



The International Comparative Legal Guide to: Environment & Climate Change Law 2011

A practical cross-border insight into environment and climate change law

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Portugal



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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Portugal and which agencies/bodies administer and enforce environmental law?

The Portuguese Constitution (CRP) of 1976 is undeniably one of the most modern Constitutions in Europe regarding environmental protection. It sets the right to a healthy environment with as much importance as human rights, granting, for instance, as a key principal the “right to a clean and healthy environment and the citizen’s duty to respect it” (article 66, paragraph 1). Environmental protection is also a fundamental task of the State (article 9, paragraphs d and e, and article 66, paragraph 2).

Further to the CRP, the parliament adopted in 1987 the Environment Framework Law (EFL), which is currently under revision by the Portuguese parliament. The purpose of this law was to reduce the “normative dispersion” of Portuguese environmental law, and to implement the abovementioned constitutional provisions. The EFL constitutes the main instrument of environmental law by defining basic concepts, general principles, objectives, environmental policy measures and tools, protected environmental values, preventive and repressive interventions of the Public Administration as an environmental agent, and rights and duties of the citizens in terms of environmental defence.

The basics of environmental policy in Portugal, as set by the CRP and the EFL, are:

- Prevention: anticipation rather than correction.
- Balance: economic and social growth must not overlook its environmental consequences.
- Participation: public and private entities must take part in the setting and executing of environmental law.
- Adequate intervention level: it is crucial to make the administrative “machine” work at its most useful, avoiding blocking up high instances. Local authorities are most capable of dealing with environmental issues under their scope and public associations and institutes are created to overcome the Governments inevitable limitations.
- International cooperation: setting and taking in good examples.
- Recovery: recuperating affected, unprotected, degraded areas.
- Liability: taking responsibility for direct or indirect damages, whomever the offender and plaintiff.

The State, through its central and local bodies, is the principal administrator and enforcer of environmental law. Local bodies, such as the municipalities, play a key role, but at a central level the most

important agent is the Ministry for the Environment and Spatial Planning (“*Ministério do Ambiente e do Ordenamento do Território*”). This entity is assisted by central or regional bodies such as the Regional Development Coordination Commissions (“*Comissões de Coordenação e Desenvolvimento Regional*”), the Water Regional Authorities (“*Administrações das Regiões Hidrográficas*”) the Water Institute (“*Instituto da Água*”), the Institute for the Environment (“*Instituto do Ambiente*”), the Institute for Nature Conservation and Biodiversity (“*Instituto da Conservação da Natureza e da Biodiversidade*”) and the General Directorate for Spatial Planning and Urban Development (“*Direcção-Geral do Ordenamento do Território e Desenvolvimento Urbano*”). Also important to refer to at a central level are the Environment and Spatial Planning Inspection Authority (“*Inspecção-Geral do Ambiente e do Ordenamento do Território*”) and the Public Prosecutor Office (“*Ministério Público*”).

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The approach of the abovementioned bodies/agencies to the enforcement of environmental law is based on the principles laid down by the CRP and its respective incorporation laws. In certain cases the following proceeding may be adopted in order to control and impose environmental provisions: (i) inspect whether environment legal rules and procedures are being abided to; (ii) inspect establishments, facilities and activities subject to the abovementioned rules; (iii) file suits against misdemeanours; (iv) exceptionally practice functions specific to crime police, when criminal actions are at stake; (v) issue opinions in the relevant environmental matter; and (vi) submit studies in order to harmonise environmental legislation and administrative services, including but not limited to permits.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Free access to information regarding the environment is key to Public Administration, and it must be public, transparent, equal and impartial information. Furthermore, outdoing the same principals of court consultation, where only people directly concerned are allowed to access judicial documents, environmental information is to be made accessible by public entities to everyone, single and collective entities, regardless of a “personal and direct interest”. There is a Commission of Access to Administrative Documents, overlooking the abovementioned right.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Permits are required for numerous activities, including but not limited to those which involve: noise pollution; water usage; use of lands adjacent to water bodies; air pollution; greenhouse gas emissions; waste management; and industrial facilities. The more paradigmatic environmental permit is the so-called “Environmental Licence” to be granted to all categories of activities listed under Annex I of Decree-Law number 173/2008, of August 26th, which transposed the Integrated Pollution and Prevention Control Directive (Directive 96/61/EC, as amended by Directives 2003/35/EC and 2008/1/EC). Decree-Law number 173/2008 introduced an important amendment: currently the Environmental Licence is no longer only a condition for the facilities’ project but is also a prerequisite for the beginning of operation and functioning of the facility. Also, it is important to note that many permits and licences must be preceded by an Impact Assessment Procedure in respect of Decree-Law number 69/2000 (please see below). Issuing permits requires *in casu* evaluation and, thus, the transfer of permits is restricted and may be subject to authorisation from the issuer.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

