

# **PORTUGUESE OMBUDSMAN**

## **REPORT TO THE PARLIAMENT**

### **2012**

### **SUMMARY**



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**Lisbon**  
**2013**







**O PROVEDOR DE JUSTIÇA**

**Her Excellency  
President of the Parliament**

Excellency,

In compliance with article 23, paragraph 1, of the Statute of the Portuguese Ombudsman, I am honoured to present to the Parliament the Annual Report of Activities for 2012.

I take this opportunity to convey my availability to be present before the competent Parliamentary Committee in order to present the report and provide all clarifications that are deemed necessary.

Yours faithfully,

THE OMBUDSMAN,

*Alfredo José de Sousa*



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**ALFREDO JOSÉ DE SOUSA**  
**(Ombudsman - (2009/....))**

**Alfredo José de Sousa was born  
on 11 October 1940, in Póvoa  
de Varzim.**

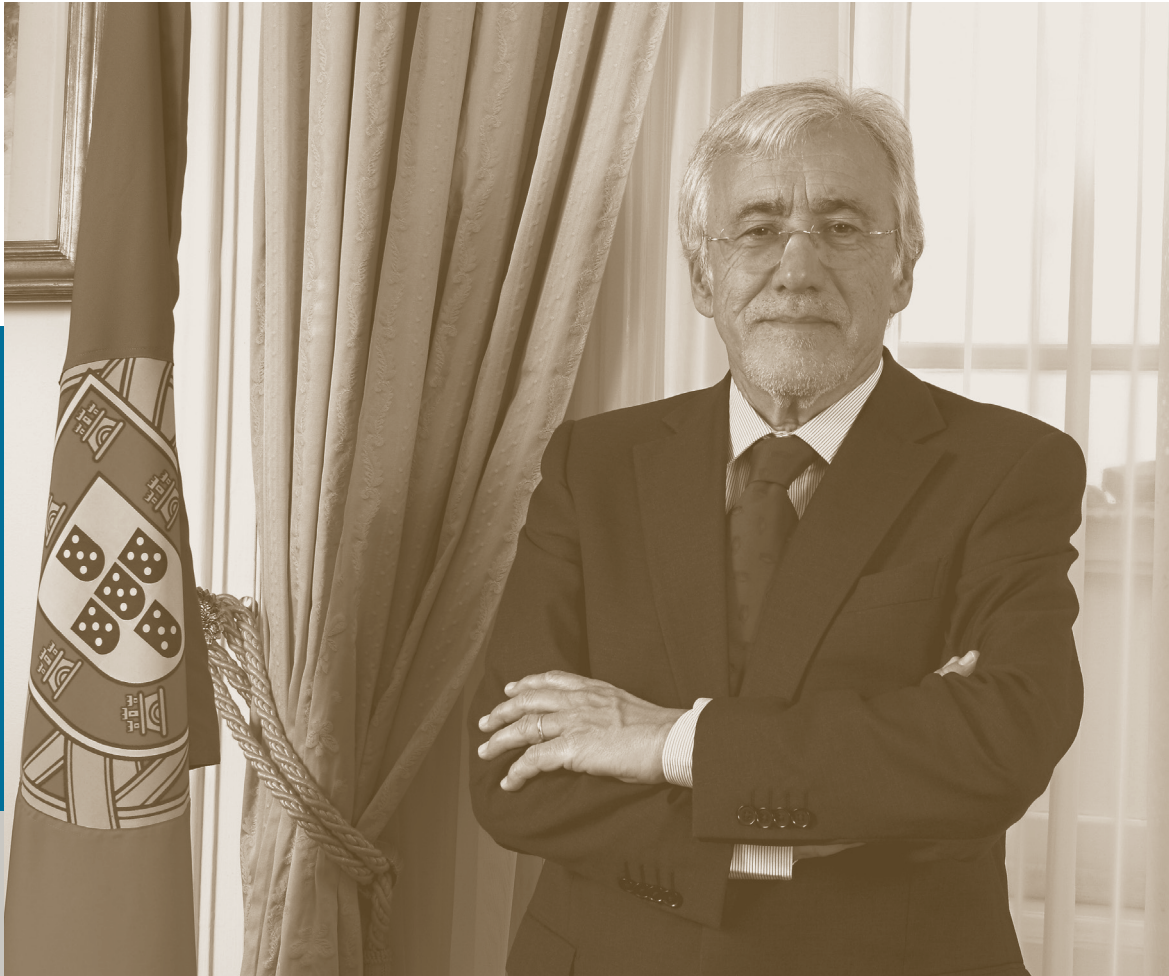
## **PROFESSIONAL CAREER**

B.A. Hons. degree in Law from the University of Coimbra (1958/63). Delegate of the Attorney General in Celorico de Basto, Mogadouro and Amarante (1967). Inspector of the Criminal Investigation Police (PJ) in Oporto (1968/74). Judge of the Courts of Tavira, Alenquer, Vila Nova de Gaia and Vila do Conde (1974/79). Judge of the Oporto Court of 1st Instance of Taxes and Contributions (1979/85).

Promoted to High Court Judge of the Court of 2nd Instance of Taxes and Contributions, in February 1986. Coordinator of the Working group responsible for drawing up the draft bill on tax infringements. Post-graduate course (unfinished) in European Studies, from the Faculty of Law of Coimbra (1986/87).

Elected on 22 January 1987 by the Parliament as member of the Supreme Council of Administrative and Fiscal Courts. Nominated, after a competition, as Judge Counsellor of the Supreme Administrative Court on 13 October 1992. Elected Deputy-President of the Court of Auditors. Nominated President of the Court of Auditors on 2 December 1995. Member of the Inspection Committee of the European Anti-Fraud Office (OLAF) from 2001, reconfirmed on March 2003, but subsequently resigned, at his own request, on health grounds, on 25 February 2005. Reconfirmed as President of the Court of Auditors for four years, and ceased functions on 6 October 2005, when he formally retired.

## The Ombudsman



Alfredo José de Sousa was elected to succeed Nascimento Rodrigues, as Ombudsman, **by a vote well above the necessary two-thirds majority**, thus ending a one-year impasse. The candidate was proposed jointly by the PS and PSD parties and was elected by 198 of the 217 members of parliament who took part in the vote (four voted against, ten abstained, with three null votes and two blank votes). He was invested as Ombudsman, in the Parliament, on 15 July 2009.



# MESSAGE FROM THE OMBUDSMAN

In compliance with Article 23, paragraph 1, of the Statute of the Portuguese Ombudsman (Law 9/91, of 9th April) I have the honour to present to the Parliament the 2012 Annual Report of Activities.

## 2012 in large numbers

In 2012 I decided to open 7027 cases, 12 of which on my own initiative and the remainder pursuant to complaints presented by 27218 complainants. In total, in 2012 I opened 1215 cases more than in 2011.

About 1430 citizens submitted communications that, due to their anonymous or generic nature, were deemed inadmissible. The same happened with 1290 complaints that did not fall within the Portuguese Ombudsman's scope of jurisdiction. In both cases the communications did not lead to the opening of a case.

Of the 7027 cases that were opened, 2198 resulted from written complaints, 4162 from complaints submitted electronically and 655 from complaints presented in person. **Electronic complaints remained at the top of the chart, representing 60% of the complaints received.**

Of the 7027 cases opened in 2012, 5027 were closed in the same year. In total, **in 2012, 6824 cases were closed**, 5342 of which within 6 months. At the end of the year there were 2199 pending cases.

In 2012, in about **40%** of the 6824 closed cases there was at least partial agreement with the complaint and a solution that was fair and in conformity with the request was reached still during the investigation of the case. In **39%** of the cases the complaints were considered unfounded or an adequate solution was not, or could not, be reached, with the pursuit of further measures being deemed not useful. In other cases, in which it was not possible to restore the legality or justice in dialogue with the administration, I drew the attention of the competent bodies or services (185 cases), issued 35 recommendations (30 cases) and requested the intervention of the Constitutional Court (5 cases).

**Issues related to social rights and rights of workers led the chart of complaints issues.** The central public

administration was targeted in more than 50% of cases, with the Ministry of Solidarity and Social Security, followed by the Ministry of Finance, at the top of the table. Concerning local administration, the municipality of Lisbon was the most targeted entity, with 17% of the total of complaints.

In what refers to **constitutionality review**, having examined 65 requests to seize the Constitutional Court, I decided to request the declaration of unconstitutionality in 2 cases. In one of them, a judgment has already been issued, upholding my request.

In 2 of the 3 judgments delivered in 2012 pursuant to requests for review of constitutionality from previous years, the Court complied with my requests.

Throughout 2012, **I issued 35 recommendations**, 20 of which had been accepted by the end of that year. Of the remaining 15, 4 were not accepted, 3 had no reply and for the other 8 the deadline for a reply is still running or discussions are still ongoing with the entity concerned.

**These figures allow me to conclude that, despite the increase in the number of cases that were opened, the normal activity of the Ombudsman maintained the upward trend of closed cases and the reduction of the backlog from the previous years.**

## The amendment to the Statute of the Portuguese Ombudsman

On 29 February 2012, pursuant to article 20, paragraph 1, indent b) of the Statute of the Portuguese Ombudsman, I addressed a recommendation to the Parliament with a view to introducing specific amendments to that instrument, in order to recognize the new activities that have been committed to the Ombudsman within the European Union, the United Nations and the Council of Europe, as well as in his capacity as National human Rights Institutions, and also to extend the scope of competence of the Ombudsman to services of general economic interest. This recommendation resulted in the adoption of Law 17/2013, of 18 February, which was the third amendment to the Statute of the Portuguese Ombudsman.

## Rules of Procedure of the Portuguese Ombudsman

On 10 February the **Rules of Procedure of the Portuguese Ombudsman**, concerning the organization of departments and the work of coordinators and legal advisers, as well as their coordination with the Ombudsman's Cabinet and Secretary-General, came into force. These new Rules of Procedure, which came into force in 2012, are available on the website of the Ombudsman, to ensure that complainants know the procedure used to assess their complaints, thereby ensuring greater transparency of the activity of Ombudsman. The Rules of Procedure also integrate the Code of Good Administrative Behaviour, thus anticipating the implementation of the Recommendation that I addressed to the Parliament in 2012 and in relation to which I still have no information as to any follow-up given to it. Pursuant to the recent amendment to the Statute, which I have just mentioned, the Rules of Procedure of the Portuguese Ombudsman should be published in the Official Journal.

## Project to modernize the ICT infrastructure

In 2012, I continued to pursue my goal of reshaping the Portuguese Ombudsman's information systems.

On 20 March a **new electronic complaint form** came into force, introducing additional fields in the pre-existing form, so as to simplify and improve the preliminary assessment of complaints; elements to improve the reliability and safety of the information that is gathered were also introduced.

On 1 June 2012, on the occasion of the celebration of Children's Day, the **Child Friendly Page** of the Ombudsman's website was launched.

The new **website** of the Portuguese Ombudsman started its operation on 19 November and, further to being more user-friendly, it also has additional features, such as the possibility to perform free-text searches and a larger capacity to store essential information about the Ombudsman's activity, which should be accessible to all citizens.

Throughout 2012 the project for the implementation of a case management system was continued. The system will provide support to the main proceedings used by the institution, namely the handling of complaints, and aims to improve the case registration system and workflow services of the Portuguese Ombudsman.

## The facilities of the Portuguese Ombudsman

In 2012, after the necessary works in the building where the Ombudsman's services are situated came to an end – works which were essential for the safety of the people who work here and for the maintenance of the facilities – small maintenance works were carried out, namely the replacement of the front windows of the main building, with a view to improving the quality of temperature regulation in it.

## Dissemination and promotion of the Ombudsman's actions

To promote and disseminate among the immigrant community the Ombudsman's action, the means of action available to him and how to appeal to him, on 3 May 2012 I celebrated a **Collaboration Protocol with the High Commissioner for Immigration and Intercultural Dialogue (ACIDI)**.

Through this Protocol the ACIDI commits to disseminating to the citizens that seek it information on the mission and mandate of the Portuguese Ombudsman, informing them of the available means to submit a complaint. The ACIDI also makes available, in National Immigrant Support Centres, adequate means and free access to the website of the Portuguese Ombudsman, assisting in the filling in of the complaint form, if so requested. In turn, the Ombudsman provides to the ACIDI all the relevant documents to disseminate his mission and mandate, and will refer to the Legal Support Offices of the National Immigrant Support Centres the citizens that contact him and that need guidance that the ACIDI is especially competent to provide.

The prior Cooperation Protocols celebrated with the **National Association of Portuguese Municipalities**, the **Minister for Education** and the **Law Faculty of the University of Lisbon** remained in force, with the aim of promoting and disseminating the Portuguese Ombudsman, namely his role as National Human Rights Institution, as well as to promote and disseminate the fundamental rights and freedoms of citizens, and the means through which citizens may appeal to the Ombudsman.

With the same goal I attended and ensured representation in several events at national level, held by civil society organisations, in particular organizations representing and defending the rights of groups of citizens in a more vulnerable situation.

## International Relations

With regard to international relations, I tried to resume the work of **continuity and deepening of the cooperation with counterpart institutions**, whether bilaterally or within the international *fora* of Ombudsmen and National Human Rights Institutions, in line with the so-called Paris Principles.

Thus, I continued to pursue my goal to strengthen the role of the Ombudsman as National Human Rights Institution, promoting the institution amongst NGOs and other civil society actors and establishing a link between the national level and the international human rights system.

Pursuant to the efforts and contacts employed with a view to the **promotion and creation of Ombudsmen / National Human Rights Institutions in the countries of the Community of Portuguese-Speaking Countries (CPLP)**, I organized, in collaboration with the Office of the United Nations High Commissioner for Human Rights, from 15 to 17 October, in Cape Verde, a seminar attended by representatives of National Human Rights Institutions, Governments and Parliaments of the eight Portuguese-speaking countries. In the seminar, the Praia Declaration was adopted, calling on the creation of National Human Rights Institutions that are effective and independent, in conformity with the Paris Principles. As a side event, in the presence of His Excellency the President of the Republic of Cape Verde, a **Memorandum of Understanding** was signed between the Ombudsmen of Angola, Mozambique, Timor-Leste, the *Procurador Federal para os Direitos do Cidadão Adjunto* of Brazil and the Ombudsman of Portugal, with a view to organizing, within a short delay, a meeting to promote the creation of a Network of Ombudsmen / National Human Rights Institutions of the CPLP countries. It is my intention that this meeting, to be organised in collaboration with the Executive Secretariat of the CPLPL, takes place in Lisbon, still during the first semester of 2013.

Still at the international level, I once again reiterated my availability to **take on the function of National Prevention Mechanism for the Prevention of Torture**, considering that this appointment should have been made at the time of the ratification by Portugal of the Optional Protocol to the United Nations Convention Against Torture, based on the powers already conferred to the Ombudsman and the extensive work carried out on the penitentiary system and the rights of inmates.

## The Ombudsman and the Parliament

Collaboration with the Parliament is essential for the development of the activity of the Ombudsman and it is, in fact, a natural result of the close relationship that exists between the two entities. The Ombudsman is elected by the Parliament, must submit to it his annual report of activities

and, in order to deal with matters within his competence, may take part in the work of parliamentary committees when he deems it appropriate and where his/her presence is requested. He may also issue an opinion, at the request of the Parliament, on any matter related to his activity. Since his recommendations are not binding, if the Administration does not act according to them or refuses the requested collaboration, the Ombudsman may address himself to the Parliament, stating the reasons for his position.

In compliance with Article 23 of the Statute of the Portuguese Ombudsman, on 17 May I **personally presented to the President of the Parliament the Annual Report of the activity of the Ombudsman in 2011**, while expressing my entire availability to be present before the Parliamentary Committee for Constitutional Affairs, Rights and Liberties, during the discussion and assessment of the Report. I presented this report on 27 June 2012, at the Committee on Constitutional Affairs, Rights, Freedoms and Guarantees.

In 2012 I addressed 3 recommendations to the Parliament, among which the one related to **specific amendments to the Statute of the Portuguese Ombudsman**, described above in greater detail, and the recommendation concerning the **adoption of a Code of Good Administrative Behaviour**, with a view to recognizing the right to good administration, established in article 41 of the Fundamental Rights Charter of the European Union. In this context, I welcome the adoption of Law 17/2013, of 18 February, which amended the Statute of the Portuguese Ombudsman, not only by recognizing the role of National Human Rights Institution, but also by broadening the scope of activity so as to cover services of general interest. **I regret, however, that no follow-up was given** to my recommendation envisaging the adoption of a Code of Good Administrative Behaviour.

On 29 May I attended a hearing of the **Subcommittee on Equality of the Parliamentary Committee of Constitutional Affairs, Rights, Freedoms and Guarantees**, and on 7 November a hearing of the **Parliamentary Committee on Environment, Spatial Planning and Local Authorities**, regarding the revision of the Framework Law on Environment.

On two occasions I addressed myself to the competent Parliamentary Committee, expressing my opinion on matters being assessed by the Parliament; on 31 August with regard to the approval for ratification of the Optional Protocol to the United Nations Convention against Torture and on 22 October on the legal regime of professional associations.

## Council of State

In my capacity as member of the Council of State I was present at the meeting that took place on the 21 September, to analyze the European response to the crisis of the Euro zone and the Portuguese situation.

# 1. THE OMBUDSMAN'S MANDATE

The institution of the Ombudsman, directly inspired by the Swedish Ombudsman set up in the early 19<sup>th</sup> century, was introduced in Portugal by Decree-Law no. 212/75, of 21<sup>st</sup> April. In 1976 the Ombudsman was consecrated at constitutional level, in article 24 of the Portuguese Constitution, current Article 23.

The consecration of the Ombudsman in the general principles of Part I of the Portuguese Constitution relating to fundamental rights and duties gives this State body increased protection. Indeed, the Ombudsman has been established within the framework of constitutional values as a fundamental right of the people, thus benefiting of the general regime of fundamental rights and the special regime of rights, freedoms and guarantees, instead of a simple institutional guarantee. So the Ombudsman is, *de jure*, a constitutional body due to ensure the fundamental rights and, more generally, human rights.

Thus, it was the responsibility of the Portuguese legislator to establish the respective Statute, via Law 81/77, of 22 November, that in the meantime has been revoked by Law 9/91, of 9<sup>th</sup> April, and subsequently amended by Laws 30/96 of 14<sup>th</sup> August, 52-A/2005 of 10<sup>th</sup> October, and, more recently, 17/2013 of 18<sup>th</sup> February.

In essence, the Constitution and the Law define the Ombudsman as a single person body of the State, irremovable, completely independent<sup>1</sup> and impartial in the exercise of his functions, and endowed with parliamentary legitimacy.

The mandate holder is designated by the Parliament, by a qualified two-thirds majority of MPs present, provided that this is higher than the absolute majority of MPs effectively in functions. The Ombudsman's mandate is four years, and may only be renewed once. His/her functions cannot terminate prior to the end of the period for which he/she has been designated, except in the cases specified in the law (articles 23, paragraph 3, and 163, indent i) of the Constitution and articles 5 to 7 of the Statute).

