

# Distribution of regulatory disputes between administrative and judicial courts

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# Portuguese Regulatory authorities

Independent Administrative Bodies (regulatory authorities) enumerated on article 3 of the law approving its **framework legal regime**

- Insurances and Pensions Funds Supervision Authority
- Portuguese Securities Market Commission
- Portuguese Competition Authority
- Energy Services Regulatory Authority
- National Communications Authority
- Mobility and Transports Authority
- Civil Aviation National Authority
- Water and Waste Services Regulation Authority
- Health Regulation Authority

Excluded from this regime and regulated by special rules are:

- The Portuguese Central Bank
- The Portuguese Regulatory Authority for the Media

# Portuguese Regulatory authorities framework legal regime: main insights

(approved by Law of the Parliament  
67/2013, 28<sup>th</sup> August, last revised on 2020  
by Law of the Parliament 75-B/2020)



- Administrative independent bodies (economic regulation issues that should not be submitted to the power of the Government)
- Mission: economic regulation and competition promotion (they can also provide some consultation services to the Parliament and the Government)
- Legal regime: framework law; sectorial legal regime; statutes; internal rules
- When using public powers:
  - Administrative procedure rules (administrative acts)
  - Administrative Legal Procedure Code (judicial review)
- In general:
  - Public procedure law
  - Law on noncontractual civil liability of the State
  - Court of Auditors jurisdiction and financial control law
  - State bodies inspection and auditing legal regime
- Other aspects:
  - Private labour regime: individual employment contract (although a recruitment procedure is mandatory)
  - Regulators must pay a fee for regulation

# Portuguese Regulatory authorities main acts and competent jurisdiction (general rules)

- Regulations (normative powers)
  - administrative court dispute (procedure and legality control, disapplying rules on concrete decision based on violation of constitutional norms and principles)
  - constitutional court dispute (violation of constitutional norms and principles – unconstitutionality decision)
- Administrative Acts
  - administrative court dispute
  - *Except* decision from the Portuguese Competition Authority which are “special” civil court disputes
- Administrative contracts
  - administrative court dispute / arbitration
- Labour contracts
  - civil court dispute [article 4, n.º 4b), Administrative Courts Statute]
- Sanctions (non-criminal fines) [applied by all regulatory authorities even by the Portuguese Central Bank and the Portuguese Regulatory Authority for the Media]
  - “special” civil courts dispute

# Criteria and legal bases for the competence of civil courts in regulatory matters (general comments)

- All decisions adopted by the Portuguese Competition Authority fall under the competence of the “special” civil courts
  - **Decisions on non-criminal fines and other additional penalties** (criminal law-based regulation): special civil courts are competent for judicial review, applying criminal law-based procedure rules
  - **Decisions regulated by administrative procedure rules (including a Governmental decision on the opportunity of a merge operation prohibited by the Competition Authority):** special civil courts are also competent for judicial review, applying Administrative Legal Procedure Code
- Non-criminal Fines applied by all regulatory authorities (special norms and decree-law 433/82 on non-criminal fines and other special penalties legal regime)

Criteria and  
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(general comments)

- Civil courts competence on regulation is just a criteria (although contested) of judicial organization
- Competition is a civil-based regulation issue
- Non-criminal fines have a long tradition in Portugal as a criminal-based issue
- There is no tradition on administrative offences as an administrative issue nor a legal bases for administrative courts to judge it (except on urbanism, which is a recent legal issue added to the competence of administrative courts)

# Issues, constraints, strengths and limitations of the Portuguese model

- if applying a non-criminal fine is a regulatory act (and it is), it makes no sense treating it under criminal-based law rules and judicial legal rules (we don't do that on tax non-criminal fines applied by tax administration)
  - When identifying the illegality or misconduct of the regulator, civil courts will have to evaluate that conduct under an administrative rule-based perspective and manage discretion theory

Issues,  
constraints,  
strengths and  
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the  
Portuguese  
model –  
Case law

- The Portuguese Nacional Bank as a national authority on resolution regulatory measures applied a resolution measure to a commercial bank
  - Legal Framework of Credit Institutions and Financial Companies just refers to the competition and regulation civil court competence (article 229.º)
  - Administrative courts considered themselves competent to review that decision, qualifying it was an administrative measure
  - The conflicts court ruled that administrative courts are competent to review acts and omissions on financial supervision matters (decision from 27.04.2021)



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- The Portuguese National Authority of Medicines and Health Products, which is not included on the list of regulatory authorities, despite having delegated economic regulations powers decided not to authorize the commercialization of a medicine because that authorization could lead to a violation of a patent
  - Administrative courts considered themselves competent to review that decision.

# Main conclusions

- States delegate different public powers on judicial authorities, so, controlling them, despite being a control of the exercise of a public power, does not really mean it is an administrative power as the “meroni doctrine” explains;
- Discretion is also different when we review regulatory authorities’ acts
- Antitrust regulation (horizontal regulation) is quite different from economic regulation (vertical regulation)
- Civil courts or administrative courts competence does not really interfere with judicial review substantive legal regime
- In Portugal, the judicial review of regulatory authorities is a mess
  - We have a framework legal regime for regulatory authority that does not apply to all of them
  - We have a non-criminal fine framework legal regime that does not apply to all administrative offenses
  - We have a many conflicts on jurisdiction determination