



Avosetta group Portugal

Sites:

www.diramb.gov.pt Contains legislation (national, European, international and foreign) as well as jurisprudence and doctrine in the field of the environment. It is an official site supported by three public entities:



Direcção-Geral do Ambiente,



Direcção-Geral dos Serviços de Informática do Ministério da Justiça



and Centro de Estudos Judiciários

www.dgsi.pt Contains Court decisions from the Supreme Court of Justice (40199 documents), the Constitutional Court (6107 documents), the Supreme Administrative Court (57351 documents), Second Instance Court of Oporto (34161 documents), Second Instance Court of Lisboa (28381 documents), Second Instance Court of Coimbra (2293 documents), Second Instance Court of Guimarães (179 documents), and Central Administrative Court (3799 documents). It is an official site supported by a public Institute dependent upon the Ministry of Justice:



Instituto das Tecnologias de Informação na Justiça



Maria Alexandra Aragão
(<http://www.fd.uc.pt/docentes/cv11.html>)
Faculty of Law (www.fd.uc.pt)
University of Coimbra (www.uc.pt)

London, 13-14 June 2003

Principles: Prevention

Subject: Comital mining

Court: Judicial Court of First Instance in Soure

Parties: Companhia Mineira de Talco-COMITAL vs. Direcção Regional do Ambiente

Process: 1/97

Decision: 14/6/1999

Description:

Plaintiff: **Companhia Mineira de Talco – COMITAL** is a mining industry whose main activity is talc extraction in the centre of Portugal.

Defendant: **Direcção Regional do Ambiente** is a decentralised organ of the Ministry of the Environment responsible for environmental inspection activities

Direcção Regional do Ambiente imposed a fine on the mining industry for ilegal effluent emission.

COMITAL appealed to the Court arguing that the responsibility should be imposed on the Municipality of Soure who had planned and promised to build a waste water management system for the hole of the industrial area of Soure which, until that day, still hadn't been constructed.

On the basis of the law regulating industrial activities the Court recognised the company's liability for discharging waste waters without previous treatment and without a permit maintaining the imposed fine.

In the motivation of the judgement, only the prevention principle was repeatedly mentioned *«the accused had the legal obligation to confine the materials in order to avoid interaction with the environment, even if these would be the result of weather conditions. The effects of weather conditions were predictable and couldn't have been ignored by the accused since it was not the first time that this happened (...). Under the Portuguese law on industrial activities (...) there is a general duty to prevent risks ¾ the industrial manager should develop his activity according to the regulations applicable and should adopt preventive measures in order to eliminate or reduce the risks likely to affect people or goods, the working conditions or the environment (...). Whenever he detects any irregularity in the functioning of the establishment, the industrial should take the necessary measures to correct the situation and, if necessary, suspend labour. This norm has to be understood at the light of article 26 of the environmental framework law which prohibits, in national territory, the emission, deposit or introduction in the water, soil, subsoil or atmosphere of any effluents, radioactive wastes or any other waste containing substances or micro-organisms likely to alter the characteristics or to render unsuitable for its uses those environmental components, thus contributing to environmental degradation».*

Principles: Prevention
Subject: Estarreja incinerator
Court: Supreme Administrative Court
Parties: Quercus e outros vs. Ministro de Indústria e Energia e Ministra do Ambiente
Process: 38436/A/95
Decision: 7/12/1995
Description:

Plaintiff: **Quercus** is a national environmental NGO.

Defendant: **Ministro de Indústria e Energia e Ministra do Ambiente** are the Ministers of Industry and energy and of the Environment who have ratified the opinion of the Environmental Impact Assessment Commission on the siting of an Incinerator in Estarreja.

Recognising the prevention principle as «a fundamental and structural principle in this area», the Court relied on the conclusions of the environmental impact assessment (considered an indispensable tool to the application of the principle). In short, the Court concluded that damage to the environment was not likely to happen, considering both the EIA performed and the contents of the Council of Ministers Resolution according to which the project would never proceed if the environmental requirements are not met.