Furthermore, the Ombudsman is exempt from civil and criminal liability for the recommendations, comments or opinions that he/she issues or for the acts that he/she practices in exercise of his/her functions (article 8, paragraph 1 of the Statute).

The Ombudsman's main function is to defend and promote the rights, freedoms, guarantees and legitimate interests of citizens, guaranteeing, through informal means, the justice and legality of the exercise of public powers (articles 23 of the Constitution and article 1 of the Statute).

With the publication of Law 17/2013, of 18<sup>th</sup> February, the Ombudsman can also carry out the functions of independent national institution for the monitoring of the implementation of international treaties and conventions on human rights, whenever appointed to that effect. The Ombudsman also has the competence to ensure cooperation with counterpart institutions and with organizations of the European Union and other international organizations in the context of the protection and promotion of the rights, freedoms and guarantees of citizens (article 1, paragraphs 2 and 3 of the Statute).

At a subjective level, the scope of his/her activity covers, in particular, the services of the central, regional and local public Administration, the Armed Forces, public institutes, public companies or the companies whose capital is mostly public and the concessionaires operating public services or exploiting state property (article 2, paragraph 1 of the Statute).

The scope of the Ombudsman's activity does not include sovereign bodies (President of the Republic, Parliament, Government and Courts), or the Regional Parliaments and Regional Governments of the Autonomous Regions of the Azores and Madeira, except in issues associated to their administrative activity or acts of supervision of the Administration. As a result, the Ombudsman's supervision and control powers do not extend to the political activity, in the strict sense of the term, nor to the judicial activity (article 22, paragraph 2 and 3 of the Statute).

On the other hand, the Ombudsman's remit is no longer restricted solely to the public authorities, although this does configure its main scope. Since 1996, the Ombudsman may also intervene in relations between private entities, but only when there is a special relation of power and if this falls within the scope of protection of rights, freedoms and guarantees (article 2, paragraph 2 of the Statute)<sup>2</sup>.

<sup>1</sup> The constitutional revision of 1989, approved by Constitutional Law 1/89, of 8<sup>th</sup> July, clarified the Ombudsman's degree of independence (1<sup>st</sup> part of paragraph 3 of article 23 of the Portuguese Constitution).

<sup>2</sup> Legal provision introduced in the Ombudsman's Statute by means of Law 30/96, of 14<sup>th</sup> August.

The Ombudsman acts, as a general rule, pursuant to citizens' complaints (article 23, paragraph 1, of the Constitution and article 3 of the Statute). Nonetheless he/she may also act on his/her own initiative (articles 4 and 24, paragraph 1 of the Statute), in response to facts that he/she becomes aware of by any other means, either via: the media; alerts issued by a NGO's and reports from International Organisations; his/her sensitivity in diagnosing more problematic situations of national scope and also by the special depth with which he/she analyses complaints and withdraws the common denominator that resides therein, classifying and analysing issues or questions that require more in-depth analysis<sup>3</sup>. The Ombudsman therefore has complete autonomy to act on his own initiative, investigate, inspect, denounce irregularities and recommend changes, aimed at improving public services. In this context, the Ombudsman may guide his/her activity in order to prevent incorrect conduct by the public powers and instil an administrative culture, and also monitor the public policies.

The Ombudsman's activity is independent of any acts of grace or legal remedies specified in the Constitution and in the laws (article 23, paragraph 2 of the Constitution and articles 4 and 21, paragraph 2 of the Statute).

In the exercise of his/her functions, the law attributes broad powers to the Ombudsman as a national constitutional fundamental rights' protection body. In summary, in accordance with articles 20 and 21, 23 and 38 of the Statute, the Ombudsman can:

- address recommendations to the competent bodies with a view to correcting illegal or unfair acts of public authorities or to improving their services (administrative recommendations). If recommendations are not accepted, and whenever the collaboration requested is not forthcoming, the Ombudsman may address the Parliament, or if applicable, Regional Parliaments, stating the reasons behind his actions.
- point out shortcomings in legislation, issue recommendations concerning its interpretation, amendment or revocation, or suggesting the drafting of new legislation (legislative recommendations);
- request the Constitutional Court to declare the unconstitutionality or illegality of any legal provisions, or to rule on cases of unconstitutionality due to a legislative omission;
- issue opinions, upon request of the Parliament, on any matter related to its activity; If he/she deems it convenient, and at their request, the Ombudsman may participate in the work of parliamentary committees for the purpose of dealing with matters within his/her competence;
- promote the divulgence of the content and the meaning of each of the fundamental rights and freedoms, as well as of the aims of the Ombudsman, the means of action at his/her disposal and how to appeal to him/her;

<sup>3</sup> The Ombudsman may, in particular, after studying a complaint, analyse the dysfunctional aspects of the respective system or sector of the Public Administration.

- intervene, in accordance with the applicable law, in the protection of collective or diffuse interests whenever a public entity is involved.
- make, with or without prior notice, inspection visits to any area of activity of the central, regional and local administration, including public services and civil and military prisons, or to any other entities under his/her control, hearing their bodies and officials and requesting such information, and the exhibiting of documents, as he/she may deem adequate;
- Undertake such investigations and enquiries as he/she may deem necessary or convenient;
- Search, in cooperation with the competent bodies and services, the solutions which best allow the protection of the legitimate interests of citizens and the improvement of the Administration's activity.

In the performance of his/her duties, he/she may carry out investigations and inquiries as he/she deems necessary, make inspections<sup>4</sup> (article 21, paragraph 1, indents a) and b)) and is entitled to order any civil servant or any official of any public body to be present at his/her Office (article 29, paragraph 5 of the Statute). Correspondingly, the bodies and agents of public entities, civil and military, have a duty of cooperation, also defined in broad terms (article 23, paragraph 4, of the Constitution and articles 21 and 29 of the Statute). Given that this is a legal duty, non-compliance constitutes a crime of disobedience, liable for a disciplinary procedure (Article 29, no. 6 of the Statute).

The Ombudsman is a member of the Council of State.

To ensure greater transparency of his activity and that complainants know all the internal procedures that are necessary to it, in February 2012 the Ombudsman adopted new Rules of Procedure, which can be available on his website and which, pursuant to Law 17/2013, of 18th February, shall be published in the Official Journal (article 17, paragraph 2 of the Statute).

## The right to present a complaint to the Ombudsman

Citizens' access to the Ombudsman is broad, direct and free of charge. All citizens are entitled to present complaints to the Ombudsman, regardless of their age, nationality <sup>5</sup>

<sup>4</sup> Either by exercising his right to take own initiatives, or after a specific complaint, the Ombudsman may carry out, without providing any prior notice, inspection visits to all and any activity sector of the central, regional and local Administration - specifically public services and civil prison establishments and military personnel establishments, or to any entities subject to its control - and also undertake all the investigations and inquests that it considers to be necessary or convenient.

<sup>5</sup> Result of the constitutionally-established principle of equivalent treatment (article 15, no. 1, of the Constitution), the Ombudsman is an institution that is open to foreigners and stateless persons, regardless as to whether or not they have regularised their legal situation.

or residence. The complaint may be presented by citizens, either individually or jointly, and depends neither on the complainant's direct, personal and legitimate interest nor on any time limits (article 24, no. 2 of the Statute). The complaints must concern illegal or unfair actions or omissions by public authorities, that the Ombudsman is responsible for redressing or preventing (article 23, paragraph 1, of the Constitution and article 3 of the Statute).

The right to present a complaint to the Ombudsman is therefore also subject to same constraints and limitations that should be explained in further detail.

A specific example is the regime governing complaints filed by military personnel to the Ombudsman, regulated in a special and autonomous manner by Law 19/95, of 13th July and by the Law of National Defence, approved by the Organic Law 1-B/2009, of 7th July (article 34). In accordance with these legal norms, military personnel, prior to presenting an individual complaint to the Ombudsman, must exhaust all other forms of hierarchical appeal and complaint within their respective chain of command. In 2009, the Ombudsman opened a case, on his own initiative, to appraise this issue, due to the fact that he disagreed with this regime, in light of the relevant constitutional provisions, above all Article 270 of the Portuguese Constitution. On the same topic, in 2010, he issued a recommendation to Parliament, to eliminate negative discrimination against military personnel, which constitutes a barrier to the Ombudsman's activity as the protector of justice, rights and freedoms of all citizens<sup>6</sup>.

Public bodies or entities cannot however present complaints against other bodies or entities of the same nature. This is because the Ombudsman is a body intended to defend citizens against the exercise of public powers, against abuses practised by the Administration and other public powers, rather than a body designed to mediate institutional conflicts between these powers. On the contrary: a characteristic quality of his/her function and the powers conferred to him/her is to foster initiatives of concertation and mediation, in an attempt to find, in collaboration with the competent bodies and services, the most suitable solutions to protect citizens' legitimate interests and to improve administrative action (article 21, paragraph 1, indent c) of the Statute).

The Ombudsman is not bound by the complaint itself, or by the exact terms in which it is formulated. He/she may, first and foremost, reject complaints that he/she objectively considers to be unfounded; he/she may check facts and issue recommendations beyond the terms of the request; or even, propose measures that stand in opposition to the interests of the complainants, given that he/she is a defender of both the legality and the justice of the activity of the public powers.

Within the fairly diversified range of communications received on a daily basis by the Ombudsman, the first rel-

evant task consists in qualifying the communication as a «complaint», or as a simple statement of facts. Next, the complaints are subject to a judgement of admissibility, in order to ascertain whether their material scope lies within the Ombudsman's sphere of powers. In all circumstances, it is always the substance, rather than the form, of the communication, that must be considered.

In this context, a complaint is considered to be any communication, regardless of its form, that is presented by one or more complainants, in which the Ombudsman is requested to intervene in relation to questions falling within his scope of competence.

In relation to any complaint, the parameters determining the possibility of the Ombudsman's intervention include both the mission and competencies legally attributed to this body; and respect for the principle of separation of powers, consecrated in articles 2, 110, and 111, paragraph 1, of the Portuguese Constitution; and also the purely recommendatory nature – rather than a binding nature – of his/her intervention.

A complaint that fails to respect the scope of the Ombudsman's attributions will be preliminarily rejected.

There is also the possibility that the Ombudsman will conclude that the complainant has access to acts of grace or legal remedies, as specified in the law, and the complaint may therefore be forwarded to the competent body (article 32, paragraph 1 of the Statute).

If the complaint is neither preliminarily dismissed nor simply forwarded, a case will be opened (to be sequentially numbered) and inquiries carried out.

The Ombudsman operates in an informal manner. In other words, the Ombudsman is not bound to strict procedural norms, nor to specific procedural norms in relation to the production of evidence (article 1, paragraph 1, and article 28, paragraph 1 of the Statute). Indeed, the Ombudsman frequently recourses to telephone calls or organises meetings between the entities addressed and complainants, in order to foster consensus and conciliation of the interests involved, and thereby resolve or overcome the dispute.

Another essential characteristic of the Ombudsman's activity is the speed with which complaints are processed. Suitable mechanisms and instruments are adopted in order to ensure that the Ombudsman may respond promptly to the question submitted to him – effectively and efficiently – and ensure its swift resolution.

The Ombudsman is a control body based on the principle of cooperating, that fosters prior hearings with the entities addressed, prior to taking any position on the issue or formulating any conclusions (article 34 of the Statute), listening to their arguments and permitting them to provide all necessary clarifications in order to achieve a satisfactory resolution of the question, wherein the relevant public interest will be weighed against the right claimed by the citizen.

<sup>6</sup> Recommendation no. 1/B/2010, of 3<sup>rd</sup> February.



After investigation of the case, the Ombudsman may conclude that the complaint is unfounded, due to lack of due grounds, in which case the case will be closed, and the complainant will be informed of the reasons underlying this decision, highlighting the justice and legality of the position assumed (article 31, indent b) of the Statute).

If pursuant to the inquiries made it is demonstrated that the complainant has a well-founded complaint, the case may still be closed if the illegality or injustice has been redressed in the meantime (article 31, paragraph c) of the Statute).

In other cases, unless measures are adopted to restore legality or overcome the injustice cited in the complaint, the Ombudsman may issue recommendations to correct the illegal or unfair act, or the irregular situation (articles 20, no. 1, paragraph a), and 38 of the Statute). In other situations, he/she may make suggestions or formulate proposals to the public powers, in order to restore the legality of the act against which the complaint has been submitted. He may also, in less serious cases, of a one-off nature, simply issue a warning to the body or service against which the complaint has been submitted or terminate the subject with the explanations provided, in which case the case will be closed (article 33 of the Statute).

In this context, he/she does not have any coercive power, or power to make impositions or annulments. The force of the Ombudsman's intervention fundamentally resides in the power of persuasion and what has been called «*magistrature d'influence*», i.e. the Ombudsman's authority is moral and its effectiveness depends on being demonstrably impartial and non-partisan.

Complaints may be presented in writing or orally, identifying the identity and address of the complainant and, whenever possible, his/her signature. When presented orally, a record of the complaint must be drafted, which the complainant will sign, if he/she knows how to, and is capable of doing so (article 25, paragraph 1 and 2 of the Statute).

Citizens may send their complaints by letter, telephone or fax, and also by electronic means, by filling in the specific form available at the Ombudsman's website (<http://www.provedor-jus.pt/queixa.htm>). They may also present their complaints in person at the premises of the Ombudsman.

In addition to the possibility of sending a complaint directly to the Ombudsman, they may also be sent to the Public Prosecution Service, who shall immediately forward them to the Ombudsman (article 25, paragraph 3 of the Statute).

When a complaint is incorrectly submitted its replacement will be ordered (article 25, paragraph 4 of the Statute).

## 2. THE OMBUDSMAN AND HIS TEAM

In exercising his functions the Ombudsman is assisted by two Deputy Ombudsman and by a Cabinet with a Head of Cabinet, Advisers, Secretaries and a Press Adviser.

In what concerns the work related to the investigation of complaints the Ombudsman is assisted by 6 Coordinators and 46 Legal Advisers (Advisory Service). The work is organized in 6 main departments, according to the nature of the fundamental rights in question: Environment and Life Quality Rights; Rights of Taxpayers, Consumers and Economic Operator, Social Rights, Worker's Rights, Right to Justice and Security and Other fundamental Rights.

Matters concerning the rights of children, elderly persons and persons with disabilities are currently handled by a specialized structure – the Department on Children, Elderly Persons and Persons with Disabilities (N-CID) – which has been in operation since late 2009 and is placed under the direct supervision of a Deputy Ombudsman. In addition to defending the rights of children and young people, elderly persons and persons with disabilities pursuant to complaints, it also seeks to develop more proactive action, by focusing on promoting and disseminating information on the rights of these particularly vulnerable groups. Since its creation, the N-CID has brought together two specialized and toll-free telephone services of the Portuguese Ombudsman: the Children's Hotline and the Elderly Citizens' Hotline. In 2011, the Citizens with Disabilities' Hotline began operating on an experimental basis.

The Ombudsman also has a Directorate of Technical and Administrative Services, under the supervision of the Secretary-General.

### Staff in functions in the Ombudsman's Services (as of 31 December 2012)

<b>Ombudsman's Cabinet and Deputy Ombudsman</b>	<b>12</b>
Advisory Legal Service	46
Directorate of Technical Services and Administrative Supports	44
Contracted Staff	1

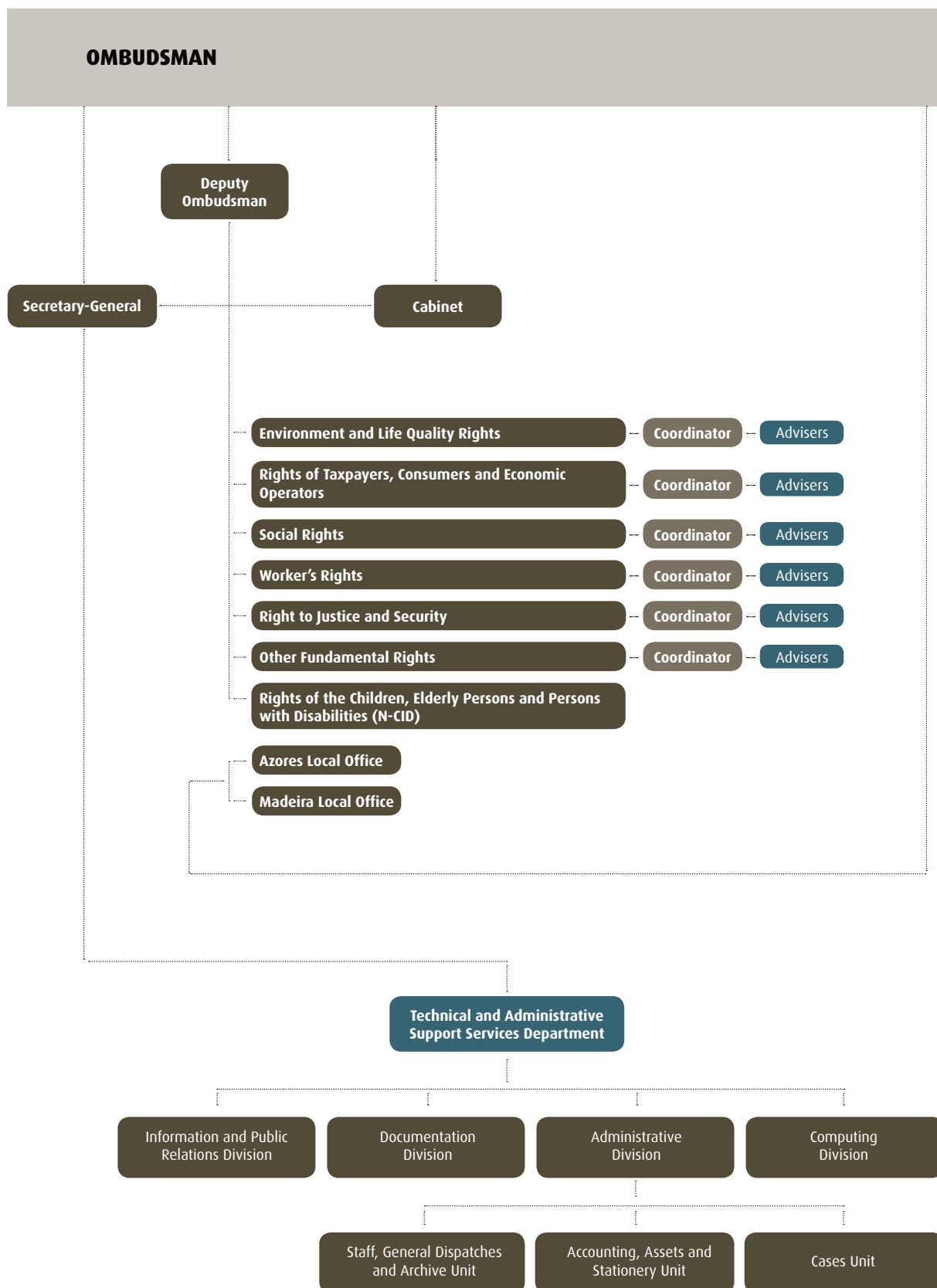
### 2012 Budget

Budgetary execution was based on policies of restriction of the current expenses. Initial budget (inferior to the budget of 2011): 5 241 897,00 €.

