

# **Legal environment and space of civil society organisations in supporting fundamental rights and the rule of law**

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# 1 Civic space developments in 2021

<b>1.1 Journalists Accused of Violating Judicial Secrecy</b>	
Area	Freedom of expression and information
Topic	Media freedom
Impact	Major

On 19 November 2021 two journalists, previously accused of violating judicial secrecy, were not indicted by the investigating magistrate and will not go for trial.<sup>1</sup> The two journalists were being accused by Public Prosecutor's Office of violating judicial secrecy, in the case known as "E-Toupeira" [e-mole] relating to corruption in the football world, by illegal access to judicial information that was protected by law during the criminal investigation phase.<sup>2</sup> The pre-trial judge sustained their decision on "the right to information and appealed to the European Court's understanding that freedom of expression, without restrictions, prevails over the judicial secrecy."<sup>3</sup>

The decision to undertake surveillance, through the *Polícia de Segurança Pública* (PSP – Public Security Police) was taken by a Public Prosecutor in 2018, after the publication of detailed information related with the criminal investigation of the case "E-Toupeira" in two national newspapers (namely, *Correio da Manhã* and *Sábado*). The Public Prosecutor suspected close relations between members of the *Polícia Judiciária* (PJ – Judicial Police) and the journalists who wrote the news, which led to the formal accusation of one Judicial Police inspector and two journalists. The decision to initiate surveillance, including the lifting of judicial secrecy relating to one of the journalists, was very controversial because it was made without the authorisation of the pre-trial judge.<sup>4</sup> The *Departamento de Investigação e Ação Penal de Lisboa* (DIAP Lisbon – Department of Investigation and Criminal Action) considered, through a press release, that this surveillance didn't have to be authorised by a pre-trial judge, because it isn't part of their legal

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<sup>1</sup> The *Sindicato dos Jornalistas* (Union of Journalists) issued a press release on 19 November 2021, "[Jornalistas acusados de violação do segredo de justiça não vão a julgamento](#)" ("Journalists accused of violating judicial secrecy are not going to trial"), announcing that the two journalists were cleared of the accusation by the Public Prosecutor's Office.

<sup>2</sup> Público (2021), "[E-Toupeira: Coordenador da PJ arguido e jornalistas vigiados por ordem do Ministério Público](#)" ("E-Toupeira: Coordinator of Judicial Police and journalists were put under surveillance by order of Public Prosecutor's Office"), 12 January 2021.

<sup>3</sup> Information on the press release issued by the *Sindicato dos Jornalistas* (Union of Journalists), on 19 November 2021, "[Jornalistas acusados de violação do segredo de justiça não vão a julgamento](#)" ("Journalists accused of violating judicial secrecy are not going to trial").

<sup>4</sup> Idem.

powers.<sup>5</sup> Nevertheless, the pre-trial judge only took into consideration for its decision the question of freedom of expression, without analysing the legitimacy of the Public Prosecutor to authorise the surveillance.

This action led to various criticisms coming from political, judicial and professional actors, and led the Attorney-General to open an internal investigation to evaluate the legality of the procedures taken by the Public Prosecutor, while the attorney for the Union of Journalists considered that this surveillance could not happen without the intervention of a judge.<sup>6/7</sup> The action of the Public Prosecutor, of ordering the surveillance of journalists without the formal authorisation of a pre-trial judge, can endanger media freedom.

<b>1.2 National Anticorruption Strategy 2020-2024</b>	
Area	Financing framework
Topic	Corruption
Impact	Major

During 2021 several major initiatives were taken regarding the prevention and fight against corruption, through the approval of the *Estratégia Nacional Anticorrupção 2020-2024* (ENAC – National Anticorruption Strategy 2020-2024). After a period of public consultation, that started on 7 September 2020<sup>8</sup> (and ended on 23 October 2020), the Portuguese government approved, on 6 April 2021, the National Anticorruption Strategy 2020-2024.<sup>9</sup> This Resolution preceded the approval of several laws, related with diverse topics that are foreseen in the ENAC.