Principles: Prevention
Subject: Azeméis dairy
Court: Judicial Court of First Instance in Oliveira de Azeméis
Parties: Lacticínios de Azeméis vs. Direcção Geral de Ambiente
Process: 18/93
Decision: 11/3/1994
Description:

Plaintiff: **Lacticínios de Azeméis** is a dairy industry in Oliveira de Azeméis.

Defendant: **Direcção Geral do Ambiente** is a service of the Ministry of the Environment responsible for environmental inspections.

Lacticínios de Azeméis used to discharge untreated waste water to a nearby river. They had a provisional six month licence that by the time had already expired. They were obliged to install a waste water treatment system but the term for the construction had also expired.

Reaffirming the prevention needs felt in these environmental matters, the court considered them guilty and condemned them to the payment of a fine.

Principles: Polluter-pays

Subject: Minderica dyers

Court: Judicial Court of First Instance in Alcanena

Parties: Tinturaria Minderica vs. Ministry of the Environment

Process: 133/96

Decision: 15/11/1996

Description:

Plaintiff: **Tinturaria Minderica** is a dyers factory

Defendant: The **Ministry of the Environment**, as authority responsible for environmental inspections.

The Ministry of the Environment imposed a penalty on the dyers factory for ilegal effluent emission.

The Court recognised that Minderica dyers were working illegally without an emission permit. The polluter-pays principle was referred as legal justification for the payment of taxes related with the emission of waste waters.

Principles: Polluter-pays
Subject: Coruche stork nests
Court: Judicial Court of First Instance in Coruche
Parties: Ministério Público vs. landowners
Process: 278/89
Decision: 23/2/1990
Description:

Plaintiff: **Ministério Público** is a public prosecutor representing the State

Defendant: **Landowners** of a farm called Quinta Grande», located in Coruche

The owners of the farm «Quinta Grande» possessed three umbrella-pine trees where twenty seven stork nests, with 23 eggs, subsisted. They were well informed by a national NGO (*Quercus*) that those storks were a legally protected species according to national and international law and additional information was posted in placards in the trunks of the trees. In spite of this, after two days the pine-trees were sold and cut down by timber-merchants. Both the nests and the eggs were destroyed. The placards had been ripped off from the trunks. The public prosecutor charged the landowners for breach of a nature conservation law and asked for a civil compensation. The landowners plead not guilty and blamed the timber-merchants for the offence.

The polluter-pays principle was mentioned along with the legal norms applicable as framework to judge the violation and to assess liability and the penalty proportion.

As ground for damage repairing, the polluter-pays principle was considered to mean «*charging the costs of fighting and preventing pollution on the polluter*» as well as «*the effective responsibility of the polluter for the damages he causes (...)*». Developing this last meaning the judge went even further and explained that «*damage compensation, according to the general liability principles and also according with the principles in force in environmental law (the “polluter-pays”) imposes, in the first place, the reconstitution of the situation that would have existed if the fact that gave origin to the damage hadn’t occurred (...)*».

In conclusion, the offenders were condemned to 87 days imprisonment (replaced by a 130.000\$00 fine or 650 Euros, approximately) and to payment of a civil compensation of 30.000\$00 plus VAT (650 Euros, approximately 150 Euros) corresponding to the price of the construction of artificial alternative pedestals for the nests.

Principles: Precaution and prevention

Subject: Póvoa de Lanhoso landfill

Court: Judicial Court of Second Instance in Oporto

Parties: Associação de Defesa do Ambiente- Terras de Lanhoso (ADA-TL) vs. BRAval

Process: 422/00

Decision: 12/6/2001

Description:

Plaintiff: **Associação de Defesa do Ambiente- Terras de Lanhoso (ADA-TL)** is a local environmental NGO

Defendant: **BRAval** is a concessionary of the Portuguese State in the construction and exploitation of the municipal solid wastes management system in some northern municipalities (Braga district).

A first instance Court adopted, as a provisional measure, the prohibition of the waste disposal activity developed by Braval, as well as the resumption of the construction activities, as requested by the plaintiff NGO. This was confirmed by the Supreme Courts.