Current services and goods	5 141 897,00 €
Investment expenses (new technologies and repairs of the building)	100 000,00 €
<b>Total</b>	<b>5 241 897,00 €</b>



## Organisational Chart



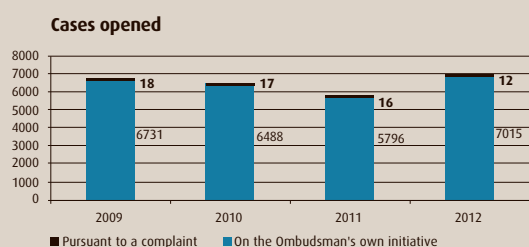


**THE HEADQUARTERS OF THE OMBUDSMAN**

# 3. THE OMBUDSMAN'S ACTIVITY IN 2012

## 3.1. Statistical Comment on Global Data

Graph I



7027 cases were opened during this year, 12 of which by the Ombudsman on his own initiative and the remaining following a complaint. This represents an increase of 1215 cases (i.e. 21%) in relation to the previous year, considerably strengthening a growth trend already observed in the last few years.

In addition, 1290 complaints were deemed inadmissible, due to not falling within the scope of jurisdiction of the Ombudsman. Another 1430 communications were also immediately dismissed, due to their anonymous or generic nature.

Table 1 – Number of complainants

Natural persons	26 745
Legal persons	473
<b>Total of complainants</b>	<b>27 218</b>

The number of individuals submitting complaints to the Portuguese Ombudsman rose significantly, from 7341 to 26745. This was due to the concentration of many thousands of complaints on issues such as those arising from the legal solutions enacted by the State Budget for 2012, about the suspension of Christmas and Holiday allowances to civil servants and pensioners. As they addressed the same subject, these complaints were incorporated into a single case, which explains why the number of complainants is much higher than the number of cases opened.

The increase in the number of legal persons submitting complaints to the Ombudsman was much less significant (473 in 2012, compared with 412 in 2011).

Table 2 – Number of cases opened

Written complaint	2198
Oral / in person complaint	655
Electronic complaint	4162
Ombudsman's own initiative	12
<b>Total of cases opened</b>	<b>7027</b>

The increase of complaints received by electronic means persists. In 2012, about 60% of the complaints leading to the opening of a case were received this way, with a corresponding decline in other written media (regular post and fax).

The proportion of complaints presented verbally was identical to the previous year, at about 9%.

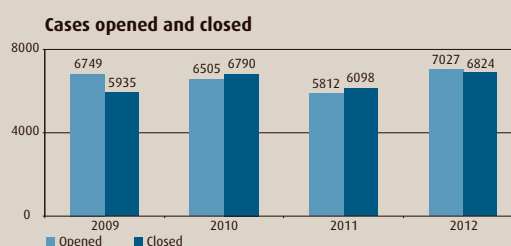
Table 3 – Number of cases closed

Main cases from 2007	1
Main cases from 2008	0
Main cases from 2009	12
Main cases from 2010	283
Main cases from 2011	1501
<b>Sum of cases prior to 2012</b>	<b>1797</b>
Cases opened in 2012	5027
<b>Total of cases closed</b>	<b>6824</b>

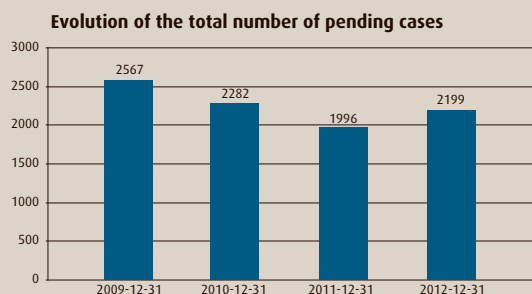
Table 4 – Number of cases pending on 31 December

Main cases from 2009	2
Main cases from 2010	10
Main cases from 2011	187
<b>Sum of cases prior to 2012</b>	<b>199</b>
Cases opened in 2012	2000
<b>Total of pending cases</b>	<b>2199</b>

Graph II



Graph III



The number of cases closed rose by 11% in comparison with 2011 (6824 cases closed). However, this increase was not enough to compensate the increase of new cases, thereby causing a rise in the number of pending cases at the end of the year, which nevertheless was still inferior to the figure recorded at the end of 2010 (2199 pending cases).

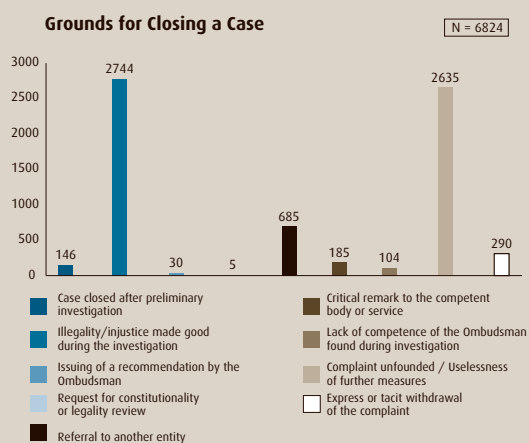
Table 5 – Summary of case activity

Total of cases from 2011	1996
Total of cases opened	7027
Total of cases closed	6824
Cases opened and closed in 2012	*5027
<b>Cases pending on 31 December</b>	<b>2199</b>

\*Corresponding to 71,5 % of the total of cases opened

The proportion of cases opened and closed in the same calendar year was equal to that of 2011, with a natural increase in the absolute number, from 4124 to 5027 cases.

Graph IV

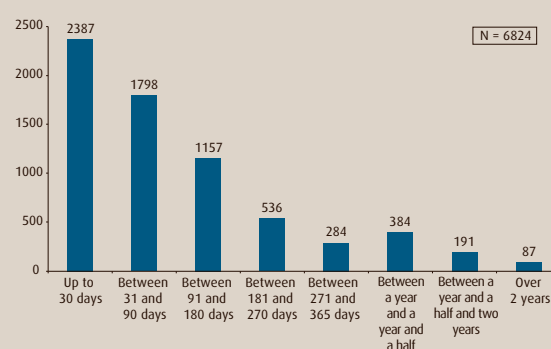


In 2012, a new table of grounds for closing a case was introduced. In around 40% of all closed cases, a fair and consistent solution was achieved still during the investigation stage. Besides this, 185 cases were closed with an appropriate proposal, 30 cases with a formal recommendation and 5 cases through the intervention of the Constitutional Court.

In 39% of the cases, the complaints were deemed unfounded or it was considered that no further useful measures could be adopted with a view to reaching an adequate solution.

Graph V

Duration of cases closed in 2012

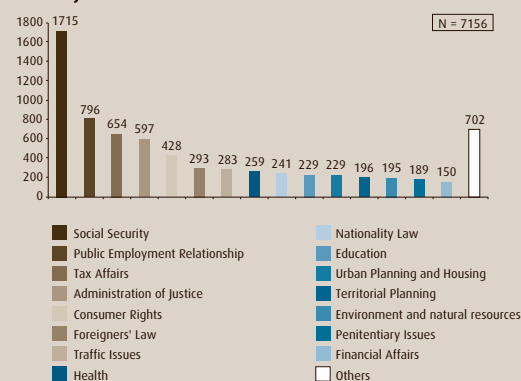


In comparison with the values of 2011, a visible reduction occurred in the duration of the cases. 35% of all cases were closed in the first month and 78% in the first six months.

As an assessment for the full year of 2011, the proportion of cases closed within a year from their opening remained at the same level of 2010, with a value of 90.5%.

Graph VI

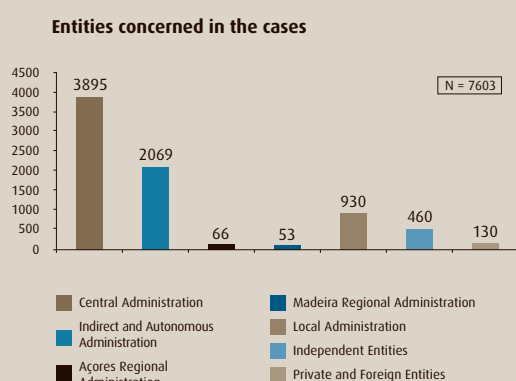
Subject-matter of the cases



The distribution of cases by subject replicates, as a rule, the distribution observed in 2011, with a significant increase in the top categories. Thus, the higher values continued to refer to Social Security, Public Employment, Taxation and Administration of Justice.

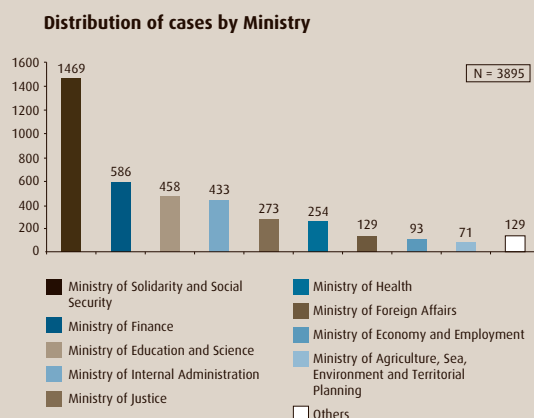
There was a significant reduction of complaints concerning nationality issues, a variation once again attributable to the situations concerning the former Portuguese State of India.

**Graph VII**



The complaints addressing the Central Administration declined (about 2%) in relation to the previous year. In an opposite trend, the growth of complaints against the Indirect or Autonomous Administration (over 4%) is, especially in the latter case, coherent with the figures of 2011.

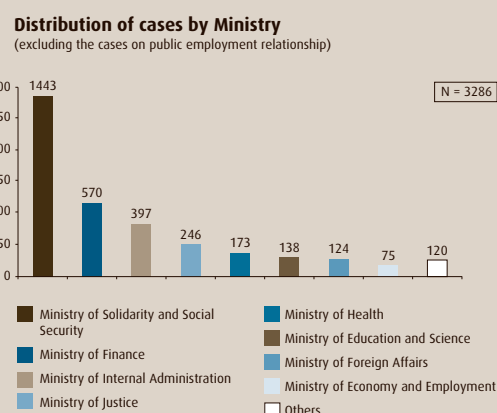
**Graph VIII**



The distribution of cases by ministry follows, in relative terms, the pattern of 2011 (although the Ministry of Education and Science and the Ministry of Internal Administration switched positions).

In 2012 the difference between the two ministries in the top position was strongly accentuated, due to the large increase in cases relating to the Ministry of Solidarity and Social Security and a small decrease in the cases relating to the Ministry of Finance.

**Graph IX**

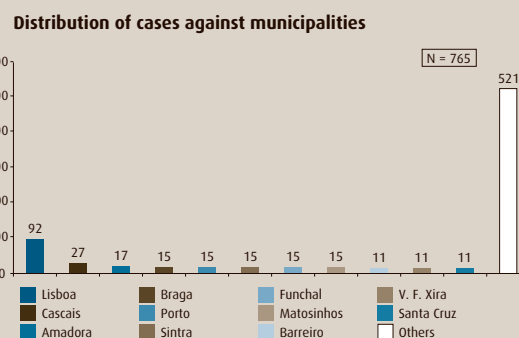


The weight of labour issues in the total number of cases aimed at the Ministry of Education and Science becomes evident when we consider that, if that subject is disregarded, the ministry falls two positions.

In fact, comparing 2012 with the previous year, this weight rose from 65% to 70%. There was an opposite trend in the case of the Ministry of Health (42% to 30%).

Among the most targeted ministries, the proportion of complaints concerning labour issues is smaller in the Ministries of Internal Administration (8%), Foreign Affairs (4%), Finance (3%) and Solidarity and Social Security (2%).

**Graph X**





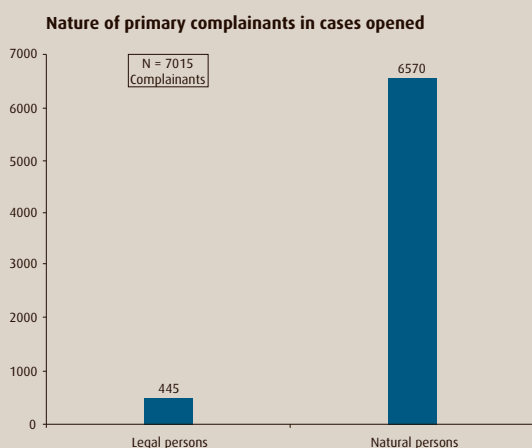
37% of the cases targeting municipalities were concentrated on 11 local authorities. The municipality of Lisbon remains the most targeted, with a significant increase. In comparison with 2011, the municipalities of Barreiro, Braga, Matosinhos and Vila Franca de Xira entered the group of the most targeted, while the municipalities of Almada, Leiria, Odivelas and Silves are no longer included in that group.

Graph XI

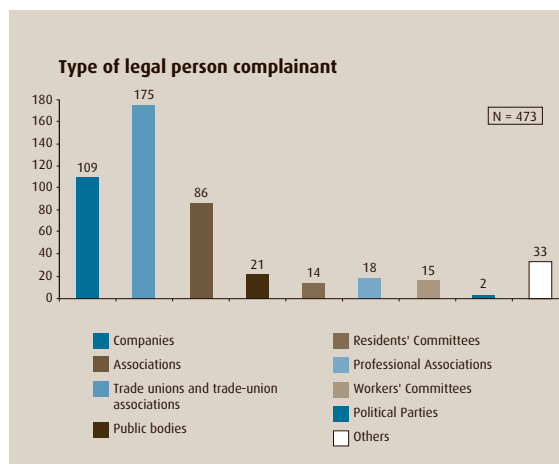


Pursuant to the new rule stipulating that no formal case is opened if the issue at stake does not fall within the jurisdiction of the Ombudsman, the number of cases against private or foreign entities persisted at low levels, even more so than in the previous year. There was a significant drop in the number of complaints against banks.

Graph XII

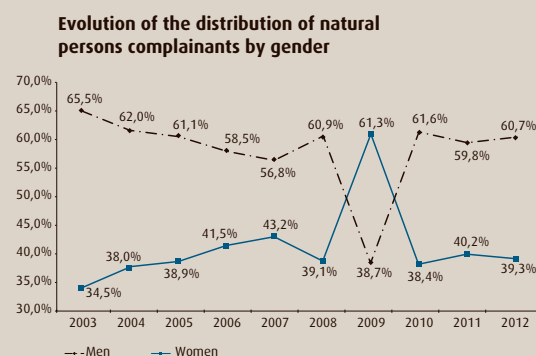


Graph XIII



As regards legal persons, there was a relative decline in the number of complaints submitted by companies and trade unions, in the first case also a decline in absolute value. Following a previous trend, the number of cases opened pursuant to complaints from associations continued to rise.

Graph XIV



These data are collected from a questionnaire sent to the complainants after their complaint is accepted. In 2012 the proportion of responses to the questionnaire remained at about 1/3, always with a lower level of collaboration from legal persons.

The breakdown by gender showed no significant change in relation to the previous year.

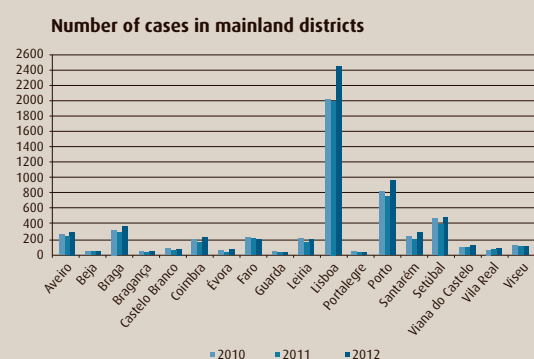
Nearly 3/4 of respondents stated that it was their first complaint to the Ombudsman; half of the remainder had already done it previously from two to five times.

The complainants' age distribution remained broadly the same as in previous years, with 46% of complainants between 40 and 59 years old and 14% over 65 years old.

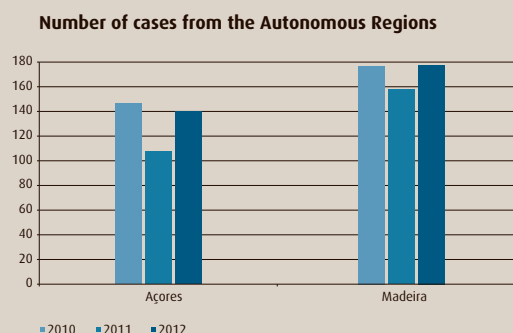
About 80% of respondents hold more than the 1<sup>st</sup> cycle of basic education, 50% with a college degree.

There was a decrease in the number of respondents who qualify themselves as pensioners or public servants, compensated by an increase of the unemployed, farmers, students and private sector workers.

**Graph XV**

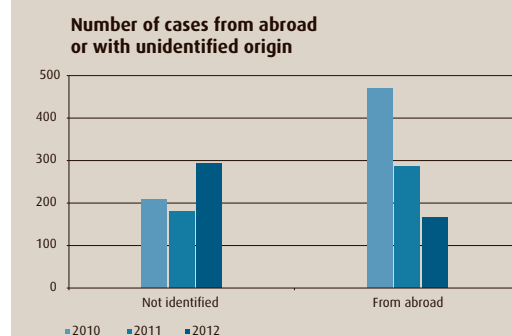


**Graph XVI**



In a year of strong growth in the number of cases, only the districts of Beja, Faro and Viseu recorded a reduction, although of negligible value. This growth was particularly felt in the districts of Lisbon, Porto, Santarém and Setúbal. In relative terms, with a growth level well above the national average, there are the districts of Évora (83%), Bragança (47%), Santarém (46%), Coimbra (41%) and the Autonomous Region of Azores (29%). With a growth level below the national average, there are the cases of the Autonomous Region of Madeira (13%) and the districts of Guarda (11%) and Portalegre (8%), to which we must add the cases of decrease mentioned above (Viseu, Beja and Faro).