As with all administrative decisions, the refusal or the issuance of a permit must be a fair and unbiased decision. If that is not the case, such administrative acts may be appealed to the entity immediately above (in the public hierarchic scale), i.e., the entity above the one issuing or refusing the permit. An administrative decision or act may also be challenged before the administrative courts where it shall follow administrative judicial procedures. There are also precautionary measures available, enabling a temporary and preemptive protection.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Particularly polluting companies and large scale installations must obtain specific licences or permits before starting its respective activities, such as: oil refineries; nuclear plants; industrial chemical plants; and large scale agricultural infrastructures. Concerning highly polluting activities, the Environmental Licence (please see above) is required. Furthermore, facilities using or storing dangerous substances must take pre-emptive measures in order to avoid serious accidents or limit their consequences: hence, they must inform authorities, draw security reports and have internal and external emergency plans, which are also to be approved by the competent licensing authority (Decree-Law number 254/2007, of July 12, which transposed Directive 2003/105). All of these activities are subject to Impact Assessment Procedure before the issuance of their respective licence or permit.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

In face of a violation of a permit any environmental regulator must

start administrative proceedings against the offender, which may result in the imposition of an administrative sanction, including a fine, and/or call the intervention of the Environment and Spatial Planning Inspection Authority or of the Public Prosecutor in case of a violation that may result in any criminal offence. If the administrative proceeding results in a sanction for the offender, this can consist of one or more of the following, depending on the degree of such violation: (i) a fine up to €3,740.98 for individuals and up to €44,891.81 for companies; (ii) loss of the equipment used on the infraction in favour of the State; (iii) suspension or removal of the permit; (iv) privation of public benefits; (v) closing of premises; and/or (vi) suspension of authorisations, permits and licences. In addition, the offender shall be liable for damage caused to the environment and third parties, under the terms of the administrative and civil legislation.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Waste is defined by law (Decree-Law number 178/2006, of September 5, as amended by Decree-Law number 183/2009, of August 10, and which transposes Directives EEC/2006/12 and EEC/91/689) as any substance or object which the holder discards or intends or is required to discard. It is unusable material, surplus of manufacturing, industrial, agricultural or any human process. It also includes damaged or altered material during the manufacturing process and, therefore, useless. Waste is ranked by categories respecting its hazardous nature (such as industrial, hospital or radioactive waste) or physical characteristics (inert or organic waste).

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The storage and disposal of waste must be duly authorised. Decree-Law number 189/2009, of August 10, which transposes Directive 1999/31/EC and applies Decision 2003/33/EC, on waste treatment facilities or landfills sets the principles for waste storage. Long-term storage implies an Impact Assessment Procedure. The elements that follow the licence request are described in the Regulation number 1023/2006 of September 20.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Decree-Law number 178/2006 holds that the producer of waste is liable until its final disposal or treatment. The duly and legal transfer of waste to another entity responsible in the waste management chain, such as a waste landfill, releases the producer of any further liability.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Producers shall only be required to take back their waste in case of unlawful disposal of such waste. Producers are, as above stated, responsible for: (i) the final destination of the waste, along with every intervenient in the waste management chain; and (ii) the costs of the waste management.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

The Portuguese law states three different liabilities, depending on the nature and seriousness of the act: there is Civil; Administrative; and Criminal liability.