During the public consultation phase, the Government received multiple contributions, including contributions from judicial entities and civic associations, such as the *Ordem dos Advogados* (Bar Association), *Associação Sindical dos*

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<sup>5</sup> SIC Notícias (2021), "[Ministério Público diz que vigilância policial a jornalistas dispensava autorização de juiz](#)" ("Public Prosecutor's Office says police surveillance of journalists did not require a judge's authorisation"), 13 January 2021.

<sup>6</sup> Público (2021), "[Procuradora-Geral da República manda averiguar actuação do Ministério Público no caso dos jornalistas vigiados](#)" ("Attorney-General orders investigation into the actions of the Public Prosecutor's Office in the case of journalists under surveillance"), 14 January 2021.

<sup>7</sup> Público (2021), "[Emails e registo de comunicações de directores da PJ apreendidos no caso da vigilância a jornalistas](#)" ("Emails and communications record of PJ's directors seized in the case of surveillance of journalists"), 14 January 2021.

<sup>8</sup> Press release from the Portuguese government announcing the opening of the public consultation on the proposed [National Strategy Against Corruption 2020-2024](#) (*Estratégia Nacional Contra a Corrupção 2020-2024*), 9 September 2020.

<sup>9</sup> Portugal, [Resolution of the Presidency of the Council of Ministers n.º 37/2001 that approved the National Anticorruption Strategy 2020-2024](#) (*Resolução da Presidência do Conselho de Ministros que aprovou a Estratégia Nacional Anticorrupção 2020-2024*), 6 April 2021.

*Juízes Portugueses* (Association of Portuguese Judges), *Sindicato dos Magistrados do Ministério Público* (Union of Public Prosecutors) or *Transparência e Integridade* (Transparency International Portugal), among others.<sup>10</sup> In spite of the short time given by the Government to receive the contributions, the proposed ENAC received a considerable number of contributions, as recognized by the Government.<sup>11</sup> The public debate was also marked by multiple individual contributions, not only on the process of public consultation, but also seen in newspaper articles, social media discussions or through the release of articles in professional journals, among many others.

Throughout 2021, the public debate on the concrete measures defined in the ENAC continued. In November 2021, three laws were finally approved, after being presented to Parliament during June 2021. Two of them were approved by Parliament, namely the protection of whistleblowers<sup>12</sup>, following the European Union’s Directive 2019/1937<sup>13</sup>, and the changes in the Criminal Code and Criminal Procedure Code<sup>14</sup>, related with criminal actions made by holders of political offices. The third law approved and published by the Government referred to the creation of the Mecanismo Nacional Anticorrupção (MENAC – National Anticorruption Mechanism), whose mission is to promote transparency and integrity in public actions and ensure the effectiveness of policies to prevent corruption and related offences.

<b>1.3 Informal Caregiver Statute</b>	
Area	Participation and cooperation with authorities
Topic	Civil dialogue
Impact	Major

In 2019, the Portuguese Parliament approved the Informal Caregiver Statute<sup>15</sup> after a long public debate and the general consensus of its necessity in providing

<sup>10</sup> The contributions of some institutions are available on the web, such as [Transparência e Integridade](#), [Associação Sindical dos Juizes Portugueses](#), [Sindicato dos Magistrados do Ministério Público](#) or [Ordem dos Advogados](#).

<sup>11</sup> The information on the result of the public consultation was published on the [Government’s](#) website and was discussed at a [public conference](#) organised by the Ministry of Justice on 25 November 2020.

<sup>12</sup> Portugal, [Law n.º 93/2021 on the General Regime for the Protection of Whistleblowers](#) (*Regime Geral de Proteção de Denunciantes de Infrações*), 20 December 2021.

<sup>13</sup> European Union, [Directive \(EU\) 2019/1937 of the European Parliament and of the Council on the protection of persons who report breaches of Union law](#), 23 October 2019.

<sup>14</sup> Portugal, [Law n.º 94/2021 on Crimes of Liability made by Holders of Political Offices](#) (*Lei relativa aos Crimes de Responsabilidade de Titulares de Cargos Políticos*), 21 December 2021.