**Graph XVII**

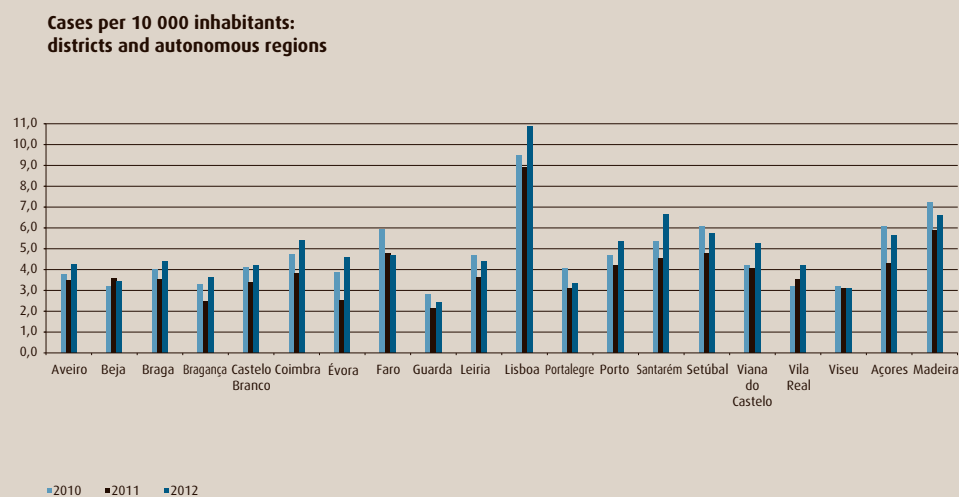


Continuing the trend already seen in 2011, the volume of cases opened pursuant to complaints about nationality issues submitted by nationals of the former Portuguese State of India continued to decline, thus explaining the fact that the number of cases based on complaints coming from abroad decreased to almost 1/3 of those from the previous year.

**Table 6 – Complaints and Population**  
The five highest values

	2008	2009	2010	2011	2012
1.º	Lisboa	Lisboa	Lisboa	Lisboa	Lisboa
2.º	Santarém	Madeira	Madeira	Madeira	Santarém
3.º	Faro	Santarém	Açores	Setúbal	Madeira
4.º	Madeira	Setúbal	Setúbal	Faro	Setúbal
5.º	Setúbal	Faro	Faro	Santarém	Açores

Graph XVIII



The district of Lisbon remains in the first position. In comparison with 2011, the exclusion of the district of Faro and the return of the Autonomous Region of Azores should be noted.



## 3.2. Recommendations of the Ombudsman

The Ombudsman has the competence to address recommendations to the competent bodies, with a view to correcting illegal or unfair acts of public powers or to improving their services, as well as to point out deficiencies in the legislation, recommending its interpretation, amendment or revocation, or suggesting the adoption of new legislation.

The addressed body must, **within 60 days** counting from the date of reception, inform the Ombudsman of its position on the issue. The decision not to accept the recommendation must always be grounded.

If the Administration does not act according to the recommendations or if it refuses to cooperate as requested, the Ombudsman may address him/herself to the Parliament, stating the reasons for his/her initiative.

In 2012, 35 Recommendations were issued, 16 of which concerning the need for legislative amendment («B» recommendations). These recommendations concerned the following subjects and were addressed to the following entities: President of the Parliament (3); Minister of State and Foreign Affairs (1); Minister of National Defense (1); Minister of Internal Affairs (2); Minister of Justice (5); Minister of Economy and Employment (2); Minister of Health (1); Minister of Solidarity and Social Security (2); President of the Regional Government of Madeira (1); Secretary of State for Public Works, Transport and Communications (2); Secretary of State for Culture (1); Secretary of State for Solidarity and Social Security (1); Secretary of State for Education and School Administration (1); Mayor of Lisbon (4); Mayor of Anadia (1); Mayor of Lagos (1); Mayor of Santa Cruz (1); Mayor of Câmara de Lobos (1); Chairman of the Board of Estradas de Portugal, EP (2); Director-General of the Tax and Customs Authority (1); Chairman of the Board of Directors of Caixa Geral de Depósitos (1); Chairman of the Board of Directors of Institute for the Financial Management of Social Security (1); Chairman of the Board of the Institute of Registries and Notaries (1).

«A» Recommendations (Article 20, paragraph 1, indent a) of the Statute of the Ombudsman)

### Recommendation 1/A/2012

**Entity addressed:** Mayor of Lisbon

**Subject:** Spatial planning. Public domain. Parking tax. Resident parking tax exemption. Progressive tax.

**Date:** 04.01.2012

**Summary:** Residents in areas subject to parking restrictions are exempted from parking taxes. Nevertheless, the granting of this exemption depends on the payment of administrative fees and user charges. The Ombudsman considered that there was no justification for the increase of user charges in cases where more than one vehicle exists per address, as the number of family members should be taken into consideration. Furthermore, the municipal regulations on this matter did not comply with the general provision according to which all taxes must be economically and financially justified. The Ombudsman recommended, in compliance with article 8, paragraph 2, indent c), of the General Framework of Local Taxes, that all taxes and charges established by Municipal Regulations on traffic and parking should be justified before the Municipal Assembly.

The Town Councilor responsible for traffic met with the Ombudsman and informed that the Regulations would be changed in order to comply with the recommendation.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_1A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_1A2012.pdf)

### Recommendation 2/A/2012

**Entity addressed:** Chairman of the Board of Directors of Caixa Geral de Depósitos

**Subject:** Financial issues. Banking Industry. Cheque presented for payment after the deadline. Returned Cheques. Undue payment. Debt without previous notice.

**Date:** 06.01.2012

**Summary:** The complaint was submitted to the Ombudsman by a company and concerned the procedure adopted by Caixa Geral de Depósitos (CGD) following the deposit of a cheque in one of its agencies. CGD released the funds of that cheque, making them available in the account of the complainant. Later, however, after the cheque had been returned when submitted to the clearing system, with the justification that the drawee bank had refused its payment on the grounds of it being «past the deadline», CGD, without informing the complainant of such return, as well as without previous notice, launched a debit on the account held by the complainant, to redeem the funds of the cheque that was paid. Subsequent to such redemption, and as a result thereof, CGD considered the complainant's account to be in

an overdraft situation and reported this information to the Central Credit Register. Several preparatory inquiries were promoted, with a view to leading the bank to assume the damage caused to the complainant with such a conduct.

CGD disagreed with this view and, as a result, the Ombudsman recommended to the Chairman of the Board of Directors of CGD that:

- a) CGD assume the liability for the improper release of funds of the cheque and the debit bank account that followed without any previous notice;
- b) CGD make enquiries with the Bank of Portugal aiming to reconstitute the record that should be available in the Central Credit Register on behalf of the complainant if the incident related to returning the cheque had not occurred.

CGD informed that it would credit the amount of the cheque and make enquiries with the Bank of Portugal in order to reconstitute the registry available in the Central Credit Register.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_2A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_2A2012.pdf)

### **Recommendation 3/A/2012**

**Entity addressed:** Chairman of the Board of EP – Estradas de Portugal S.A. (Portuguese Roads Concessionaire)

**Subject:** Spatial Planning. Expropriation on the grounds of public interest occupation. Agreement. Delay in performance.

**Date:** 24.01.2012

**Summary:** The Ombudsman verified that the Portuguese Roads Concessionaire had occupied several land parcels before concluding the expropriation procedure and that the area covered by the declaration of public utility had been exceeded. The Ombudsman concluded that there was no legitimate title to the Concessionaire's possession of the plots and recommended the payment of the price to be settled with the former owner. The Chairman of the Board informed that the expropriation procedure would be concluded and a deal with the complainant would be concluded.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_3A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_3A2012.pdf)

### **Recommendation 4/A/2012\***

**Entity addressed:** Ministry of Justice

**Subject:** Deputy Registrars. Type of public employment relationship.

**Date:** 02.03.2012

**Summary:** A group of deputy registrars submitted a complaint about the type of public employment relationship applied to them by the Institute of Registries and Notaries:

a public employment contract with non-fixed term. They argued that, since 2005, they had completed all stages of the process of training and traineeship for the career of registrar and that, since 4 years ago, no competitions had been opened allowing them to access such a career.

After analyzing the underlying legal issue, the Ombudsman concluded that:

- a) The deputy registrars should be transferred to the modality of public employment contract for an indefinite period and that, on the same day, the experimental period should be considered as successfully concluded (since they had all been approved in their final tests).
- b) Once the transition to that type of contract is operated, the previous regimes of expiry of the legal relationship of public employment should be applied to them, as provided for in Article 91, paragraph 3, and Article 88, paragraph 4, of the Law on Employment Relationships, Careers and Salaries. This means that the public employment relationship may not be ended by considering that the deadline of extension of the validity of final exams has expired.
- c) As holders of a public employment contract for an indefinite period, the deputies occupy work posts corresponding to the «category» of deputy until they come to be placed as registrars, after a documental competition procedure.
- d) The general mobility regime provided for in Articles 58 to 65 of the Law on Employment Relationships, Careers and Salaries should be applied to the deputies.

This opinion was communicated to the Minister of Justice, who did not take any position on the matter. As such, the Ombudsman recommended that:

- a) The functional and legal situation of the deputy registrars be reassessed in order to recognize that they are holders of public employment contracts for an indefinite period, with effect from the date of entry into force of the new Law on Employment Relationships, Careers and Salaries.
- b) In case of disagreement with this position, a legal measure be adopted to put an end to the situation of labor precariousness of the deputy registrars. This measure should expressly determine that they are holders of a public employment relationship for an indefinite period and that the mobility rules that apply to other civil servants are also applicable to them.

The Minister of Justice informed that efforts are ongoing to resolve the matter by way of legislation.

**Status:** Accepted (the need for legislative amendment has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_4AB2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_4AB2012.pdf)

\* The same issue was addressed in Recommendation 4/B/2012.

#### **Recommendation 5/A/20102**

**Entity addressed:** Chairman of the Board of EP – Estradas de Portugal S.A. (Portuguese Roads Concessionaire)

**Subject:** Spatial Planning. Public domain. National roads. Advertising. Taxes.

**Date:** 10.05.2012

**Summary:** The Ombudsman concluded that the Portuguese Roads Concessionaire had no competence to charge and collect taxes for advertising licenses and permits in the vicinity of national roads. This competence held by the preceding public roads concessionaire was transferred to the recently restructured Institute of Public Roads Infrastructure, without prejudice to the municipalities' competence in these matters. Moreover, there were no legal grounds to support that advertising licenses, authorizations or permits expire within one year and that taxes should be annually repaid.

The Ombudsman recommended to the Chairman of the Board that the Concessionaire abstain from charging an annual advertising tax. In view of the Concessionaire's disagreement, the Minister of Economy and Employment was requested to take a position on the matter. The Minister acknowledged it was convenient to amend the Concessionaire's Statutes.

**Status:** Accepted (the need to amend the Portuguese Roads Concessionaire's Statutes has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_5A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_5A2012.pdf)

#### **Recommendation 6/A/2012**

**Entity addressed:** Chairman of the Board of the Institute of Registries and Notaries

**Subject:** Horizontal property. Public Services. Innovation. Co-owner consent.

**Date:** 09.07.2012

**Summary:** The complaint was filed against a sign affixed in a co-owned building facade indicating the existence of a registry department. The Ombudsman concluded that neither the State nor the Institute of Registries and Notaries could impose innovations deemed of public utility in a building facade without the consent of the co-owners, for this would correspond to an unlawful administrative easement or the right-of-ways. Even if the innovation is not relevant for construction purposes the co-owners' approval is required.

The Ombudsman recommended to the Chairman of the Board of the Institute of Registries and Notaries that the consent of 2/3 of the co-owners be obtained. Additionally, it was recommended that this orientation be given to all registry departments installed in co-owned buildings.

The Chairman of the Board reported that he would endeavor to obtain the required permission from the majority of the co-owners.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_6A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_6A2012.pdf)

#### **Recommendation 7/A/2012**

**Entity addressed:** President of the Regional Government of Madeira

**Subject:** Environmental Law. Testing and acoustic measurements to check the limits set by General Noise Regulations.

**Date:** 20.07.2012

**Summary:** Following a complaint, and after the necessary preparatory inquiries, the Ombudsman concluded that the Autonomous Region of Madeira did not have any public entity accredited to perform activities of supervision and control of noise pollution, in accordance with General Noise Regulations.

Thus, the Ombudsman recommended to the President of the Regional Government of Madeira that:

- a) The necessary measures be employed to establish a public laboratory accredited in Madeira, able to perform activities of conformity assessment calibration, testing, inspection and certification, in accordance with Decree-Law 9/2007, of 17 January, and Decree-Law 125/2004, of 31 May;
- b) For this purpose, contacts be ensured with all the municipalities of the Autonomous Region;
- c) Until the completion of the procedure mentioned in the previous indent, the municipalities of the Autonomous Region of Madeira be warned of the mandatory hiring of an accredited company to carry out any tests and acoustic measurements necessary to verify compliance with the limits set by the legislature.

The President of the Regional Government of Madeira reported that the Regional Laboratory of Civil Engineering would be the accredited entity in the Autonomous Region of Madeira providing acoustic measurement tests and services and that the Regional Direction of Spatial Planning and Environment would provide the necessary equipment and training, with the process being completed in 2013.

**Status:** Accepted

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_7A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_7A2012.pdf)

#### **Recommendation 8/A/2012**

**Entity addressed:** Mayor of Anadia

**Subject:** Urban planning. Construction works. Compulsory measures. Administrative offence sanctions. Review of the master development plan. Primacy of substance over mere form. Pursuit of public interest principle. Legalization.

**Date:** 01.08.2012

**Summary:** The Ombudsman considered that, for safety and salubrity purposes, a decision should be taken in respect of the legalization or demolition of unlicensed construction works in the National Ecological Reserve area. And while a court ruling had suspended the fine imposed for the works, on the grounds that they would be in compliance with the upcoming master development plan review, the municipal-

ity of Anadia could not invoke this fact to refrain from imposing the legalization of the construction works. The main controverted issue was to establish whether municipal authorities were to abstain from adopting measures in order to restore legality (either by legalization or demolition) before a court decision.

The Ombudsman considered that the principle of separation of powers prevented a court decision from affecting the regular exercise of administrative competences. The demolition could be avoided, not by extrapolation of the court decision on the application of the fine, or because the constructions works were previous to the National Ecological Reserve classification, but in accordance with the principles of public interest and the primacy of the underlying substance over mere form.

The Ombudsman recommended that the Mayor of Anadia determine the notification of the owner in order to promote the legalization of the construction works, regardless of whether they would benefit from the impending review of the master development plan.

The Mayor accepted the recommendation and informed that the demolition actions would be suspended for a period of three years, provided that the construction works were legalized within that period.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_8A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_8A2012.pdf)

#### **Recommendation 9/A/2012**

**Entity addressed:** Mayor of Santa Cruz

**Subject:** Urban Planning Law. Illegal construction works.

**Date:** 30.08.2012

**Summary:** Following a complaint, and after the necessary preparatory inquiries, it was found that construction works had been made without being integrated into the architectural project of the building previously approved by the Municipality, leading to the completion of works without the necessary license, but which could not be covered by the legal framework concerning «works of little urban relevance», under Article 6 of the Legal Framework on Urbanization and Construction (RJUE).

It was also found that the clandestine work could not be legalized, since the applicable regulations – the Regulation of the Master Development Plan of Santa Cruz – were not complied with, in particular with regard to legal distances provided by paragraph 7 of article 35 of that instrument. Given the above, the Ombudsman recommended to the Mayor of Santa Cruz that:

- a) The necessary measures be undertaken to ensure a demolition order of the illegal works at X Street, once the impossibility to meet the legal and regulatory requirements for urbanization, under Article 106 of RJUE, was recognized;

- b) In case the measure of protection of urban legality mentioned in the previous indent failed, the takeover by the State be determined, so as to enable the due enforcement (Article 107 of RJUE).

The Mayor of Santa Cruz ordered the demolition of the porch and drew attention to its coercive enforcement in case of non-compliance, in line with the recommendation of the Ombudsman.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_09A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_09A2012.pdf)

#### **Recommendation 10/A/2012\***

**Entity addressed:** Minister of Economy and Employment

**Subject:** Gambling. Casinos. Admission. Excluded gamblers.

**Date:** 08.09.2012

**Summary:** After examining several complaints from families of casino gamblers, the Ombudsman confirmed that the admission and stay in gambling areas is only prevented by reasons of unsuitable attire or visible inability (minors). The traditional European casino – with a separation between gambling rooms and concert halls, restaurants and other tourist attractions – evolved to the American model, where gambling areas are not separate. Since gamblers are not previously identified, their admission is allowed even when they are listed as self-excluded gamblers or as being banned by administrative authorities or courts. In addition, many compulsive gamblers that have been banned are lured by targeted advertising due to being loyal customers. The Ombudsman also noted the need for more information about the so-called «irresistible attraction for gambling», which is an internationally characterized pathology and requires clinical follow-up. It is also necessary to support the families of gamblers, who are deeply affected by high expenses and accumulated debts, often at usurious rates.

The Ombudsman pointed out that recent decisions of Portuguese courts have ordered the casino concessionaires to pay the losses suffered by gamblers who should have been denied access to gamble areas. Moreover, the Ombudsman expressed his doubts about the full compliance with the anti-money laundering directives and warned against the imperfect translation and transposition of Community Directives. The economic downturn, high unemployment levels and social disruption accentuated the need for the Ombudsman to recommend to the Minister of Economic Affairs and Employment that legislative and regulatory measures be urgently adopted, based upon conclusions from several studies on the so-called ‘responsible gambling’.

**Status:** Without a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_10AB2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_10AB2012.pdf)

\* The same issue was addressed in Recommendation 8/B/2012.

**Recommendation 11/A/2012\*****Entity addressed:** Ministry of Justice**Subject:** Delays in the completion of medico-legal reports. Implications on the speed of judicial proceedings.**Date:** 06.09.2012**Summary:** Following the inspection carried out to check the situation of the National Institute of Legal Medicine and Forensic Sciences, regarding the slow progress in responding to requests from courts, with implications at the level of court proceedings, a report was drafted on the topic of «Delays in the completion of medico-legal exams: implications for the speed of the proceedings - Conclusions of the inspection visits to delegations to the north, center and south of the National Institute of legal Medicine and Forensic Sciences».

In concluding the case, the Ombudsman recommended that the Minister of Justice promote the regulation, possibly through a Protocol with the Ministry of Health, of the following issues:

- c) Ensure that urgency is given to applications for medico-legal examinations at the request of the National Institute of Legal Medicine and Forensic Sciences and that a deadline is set for delivery;
- d) Ensure that priority is given to requests for information made by the National Institute of Legal Medicine and Forensic Sciences to the establishments of the National Health Service.

The Minister of Justice informed that an opinion on the recommendation had been requested to the competent services of the Ministry and a definitive reply was still awaited.

**Status:** Awaiting a definitive reply.[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_9B\\_11A\\_2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_9B_11A_2012.pdf)

\* The same issue was addressed in Recommendation 9/B/2012.

**Recommendation 12/A/2012****Entity addressed:** Mayor of Lagos**Subject:** Allotment. Spatial planning. Building constraints.**Date:** 28.10.2012**Summary:** The Ombudsman concluded that the Lagos Municipality has been arbitrarily forbidding an allotment based upon unacceptable and illogical legal arguments.

Although allotments are not permitted outside urban perimeters, the delimitation of urban soils is not exclusively entrusted to master development plans: in the absence of a binding master plan, allotments are subject to favorable opinion of the Committee for Coordination and Regional Development (which was issued regarding the case in consideration). Furthermore, the master development plan under elaboration does not dismiss the allotment.

The Ombudsman recommended that the Mayor of Lagos should not reject the allotment permit. The Mayor did not

comply with the recommendation and maintained his previous opinion.

