

Recent Developments in Portuguese Law in 2015-2016

Alexandra Aragão (aaragão@ci.uc.pt)

Laws

- *Law on Land Management Instruments* (Decree-Law No. 80/2015 of 14 May).

This Law determines the duty to rank public interests converging in the same territory. “In territorial areas that converge public interests incompatible with each other, priority should be given to those whose pursuit determine the most appropriate environmental, economic, social and cultural land use” (article 9 no.1). Interests relating to national defense, security, public health, civil protection and the prevention and minimization of risks, are excluded from graduation and have priority over other public interests (article 9 no. 2).

Furthermore, the following territorial resources shall be identified in the land management plans (article 10):

- a) the areas dedicated to national defense, security and civil protection;
- b) the natural resources and values;
- c) the dangerous areas and risk areas;
- d) agricultural and forest areas;
- e) the areas suitable for energy exploration and geological resources;
- f) the ecological structure;
- g) the heritage architectural, archaeological and landscape;
- h) the urban system;
- i) the location and distribution of economic activities;
- j) transport networks and mobility;
- k) Infrastructure networks and collective facilities.

Finally, minimum and maximum thresholds for use of natural resources (as well as values and systems essential to sustainable land use and to the preservation of the renewal capacity and enhancement of natural heritage) shall be established (article 12 no.1). The resources and natural values having strategic relevance to environmental sustainability and intergenerational solidarity are, inter alia (article 12 no.2):

- a) coastal zone and riparian areas;
- b) public water reservoirs;
- c) protected areas and the only areas that are part;
- d) river network;
- e) other relevant territorial resources for the conservation of nature and biodiversity.

- *Law on administrative sanctions for environmental infractions* (Law 114/2015, of 28 August amending Law 50/2006 of 29 August)

Extends the sanctioning regime to urbanistic infractions and to violations of territorial plans. Determines the joint liability of directors, managers and any other person who exercises, even *de facto*, management functions.

Projects

- Negative EIA decision stopped major projects in Portugal. A wind Farm in the municipalities of Torre de Moncorvo and Carrazeda de Ansiães (30 wind turbines of 120

meters) affecting the landscape as well as protected species (24 species of birds and bats) in a Special Protection Area for the birds and a World Heritage site in a charismatic wine Region.

- After the revaluation of the National Program for High Hydroelectric Potential Dams by the Government, two dams were canceled (Alvito in the river Tejo, and Girabolhos in the river Mondego), and one was suspended for three years (Fridão the river Tamega). Three other dams (also in river Tamega) are still under construction.

Taxation

A new incentive for recycling (EUR 1.5 million) will reward the effort of municipal waste management companies. Up to 35% of the taxes payed to the Environmental Intervention Fund will be restituted to the waste management companies in proportion of their achievements on waste recycling.

Complaints to the European Commission

- Two years after the NGOs complained against the Portuguese Government, for failing to comply with the EU directive on asbestos, the response by the European Commission was negative.
- The complaint, filled in 2013, was on the government fail to complete the survey of public buildings containing asbestos. The actual list of public buildings published in the government's website is far from being exhaustive. The European Commission rejected the complaint considering that the Directives 89/391 / EEC and 2009/148 / EC had been transposed into national law, failing to understand that it was implementation and not transposition that was at stake.
- In January 2016 the ENGO Quercus complained to the European Ombudsman and the European Parliament for not receiving a response from the European Commission on a previous complaint, presented to the European Commission in 2014, about waste incineration in Açores.

Environmental activism

Unprecedented cleavage among the leaders of the biggest and more active national ENGO, Quercus. In January 2016 the NGO was split: the historic founders of Quercus left and founded a brand new environmental association called ZERO.

Case Law from higher courts

Supreme Administrative Court (8 June 2015) on *fait accompli*

Demolitions of illegal constructions in nature conservation sites should only be carried out as a last resort and only if a legalization procedure proves to be impossible.

The Municipality of *Sesimbra*, near Lisbon, issued an illegal building permit inside a nature protection area, after failing to consult the competent authorities in charge of the management of the park. The court declared that the house should be demolished and the soil should be restored to its previous state within 90 days. The land owner and the Municipality appealed and were granted a favorable decision considering that, despite the illegality of the construction, all the possible alternatives to avoid demolition had to be previously exhausted.

«I - Although the licensing process has been lacking the binding opinion and, by virtue of that fact, the contested measures are effectively null acts, this does not mean that the artº 106, paragraph 2 of the legal regime on construction and urbanization should not be applied in this context for the purpose of trying a possible legalization [the demolition can be avoided if the work is likely to be licensed or subject to prior communication or if it is possible to ensure the compliance with the provisions, laws and regulations applicable to it by carrying out corrective works or changes], because, despite the invalidity of the contested measures, which caused the consequential invalidity of license, it still It can be legalized, provided that a positive opinion can be obtained.

II - The demolition is the last resort, so it is always mandatory to ascertain the possibility of legalizing the construction work, before proceeding with the demolition, considering that the licensing procedure and the legalization procedure are completely different procedures».