Braval has requested the replacement of this drastic provisional measure for another one, usually permitted according to the Portuguese Civil Process Code: the payment of a financial bond, considering the few probabilities that the construction and functioning of the sanitary landfill would cause any danger to the environment and also considering that it was holder of a civil responsibility insurance up to 100.000.000\$00 (approximately 500.000 Euros).

Confirming the arguments of the plaintiff, the reasoning of the judge can be considered almost revolutionary, at least in the global context of the Portuguese jurisprudence:

«we have to learn with our mistakes and not get used to accept the consequences. It's not the time to cry over the spilled milk, it's better to be safe than to be sorry¹. It's urgent to correct the causes and not regret the effects because time is running and it's late [explains the ozone layer effect in detail] (...) the principle of prevention as well as of precaution are fundamental principles in the domain of environmental law, meaning that confronted with the imminence of a human activity which will confirmedly cause damage to environmental goods, in a serious and irreversible way, such intervention should be stopped. (...)

The second principle means that the benefit of the doubt must be used in favour of the environment, whenever there is uncertainty, for lack of obvious scientific proof on the cause-effect relation between an activity and a certain form of pollution or of environmental degradation. One promotes on one side: the anticipation of preventive action although there is no certainty on its need; and on the other side, the prohibition of potentially damaging activities, even if that potentiality is not scientifically certain.

On the other side it has, from the procedural point of view, an important formulation, which is the inversion of the burden of the proof. (...)

¹ Mieux vaut prévenir que guérir.

This principle has the effect of preferring an anticipatory protection, aiming at preventing the ecological damage before its occurrence.

The duty to prevent environmental degradation is at the basis of all international regulation, even if this principle is not very often explicitly mentioned.

The European Community has a major formulation on this matter: the main reason for the importance of prevention is that, most times, the damage caused to the environment cannot be repaired, but only compensated and, on the other side, though reconstituting a degraded environment is physically possible, its costs can be prohibitive and it's a very long term process.

The principle of prevention has to be understood as resulting from a qualified interpretation of the prevention principle (the most environmental friendly interpretation) (...) imposing a serious balancing of the environmental interest namely before the other economic interests, considering article 174 n. 2 of the European Community Treaty, of which Portugal is a Member State.(...)

The response of the Court to the question raised is the confirmation, for precaution reasons, of the decision of the previous instance, therefore upholding the values inherent to the protection of the environment (an essentially non-patrimonial right hard to repair or even impossible to repair considering the amounts at stake in the financial bond, and considering that this is neither adequate nor sufficient to the prevention of the damage or to its full compensation (...))».

In a new action brought against **ADA-TL** before the Constitutional Court the plaintiff BRAval argued the unconstitutionality of this last decision without success (decision of 8/7/1999, process n. 445/99).

Principles: Polluter-pays and prevention

Subject: Póvoa de Lanhoso landfill

Court: Supreme Court of Justice

Parties: Associação de Defesa do Ambiente- Terras de Lanhoso (ADA-TL) vs. BRAval

Process: 200/98

Decision: 23/9/1998

Description:

Plaintiff: **Associação de Defesa do Ambiente- Terras de Lanhoso (ADA-TL)** is a local environmental NGO

Defendant: **BRAval** is a concessionary of the Portuguese State in the construction and exploitation of the municipal solid wastes management system in some northern municipalities (Braga district).

In 19/6/1997 the First Instance Court of Póvoa de Lanhoso denied the request of the plaintiff to declare the siting of a new sanitary landfill in Póvoa de Lanhoso as inappropriate. So did the Court of Second Instance in 23/10/1997, in deciding the appeal.

However, the Supreme Court of Justice seemed to be more sensitive and recognised the plaintiff's reason thus declaring the site as unsuitable for a municipal solid waste landfill. Based on article 66 of Portuguese Constitution («»), in several rules of the framework law on the environment and in the environmental impact assessment law of 1990, the Supreme Court referred, in its decision, five fundamental principles: prevention principle, polluter-pays principle, participation principle, restoration principle and principle liability principle. Although the relation was not expressly established, by the Court, the identification and description of the principles was supposed to prove the existence of a «grounded fear of damage». This «grounded fear of damage» is requested by the process law to suspend authorised activities of recognised public interest.