**Status:** Not accepted.[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_12A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_12A2012.pdf)**Recommendation 13/A/2012****Entity addressed:** Mayor of Lisbon**Subject:** Critical area of urban rehabilitation and conversion. Acquisition of property. Expropriation. Compensation. Agreement obligations. Delay in performance. Trust.**Date:** 26.10.2012**Summary:** The Ombudsman concluded that the Lisbon Municipality had not compensated the owners of a property which was taken over for 14 years although it had carried out the demolition works of a building thereon. Nevertheless, these same owners were annually notified to pay the local property tax. Although the initial proposals for compensation, lower than the tax value, were rejected by the owners, an agreement had been reached in 2010. The municipality did not pay the agreed sum considering there was an obstacle to the conclusion of the public deed due to one of the heirs being bound by a testamentary trust. Since the trustee gave up his rights, the inheritance was returned to the heirs (article 2293, paragraph 3, of the Civil Code) and the municipality could have executed the public deed.

The Ombudsman recommended that the Mayor of Lisbon should take up the necessary measures to formalize the transfer of the property's ownership and to proceed with payment of the compensation agreed with the owners.

The Mayor of Lisbon informed that the recommendation had been complied with – the public deed was formalized and the compensation paid.

**Status:** Accepted.[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_13A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_13A2012.pdf)**Recommendation 14/A/2012****Entity addressed:** Mayor of Câmara de Lobos**Subject:** Urban Planning.**Date:** 05.11.2012**Summary:** Following a complaint about the maintaining of a situation of illegality in the urban road of Achada, the Ombudsman identified the construction of a «cluster of buildings» without a license and in disregard for the provisions on regulatory distances.

The Ombudsman also confirmed the existence of illegitimate collection of fees for overseeing municipal urban offenses in violation of the rules prescribed by the Local Finance Law (LFL) and by the General Regime of Local Exchange (RGTL). Thus, the Ombudsman recommended to the Mayor of Câmara de Lobos:

- a. That the necessary arrangements and measures be triggered, for the prosecution of administrative offenses committed by the offender, in accordance with Article 98, paragraph 1, indent a), of the Legal Framework for Urbanization and Construction (RJUE), and that the municipality adopts, with the due celerity, the mechanisms for protection of urban planning, as established in the referred legislation;
- b. The return of the amounts charged by the municipality of Câmara de Lobos as a fee and the repeal of Article 17 of Annex I of the Regulation on Fees and Licenses of the City Council of Câmara de Lobos, under the heading «inspections by claims against third parties».

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_14A2012\\_.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_14A2012_.pdf)

#### **Recommendation 15/A/2012**

**Entity addressed:** Secretary of State for Culture

**Subject:** Arts and shows. Artistic creation. Subsidy. Public tender. Regulation.

**Date:** 02.11.2012

**Summary:** After studying a complaint against the Directorate-General of the Arts, presented by candidates excluded from the *Apoio Pontual 2010* tender, the Ombudsman concluded that a certain rule had been inaccurately interpreted. Indeed, the reference to specific deadlines did not concern the conclusion of the cultural project but rather the procedure for choosing the co-contractor. Moreover, the administrative appeal brought before the Government had been decided too late.

Without prejudice to the revocation of the act of exclusion of the public tender, due to its invalidity, although subject to consideration in light of the serious financial situation since 2010, the Ombudsman recommended that the Secretary of State for Culture ensure the authentic interpretation of the rule, and that interested parties be notified of the unfavorable decision, so that they might challenge it before an administrative court.

**Status:** Waiting for a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_15A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_15A2012.pdf)

#### **Recommendation 16/A/2012**

**Entity addressed:** Mayor of Lisbon

**Subject:** Flammable, toxic or hazardous products. Fuel station and fuel storage. Location. Error of law. Application of transitional law.

**Date:** 02.11.2012

**Summary:** The Ombudsman considered illegal the licensing of a fuel station as a result of incorrect application of the transitional provisions set by Decree-Law 267/2002, of

26 November. Since the legalization procedure of the fuel station had begun in 2010, it was incorrect to admit that it could benefit from the location conditions prior to 2002, as a result of administrative procedures that had expired in 2001, for reasons beyond the control of the Lisbon Municipality. In fact, the request to license the fuel station, rejected in 2001, could not be used to avoid the application of the current binding location standards, which are much stricter. Consequently, the Ombudsman recommended that the Mayor of Lisbon revoke the license on the grounds of illegality and that administrative measures be taken to restore environmental safety conditions. The Mayor of Lisbon disagreed, considering that no illegality had occurred, and that, even if it were otherwise, the deadline for revocation had been expired.

**Status:** Not accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_16A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_16A2012.pdf)

#### **Recommendation 17/A/2012**

**Entity addressed:** Chairman of the Board of Directors of Institute for the Financial Management of Social Security (IGFSS, I. P.).

**Subject:** Taxation. Tax enforcements. Tax enforcement against the person who is secondarily liable («*reversão*»). Exemption of fees and interest for late payment.

**Date:** 30.11.2012

**Summary:** Two cases of fiscal enforcements were initiated by the Enforcement Section of Lisbon of the IGFSS, I. P., for debts of social security contributions from the company C., Lda. There was a transfer of liability («*reversão*») to the directors T. and J., who had secondary liability. Within the opposition period, the director T. paid the enforced debt, free from fees and interest for late payment, under article 23, paragraph 5, of the General Tax Law (GTL). However, contrary to what was required by the debtors under the aforementioned law, the tax enforcement was not extinguished and the attachment of individual income tax reimbursement and bank account balances of J. was maintained. The Ombudsman conducted a hearing to the President of the Governing Board of the IGFSS, I. P., who confirmed the elements of the complaint, justifying the pursuit of the tax enforcement against J. for the debt of fees and interest on late payment with the fact that the DUC (single collection document) for the payment of the debt in full, within the period prescribed for this purpose, had been issued in the name of the other member of the statutory governing bodies (MSGB).

Disagreeing with this opinion and considering that:

1. Directors of legal persons and fiscally equivalent entities are secondarily liable in relation to the those entities and jointly and severally liable between themselves for the debts to which paragraph 1 of article 24 of GTL refers;



2. The implementation of the directors' secondary liability operates through the transfer (*«reversão»*) of the tax enforcement. The acquisition of debtor status (*«executados»*) occurs with the service in person (*«citação pessoal»*);
3. The director who pays the outstanding debt within the opposition period is exempt from fees and interest on late payment, under article 23, paragraph 5, of GTL;
4. If the payment is made by one of the directors before the expiry of the deadline during which the other directors who have been served can file an opposition, they all benefit from the prerogative exercised by one of them (exemption from fees and interest on late payment), given the fact that they are jointly and severally liable.

The Ombudsman recommended to the Chairman of the Board of Directors of IGFSS, I. P.:

- a) The closure of the tax enforcement cases ...and joined cases ..., against the director of company C., Lda., J.;
- b) The termination of the attachments on the individual income tax reimbursement and bank account balances of the MSGB;
- c) Reimbursement to the director of the amounts, arising from the referred attachments, which have been unduly transferred to the cases ... and joined cases ..., with the addition of by default interest at the legal rate;
- d) Dissemination of the opinion contained in this recommendation by the tax enforcements section of the IGFSS, I. P., to be adopted in all future cases of this nature.

The Chairman of the Board of Directors of the IGFSS, I. P. reported to be making efforts to comply with the Recommendation.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_17A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_17A2012.pdf)

### Recommendation 18/A/2012

**Entity addressed:** Director-General of the Tax and Customs Authority.

**Subject:** Taxation. Exemption of real estate capital gains for individual income tax (IRS) purposes. Sale and purchase of real estate allocated to the tax payer residence and to that of its household.

**Date:** 28.12.2012

**Summary:** The complaint was addressed to the Ombudsman by a citizen whose spouse, by the wedding date, was the owner of the real estate. They allocated the real estate to their residence and to that of the members of their household. They sold the real estate in 2009 and reinvested the proceeds on the acquisition, by both, of another real estate which they established as their permanent residence and also that of the members of their household. They declared such reinvestment in the proper section of the IRS return, hoping thereby to see the proceeds generated with the sale of the first real estate excluded from taxation,

under article 10, paragraph 5, indent a), of the IRS Code. This was not the opinion of the tax authorities. They invoked the circumstance that the real estate sold was owned only by the wife and that the real estate purchased is owned by both. Therefore, tax authorities considered that the conditions required to apply the referred law were not met. Tax authorities took the view that there had been a partial reinvestment (50%) of the sale value of the first real estate and therefore reducing by half the exemption from taxation of the income.

Disagreeing with this view, namely because it added to article 10, paragraph 5, indent a), of the IRS Code, requirements that the legislator did not choose as conditions for exemption of taxation, the Ombudsman recommended to the Directorate-General of the Tax and Customs Authority:

- a) That, in deciding the administrative appeals filed by taxpayers with respect to IRS/2009, the tax authorities consider included on the exemption foreseen in article 10, paragraph 5, indent a), of the IRS Code, the full proceeds arising from the sale of the real estate that they previously allocated as their permanent residence and that of the members of their household, as it had been fully reinvested in the purchase of another real estate with the same aim. For the purpose of applying the rule in question, no requirement which the law does not demand should be considered, namely that the real estate sold should be owned by both tax payers (and not by only one of them);
- b) To consider converting the view expressed in the recommendation into an administrative order, with a view to providing future guidance to the Tax and Customs Authorities' offices.

**Status:** Awaiting a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_18A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_18A2012.pdf)

### Recommendation 19/A/2012

**Entity addressed:** Secretary of State for Education and School Administration

**Subject:** Teaching staff. Fixed-term work contract. Work accident. Absolute temporary incapacity. Expiry of the contract of employment. Right to compensation for temporary incapacity for work.

**Date:** 28.12.2012

**Summary:** The complaint was lodged by three teachers employed under fixedterm contract by the Ministry of Education and Science. The three have suffered accidents at work which resulted in absolute temporary incapacity and complained that after the termination of their contracts they ceased to receive the monetary compensation they were paid (as provided for in Article 4, paragraph 4, indent a) and Article 15 of Decree-Law 503/99, of 20 November), in spite of the persistence of the above mentioned incapacity.

Due to the fact that those provisions cannot be considered in isolation, nor can they be literally interpreted, because they would lead to an unfair result, leaving without compensation a damage resulting from an accident at work, the hearing of the Secretary of State for Education and School Administration was requested, in order to find an urgent solution for these cases.

Within the framework of the constitutional right to assistance and fair compensation of workers who have been victims of work accidents, of the principle of equality and also of the general regime on the compensation for work accidents and occupational diseases, the right to monetary compensation should be recognized while the inability persists and until the time of discharge, in accordance with the law.

In response, it was defended that monetary compensation shall be payable only in the exact terms laid down in the law and, therefore, only for the period of absence from work while there is a right to the payment of remuneration. Otherwise, there would be unjustified enrichment of the worker. The lack of protection created with the expiry of the contract should be covered by Social Security, being considered as a situation of unemployment.

Nevertheless, considering that:

- a) The absolute temporary incapacity due to work-related accidents is a responsibility of the employer to be compensated through monetary payments, which can persist beyond the duration of the contract of employment and might not be covered by the Social Security system;
- b) These monetary payments are not intended to remunerate the worker, but should be considered as compensation for the temporary loss of the ability to work or gain;
- c) This position leaves the teachers unprotected as a result of the accident that they suffered,

the Ombudsman recommended that the Secretary of State for Education and School Administration ensure to those teachers the payment of monetary compensation for the damage of absolute temporary incapacity, while the incapacity persists in accordance with the law, *i.e.*, until the time of medical discharge.

**Status:** Awaiting a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_19A2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_19A2012.pdf)

**«B» Recommendations (Article 20, paragraph 1, indent b) of the Statute of the Ombudsman)**

**Recommendation 1/B/2012**

**Entity addressed:** President of the Parliament

**Subject:** Code of Good Administrative Behaviour.

**Date:** 19.01.2012

**Summary:** In 2001, the European Parliament adopted, by

way of a resolution and on the basis of a proposal presented by the European Ombudsman, the European Code of Good Administrative Behaviour, which seeks to explain in greater detail and a more accessible language what the right to good administration, established in article 41 of the Fundamental Rights Charter of the EU, means in practice. Against this background, the Portuguese Ombudsman considered that in the Portuguese legal order it was also justified to promote an initiative similar to that of his European counterpart, with a view to strengthening the quality, transparency and citizen-oriented service of the Public Administration.

To that effect, the Ombudsman recommended to the President of the Parliament that a Code of Good Administrative Behaviour be adopted. The ombudsman annexed the corresponding proposal, in an initiative that follows a similar suggestion submitted to the 11<sup>th</sup> legislature, in 2010, and which led to the Ombudsman being heard, in that year, by the Parliamentary Committee on Labour, Social Security and Public Administration.

Focusing on the protection of the citizens, the intention was to gather in the document submitted to the Parliament the principles of good administration that should guide the conduct of all public agents, in their dealings with the citizens, by affirming fundamental values of public service in the conduct expected from the Public Administration.

**Status:** Awaiting a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_1B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_1B2012.pdf)

**Recommendation 2/B/2012**

**Entity addressed:** Mayor of Lisbon

**Subject:** Construction works with similar impact to that of an allotments. Article 6 of the Lisbon Regulation on Urbanization and Construction (RMUEL).

**Date:** 03.02.2012

**Summary:** The Ombudsman considered unjustified the equal treatment given by the Lisbon Regulation for Urbanization and Construction to two different situations and to two types of charges distinguished by the Legal Framework for Urbanization and Construction: on the one hand, the protection of green areas and areas of collective use, infrastructure and equipment that is to be ensured by the construction of adjoining and functionally interconnected buildings with impact similar to that of an allotment; on the other hand, the cession of land imposed on the majority of construction works with relevant urban impact. Although the two impacts may perhaps be treated the same way, it is not possible either to standardize their conditions and effects or to burden the same urban operation with both charges.

Accordingly, the Ombudsman recommended that the Mayor of Lisbon provide for the amendment of article 6 of the



Regulation on Urbanization and Construction, in order to make it compliant with the Legal Framework of Urbanization and Construction.

The Mayor of Lisbon agreed with the Ombudsman's position and submitted to the Municipal Assembly a proposal to amend the Regulation.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_2B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_2B2012.pdf)

### **Recommendation 3/B/2012**

**Entity addressed:** President of the Parliament

**Subject:** Amendment to the Statute of the Portuguese Ombudsman

**Date:** 29.02.2012

**Summary:** The Portuguese Ombudsman recommended to the President of the Parliament the introduction of specific amendments to the Statute of the Ombudsman, published in 1991, without changing its overall structure. The need for the specific updates results from the activities attributed to, or promoted by, this State body in the context of the European Union, of international treaties conventions and other instruments or of regional associations. It also results from the evolution in terms of reorganization of public administration and the need to internally reorganize the services of the Portuguese Ombudsman. The proposed amendments do not have implications as regards added human resources or public expense.

Pursuant to this recommendation, two draft laws were presented by the parliamentary groups of PSD, CDS-PP and PS, which led to the adoption of Law 17/2013, of 18 February (third amendment to Law 9/91, of 9 April).

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_3B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_3B2012.pdf)

### **Recommendation 4/B/2012\***

**Entity addressed:** Ministry of Justice

**Subject:** Deputy Registrars. Type of public employment relationship.

**Date:** 02.03.2012

**Summary:** A group of deputy registrars submitted a complaint about the type of public employment relationship applied to them by the Institute of Registries and Notaries: a public employment contract with non-fixed term. They argued that, since 2005, they had completed all stages of the process of training and traineeship for the career of registrar and that, since 4 years ago, no competitions had been opened allowing them to access such a career.

After analyzing the underlying legal issue, the Ombudsman concluded that:

a) The deputy registrars should be transferred to the modal-

ity of public employment contract for an indefinite period and that, on the same day, the experimental period should be considered as successfully concluded (since they had all been approved in their final tests).

b) Once the transition to that type of contract is operated, the previous regimes of expiry of the legal relationship of public employment should be applied to them, as provided for in Article 91, paragraph 3, and Article 88, paragraph 4, of the Law on Employment Relationships, Careers and Salaries. This means that the public employment relationship may not be ended by considering that the deadline of extension of the validity of final exams has expired.

c) As holders of a public employment contract for an indefinite period, the deputies occupy work posts corresponding to the «category» of deputy until they come to be placed as registrars, after a documental competition procedure.

d) The general mobility regime provided for in Articles 58 to 65 of the Law on Employment Relationships, Careers and Salaries should be applied to the deputies.

This opinion was communicated to the Minister of Justice, who did not take any position on the matter. As such, the Ombudsman recommended that:

a) The functional and legal situation of the deputy registrars be reassessed in order to recognize that they are holders of public employment contracts for an indefinite period, with effect from the date of entry into force of the new Law on Employment Relationships, Careers and Salaries.

b) In case of disagreement with this position, a legal measure be adopted to put an end to the situation of labor precariousness of the deputy registrars. This measure should expressly determine that they are holders of a public employment relationship for an indefinite period and that the mobility rules that apply to other civil servants are also applicable to them.

The Minister of Justice informed that efforts are ongoing to resolve the matter by way of legislation.

**Status:** Accepted (the need for legislative amendment has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_4AB2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_4AB2012.pdf)

\* The same issue was addressed in Recommendation 4/A/2012.

### **Recommendation 5/B/2012**

**Entity addressed:** Minister of Internal Affairs

**Subject:** Refund of towing taxes. Blocking. Deposit in case of lapse of the limitation period for administrative offence case.

**Date:** 09.04.2012

**Summary:** The Ombudsman received several complaints about the fact that only the amounts paid as fines are refunded when cases are not decided by the National Road

Safety Authority due to the lapse of the limitation period. Indeed, the amounts paid as fees for the blocking, towing and deposit of vehicles are not returned, even if they relate to the same offense.

The Ombudsman recommended to the Minister of Internal Affairs that the Highway Code be amended to allow for the refund of the blocking, removal and disposal fees, when cases are not decided by the National Road Safety Authority due to the lapse of the limitation period.

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_582012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_582012.pdf)

### **Recommendation 6/B/2012**

**Entity addressed:** Secretary of State for Public Works, Transport and Communications

**Subject:** Non-registered transfer of ownership of vehicles. Destruction of vehicles by unauthorized operator. Cancellation of vehicle registration.

**Date:** 22.06.2012

**Summary:** The Ombudsman found that citizens have no means to register the ownership of vehicle that have already been sold or to prove the destruction of vehicles that have been made by unauthorized operator.

In addition to the tax implications, this situation also has important implications in terms of road offenses, since, to notify offenders by post, the authorities resorted to queries of the database of the Institute of Registries and Notaries, which meant that the responsibility for offenses against the Highway Code could be attributed to those who have not committed them.