Criminal offences against the environment may be punished with imprisonment: (i) in case of pollution - 1 to 8 years, if life threatening to third parties, and up to 5 years in case of negligence; (ii) in case of fires, explosions or emission of toxic gas - 3 to 10 years or 5 to 15 years, for radioactive or nuclear energy, respectively; (iii) disregarding construction regulations and damaging facilities - 1 to 8 years; and (iv) damages to nature in general (fauna, flora or natural habitats) - up to 3 years. However, the Penal Code lists the following exceptions to criminal liability: (i) the damaging action is necessary to avoid a greater damage; (ii) the necessary result could not be obtained through any other (less damaging) act; and (iii) the action was negligent, as the offender did not know and, most importantly, should not have known, or the illegal nature of such acts. Concerning Administrative Liability, the breach of permits, licences or of any laws or regulations respecting environmental protections is subject to sanctions, which include fines, prohibition to perform a certain activity, restitution of subsidies, suspension or revocation of permits or licences, confiscation of equipment, or suspension or closing of the premises/activities causing the environmental damage or violating the said rules.

Finally, Decree-Law number 147/2008, of July 29, as amended by Decree-Law number 245/2009 of 22 September 2009, implemented the Environmental Liability Directive in Portugal. This statute regulates several types of environmental liability, which can be described as follows:

- (a) Environmental liability for unlawful conduct, which applies to any entity which violates third parties' rights through damages to an environmental component, such as air, soil or water.
- (b) Strict environmental liability, which applies only to certain entities carrying out specific activities such as those: (i) requiring an environmental permit; (ii) requiring an environmental impact assessment procedure; (iii) encompassed by the rules on the prevention of serious accidents involving hazardous substances, or (iv) involving the transportation or storage of hazardous substances. Given the broad scope of activities, the applicability of this type of liability would have to be determined on a case by case basis.
- (c) Administrative liability for the prevention and reparation of environmental damages, which again is subdivided into liability for environmental conduct and strict liability. Under the rules on administrative liability, operators held liable for environmental damages (either through unlawful conduct or through strict liability) must repair the damages caused. Additionally, all entities who may be subject to liability under Decree-Law number 147/2008, of July 29, must take measures to prevent the occurrence or limit the extent of environmental damages.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Any third party may seek compensation or request the necessary ending or prevention of future damages for any damages caused to

the environment or to third parties even if the polluting activity was caused within the permit limits. Please see question 4.1 above.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under the environmental liability rules enacted by the above-referenced Decree-Law number 147/2008, of July 29, a corporation's directors are held jointly and severally liable for a corporation's obligations thereunder, including compensation obligations and obligations to remove the cause of environmental damages. Directors and Officer Liability Insurance may be used as a way to provide financial protection to directors in case the company is sued.

Entities carrying out certain activities (as described above) must post adequate guarantees for the reparation costs of possible environmental damages, through the subscription of insurance policies, bank guarantees, participation in environmental funds or by setting aside a reserve.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

A share sale does not, in general terms, transfer any liability, since this remains with the company. However, the sale of assets may transfer the liability to the purchaser.

Note that the change of control over a certain asset subject to an environmental permit may require the authorisation of the permit issuer.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

In general terms a lender may not be held liable for environmental wrongdoing or remediation costs, unless it can be demonstrated that it had real direct control over the polluting activity.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Liability for contamination of soil and groundwater is now covered under Decree-Law number 147/2008, of July 29, as amended by Decree-Law number 245/2009, of 22 September 2009, which implemented the Environmental Liability Directive in Portugal (please see questions 4.1 and 4.2 above).

5.2 How is liability allocated where more than one person is responsible for the contamination?

In accordance with Decree-Law number 147/2008, of July 29, if there is more than one person responsible for the soil or groundwater contamination, they will all be jointly and severally liable for the environmental damages caused. The level of fault of each contaminator is presumed equal. In case of different degrees of liability among the polluters, those that had to pay a higher portion of the damages will be allowed to recover the excess back from the others.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

According to the new Public Contracts Code, enacted by Decree-Law number 18/2008, of January 18, the environmental regulator may only alter unilaterally the agreement for public interest reasons. Any third party with a direct interest may challenge the agreement in case it breaches any legal provision.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

A person may have a private right of action to seek contribution from a previous owner, occupier or person who caused or contributed to the contamination of the land, under the civil liability rules set forth by Decree-Law number 147/2008, of July 29. In that case it shall be necessary to demonstrate the existence of damage, the breach of a rule and a connection between the faulty action and the said damage. It may also be possible to seek decontamination or to return the purchased land to the previous owner on the grounds of hidden defects, in case the contamination was not disclosed or visible at the moment of the purchase and such defect impairs its intended use or diminishes its value.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g., rivers?