In the present case, the high probability of environmental degradation caused by the construction and functioning of the landfill had to be proved.

Both Courts deciding in first and second instance have declared the importance of arguments such as not being in the presence of dangerous wastes, the urgent need to solve a serious environmental problem and the prevision of security systems assuring risk acceptability.

On the contrary, the Supreme Court stated that the two year gap between the commercial guaranty of the liners used to render impermeable the landfill (ten years) and the period foreseen for the functioning of the landfill (twelve years lifetime) was relevant.

In conclusion it considered the «grounded fear of damage» to be reasonable and therefore declared the site inappropriate and suspended the construction activity.

Principles: Prevention and polluter-pays

Subject: Cerveira Scrap-ground

Court: Judicial Court of Second Instance in Oporto

Parties: Ministério Público vs. Scrap industrial in Vila Nova de Cerveira

Process: 132-A/00

Decision: 8/2/2001

Description:

Plaintiff: **Scrap-ground explorer** is the owner of a 2400 m² site in Cerveira who is paid to accept scrap to be deposit there.

Defendant: **Ministério Público** is a public prosecutor representing the State.

After having been condemned in a first instance Court, the Cerveira scrap-ground explorer appealed to the second instance Court.

The public prosecutor asked the Court to forbid the scrap-ground explorer from proceeding with his noxious activity.

The judges considered the environmental degradation to be highly likely and, on the basis of the prevention and the polluter-pays principles, granted an interim protection to the ground, maintaining the previous judicial decisions. Quoting the decision: *«The above mentioned specific principle of prevention establishes that actuations likely to have immediate or long term effects in the environment should be considered in anticipation, reducing or eliminating the causes rather than correcting the effects of those actions or of those activities likely to alter the quality of the environment; the polluter is obliged to correct or recover the environment, bearing the consequent charges and not being allowed to proceed with the polluting activity».*

Principles: Prevention and integration

Subject: Nisa swallow nests

Court: Supreme Judicial Court

Parties: Fundo para a Protecção dos Animais Selvagens - FAPAS vs. Portuguese State

Process: 413/00

Decision: 27/6/2000

Description:

Plaintiff: **Fundo para a Protecção dos Animais Selvagens – FAPAS** is a national environmental NGO.

Defendant: **Portuguese State**

After the destruction of 400 swallow nests in a cleaning operation to the Courthouse in Nisa, FAPAS brought an action against the State for breach of nature conservation law asking, as an interim measure, for the condemnation of the State to permit swallow nesting. For that purpose, all the devices intended to prevent the swallows (*Delichon Urbica*) from nesting in the walls of the Nisa Courthouse should be removed.

The Court recognised the plaintiff's arguments and concluded that the requirements for authorising the removal of all devices were present in this case: there was a right, there was a «grounded fear of damage» (since the swallows still couldn't nest where they used to) and there was proportionality between the prejudice caused by the interim measure and the damage that is to be avoided.

In the grounding of its decision, the Court referred to some environmental principles, quoting well established national doctrine, for that purpose:

«(...) a) *the prevention principle according to which the actions on the environment should, above all, avoid the creation of pollutions and nuisance in the origin and not fighting its effects afterwards, since it's better to prevent environmental degradation than to remedy it subsequently; b) the principle of collective participation, in other words, the need of the different social groups interested in intervening in the formulation and execution of the environmental policy; c) the cooperation principle, pointing at the search for agreed solutions with other countries and international organisations; d) the equilibrium principle which expresses the creation of adequate means to assure the integration of the economic and social growth on one hand and environmental protection on the other hand*»²

The prevention principle is implicit in the judgement as far as the interim decision was intended to have the effect of safeguarding the utility and practical effects of the final judgement on the substance of the dispute to be pronounced in another process, by another Court.