The Ombudsman recommended that the Secretary of State for Public Works, Transport and Communications:

- a) Promote legislative change in order to adapt the system for cancellation of vehicle registrations to the current system of car taxation;
- b) Promote legislative change in order to expedite the process of registration of transfer of ownership, to allow the seller to register the transfer of ownership of the vehicle;
- c) Approve a transitional regime that safeguards the interests of many thousands of vehicle owners already destroyed without recourse to an authorized operator or whose property has already been transmitted without the acquirer having made the due registration.

**Status:** Accepted (the need for legislative initiative has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_682012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_682012.pdf)

### **Recommendation 7/B/2012**

**Entity addressed:** Minister of Internal Administration, Minister of National Defense and Minister of Justice

**Subject:** Admission to the Armed Forces and Police of HIV-positive citizens.

**Date:** 04.07.2012

**Summary:** A complaint was lodged against the rules for accessing the School of Police Science and Internal Security, for subsequent entry into the career of police commissioned officer. These rules prevented the access of those candidates with a positive test for one of several viral infections. Noting the similarity of such rules also in other law enforcement bodies and the Armed Forces, the Ombudsman recommended to the Ministers of Internal Administration, Defence and Justice, to revoke such rules and to adopt strict parameters of prevention of risks in the engagement protocols.

The Minister of Justice has recognized the need for legislative change, however subject to negotiation with the trade unions concerned. Negative response was received from the Minister of National Defence, although considering applying the principles defended in this recommendation to future modification of existing solutions. No conclusive answer from the Minister of Internal Administration.

**Status:** Awaits a definitive reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_782012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_782012.pdf)

### **Recommendation 8/B/2012\***

**Entity addressed:** Minister of Economy and Employment

**Subject:** Gambling. Casinos. Admission. Excluded gamblers.

**Date:** 08.09.2012

**Summary:** After examining several complaints from families of casino gamblers, the Ombudsman confirmed that the admission and stay in gambling areas is only prevented by reasons of unsuitable attire or visible inability (minors). The traditional European casino – with a separation between gambling rooms and concert halls, restaurants and other tourist attractions – evolved to the American model, where gambling areas are not separate. Since gamblers are not previously identified, their admission is allowed even when they are listed as self-excluded gamblers or as being banned by administrative authorities or courts. In addition, many compulsive gamblers that have been banned are lured by targeted advertising due to being loyal customers. The Ombudsman also noted the need for more information about the so-called «irresistible attraction for gambling», which is an internationally characterized pathology and requires clinical follow-up. It is also necessary to support the families of gamblers, who are deeply affected by high expenses and accumulated debts, often at usurious rates. The Ombudsman pointed out that recent decisions of Portuguese courts have ordered the casino concessionaires to pay the losses suffered by gamblers who should have been denied access to gamble areas. Moreover, the Ombudsman expressed his doubts about the full compliance with the

anti-money laundering directives and warned against the imperfect translation and transposition of Community Directives. The economic downturn, high unemployment levels and social disruption accentuated the need for the Ombudsman to recommend to the Minister of Economic Affairs and Employment that legislative and regulatory measures be urgently adopted, based upon conclusions from several studies on the so-called 'responsible gambling'.

**Status:** Without a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_10AB2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_10AB2012.pdf)

\* The same issue was addressed in Recommendation 10/A/2012

### Recommendation 9/B/2012\*

**Entity addressed:** Ministry of Justice

**Subject:** Delays in the completion of medico-legal reports. Implications on the speed of judicial proceedings.

**Date:** 06.09.2012

**Summary:** Following the inspection carried out to check the situation of the National Institute of Legal Medicine and Forensic Sciences, regarding the slow progress in responding to requests from courts, with implications at the level of court proceedings, a report was drafted on the topic of «Delays in the completion of medico-legal exams: implications for the speed of proceedings - Conclusions of the inspection visits to delegations to the north, center and south of the National Institute of legal Medicine and Forensic Sciences».

In concluding the case, the Ombudsman recommended that the Minister of Justice promote legislative changes in order to:

- a) Standardize the deadlines for the delivery of expert reports to courts.
- b) Provide that, once the deadline is lapsed, the expert may be called directly by the court to provide the missing information indispensable to the court decision;

The Minister of Justice informed that an opinion on the recommendation had been requested to the competent services of the Ministry and a definitive reply was still awaited.

**Status:** Awaiting a definitive reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_9B\\_11A\\_2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_9B_11A_2012.pdf)

\* The same issue was addressed in Recommendation 11/A/2012.

### Recommendation 10/B/2012

**Entity addressed:** Minister of Solidarity and Social Security

**Subject:** Commissions for the protection of children and young people at risk. Review of the Performance Evaluation Integrated System (SIADAP).

**Date:** 14.09.2012

**Summary:** The Ombudsman decided to open a case to assess the situation of the Commissions for the Protection of Children and Young People of Western and Eastern Sintra.

Visits were carried out to those Commissions and meetings were held with their Presidents. The aim was to assess the existing facilities and equipments, the adequacy of human and financial resources, the administrative organization and procedural activity and statistical data.

After giving the concerned entities the possibility to comment on the findings, the Ombudsman drafted a final report, which was submitted to the intervening entities, and in which he recommended to the Minister of Solidarity and Social Security:

- a) To ponder the revision of the performance evaluation system be applied to the various elements that comprise the commissions for protection of children and youth, so that the services take into account the work carried out by them in protecting and promoting the rights of children and that the assessment is guided by the realization of goals set in advance in this field, according to the principles of equality and prevention of discretion,
- b) To consider the amendment of Article 26/2, of the Law of Protection of Children and Young People in Danger, enabling the exercise of functions in Commissions for Protection of Children and Young People can be extended for more than six consecutive years, in cases of justified public interest, given the primacy of the best interest of the child, and according to convenience in carrying out the tasks conferred upon the commission of protection.

**Status:** Accepted (the need for legislative amendment has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_10B2012\\_0.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_10B2012_0.pdf)

### Recommendation 11/B/2012

**Entity addressed:** Minister of Health.

**Subject:** New system of fees to access the benefits of the National Health Service. Exemption.

**Date:** 13.09.2012

**Summary:** Following dozens of complaints about the new system of access fees to the benefits of the National Health Service, primarily regarding the conditions of exemption for financial reasons, the Ombudsman recommended to the Minister of Health:

- a) The study of the creation of a more gradual system of fees, setting intermediate levels of partial exemption;
- b) The elimination of user fees when accessing emergency services in a situation deemed as urgent by medical opinion;
- c) The establishment of safeguards for cases of sudden negative change in a certain user's economic situation, apart from the case of unemployment already protected;
- d) The exclusion of the relevant income of the social benefits expressly designed to support certain specific needs, such as the need of another person's support for carrying daily activities;

- e) The consideration in the relevant income of a specific exemption established in the Individual Income Tax Code;
- f) The modification of the calculation of rental income, eliminating the current cumulative effect of the income declared and presumed, setting the greatest of these values;
- g) The change of the rules about capitation, giving relevance to the actual composition of the household, namely children above 12 years old;
- h) The explicit reasoning for the denial of exemption, clearly indicating the calculations made by the Customs and Fiscal Authority.

It was expressly emphasized that none of these proposals, by itself, carries a negative implication in terms of increased spending or reduced revenue, leading only to a clear improvement in the distribution of benefits and burdens within the universe of the users of the National Health Service.

**Status:** These issues were discussed with the Ministry of Health and the dialogue is still on-going.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_11B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_11B2012.pdf)

#### **Recommendation 12/B/2012**

**Entity addressed:** Parliament

**Subject:** Compensation for expiry of a fixed-term contract.

**Date:** 17.10.2012

**Summary:** The Ombudsman decided to open a case of his own initiative, following the presentation of several complaints contesting the decisions of many public administration bodies and services, namely of Municipal Councils. According to the interpretation of these bodies and services, the expiry of fixed-term contracts does not confer the right to compensation provided for in paragraph 3 of article 252 and paragraph 4 of article 253 of the Legal Regime of the Contract of Employment in Public Functions (RCTFP), approved by Law 59/2008, of 11 September, in all cases in which it has been reached the maximum number of renewals or the maximum duration of the contract have been reached.

In the common labor regime, when the expiry of a fixed-term contract is not the consequence of the will of the worker, he always has the right to the due compensation, as results from the provisions of paragraph 2 of article 388 of the Labor Code of 2003.

The RCTFP has incorporated the provisions of the Labor Code, the legislator limiting himself to «adapt the scheme, within the framework of Public Administration, to the requirements of public interest and, above all, to comply it with the constitutional right of access to the public service, in conditions of equality and freedom, as a rule by means of competition process». However, neither the requirements of the public interest, nor the compliance with the constitutional right of access to public function are incompatible with the statutory scheme of compensation by the expiry

of the contract as set out in the Labor Code that was applicable to the Public Administration in accordance with Law 23/2004, of 22 June. What the requirements of the public interest and the compliance with the constitutional right of access to public functions determined was the impossibility to convert a fixed-term contract in a contract for an indefinite period of time, thus resulting the need to adapt to these circumstance the rules on renewal and expiry of the contract, provided for in the Labor Code.

Thus, the provisions of paragraph 3 of article 252 of the RCTFP is no more than a transposition *mutatis mutandis* to what is prescribed in paragraph 2 of article 88 of the Labor Code, in order to make it more compatible with its specific arrangements of expiry of contract, arising from the absence of automatic renewal and conversion contract.

When the Administration, especially the Local Administration, reduces the right to compensation by the expiry of the contract to a residual expression, transforms into exception which, in paragraph 3 of article 252 of the RCTFP, clearly intended to establish as a rule.

Therefore, the Ombudsman recommended that the Parliament should promote the revision of article 252, paragraph 3, of the RCTFP in order to make clear that there is a right to compensation whenever the expiry of a fixed-term contract is not the consequence of the will of the worker.

On 31 December 2012, the Parliament adopted Law 66/2012, which amended Article 252, paragraph 3, of the RCTFP, in accordance with the recommendation of the Ombudsman

**Status:** Accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_12B2012\\_0.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_12B2012_0.pdf)

#### **Recommendation 13/B/2012**

**Entity addressed:** Minister of Solidarity and Social Security

**Subject:** Public road Parking. Parking places for people with reduced mobility. Subsidiarity principle. Relationship between Community law and national law.

**Date:** 02.11.2012

**Summary:** Pursuant to the refusal of a municipality to award a private parking place to a person with reduced mobility, it was verified that several municipalities had abolished that right after the establishment of the Community Parking Card for People with Disabilities. This card, while granting additional rights to people with disabilities, did not intend to remove other protective instruments. In fact, collective parking in specific places does not meet the basic need of a person with disability to have a private parking place next to the place of residence or workplace.

Therefore, the Ombudsman recommended to the Minister of Solidarity and Social Security that: a) the above conclusion should be accepted and conveyed to agencies and local government services; b) measures in this respect should be taken in the next National Plan to Promote Accessibility;

and c) Ministerial Order 878/81, of 1 October, should be restored, except for point 8, to ensure that people who meet the necessary requirements may apply for reserved parking place, displaying the vehicle registration, at their residence or at work.

The Minister did not comply with the recommendation on the grounds that the Community Parking Card for People with Disabilities aims to enable the mobility of these people in any Member State of the European Union and allows them to park in specially designated places, whereas the reservation of a private parking place collides with the rights of other citizens with disabilities, regardless of their nationality.

**Status:** Not accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_13B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_13B2012.pdf)

#### **Recommendation 14/B/2012**

**Entity addressed:** Secretary of State for Public Works, Transport and Communications.

**Subject:** Rights of consumers. Collective passenger transport. Process of revising the penalty system applicable to infringements.

**Date:** 28.11.2012

**Summary:** Law 28/2006, of 4 July, has implemented a new penalty system applicable to collective passenger transport infringements, which soon raised several concerns about its suitability with regard to passenger rights, constitutionally and legally enshrined. The revision of the law has been immediately claimed by the users of such transports, the Ombudsman and the transport firms. This led the (then-called) Institute for Mobility and Land Transport (IMTT) to begin working on a preliminary draft for the law's review. However, the only problem that was solved with the changes proposed by IMTT to Law 28/2006, of 4 July, refer to cases of users who have purchased and paid their monthly subscriptions and were fined only because they have not validated their tickets. In accordance with the draft of the preliminary draft law review, this would no longer constitute a punishable infringement. As for the two other issues that most concerned the Ombudsman – impossibility of defense after the payment of fines and their exorbitant amount – no changes were made to the initial project.

Considering that:

- a) The penalty is a mere administrative or disciplinary enforcement measure. This qualification should restrict the freedom of shaping legislation when it comes to fixing the amount of fines corresponding to each typology of infringements;
- b) This freedom to define the limits of the sanction which assists the legislator has thus to give in when it involves inadequate fines for being excessive compared to the legal framework affected;

c) The setting of € 300.00, as maximum value for a fine applicable for the infringement committed on collective passenger transport collides with the constitutional principle of proportionality of fines vis-à-vis the gravity of the infringements, arising from article 18, paragraph 2, of the Constitution of the Portuguese Republic;

d) When the user chooses to voluntarily pay the fine, he does it, in many cases, only to prevent aggravation of its value. However, under the law in force and the preliminary draft law known, this payment reflects a true assumption of guilt, because it prevents him from defending himself;

e) In various constitutional rules (see Article 20, paragraph 4, Article 32, paragraph 10 and Article 268, paragraph 4), as well as Article 6 of the European Convention on Human Rights, the ability to appeal generic administrative decisions that affect the rights and interests of citizens is enshrined, including of course the legal proceedings in all phases in which they unfold;

f) Therefore it cannot be accepted the infringements of the rights of defense of the passenger fined who pays voluntarily the fine imposed.

The Ombudsman recommended to the Secretary of State for Public Works, Transport and Communications that:

a) In the work of revising law 28/2006, of 4 July, the following be included:

- Substantial reduction of the maximum value of the fines applied to infringements in collective passenger transport;
  - The possibility of the defendant to present his/her defence, even after making the voluntary payment of the fine imposed
- b) High priority be given to the completion of the preliminary draft review of such law.

**Status:** Not accepted.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_14B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_14B2012.pdf)

#### **Recommendation 15/B/2012**

**Entity Addressed:** Secretary of State for Solidarity and Social Security

**Subject:** Special Education Subsidy

**Date:** 28.12.2012

**Summary:**

In the past few years the Ombudsman has been confronted with a significant number of complaints regarding the attribution of the Special Education Subsidy, which led to several interventions in relation to the Government. Such complaints reflect, on the one hand, the delay in concluding the cases and, therefore, in paying the subsidy, and raise, on the other hand, several questions related to the analysis of the requests, to the grounds for their refusal and, in particular, to how social security services interpret the law. Despite the various interventions made to solve the problem, at the end of 2010 the Ombudsman received new

complaints related to the same subject, which made it clear that the problem persisted. Therefore, in 25 October 2010, the Ombudsman addressed the predecessor of the current Secretary of State for Solidarity and Social Security, pointing out that the problems experienced in the attribution of the special education subsidy had dragged on for years and were due, essentially, to the great difficulty in the interpretation and implementation of the existing legal concepts (especially the concept of disability relevant for this purpose), aggravated by the fact that the applicable legal framework was disperse and outdated. Taking into account the problems identified and their impact in the attribution of the special education subsidy, the Ombudsman concluded that there was an urgent need to revise the special education subsidy legislation.

Given the lack of response and in view of the taking of office of a new government, in 2011 the Ombudsman reiterated the issue to the current Secretary of State for Solidarity and Social Security. After several reminders, clarifications were provided to the Ombudsman. Those, however, did not respond adequately to the aforementioned need of revising the special education subsidy legislation.

Given the standstill, the Ombudsman recommended that the Secretary of State for Solidarity and Social Security: Promote, in articulation with the Secretary of State for Education and School Administration, a legislative initiative to fully review and clarify the regulation of the special education subsidy.

Promote in the meantime, and until such a review is undertaken, the adoption of urgent measures to clarify the current special education subsidy legislation, in order to enable the immediate resolution of the ongoing cases.

In his reply, the Secretary of State for Solidarity and Social Security informed that a proposal had been made to the Ministry of Education and Science to create a working group to review the legislation.

**Status:** Accepted (the need of legislative amendment has been acknowledged).

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_15B2012\\_e\\_Oficio\\_SEEAE.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_15B2012_e_Oficio_SEEAE.pdf)

#### **Recommendation 16/B/2012**

**Entity addressed:** Minister of State and Foreign Affairs

**Subject:** Diplomats. Transition to non-operational status. Age limit.

**Date:** 28.12.2012

**Summary:** A complaint was lodged with the Ombudsman regarding the provision of Decree-Law 40-A/98 regarding the transition to non-operational status on by virtue of attaining a certain age, depending on the rank held, of diplomatic officials. It was considered that this solution constitutes, undoubtedly, a difference in treatment directly based on age among persons within the same «unique and special body

of state officials» (Article 2 of Decree-Law 40-A/98) with identical category and therefore in «comparable situation».

In the context of ensuring the exercise by the officials concerned of their work and the «need to pay particular attention to supporting older workers to increase their participation in active life», the Ombudsman recommended to the Minister of State and Foreign Affairs to revise the current legal regime, in order to:

- a) adopt a solution that is based on objective criteria, regardless of the rank, similar to that which exists in Spain, notwithstanding the relevance of the will of the person concerned;
- b) establish a safeguard clause when the public interest requires a different solution.

**Status:** Awaiting a reply.

[http://www.provedor-jus.pt/site/public/archive/doc/Rec\\_16B2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/Rec_16B2012.pdf)

#### **In 2012 20 of the 35 recommendations issued by the Ombudsman were accepted.**

Of the remaining 15 recommendations, 4 were not accepted, 3 were still awaiting a reply or were still being the subject of dialogue with the addressed entity.

#### **Follow-up of the 2011 recommendations:**

In relation to the 3 recommendations from 2011 that were still waiting for a reply at the end of that year, 1 was accepted, another was not and the third still awaits a reply.

#### **Recommendation 7/A/2011**

**Target entity:** Mayor of Santa Cruz

**Subject:** Consumer rights. Guarantee deposit for access to public water supply.

**Date:** 04.11.2011

**Summary:** The Ombudsman recommended to the Mayor of Santa Cruz that the necessary administrative measures be initiated to ensure that the complainant is paid an amount equal to the value of the guarantee deposit whose refund he requested under Decree-Law 195/99, of June 8, which established the regime on deposits in contracts for the provision of essential public services to consumers, as amended by Decree-Law 100/2007, of April 2.

**Status:** Accepted.

[http://www.provedor-jus.pt/restrito/rec\\_ficheiros/Rec\\_07112011.pdf](http://www.provedor-jus.pt/restrito/rec_ficheiros/Rec_07112011.pdf)

#### **Recommendation 8/A/2011**

**Entity addressed:** Director-General of Human Resources of the Ministry of Education

**Subject:** Compensation for the expiry of fixed-term contracts.



**Date:** 09.11.2011

**Summary:** The Ombudsman recommended to the Director-General of Human Resources of the Ministry of Education the amendment of the interpretation disclosed in a circular, whereby the termination of contracts concluded under special hiring teachers regimes does not confer the right to compensation established by the Legal Regime of the Contract of Employment in Public Functions. The Ombudsman considered that the right to compensation occurs whenever the expiry of the term contract does not derive from the will of the worker and he/she does not get a new position that will ensure the maintenance of a public employment legal relationship. It was therefore recommended that the decisions refusing such compensation to teachers whose contracts expired without having obtained new employment should be reviewed.