Any person is entitled to court proceedings, as well as public entities, to promote the prevention, ending or repairing of environmental damages and to obtain due compensation. Monetary damages are only due in case a natural reparation is not possible.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Only public authorities with inspection and police authority powers may enter any public or private property or activity in order to conduct site inspections, request or produce documents, take samples, or interview employees. In Portugal the environmental regulator with such powers is the Environment and Spatial Planning Inspection Authority as well as the police authorities.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

As a general rule, all public entities (ultimately public servants) must report to their administrative superior, any crime or public offence, during and as a result of their service. Furthermore, a general duty of cooperation by all citizens is determined towards

the accomplishment of a healthy environment in accordance with Article 40 paragraph 1 of the EFL.

Also, for certain activities subject to Decree-Law number 254/2007, of June 12, which transposed the Seveso Directive and sets the legal regime on the control of major-accident hazards involving dangerous substances, several duties arise in this respect. Finally, Decree-Law number 147/2008, of July 29, states that any operator is required to provide immediately information on any imminent threat of environmental damage or in suspected cases of such an imminent threat, and must also take the necessary preventive measures in order to avoid or repair any environmental damage.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

All companies with facilities using or storing dangerous substances must take pre-emptive measures in order to avoid serious accidents or limit their consequences: hence, they must inform authorities, draw security reports and have internal and external emergency plans, which are also to be approved by the competent licensing authority (Decree-Law number 254/2007), they also have to comply with the permanent obligation to investigate their land and maintain constant examinations for government determined values. All of this is governed by the policy of environmental disaster prevention as well as by Decree-Law number 147/2008, of July 29.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

The duty to disclose any environmental problems in a commercial or private transaction derives from the principle of *bona fide* duty imposed by the Portuguese Civil Code. Also, under the terms of the Portuguese Companies Code, all companies must provide an annual balance sheet, in which liabilities, present and future, if the financial value may be assessed, must be clearly stated.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

It is possible to use environmental indemnities as a mechanism to reduce environmental risk exposure, however appropriately limited.

They would only apply between the parties to the contract not affecting a legitimate claim for environmental misleading of any third party to the contract. Nevertheless, the beneficiary of the indemnity could then claim restitution from the entity that provided the indemnity. Yet, it is important to state that such indemnities can only apply to civil liabilities and not to administrative and/or criminal liabilities.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

As already mentioned, under the terms of the Portuguese Companies Code, every company must provide an annual balance

sheet, in which liabilities, present and future, if the financial value may be assessed, must be clearly stated.

Even in the event of dissolution, whatever the reason for such event, liabilities are still to be answered, up to the company's assets limits.

Once the company is dissolved, later liabilities shall be held by the shareholders, under certain conditions, in proportion to the assets allocated to them in result of such dissolution. It is also important to note that dissolving a company with the sole purpose of evading liability, under whatever circumstance, may be considered a criminal offence.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

As parent companies and their affiliates are considered separate legal entities under Portuguese law, the former cannot be held responsible for the acts of the latter. However, the following exceptions to that rule may apply if (i) the parent and affiliate are bound in a management subordination agreement and if (ii) the parent has total control over the affiliate. In these cases, the parent company is liable if the offender chooses to sue it instead of its affiliate.

Liability is transferred with a company's shares: shareholders become, consequently, affected by the company's liability.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

No specific legislation has been approved on this matter.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

This action is available under the terms of Law number 83/95 ("*Lei da Acção Popular*"), which also specifies terms of civil and criminal liabilities.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Portugal and how is the emissions trading market developing there?