<sup>15</sup> Portugal, [Law n.º 100/2019 on the Informal Caregiver Statute](#) (*Estatuto do Cuidador Informal*), 6 September 2019.

the best conditions for people who care for someone with special needs. In concrete terms, the law regulates the rights and duties of the caregiver and the person cared for, establishing the corresponding support measures provided by State institutions. This statute was possible due to the social and political “conditions of the XIII Legislature and the emergence of the informal carers’ movement, that has triggered an increase in political and public attention, have allowed an opening for the creation of the law. With political pressure to reorganise public care policies in the face of demographic ageing and changes in the dynamics of family structures, informal care has emerged as a sustainable alternative.”<sup>16</sup> This was, therefore, only possible after the public debate and pressure from civil society organisations<sup>17</sup> and political parties, which obtained a wide consensus.

The Statute was launched initially in 30 municipalities, as a pilot scheme, to evaluate its functioning and implementation. But later, during 2021, civil society organisations started to claim that it was time to enlarge the application of the Statute to the whole country and to introduce several changes that were deemed necessary to cover the diversity of situations and integrate the rights of the caregivers into the labour laws, as stated by the *Plataforma Saúde em Diálogo* (Platform Health in Dialogue)<sup>18</sup>. The *Associação Nacional de Cuidadores Informais* (National Association of Informal Caregivers), that holds an annual meeting, bringing together civil society organisations, public entities and political actors, also called for several changes in the Statute.<sup>19/20</sup>

The enlargement of the Statute to the whole country and the remaining changes, introduced to provide better access to public support of caregivers and the persons cared for, were deemed possible due to public pressure from civil society. The “right to participate”, as discussed by the United Nations Guidance Note on Protection and Promotion of Civic Space<sup>21</sup>, provided the emergence of contributions from civil society organizations in the construction of better solutions to solve concrete problems in society, contributing to more resilient and capable societies in supporting the most needy and most socially vulnerable people.

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<sup>16</sup> Sara Canha (2020), “[Condições políticas e justificações para a criação do Estatuto do Cuidador Informal em Portugal – perspetivas sobre o papel dos cuidados informais](#)” (“Political conditions and justifications for the creation of the Informal Caregiver Statute in Portugal – perspectives on the role of informal care”). Master Thesis. Lisboa: ISCTE.

<sup>17</sup> Diário de Notícias (2019), “[Cuidadores informais reclamam junto ao parlamento estatuto próprio](#)” (“Informal caregivers complain to Parliament for their own statute”), 8 March 2019.

<sup>18</sup> “[Plataforma quer alteração da lei do cuidador informal](#)” (“Platform wants changes in the informal caregiver statute”), website of Platform Health in Dialogue, 2021.

<sup>19</sup> SIC Notícias (2021), “[Associação de cuidadores informais pede alargamento de projeto piloto a todo o país](#)” (“Association of informal caregivers claims for expansion of pilot project to the whole country”), 4 June 2021.

<sup>20</sup> SIC Notícias (2021), “[Associação de cuidadores informais pede revisão dos critérios de estatuto](#)” (“Association of informal caregivers calls for revision of statute’s criteria”), 4 August 2021.

<sup>21</sup> United Nations (2020). “[United Nations Guidance Note on Protection and Promotion of Civic Space](#)”, September 2020.

In response to civil society's and political claims, the Council of Ministers approved "the regulatory decree that establishes the terms and conditions for the recognition of the status of informal caregivers, as well as measures to support informal caregivers and those cared for. This regulation defines the measures required to support informal caregivers, such as the caregiver's rest programme, promotion of integration into the labour market or the subsidy to support the informal caregiver. Among the main changes is the simplification of the subsidy recognition and attribution process, reducing the deferral periods and eliminating some evidential documents. It also provides for the expansion of the aforementioned support measures, namely caregiver's rest programme within the scope of the National Network of Continuing Care in Mental Health and the extension of the conditions of access to the Statute."<sup>22</sup> Therefore, the recently published Practical Guide<sup>23</sup> for caregivers, released by the *Instituto de Segurança Social* (Social Security Institute) will have to be reviewed in light of the new regulatory decree, that still has to be published in the official gazette (*Diário da República*).

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<sup>22</sup> Council of Ministers (2021). [Press release related with the changes in the Informal Caregiver Statute](#), 16 December 2021.

<sup>23</sup> Instituto de Segurança Social (2021), "[Guia Prático do Estatuto do Cuidador Informal: cuidador informal principal e cuidador informal não principal](#)" ("Practical Guide to the Informal Caregiver Statute: primary informal caregiver and non-primary informal caregiver"), 6 December 2021.