The integration principle, named by the legal doctrine as «equilibrium principle» is present in the reasoning on the conflicts of rights and balancing of interests. In the wordings of the Court: «*The Portuguese State can't approve the right to the environment in its Constitution, can't defend an environmental policy, can't subscribe international treaties that are binding to it, can't make laws and decrees for the protection of savage life and afterwards deny all this with its concrete behaviour (...). The right to the environment implies the State rendering certain services to the community (...) there are means to harmonise the life of savage birds with the well-being of man (...) the search of this technical means to avoid or minimise potential conflicts or collisions of rights is a task of the State, in view of the mentioned constitutional principles*».

² Quoting Gomes Canotilho and Vital Moreira, in their anotation to the Portuguese Constitution, Coimbra Editora, 3rd edition, page 348.

Principles: Prevention and integration

Subject: New Bridge over Tagus River in Lisbon

Court: Supreme Administrative Court

Parties: Liga para a Protecção da Natureza-LPN vs. Conselho de Ministros

Process: 31535/99

Decision: 14/10/1999

Description:

Plaintiff: **Liga para a Protecção da Natureza-LPN** is a national environmental NGO.

Defendant: **Conselho de Ministros** is the Council of Ministers whose resolution approved the sitting of the new Bridge over the Tagus River, in Lisbon.

The Supreme Court denied the suspension of the Council of Ministers Resolution considering that *«although one cannot forget the preventive concerns that prevail in all environmental law, but one cannot get to the point of rendering impracticable each and every procedure and obstruct each and every undertaking whatever its nature is»*.

The Court believed that both the characteristics of the bridge and the techniques to be used in the construction could still influence the environmental impacts of the bridge in such terms as to determine its environmental acceptability in spite of the lack of sitting alternatives.

Principles: Prevention and other

Subject: Maia petrol pump

Court: Supreme Judicial Court

Parties: Associação de pais e encarregados de educação da Escola Primária da Maia vs. Importação e Distribuição de combustíveis-Idetex

Process: 483/96

Decision: 2/7/1996

Description:

Plaintiff: **Associação de pais e encarregados de educação da Escola Primária da Maia** is a parents association of children attending an elementary public school at Maia.

Defendant: **Importação e Distribuição de Combustíveis-Idetex** is a firm that imports and distributes fuels.

Idetex has obtained public authorisation to install and explore a petrol pump in the neighbourhood of an elementary public school at Maia. The **Associação de pais e encarregados de educação da Escola Primária da Maia** decides to attack this decision.

Here is the reasoning of the Court: «*Although the activity is licensed according to administrative law, the Common (civil) Court is competent to decide on the suspension of the activity based on the existence of an environmental danger. (...) Environmental law has constitutional dignity (...) [and] is preventive, by nature*».

«*Environmental law (...) has gained an ever increasing importance and its principles must influence juridical interpretation and, more than that, have to influence the application of the law, considering the unity of the legal order (...). With due respect it is obvious the lack of syntony between the defendant and the environmental law (...) ignoring the preventive character of environmental law (besides the identical character of the interim preventive measures) as if one were to admit something like “get ill now and protest later”*».

In sum, the Supreme Court considered to be competent and attended their claim applying the Constitution (article 66°), the European Community Treaty (article 130°R) the environmental framework law, the Civil Code and other pieces of legislation on facility sitting. In terms of principles it relied on the prevention principle and on some other unnamed environmental principles.

Principles	Precaution			Prevention			Polluter-pays			Integration		
	subject	court year	dispute	subject	court year	dispute	subject	court year	dispute	subject	court year	dispute
				Mining Dairy Incinerator	1 st 99 1 st 94 S ^{up} 95	Water Water LULU	Dyers Storks	1 st 96 1 st 90	Water Nature			
Prevention	Landfill	2 nd 01	LULU				Landfill Scrap	S ^{up} 98 2 nd 01	LULU Soil	Swallows Bridge	S ^{up} 00 S ^{up} 99	Nature LULU
Other				Petrol	S ^{up} 96	LULU						

Cases: Mining, dairy, incineration; dyers, storks; landfill (1,2), scrap, swallow, bridge, petrol.

Courts: Judicial, Administrative; 1st, 2nd, Supreme

Disputes: LULUs and illegalities (water, nature, soil)

Decision: pro/against the environment