Portugal has ratified the Kyoto Protocol (KP) and as transposed the European Directive on the ETS. In 2006 the Government has finally concluded the process for the establishment of the Designated National Authority in order to create conditions to participate in the mechanisms foreseen in articles 6 and 12 of KP.

Furthermore given the relative derail of the Kyoto targets, when submitting to the EU Commission the second phase NAP Portugal has created a public Carbon Fund (a private one had already been authorised by the CMVM) funded by the State budget. Such Fund will, over the next five years, dispose of around 300 million Euros to purchase an estimate of 1.86 MT CO₂. The reasoning is the following: Portugal has a deficit of 7.41 MT CO₂ and this deficit will be overcome by the measures foreseen in the newly enacted National Climate Change Plan (3.6 MT) by the acquisitions of the public Carbon Fund in the said amount and by reduction through

the NAP. Given the serious delay in implementation of the measures foreseen in the mitigation plan we expect the volume of the Fund to grow over the next few years.

9.2 What is the overall policy approach to climate change regulation in Portugal?

The global strategy adopted by Portugal concerning climatic changes regulation has four goals, as defined in the National Action Plan enacted in 2006 ("PNAC 2006"):

- 1- Acknowledge, identify and anticipate vulnerable points and impact of climatic changes in several sectors as well as chose methods to identify adaptation measures, analysis of its viability and its costs and benefits. The adaptation strategies are meant to anticipate important impacts and adopt the measures necessary to prevent it from occur or to reduce it. In a first stage of the process the issues shall be approached by the construction of climatic and economical scenarios and the evaluation of different sectors and activities exposition to climatic patterns different from the present ones.
- 2- The second purpose is to reduce vulnerability and increase several economical sectors' response ability to climatic changes. The integration and adaptation to climatic changes promotion concerning sectors policies and territorial management instruments in a regional and local basis is fundamental to Portugal. This will be a gradual process dependent on the instruments revision cycle. The plans and programmes environmental evaluation and the environmental impact evaluation are some of the instruments that shall be used for the programmes, plans and projects validation.
- 3- The third purpose shall be promoting the people's awareness and the disclosure of information concerning what leads to climatic changes and its consequences. Here, publicity before a wide range of interested people is of great importance.
- 4- The fourth goal concerns international cooperation promoting the negotiation, follow up and the establishment of adaptation measures in the more vulnerable countries, especially in the Portuguese Language Countries.

The Portuguese government's cooperation with foreign countries aims to accomplish: integration and adaptation to climatic changes promotion, concerning sector policies and planning instruments; the State's involvement at several organisational levels; general citizens' and economic sector's involvement; and easy access to information about climatic changes vulnerabilities, impacts and risks.

10 Asbestos

10.1 Is Portugal likely to follow the experience of the US in terms of asbestos litigation?

Although legislation regarding asbestos has existed for over twenty years in Portugal, specifically concerning the health of workers exposed to asbestos (Decree-Law number 101/2005, of June 23, and Decree-Law number 284/89, of August 24), there are very few court cases on this subject (only respecting the health of workers at the workspace), but most certainly this will not represent the extent and importance of what occurred in the U.S.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Measures are taken in terms of awareness (labelling products containing asbestos is mandatory, as well as signalling them as dangerous products) and prevention (handling rules, due information to employees exposed to asbestos as well as a compulsory medical inspection).

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Portugal?

Decree-Law number 147/2008, of July 29, has triggered the need for environmental risk insurance. However, only a few numbers of insurance companies operating in the national market have products that are adequate to cover environmental liability.

11.2 What is the environmental insurance claims experience in Portugal?

As stated above, there is a limited experience in the area of environmental risk insurance in Portugal.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Portugal.

The most significant developments to Environmental Law in Portugal were brought by Decree-Law number 147/2008, of 29 July, which transposed Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Furthermore, it is important to note that, as stated above, the EFL is being altered by the parliament.

It is also important to note that the environmental authorities and particularly the IGAOT have been more active and acting in coordination with police authorities such as the nature protection service of the GNR (SEPNA). One of the factors contributing to this activity is the enactment of Law number 50/2006, of August 29 (*Lei Quadro das Contra-Ordenações Ambientais*), respecting environmental misdemeanors and administrative offences.

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