**Status:** Not accepted.

[http://www.provedor-jus.pt/restrito/rec\\_ficheiros/Rec\\_8A2011.pdf](http://www.provedor-jus.pt/restrito/rec_ficheiros/Rec_8A2011.pdf)

#### **Recommendation 2/B/2011**

**Entity addressed:** Minister of State and Finance

**Subject:** Chartered Accountants. Debt to a previous professional. Need to terminate the obligation prior to the assumption of duties by a new Chartered Accountant.

**Date:** 30.11.2011

**Summary:** The Ombudsman recommended to the Minister of State and Finance the amendment of article 56 of the Statute of the Order of Chartered Accountants and of article 17, paragraph 2, of the Code of Conduct for Chartered Accountants, expressly stating that the existence of a debt to a previous professional does not imply the impossibility of another Chartered Accountant to provide services, notwithstanding the need to undertake every adequate effort towards the clearance of such debt, with an assessment of each individual situation.

**Status:** As the case refers to a possible amendment to the statute of the professional association, the Minister of Justice postponed the assessment of the proposal until the finalization of the legislative procedure that led to the publication of Law 2/2013, of 10 January.

[http://www.provedor-jus.pt/restrito/rec\\_ficheiros/617-10.pdf](http://www.provedor-jus.pt/restrito/rec_ficheiros/617-10.pdf)

### 3.3. Review of the Constitutionality

The Portuguese Ombudsman, in accordance with Article 281, paragraph 2, indent d), of the Portuguese Constitution and Article 20, paragraphs 3 and 4, of his Statute, may seize the Constitutional Court to declare the unconstitutionality or illegality of legal provisions and to assess and verify situations of unconstitutionality by omission. He/she may exercise these competences either pursuant to a complaint or on his/her own initiative.

In 2012, 65 complaints were received on such grounds, 29 more than in 2010, representing a growth of 81%.

Among the grounds more frequently invoked, one should note the lower number of cases concerning the principle of equality together with an increase of the number of cases invoking the principle of confidence.

The lack of legislation regulating the organizations of residents, provided by articles 263 to 265 of the Constitution, was raised as a possible ground for an initiative of unconstitutionality by omission.

UNCONSTITUTIONALITY			36
	CONFIDENCE	10	15%
	EQUALITY	12	18%
	ORGANIC AND FORMAL DEFECTS	5	8%
	OTHER GROUNDS	37	57%
	OMISSION	1	2%

In 2012, the Ombudsman filed two applications with the Constitutional Court, both within the successive abstract control of constitutionality, concerning:

- the transitional rule contained in Article 8, paragraph 1, of Decree-Law 75/2010, of 23 June, which amended the Statute of Educators and Teachers, when applied to teachers holding a certain rank, to the extent that it leads to their being superseded, in income terms, by teachers with less seniority, in violation of Article 59,

paragraph 1, indent a) of the Constitution, as a corollary of the principle of equality enshrined in Article 13 of the Constitution.<sup>1</sup>

- the rule contained in Article 4, paragraph 2 of Decree-Law 280/2001, of 23 October, which establishes regulatory standards for the seafarer profession to the extent that, apart from the situation of nationals of other EU Member States and the provisions of conventions and other international instruments in force in national law, it reserves to Portuguese citizens the possibility to enroll as a seafarer – which is indispensable to work in that profession – in violation of article 15, paragraphs 1 and 2, article 18, paragraph 2, and article 165, paragraph 1, indent b) of the Constitution.<sup>2</sup>

In 2012, in response to the three initiatives presented by the Ombudsman in the previous year, the Constitutional Court handed down three judgments, in two cases upholding all or part of the application and denying it on the third case. Thus:

- Judgment 25/2012<sup>3</sup> did not declare unconstitutional or illegal certain provisions of the Solicitors' Statute, approved by Decree-Law 88/2003, of 26 April, in the version given by Decree-Law 226/2008, of 20 November, in the implementation of the creation of the Commission for the Efficiency of Executions;<sup>4</sup>
- Judgment 89/2012<sup>5</sup> declared the unconstitutionality of several provisions of a regulation issued by the Bar Association (Regulation 52-A/2005, of 1 August), for breaching organic and formal rules about the system of rights, freedoms and guarantees, by establishing the impossibility of re-enrollment for a period of three years in case of repeated failure to pass the Bar examination needed to obtain a license to work as an attorney.<sup>6</sup>
- Judgment 404/2012<sup>7</sup> declared unconstitutional Article 34, paragraph 1, of Law 1-B/2009, of 7 July, approving

<sup>1</sup> See [http://www.provedor-jus.pt/site/public/archive/doc/R-6185-10\\_D12.pdf](http://www.provedor-jus.pt/site/public/archive/doc/R-6185-10_D12.pdf)

<sup>2</sup> See <http://www.provedor-jus.pt/site/public/archive/doc/R-5866-09D1.pdf>.

<sup>3</sup> See <http://dre.pt/util/getpdf.asp?s=dip&serie=2&id=31.2012&idip=2012008420>.

<sup>4</sup> See [http://www.provedor-jus.pt/site/public/archive/doc/DI\\_R6480\\_09.pdf](http://www.provedor-jus.pt/site/public/archive/doc/DI_R6480_09.pdf).

<sup>5</sup> See <http://dre.pt/util/getpdf.asp?s=dip&serie=1&id=2012.50&idip=20120445>.

<sup>6</sup> See <http://www.provedor-jus.pt/site/public/archive/doc/R-1870-11D1.pdf>.

<sup>7</sup> See <http://dre.pt/util/getpdf.asp?s=dip&serie=1&id=2012.194&idip=20121984>.



the National Defense Act, due to limiting the possibility of complaint to the Ombudsman about actions or omissions of the Armed Forces to cases where only the complainant's rights, freedoms and guarantees were at stake.<sup>8</sup>

Among the several situations on which the Ombudsman, throughout 2012, decided not to request the intervention of the Constitutional Court, the following should be pointed out:

- After several initiatives were undertaken by other competent entities, leading to the review of the constitutionality of several provisions of the State Budget for 2012, including those suppressing 1/7 of the annual income of pension holders and public servants (holiday and Christmas allowances) during that year, the Ombudsman considered unnecessary further action on his part, but made several remarks deemed relevant.<sup>9</sup>
- The repercussion on consumers of gas of the municipal fee for occupying the subsoil and the inclusion of the fee under the incidence of Value Added Tax (VAT). It was explained that charging for a certain use of the public domain was not incompatible with the Constitution, and that taking into consideration the Constitutional Court's decision specifically on this matter (see Judgment 45/2010), nothing prevented that this cost be considered for the purposes of the utility concession contracts concerned. Therefore, it was considered that, within the margin of autonomy available to the Government as grantor, it was legitimate, when delimiting the

regime of prices to be charged by the concessionaire, to allow for the establishment of prices covering all costs incurred in. As regards the levy of VAT, it was explained that no breach of the principle of legality existed and that the solution in question was expressly provided for by Article 16, paragraph 5, indent a), of the Value Added Tax Code.

- The alleged breach of the principle of equality by a provision, included in the State Budget for 2013, increasing the unemployment benefit only to households with dependent children. The scope of the principle invoked was explained to the complainant, framing the solution in question within the public tasks to protect families with children set for the State in Article 67, paragraph, indent f) of the Constitution
- The alleged unconstitutionality of the requirement of a regular tax and social security situation for the exercise of the activity of real estate agents. An overview of the previous intervention of the Ombudsman regarding this law was provided to the complainant, namely as regards the presentation of an initiative that resulted in Judgment 362/2011 of the Constitutional Court.<sup>10</sup> About the specific issue at stake, the freedom of profession is not constitutionally established in absolute terms, and the restriction, established by the competent body and obeying to the due process, was deemed as proportionate to its aims.

<sup>8</sup> See <http://www.provedor-jus.pt/site/public/archive/doc/P-9-09%20DI.pdf>.

<sup>9</sup> See [http://www.provedor-jus.pt/site/public/archive/doc/cortes\\_marco\\_2012.pdf](http://www.provedor-jus.pt/site/public/archive/doc/cortes_marco_2012.pdf).

<sup>10</sup> See Relatório à Assembleia da República, 2011, p. 108.

## 3.4. Cases and Inspections of the Ombudsman's Own Initiative

In 2012, 12 cases were opened on the initiative of the Ombudsman.

### P-01/12

**Entity addressed:** Regional Secretary for the Environment and Natural Resources (Autonomous Region of Madeira)

**Subject:** Spatial Planning. Planning of the Coastal Zone

**Summary:** Case opened by the Ombudsman on his own initiative, as it was found that the Autonomous Region of Madeira had not yet proceeded to the preparation and approval of the Spatial Planning of the Coastal Zone (POOC). The aim of this case is to know the measures taken by the Regional Secretariat for the Environment and Natural Resources regarding this matter. During the investigation the Ombudsman was informed that the preparation of the POOC is part of the current Government program and it is expected that the preparation of POOC-Porto Santo will be adjudicated in early 2013, while the best options for funding are being considered.

**Status:** In the investigation phase.

### P-02/12

**Entity addressed:** Mayor of Marvão / Chairman of the Board of the Institute for Nature Conservation and Forests

**Subject:** Land development. Natural heritage.

**Summary:** This case was opened upon notice that large fences were being built in the «Serra de São Mamede» National Park, in Portalegre. The initiative aims to assess the control of the construction works by the municipal authorities and by the Institute for Nature Conservation and Forests. The Marvão Municipality and the Institute for Nature Conservation and Forests were asked about the nature of the disputed works in light of the relevant legal standards of urbanization and construction, as well as their compliance with the Regulation of the «Serra de São Mamede» National Park.

**Status:** In the investigation phase.

### P-03/12

**Entity addressed:** Mayor of Angra do Heroísmo

**Subject:** Catering and drinking establishments. Operating conditions.

**Summary:** This case was opened following an anonymous complaint to assert whether some catering and drinking establishments are legally operating in the municipality of Angra do Heroísmo.

The case concerns mainly several bars located near the towns' marina, which have been the object of several complaints, claiming both illegal operation (in licensing conditions and in carrying out non permitted activities) and the production of excessive noise, far beyond legal opening hours, from which damage to other businesses and to the quiet and rest of the surrounding neighbours allegedly ensues.

**Status:** In the investigation stage.

### P-04/12

**Entity addressed:** Commissions for the Protection of Children and Young People of Sintra

**Subject:** Inspection to the operation of Commissions for the Protection of Children and Young People of Sintra.

**Summary:** An inspection was carried out to the Commissions for the Protection of Children and Young People of Sintra, to assess the facilities, the existing equipment, the adequacy of human and financial resources and the administrative and procedural activities.

**Status:** Closed. Recommendation 10/B/2012 was addressed to the Minister of Solidarity and Social Security, who came to recognize the need for a legislative amendment.

### P-05/12

**Entity addressed:** General Directorate of Tax and Customs Authority

**Subject:** Taxation. Municipal Property Tax (IMI). Director-General of the Tax and Customs Authority.

**Summary:** This case was opened on the Ombudsman's own-initiative to monitor the overall evaluation procedure of urban real estate, since 1 December 2011, following media reports and a considerable number of complaints from citizens that challenged the way the assessments were carried out and/or their consequences as regards the tax values and IMI assessment of urban real estate they owned. Following a meeting between representatives of the Ombudsman and the Tax and Customs Authority (AT), a request

for clarification and sending of elements was formalized, covering issues such as the number, origin and identification of real estate for which claims have been submitted of evaluations already carried out. Also requested were copies of manuals/instructions/clarifications produced by the AT on the overall ongoing evaluation and clarification of the criteria used for fixing the rates due for second evaluation requests. Lastly, it was requested that a table be completed to ascertain the universe of real estate already evaluated and, among it, the one pending of second evaluation and the one whose evaluations have been challenged in court.

**Status:** In the investigation phase.

#### P-06/12

**Entity addressed:** Secretary of State for Energy

**Subject:** Construction and housing. Mandatory inspections. Lifts. Local charges.

**Summary:** The case was opened based on a complaint against the allegedly arbitrary charges due for the inspection of lifts, hoists, escalators and moving walkways, the study of which has shown significant dysfunctions in the application of Decree-Law 320/2002, of 28 December. It was confirmed that the charges due for regular and special inspections to elevators and other mechanical equipment vary from municipality to municipality and represent a heavy burden for many co-owners and condominiums.

The Secretary of State was confronted with the frequently exorbitant charges fixed by the municipalities on inspections performed by third parties. He informed that Decree-Law 320/2002 was under revision and the conclusions of Ombudsman would be taken into account.

**Status:** Closed.

#### P-07/12

**Entity addressed:** Portuguese Public Security Police

**Subject:** Investigation of an incident at a Police Station.

**Summary:** The case was opened to investigate the circumstances in which the detention of a transsexual citizen in a Police Station in Lisbon occurred.

Specifically, it was examined whether the rules of the Code of Criminal Procedure and the Legal Regime of Forensic Medicine were fulfilled.

The case had to do with the police requiring a medical examination of an arrested person, since, after a search conducted in the police station, the detainee accused the agents of having subtracted an amount of money.

Anticipating the possibility of indictment, the police agents decided to take detainee to the hospital so that a radiological examination was performed, in order to obtain evidence that he hid in the body (bowels) the money in question.

**Status:** Closed.

#### P-08/12

**Entity addressed:** Parliament

**Subject:** Compensation for expiry of fixed-term contract.

**Summary:** The Ombudsman decided to open a case on his own initiative, following the presentation of several complaints contesting the decisions of many public administration bodies and services, namely of Municipal Councils. According to the interpretation of these bodies and services, the expiry of fixed-term contracts does not confer the right to compensation provided for in paragraph 3 of article 252 and paragraph 4 of article 253 of the Legal Regime of the Contract of Employment in Public Functions (RCTFP), approved by Law 59/2008, of 11 September, in all cases in which the maximum number of renewals or the maximum duration of the contract have been reached.

Therefore, the Ombudsman recommended that the Parliament should promote the revision of article 252, paragraph 3, of the RCTFP, in order to clarify that there is a right to compensation whenever the expiry of a fixed-term contract is not the consequence of the will of the worker.

On 31 December 2012, the Parliament adopted Law 66/2012, which amended Article 252, paragraph 3, of the RCTFP, in accordance with the recommendation of the Ombudsman

**Status:** Closed.

#### P-09/12

**Entity addressed:** Institute for Social Security (ISS)

**Subject:** Host families for the elderly not covered by the legal framework established in Decree-Law 391/91, of 10 October.

**Summary:** This case was opened by the Ombudsman on his own initiative, pursuant to complaints about host families for senior citizens, up to a maximum of three, not covered by the legal framework established in Decree-Law 391/91, of 10 October, i.e. families who hadn't submitted applications nor been selected by the Social Security district centers, the *Santa Casa da Misericórdia de Lisboa* or other Private Institutions of Social Solidarity with a Protocol with the Social Security district centers..

Given the lack of legal basis for this type of elderly care, it is impossible for the Portuguese State to control the suitability of the families that provide this kind of support, or to ensure that appropriate conditions are provided by them. Therefore, the health and wellbeing of the elderly in those circumstances may be at risk.

In this context, the Ombudsman addressed the ISS, pointing out the problem and asking if its analysis and study had already been carried out. The Ombudsman also asked if the adoption of regulations or legislation about those situations was scheduled.

A reply from the ISS is still awaited.

**Status:** In the investigation phase.

**P-10/12**

**Entity:** Mayor of Amadora

**Subject:** Urban planning and housing; slums; eviction; demolition; rehousing.

**Summary:** The case was opened pursuant to news reports in the media, to monitor the demolition of buildings undertaken by the Municipality of *Amadora* and the rehousing of families that justified special measures of humanitarian nature, such as temporary accommodation. The investigation was concluded in view of the adoption of the required arrangements.

**Status:** Closed.

**P-11/12**

**Entity addressed:** Portuguese Public Security Police

**Subject:** Inspection to the places of detention of citizens of the Public Security Police in Lisbon.

**Summary:** The Ombudsman decided to carry out inspection visits to places of detention of citizens in order to assess, particularly:

- a) The physical conditions (location, accessibility, safety and service);
- b) The working conditions of staff and other personnel;
- c) The conditions of detention of citizens;

d) The compliance, by agents of the Portuguese Public Security Police, with legal requirements provided for specific procedures, such as the submission of complaints, the arrest of citizens, the submission of complaints concerning domestic violence and the interventions under the Law on the Protection of Children and Young People in Danger, issues relating to the elderly population and the Mental Health Act.

**Status:** The inspection was completed in 2012, but the drafting of the corresponding reports will be concluded in 2013.

**P-12/12**

**Entity addressed:** Parliament

**Subject:** State Budget for 2013.

**Summary:** This case was originally opened to analyse the various issues arising from the expected approval of the State Budget for 2013. It was afterwards restricted to the provisions concerning changes in the retirement conditions for teachers who fulfilled a certain period of service as sole teachers of a class.

**Status:** In 2013, the Constitutional Court was seized with regard to articles 77 and 78 of the State Budget for 2013. The specific issue identified above was still under study.

## 3.5. International Relations

The international activity of the Portuguese Ombudsman fundamentally derives from two roles this institution plays simultaneously: that of **Ombudsman**, pursuant to the Swedish institutional model created at the outset of the 19<sup>th</sup> century; and that of **National Human Rights Institution**, fully compliant with the guidelines affirmed by the United Nations in the so-called «Paris Principles».

In this domain, while maintaining the budget limitation effort motivated by the adverse economic situation face by the country, which manifested itself in a smaller number of international participations in relation to the previous years, 2012 was nevertheless a year of further development of the projects and thematic priorities chosen by the current Ombudsman at the beginning of his mandate.

As regards bilateral cooperation with counterpart institutions, a work visit was carried out to the **Défenseur des Droits of France**, on 14 June, and visits were received from the **Ombudsman of Angola**, on 31 August, the **Síndic de Greuges of Catalonia**, on 1 October, and the Ombudsman of Mozambique, from 8 to 12 October.

Following this latter visit, a work/study visit was organized from 26 to 30 November for a team of technical staff from the services of the Ombudsman of Mozambique. During this visit, the staff had contact with the different services of the Portuguese Ombudsman and with their procedures and work methodologies.

In addition, and whenever possible, reply was given to information requests received from counterpart institutions, like the questionnaire of the German Institute for Human Rights regarding the protection function of National Human Rights Institutions, the questionnaire of the Fundamental Rights Commissioner of Hungary concerning benefits and pension systems for persons with disability and/or reduced work capacity and the questionnaire of the Defender of Human Rights of Armenia about the scope of intervention of Ombudsmen as regards the police and judicial authorities.