## 2 Examples of civil society contributions to the rule of law

<b>2.1 Non-discrimination in Blood Donor Statute</b>	
Topic	Supporting public authorities in countering discrimination

On 15 December 2021, the Portuguese Parliament approved changes in the Blood Donor Statute that aim to put to an end to the ambiguous interpretation of the previous law, released in 2012, as regards the criteria to be considered suitable to be a blood donor.<sup>24</sup> The previous law, in spite of the existence of Article 13 of the Constitution<sup>25</sup> that prohibits discrimination based on sexual orientation, allowed the existence, in preceding years, of several occurrences of discrimination against LGBTI+ people in blood donor services due to their sexual orientation.<sup>26/27</sup>

*ILGA Portugal - Intervenção Lésbica, Gay, Bissexual e Transgénero* (ILGA Portugal – Lesbian, Gay, Bisexual and Transgender Intervention) claimed, at the beginning of 2021, when a new case of sexual orientation discrimination became public, that “We've been regularly receiving complaints for many years, but there's been an increase in recent weeks because people realize they're not the only ones”<sup>28</sup>. At the same time, an email sent by a medical doctor, from the *Instituto Português do Sangue e da Transplantação* (IPST – Portuguese Institute of Blood and Transplants) also came to light, which stated that “men who have sex with men are barred from giving blood” because it is an “international criterion”.<sup>29</sup> Portugal Gay, another association, also contributed to the public pressure to solve the problem of discrimination, after a long process that started at the end of the last century.<sup>30</sup>

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<sup>24</sup> Portugal, [Law n.º 85/2021 that introduces changes in the Blood Donor Statute](#) (*Alteração ao Estatuto de Dador de Sangue*), 15 December 2021. The previous version of the Blood Donor Statute didn't include either any article that could sustain any discrimination based on the sexual orientation ([Law n.º 37/2012, 27 August](#)).

<sup>25</sup> Portugal, [Constitution of the Portuguese Republic](#) (*Constituição da República Portuguesa*), 12 August 2005.

<sup>26</sup> Expresso (2020), [“Dádiva de sangue por homens gay está num “limbo”. Grupo que estuda período de abstinência só deve apresentar conclusões em junho”](#) (“Blood donation by gay men is in “limbo”. Group studying abstinence should only present conclusions in June”), 27 February 2020.

<sup>27</sup> Público (2021), [“Homossexuais impedidos de doar sangue apesar de lei o permitir: “Nesse dia deixei de salvar uma vida””](#) (“Homosexuals barred from donating blood despite the law allowing it: “That day I failed to save a life””), 21 January 2021.

<sup>28</sup> Idem.

<sup>29</sup> Idem.

<sup>30</sup> Portugal Gay (2021), [“Entrevista com Sérgio Vitorino sobre a dádiva de sangue por homens que tem sexo com homens”](#) (“Interview with Sérgio Vitorino about blood donation by men who have sex with men”), 19 February 2021.



The *Direção-Geral da Saúde* (DGS – Health Services Directorate) felt the need to update the eligibility criteria for being a blood donor in March 2021, in face of the previous occurrences that came under the spotlight and were frequently denounced by civil society organisations defending LGBTI+ rights. In 2017, the DGS released an internal regulation, to be applied by the blood donor services, on the “Risk behaviours with impact on blood safety and donor management: donor inclusion and exclusion criteria due to sexual behaviour”, intending to harmonise the protocol by health professionals.<sup>31</sup> Nevertheless, several incidents continued to occur. In this context, the new law, that updates the Statute, aimed to clarify the criteria and reinforce the non-discriminatory clauses oriented towards LGBTI+ people. The evaluation criteria are focused on the risks of sexual behaviour and not on sexual orientation, following international best practices.

The public pressure from civil society organisations was crucial for the social and political consensus that ended in the new law being approved. Although the previous DGS regulations and protocols, as well as the former version of the Blood Donor Statute, could be considered sufficient for the legal and medical framework, the Government decided to approve the new version of the Statute to clarify once and for all the non-discrimination legislation, in the hope that the health professionals’ practices will follow the defined criteria.

