

Recent developments in Portuguese environmental law

I. Legal framework

A— Amendment of the Framework Environmental Law

The old, but still in force, Framework Environmental Law is undergoing a revision process. The Framework Environmental Law was approved in 1987 and was considered to be quite innovative at the time. All its architecture was based on a preventive approach; it recognized *actio popularis* as well as subjective and objective liability; and also instruments like environmental impact assessment. However, many of its outstanding proposals were only regulated several years later, not to mention the fact that the law also had some technical errors like the concepts of “human components” and “pollution”.

In 2010 several proposals, coming from the different political parties (left wing and right wing), were presented to the Parliament. Last February the Council of Ministers approved a draft proposal that was forwarded to the Parliamentary Committee for Environment for discussion and consolidation.

In the words of the Presidency of the Council of Ministers, the proposal contains "new principles of environmental law" (reference to the integration principle and to the separation of the precaution and prevention principles).

Compared to the previous Act, this proposal leaves urban planning and cultural heritage out of the law, it regulates the sea independently from the other water bodies, it does not refer to light (luminous pollution and the right adequate lighting which was present both in the old law and in the proposals from the political parties) and instead of the very criticized "human components" concept of the 1887 Law, it mentions "threats to the environmental components".

Finally, it includes concepts such as climate change, abuse of resources, biodiversity loss and sustainability.

B — Changes in the penal code to introduce a new type of crime

The Penal Code was amended to increase the penal sanctions for corruption and to criminalize the violation of urban law rules by individuals, legal persons and civil servants. The concept of civil servant (*funcionário*) is now enlarged to include elected officials (*titulares de cargos autárquicos*), any employees in municipalities (*trabalhadores das Câmaras*), referees, jury members and experts.

This is the 25th amendment to the Penal Code to introduce a norm similar to the one that motivated a number of convictions of mayors in Spain.

The main articles on Violation of urban rules are:

Article 278/A – Violation of urban rules

«1 – Anyone who constructs, reconstructs or extends a property affecting public ways, National Natural Reserve, National Agriculture Reserve, public domain or any soil specifically protected by law, aware of the inconsistency of his conduct with the urban law rules applicable, is punishable with imprisonment up to three years or a fine.

2 - Works of little urban relevance, classified as such by the law, are not punishable.

3 - The legal persons and similar entities are responsible, in general terms, for the crime provided in paragraph 1 of this article.

4 - The court can order, in the decision of conviction, the demolition of the work or restoration of the situation to the previous, state at the expense of the perpetrator».

Article 382/A – Violation of rules by civil servants

«1 - The civil servant who reports or decides favourably in o process of licensing or authorization or which provides false information about the laws or regulations applicable, aware of the inconsistency of his conduct with the urban planning rules, is punished with imprisonment up to three years or a fine.

2 - If the subject of the license or permit affects public ways, National Natural Reserve, National Agriculture Reserve, public domain or any soil specifically protected by law, the agent is punished with imprisonment up to five years or a fine.»

This amendment was adopted in September 2010 and entered into force in March 2011. In the meantime, very serious corruption cases¹ involving highly placed public officials are still pending in the courts but most facts have already come to light through media investigation.

In other cases, both media coverage and private investigations by NGOs reveal the impotence of public powers to control illegal activities like cutting down highly protected trees (cork and holm-oak), fishing in interdict waters and during interdict periods or building in flood risk areas.

II. Better regulation and transparency

A – Laws are now “translated” into “plain Portuguese”

Since October 2010 the main laws published in the Official Journal come with two summaries: one in “plain Portuguese” and another in “plain English”. The aim of the publication of summaries in plain language (Portuguese and English) is to facilitate the access of people and companies to the laws. However, the abstracts are not legally binding and do not replace the law published in the Official Journal.

The original aspect is not the publication of an English version of the laws. The originality — and the controversy — about this measure is admitting that the laws are not clear; it’s having two versions for the same law; it’s establishing the criteria for selecting only some laws to be “translated” into “plain Portuguese”²; it’s like having “first class” and “second class” laws that don’t deserve “translation”; it’s the risk of over simplification, misleading precisely those who aren’t capable of reading/understanding the “official” version;

An example of “translation” of laws into “plain language” is the Decree-law n. 115/2010, transposing into the Portuguese law the European Directive on the assessment and management of flood risks

¹ Cases concerning contracts and public tenders for environmental services like waste management, metal scrap trade or landfill disposal of waste, licensing of luxury tourist resorts authorizing the destruction of cork tree plantations, and so on.