At the multilateral level, participation was ensured in annual meetings and other events promoted by organizations and international networks to which the Portuguese Ombudsman belongs, notably:

- The 25<sup>th</sup> Annual Meeting of the International Coordinat-

ing Committee of National Institutions for the Promotion and Protection of Human Rights, held in Geneva, Switzerland, from 19 to 22 March;

- The Annual Meeting of the Fundamental Rights Agency of the EU with National Human Rights Institutions, followed by the 5th Meeting of the Fundamental Rights Platform, both of which held in Vienna, Austria, on 18 and 19 April respectively;
- The 8<sup>th</sup> Seminar of Liaison Officers of the European Network of Ombudsmen, held from 24 to 26 June, in Strasbourg, France, and during which the Portuguese Ombudsman's representative presided over the session dedicated to the role of the Ombudsman in the protection of detained persons;
- The 6<sup>th</sup> Meeting of the Association of Mediterranean Ombudsmen, held in Paris, France, on 11 and 12 October, during which a presentation was made on the topic «The way Ombudsmen reach out to vulnerable groups (children, disabled persons, women and elderly)»;
- The 10<sup>th</sup> World Conference of the International Ombudsman Institute, held in Wellington, New Zealand, from 12 to 17 November, during which two presentations were made on the topics «The Code of Good Administrative Behaviour» and «The role of the Ombudsman in the Promotion and Protection of Human Rights», and the Portuguese Ombudsman's representative also presided over the session on innovative practices to improve administrative practices;
- The Annual Meeting of the Legal Working Group of the European Group of National Human Rights Institutions, held in Paris, on 26 November.

Also to be mentioned are the participations of the Portuguese Ombudsman in the international human rights system, in the context of the efforts employed to strengthen the interaction with that system and to exercise the participation rights deriving from the capacity of A-status National Human Rights Institution.

To that effect, the Portuguese Ombudsman has contributed to various examinations, consultations and meetings promoted in the framework of the United Nations, the Council of Europe, the Organisation for Security and Cooperation in Europe and the European Union. This contribution

is done both directly and by way of his participation, always with the necessary independence, in the meetings and activities of the National Human Rights Commission (CNDH).

In 2012, the Portuguese Ombudsman had the opportunity to contribute to the discussion of the **12<sup>th</sup> to 14<sup>th</sup> national implementation reports on the Convention on the Elimination of All Forms of Racial Discrimination**, by submitting written information to the CNDH and to the United Nations Committee on the Elimination of Racial Discrimination, as well as by participating in the meetings of that Committee of 20 and 21 February, in which the reports were discussed.

An autonomous written contribution was also sent to the CNDH and to the United Nations Human Rights Committee on the occasion of the discussion of the **4<sup>th</sup> national implementation report on the International Covenant on Civil and Political Rights**.

In addition, the Portuguese Ombudsman has already sent to the CNDH written information to prepare the 15<sup>th</sup> national implementation report on the Convention on the Elimination of All Forms of Racial Discrimination, as well as the 8<sup>th</sup> and 9<sup>th</sup> national implementation reports on the Convention on the Elimination of All Forms of Discrimination against Women, which will be sent to the United Nations in due time.

Pursuant to his active participation in the **Universal Periodic Review**, through which the United Nations Human Rights Council reviewed the overall situation of human rights in Portugal (see 2009 and 2010 Reports to the Parliament), the Portuguese Ombudsman contributed to the follow-up launched by the international NGO, UPR Info, by sending written information to enable a better monitoring by that entity of the state of implementation of the recommendations addressed by the Human Rights Council to our country. The report produced by UPR Info, in English, is available at [http://www.upr-info.org/IMG/pdf/2012\\_on\\_the\\_road\\_to\\_implementation.pdf](http://www.upr-info.org/IMG/pdf/2012_on_the_road_to_implementation.pdf).

In what concerns more general information requests, autonomous contributions were sent to different questionnaires, studies and reports, such as, for example, the United Nations questionnaires on the freedoms of peaceful assembly and association and on racism and sports; the questionnaire of the Special Rapporteur on the human right to safe drinking water and sanitation; the Council of Europe report on the state of local and regional democracy in Portugal; the survey of the European Ombudsman on strategy and governance; the information requests of experts appointed by the European Commission, regarding the treatment given to children in judicial proceedings and more specifically to children and adolescents in criminal proceedings; the information request of the Fundamental Rights Agency of the European Union on the role of the Ombudsman in the area of fundamental rights of migrants in an irregular situation; the survey of the *Centro de Estudos para a Intervenção Social*, national focal point of that Agency, on the subject

of the rights of the child; and also information requests of other type of international entities, like the Global Initiative to End All Corporal Punishment of Children and the Legal Network of Experts for Human European Consultancy.

The Portuguese Ombudsman also had the opportunity to contribute to different on-going activities in the National Human Rights Commission, namely regarding business and human rights and the creation of indicators to assess progress in the implementation of human rights.

Lastly, the Portuguese Ombudsman was represented at an International Expert Seminar on relations between National Human Rights Institutions and Parliaments, which took place on 22 and 23 February, in Belgrade, Serbia. It was jointly organized by the Office of the United Nations High Commissioner for Human Rights, the Protector of Citizens of Serbia and the Parliament of Serbia. Pursuant to this seminar, the Belgrade Principles were adopted. Their goal is to provide guidance on how the interaction and co-operation between National Human Rights Institutions and Parliaments should be carried out.

Concerning visits from international delegations, the Portuguese Ombudsman received in Lisbon a delegation of the **European Committee for the Prevention of Torture**, on 7 February, the **Director of the Fundamental Rights Agency of the European Union**, on 14 June, the **Human Rights Commissioner of the Council of Europe**, on 8 May, and a delegation of the **European Commission against Racism and Intolerance**, on 26 September. In the context of these visits the Ombudsman had the opportunity to share his experience in the areas of activity covered by each entity, offering his perspective on the main successes and challenges identified in relation to them in our country.

Within the Ombudsman's international activity, highlight should also be given to the **Seminar on Strengthening and Establishing National Human Rights Institutions in the countries of the Community of Portuguese-speaking Countries**, jointly organized by the Portuguese Ombudsman and the Office of the United Nations High Commissioner for Human Rights, from 15 to 17 October, in Praia, Cape Verde. This event was the culmination of the repeated efforts employed by the Portuguese Ombudsman to promote the creation and appointment of Ombudsmen and National Human Rights Institutions in the countries of the Community of Portuguese-Speaking Countries (CPLP). During the seminar, the **Praia Declaration** was adopted, calling on the creation of National Human Rights Institutions that are effective and independent, in conformity with the Paris Principles. As a side event, in the presence of His Excellency the President of the Republic of Cape Verde, a Memorandum of Understanding was signed between the Ombudsmen of Angola, Mozambique, Timor-Leste, the *Procurador Federal para os Direitos do Cidadão Adjunto* of Brazil and the Ombudsman of Portugal, with a view to organizing, within a short delay, a meeting to promote the

creation of a Network of Ombudsmen / National Human Rights Institutions of the CPLP countries.

We would further note that, in 2012, the process for reaccreditation of the Portuguese Ombudsman as National Human Rights Institution was initiated. This process will be

further detailed in the chapter dedicated to «The Ombudsman as National Human Rights Institution».

The table below provides summarised information on the international events that took place in 2012 and in which the Portuguese Ombudsman was present or represented:

Event	Location and Date	Participant(s)
Meeting of the Committee for the Elimination of Racial Discrimination, United Nations, on the occasion of the discussion of the 12 <sup>th</sup> to 14 <sup>th</sup> national reports on the implementation of the Convention on the Elimination of All forms of Racial Discrimination	Geneva, Switzerland 21-22.02.2012	Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman
International Expert Seminar on relations between National Human Rights Institutions and Parliaments, organized jointly by the Office of the United Nations High Commissioner for Human Rights, the Protector of Citizens of Serbia and the Parliament of Serbia	Belgrade, Serbia 23-24.02.2012	Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman
25 <sup>th</sup> Annual Meeting of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights	Geneva, Switzerland 29-30.03.2012	Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman
5 <sup>th</sup> Annual Meeting of the Fundamental Rights Agency of the European Union with National Human Rights Institutions	Vienna, Austria 18-19.04.2012	Ms. Adriana Barreiros, Adviser to the Portuguese Ombudsman
8 <sup>th</sup> Seminar of Liaison Officers of the European Network of Ombudsmen	Strasbourg, France 24-26.06.2012	Ms. Catarina Ventura, Legal Adviser
6 <sup>th</sup> Meeting of the Association of Mediterranean Ombudsmen	Paris, France 11-12.06.2012	Mr. Alfredo José de Sousa, Portuguese Ombudsman, and Ms. Helena Vera-Cruz Pinto, Deputy Ombudsperson
Seminar on Strengthening and Establishing National Human Rights Institutions in the countries of the Community of Portuguese-speaking Countries	Praia, Cape Verde 15-17.10.2012	Mr. Alfredo José de Sousa, Portuguese Ombudsman, and Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman
World Conference and General Assembly of the International Ombudsman Institute	Wellington, New Zealand 12-16.11.2012	Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman
7 <sup>th</sup> European Forum on the Rights of the Child, organised by the European Commission	Brussels, Belgium 13-14.11.2012	Mr. José Álvaro Afonso, Legal Adviser
Annual Meeting of the Legal Working Group of the European Group of the ICC	Paris, France 26.11.2012	Ms. Mariana Sotto Maior, Head of Cabinet to the Ombudsman

Lastly, brief information is also gathered on the visits of foreign entities received in 2012 by the Portuguese Ombudsman and/or by members of his staff on his behalf:

Entity	Date
Committee on the Prevention of Torture of the Council of Europe	07.02.2012
Human Rights Commissioner of the Council of Europe	08.05.2012
Director of the Fundamental Rights Agency of the European Union	14.06.2012
Ombudsman of Angola	31.08.2012
Delegation of the European Commission against Racism and Intolerance	26.09.2012
<i>Síndic de Greuges</i> of Catalonia	01.10.2012
Ombudsman of Mozambique	08-12.10.2012



## 3. 6. The Ombudsman as National Human Rights Institution

### What are National Human Rights Institutions

The concept of National Human Rights Institution designates a multitude of administrative institutions (i.e., non-judicial nor parliamentary) aimed at the promotion and protection of human rights. By and large, we can speak of two types of institutions: Commissions and Institutes of Human Rights and Ombudsmen.

In 1993, with **Resolution 48/134, of 20 December, the United Nations General Assembly** adopted a set of principles concerning the status of these institutions, defining aspects of their composition, mandate and methods of operation and guarantees of impartiality and pluralism. They became known as the «Paris Principles» and are nowadays considered the minimum standard to be respected by all National Human Rights Institutions, in terms of their full independence and effectiveness of their action.

Also in 1993 the **International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)** was created. Its main mission is to assess these Institutions' compliance with those principles, through a process of accreditation and re-accreditation that may result in three classifications: A (fully compliant), B (not fully in compliance) and C (not compliant).

The international community recognizes to National Human Rights Institutions with A-status accreditation a key role in the implementation of national systems of protection and promotion of human rights.

Like the Ombudsmen, they are also considered key partners by international human rights entities.

This importance is especially evident at the United Nations, which has granted them a set of participation rights in some *fora*, especially in the Human Rights Council, such as submitting documents, attending meetings and making autonomous oral interventions.

### The Portuguese National Human Rights Institution

**The Portuguese Ombudsman is accredited since 1999 as the A-status Portuguese National Human Rights Institution, in full compliance with the Paris Principles.**

This status, which grants him increased participation rights at the internal and international levels, needs to be periodically renewed, through a process of reaccreditation carried out by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

In 2012, five years after the last reaccreditation, a communication was received from that Committee asking the Portuguese Ombudsman to initiate a new process of reaccreditation as National Human Rights Institution. This process continued in 2013 and at the time of drafting of the present report a final decision is still awaited.

As noted in previous reports, the human rights dimension is expressed in several aspects of this institution, starting with its mandate, which is broadly defined, covering the promotion and protection of fundamental rights and not only administrative justice.

Thematically, this focus is particularly evident in certain areas of activity, such as the penitentiary system and the rights of inmates, the rights of foreigners and migrants and also the rights of children, elderly persons and persons with disabilities.

In such areas, the most essential rights often come into play, those most strictly connected to the principle of human dignity and which are widely established in international instruments such as United Nations and Council of Europe Conventions.

In 2012, we could recall, for example, the Portuguese Ombudsman's intervention to draw the attention of the Ministers of Justice and of Solidarity and Social Security to the need for urgent measures, in view of the serious situation of delays of the Institute of Social Security in drafting social reports requested by the Family and Children Courts, in the context of cases to regulate the exercise of parental responsibilities. It was an intervention with undeniable relevance to the protection of the rights and best interest of the child. Attention should also be paid to the set of inspections carried out, on the initiative of the Portuguese Ombudsman, to the subway network in Lisbon, to evaluate the conditions of accessibility for people with limited mobility, especially

people with disabilities and elderly people. Pursuant to these inspections, several conclusions were addressed to the administration of Metropolitano de Lisboa and to the President of the City Council of Lisbon.

By way of a recommendation regarding the admission into the Armed and Police Forces of citizens with HIV, the Portuguese Ombudsman urged the Ministers of Internal Affairs, of National Defense and of Justice to expressly ban in the law discriminatory practices, replacing them with criteria for preventive action, in accordance with national and international best practices.

As a last example, we recall the repeated interventions of the Portuguese Ombudsman to ensure the review and clarification of the legislation regarding the special education subsidy, to address the different insufficiencies found over the years, which hindered the full enjoyment and exercise of the right to education by all children.

The Portuguese Ombudsman's competences as regards dissemination of information and human rights education are also relevant to his role as National Human Rights Institution. In this context, the Ombudsman continued to provide information and clarification to the users of the Children's Hotline, the Elderly Citizens Hotline and the Citizens with Disabilities Hotline, and, more in general, of the public relations services.

In addition, the Portuguese Ombudsman once again marked Children's Day, on 1 June, with an event that included the delivery of awards of the contest to create a logo for the Portuguese Ombudsman's Children's Hotline, which was organized in the framework of the Cooperation Protocol signed with the Ministry of Education. It also included the public launch of the Children and Young People's page of the website of the Portuguese Ombudsman. Both initiatives aimed to promote the younger population's knowledge of and access to the Portuguese Ombudsman, as a body dedicated to the protection and promotion of their rights.

Also pursuant the Protocol with the Ministry of Education, three actions for education, training and awareness-raising regarding human rights were carried out in schools around the country.

The Protocol celebrated with the Law Faculty of the University of Lisbon also led to the participation of the Portuguese Ombudsman in some events through which it was possible to raise the awareness of different audiences to specific aspects of his activity, such as the Ombudsman's action to protect of human rights.

In addition, with the goal of promoting and raising the awareness of the immigrant community to the action of the Portuguese Ombudsman, the means available to him and the way to appeal to him, on 3 May the Ombudsman signed a Cooperation Protocol with the High Commissioner for Immigration and Intercultural Dialogue.

The Portuguese Ombudsman was also represented in events promoted by civil society organizations, notably by

organizations that represent and defend the rights of citizens in more vulnerable situations. In some of these events, there was the opportunity to provide information on the Ombudsman's activity on the topics addressed.

As mentioned in previous reports, the human rights dimension is not only reflected in the mandate of the Portuguese Ombudsman, but also in the way in which the powers of the Ombudsman are defined, with the inclusion of the power to issue recommendations – particularly legislative recommendation – and the power to request the intervention of the Constitutional Court.

These two prerogatives, in particular, combined with the ability to act on its own initiative, allow this institution to contribute to the greatest possible alignment of Portuguese legislation and practice with international law on human rights, as well as with the recommendations issued by the international bodies monitoring the respect for these rights.

Conversely, the knowledge and experience gained by the Ombudsman in carrying out his functions allow him to provide to the international entities an impartial and detailed perspective on the human rights situation in Portugal, thus enabling them to carry out their duties in a more informed way.

As such, in 2012 this State body had the opportunity to contribute to several consultations and questionnaires launched by different international human rights entities, as well as to share experiences and points of view with the delegations of the European Committee for the Prevention of Torture, the Director of the Fundamental Rights Agency of the European Union, of the Human Rights Commissioner of the Council of Europe and of the European Commission against Racism and Intolerance.

At the national level, the Ombudsman participated, always with the necessary independence, in the activity of the National Commission for Human Rights, ensuring representation in its meetings and transmitting to it relevant information to its activity, *inter alia* for the preparation of national reports on the implementation of United Nations Conventions to which Portugal is a party, as well as for the discussion of those reports with the competent international bodies.

Lastly, in line with the priority accorded to that domain, the Portuguese Ombudsman reiterated to the Minister of Foreign Affairs and to the Parliament his full availability to take on the functions of the National Preventive Mechanism envisaged in the Optional Protocol to the Convention against Torture, taking into account that this appointment should have been made at the time of ratification of that instrument by Portugal, given the competences already held and effectively exercised by the Ombudsman with regard to the penitentiary system and the rights of inmates.

In the chapter on «International Relations», a more detailed account is given of the various international events and initiatives in which the Portuguese Ombudsman participated or was represented, as a National Human Rights Institution,

as well as of the contributions that he presented to the National Human Rights Commission in that capacity.

Finally, we should also recall that one of the goals of the Portuguese Ombudsman has been to promote a greater awareness of the importance of the role played by National Human Rights Institutions.

At national level, by way of recommendation 3/B/2012, this State body urged the Parliament to amend the Statute of the Portuguese Ombudsman to, among other aspects, expressly establish that dimension of his activity. This proposal was included in Law 17/2013, which is the third amendment to the Statute of the Portuguese Ombudsman and was published on 18 February 2013.

At the international level, the efforts and contacts carried out by the Portuguese Ombudsman with a view to the **promotion and establishment of Ombudsmen / National Human Rights Institutions in the Community of Portuguese-speaking Countries (CPLP)** culminated in the organization of an International Seminar in Cape Verde, from 15 to 17 October, pursuant to which the Praia Declaration was adopted. This Declaration calls for the creation of effective and independent National Human Rights Institutions, in full conformity with the Paris Principles. A **Memorandum of Understanding** was also adopted, to carry out, within a short delay, a meeting to promote the creation of a network of Ombudsmen / National Human Rights Institutions of the CPLP.

## Principles relating to the Status of National Institutions (The Paris Principles)<sup>1</sup>

Adopted by General Assembly resolution 48/134 of 20 December 1993

### Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, *inter alia*, have the following responsibilities:
  - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
    - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
    - (ii) Any situation of violation of human rights which it decides to take up;
    - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
    - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and,

where necessary, expressing an opinion on the positions and reactions of the Government;

- (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

### Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

- (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;
- (d) Parliament;
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

<sup>1</sup> <http://www2.ohchr.org/english/law/parisprinciples.htm>

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

### Methods of operation

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

### Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.





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