<b>2.2 Support to Victims of Domestic Violence</b>	
Topic	Assisting victims in accessing judicial and non-judicial mechanisms of justice

Portugal approved 219 emergency shelter vacancies for victims of domestic violence, through the funding programme via the *Programa Operacional Inclusão Social e Emprego* (POISE – Social Inclusion and Employment Operational Programme), under the European Social Fund. These shelter vacancies will be implemented by several civil society organisations operating in the North, Centre and Alentejo regions. According to the information released by the *Comissão para a Cidadania e a Igualdade de Género* (CIG – Commission for Citizenship and Gender Equality), these “(...) emergency vacancies are intended to temporarily accommodate victims of domestic violence in an emergency situation, and monitor them and their dependent children, in order to guarantee the necessary conditions for their physical and psychological safety and well-being in crisis situations and in situations assessed as being of high risk of revictimization.”<sup>32</sup>

<sup>31</sup> DGS (2017), [Risk behaviours with impact on blood safety and donor management: donor inclusion and exclusion criteria due to sexual behaviour](#).

<sup>32</sup> Commission for Citizenship and Gender Equality (2021), [219 new emergency shelter vacancies for victims of domestic violence](#) (“219 vagas de acolhimento de emergência de vítimas de violência doméstica”), 17 December 2021.

According to the call for proposals issued by POISE, opened in August 2021, the funding is intended to "(...) to protect, support and empower victims of domestic violence and gender violence, by supporting the functioning of emergency reception structures, as a direct and interconnected response to the action of service structures, within a perspective of consolidation and expansion of the Rede Nacional de Apoio a Vítimas de Violência Doméstica (RNAVVD – National Support Network for Victims of Domestic Violence).<sup>33</sup> The rules specify that the beneficiary entities are those that belong or may in future belong to the RNAVVD. The approved projects will benefit 17 entities, with a global funding of 2.6 million euros. The new entities must be fully operational until the of 2022.<sup>34</sup> The funding allows an increase in the number of vacancies from 141 to 219 (78 more vacancies, comparing with the previous funding granted in 2019). Currently, the RNAVVD is present in 95% of Portuguese territory, with 199 service structures in 54 centres, representing a total of 843 vacancies in shelters and for emergency situations. According to the last official report of CIG of September 2021, there were 89 women, 364 children and 15 men in shelters for victims of domestic violence.<sup>35</sup>

This support, provided to civil society organisations, is included in the objectives of the *Estratégia Nacional para a Igualdade e a Não Discriminação 2018-2030* (ENIND – National Strategy for Equality and Non-Discrimination 2018-2030)<sup>36</sup>, that aims to reinforce the swift and effective responsiveness in emergency situations. In spite of the efforts made during the last few decades, domestic violence continues to be a matter of great concern and constitutes the most common crime registered with the official entities with powers to deal with the issue. According to the Minister of Internal Affairs (*Ministro da Administração Interna*), "(...) the crime of domestic violence is the most commonly reported in Portugal."<sup>37</sup> Therefore, the increase in the number of vacancies in shelters, managed by civil society organisations, for victims of domestic violence, constitutes one of the important pillars of the ENIND.

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<sup>33</sup> POISE (2021), [Call for Applications – Reference Nº POISE 37-2021-15](#) (Concurso para Apresentação de Candidaturas - Aviso Nº POISE 37-2021-15), 27 August 2021.

<sup>34</sup> POISE (2021), [Call for Applications – Reference Nº POISE 37-2021-15](#) (Concurso para Apresentação de Candidaturas - Aviso Nº POISE 37-2021-15), 27 August 2021.

<sup>35</sup> Agora Europa (2021), [Domestic violence: Portugal opens 219 new vacancies in shelters](#) ("Violência doméstica: Portugal abre 219 novas vagas em abrigos"), December 2021.

<sup>36</sup> Portugal (2018), [Resolution of the Council of Ministers n.º 61/2018 that approves the National Strategy for Equality and Non-Discrimination 2018-2030](#) (Resolução do Conselho de Ministros n. 61/2018 que aprova a Estratégia Nacional para a Igualdade e a Não Discriminação 2018-2030), 21 May 2018.