² For instance a regulation on fishing techniques (using net bags with ballast) isn’t “translated”, the amendments to the penal code (corruption crimes) aren’t “translated” but the “merger of fourteen hospitals, and the creation of six new hospital centers” is “translated”.

(Directive 2007/60/EC). The national law has 19 articles and two annexes and was presented like this in “plain language”, and I quote:

«What is it?

This decree-law transposes into the Portuguese law the European directive on the assessment and management of flood risks (Directive 2007/60/EC).

What will be implemented?

Flood risk assessment

By 22 December 2011, the Portuguese Hydrographic Region Administrations (ARH) must evaluate the possibility of flooding in their region.

In order to do so, they must take into account past floods, land and watercourse characteristics and the impacts of climate change.

Based on this assessment, by 22 December 2013 the ARH must report on:

- which areas might be flooded
- what are the possible flood scenarios, from the most rare and extreme to the most likely ones
- what impact will each scenario have on the local population, important buildings (like hospitals, schools, toxic material warehouses and others), farming, industry, water supply, roads, protected areas, etc.

Flood risk management plans

To reduce the negative impacts of floods, the ARH must draft, by 22 December 2015, flood risk management plans. These plans include:

- the flood risk assessment results
- specific solutions to avoid floods, to predict when flooding will occur and to protect people and goods.

The Portuguese National Authority for Civil Protection (ANPC) supports the ARH in the drafting of these plans, namely in its connection with civil protection emergency plans.

The Portuguese Water Institute (INAG) must inform the European Union about the implemented measures, and coordinate all the Portuguese organizations involved in this matter.

All information on flood risk assessment and management plans will be published on the INAG's, ARH's and ANPC's websites.

Creation of a national commission

This decree-law creates the Portuguese National Commission for Flood Risk Management (CNGRI), which reports to the government member responsible for environment and land planning.

Amongst others, CNGRI's functions are to:

- support the ARH in assessing flood risks and drafting flood risk management plans
- give its professional opinion on which areas floods might occur.

CNGRI members do not get paid for it.

What are its benefits?

The changes introduced by this decree-law will help:

- gather accurate information on flood risks at local, regional and national levels
- set up flood risk management priorities
- ultimately, reduce flood risk and its negative impacts.

When does it come into effect?

This decree-law will come into effect within five days of being published».

B – Difficulties with the informatics system

Since the approval of the law n. 19/2006 on access to information, transposing 2003/4/CE Directive, the access to information and public services was limited by recurring failures in the public informatics system. Besides the information not being presented in a user-friendly way (namely in what concerns EIA and SA databases), the online register for waste management, IPPC installations and GHG emissions has been often unavailable.

This week the server will be changed and hopefully the functioning will improve.

C – “Zero delay”

In spite of the government commitment to have "zero delay" in the transposition of directives, the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, which should have been transposed until December 2010, was not yet transposed.

III. Energy and GHG

A - Energy performance

According to data provided by the National Energy Network (REN) in 2010 electricity consumption increased more than twice (3.3%) while GDP grew around 1.5%. Except for 2007, every year Portugal fails to reverse this trend. In other words, Portugal isn't getting more efficient: every year more electricity is needed to produce one unit of wealth.

Between 2009 and 2010, Portugal reduced the imports of electricity by about 45% (from reducing imports from 9.6% to 5.0% of consumption).

Electricity produced from renewable sources recorded a very significant increase in 2010: more 53.2% renewable produced (compared with 36.5% in 2009, and 27.8% in 2008). This corresponds to an increase of 88.4% in hydropower production (compared to 2009), plus 20% in wind power production (although less significant if compared with the 31.6% increase between 2008 and 2009), plus 50% in photovoltaic power (this increase is mainly due to the simplification of authorization procedures, but globally this source still has an irrelevant role).

If electricity consumption would have stabilized in 2006 values, the percentage of renewable electricity in 2010 would have been 56.5%.

B - GHG emissions from forest fires

Forest fires and their effects are still a reason for great concern in Portugal. In 2003, when large fires burned 425 000 hectares, Portugal reported to the Convention on Climate Change 10 million tons of CO₂ equivalent due to fires affecting 286 000 ha forest. In 2005, when 339 000 hectares burned, 5 million tons of CO₂ equivalent were reported.

In 2010 GHG emissions due to forest fires were 520 thousand tons of CO₂ equivalent. If, in addition, we consider not only forest but also fires affecting bush wood, the emissions reach 1.1 million tons of CO₂ equivalent.