<sup>37</sup> Observador (2021), [Crime de violência doméstica é o mais reportado em Portugal nos últimos anos](#) ("Crime of domestic violence is the most commonly reported in Portugal in recent years"), 25 November 2021.

## 2.3 Contribution to the Functioning of the Judicial System

Topic	Contributing to law and policy making (including involvement in public consultations)
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SEDES is one of the oldest Portuguese civic associations. It is composed mainly of politicians, economists and executives from important companies. It was founded in 1970, during the dictatorial regime, “embodied in a proposal for political democratization, liberalization of information and association mechanisms, it would allow the various social forces to formulate and build solutions for a consistent politically and socially fairer development.”<sup>38</sup>

As part of its activities, SEDES promotes working groups to contribute to public policies in different areas. It is an important civic association, mainly because of the profile of its members and the capacity to influence public debate and, therefore, the public policies conducted by governments. During 2021, SEDES promoted several national debates on issues such as health and solidarity, public finances and the funding of economy, industry, energy and environment, reform of the political system and judicial reforms, among others.<sup>39</sup> SEDES produces reports after the debates, on the issues discussed, and publishes its contributions.<sup>40</sup>

Among the contributions by SEDES, there is a report for “Judicial Reform” with several proposals to make “(...) a real paradigm shift in justice (...), a revolution, which should lead to participatory judicial reform and the judicial system.”<sup>41</sup> Therefore, the proposed measures constitute a contribution “(...) for a justice policy that seeks to ultimately promote and guarantee the rule of law and a more democratic society.”<sup>42</sup>

SEDES’ proposals for a new paradigm in public policies on justice are divided into three main areas, according to the released document: efficiency (and efficacy), quality and transparency. These three areas are detailed in the document. Efficiency is focused on the swiftness of judicial proceedings and decisions, i.e., the swift resolution of conflicts to combat judicial delays. Quality is focused on professional training and the evaluation of judicial performance and results. Finally, transparency is focused on the predictability of judicial decisions, the accessibility to the information on judicial proceedings and the integrity of judicial professionals to guarantee judicial independence.<sup>43</sup>

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<sup>38</sup> SEDES (2021), [History of SEDES](#), 27 December 2021.

<sup>39</sup> SEDES (2021), [Events SEDES](#), 27 December 2021.

<sup>40</sup> SEDES (2021), [Documents SEDES](#), 27 December 2021.

<sup>41</sup> SEDES (2021), [Reform of Justice](#) (“Reforma da Justiça”), 1 October 2021, page 1.

<sup>42</sup> Idem, page 5.

<sup>43</sup> Idem, page 5.

Among the most important proposals to reinforce the effectiveness, quality and independence of the judicial system, and its courts, and, therefore, the rule of law in Portugal, SEDES highlights the following measures: the integration of administrative and tax courts into judicial courts, with only one judicial structure existing, guaranteeing the specialization of the administrative and tax branch; the fusion of the several high councils into only one High Council for the Judiciary (including the Bar council and the Judges of Peace's council); the creation of a Judicial Evaluation Commission, composed of different professionals; the public evaluation by Parliament of the nominees for high positions within the judicial system, before they are appointed; election of the President of the Supreme Court, by its members, and the Attorney-General, by Parliament, based on public scrutiny of the candidates; a reduction in the powers of the Public Prosecutor's Office, removing the labour and diffuse interests of their areas of jurisdiction; the creation of the career of public defender; a prohibition on access to political careers by judges and public prosecutors; the reinforcement of the concept of management by objectives; the implementation of performance indicators; the creation of a ranking of courts related with productivity; among many others.<sup>44</sup>

The published proposals are not all consensual. But the released document, numbering 34 pages, constitutes a contribution to the public debate on the reform of the judicial system in Portugal. Coming from a civic association and having been drafted after several public debates launched by SEDES, which included qualified political and professional actors and individuals, the proposals are considered significant by all. This is an example of the contribution of a civil society organisation to the public debate on the rule of law in Portugal.

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<sup>44</sup> Advocatus (2021), "[SEDES wants judges out of political positions and PGR required to be accountable](#)", ("SEDES quer juizes fora de cargos politicos e PGR obrigado a prestar contas"), 21 November 2021.