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Environmental Law 2021

Portugal: Law & Practice

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PLMJ

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Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

General Principles of Environmental Law

The aim of environmental policy is to enforce environmental rights by promoting sustainable development. This is supported by appropriate management of the environment, in particular of ecosystems and natural resources. This contributes to the development of a low-carbon society and a "green economy", and to rational and efficient use of natural resources, including the promotion of the circular economy, which ensures the well-being and the gradual improvement of the quality of life of citizens.

Public Action Principles

Public action in environmental matters is guided by the following principles:

- sustainable development;
- intra and inter-generational responsibility;
- prevention and precaution;
- responsibility;
- recovery;
- the user pays;
- the polluter pays.

Public Policy Principles

Public policies for the environment are guided by the following principles:

- a transversal approach and integration;
- international co-operation;
- knowledge and science;
- environmental education;
- information and participation.

Environmental Laws

The laws governing environmental protection are various and scattered, depending on their specific subject. However, the following main pieces of legislation should be taken into consideration:

- the Constitution of the Portuguese Republic;
- Law No 19/2014, which defines the bases of environmental policy;
- Law No 50/2006, which establishes the framework law for environmental administrative offences;
- Decree Law No 151-B/2013, the legal framework for environmental impact assessment;
- Decree Law No 147/2008, the legal framework of responsibility for environmental damage;
- Decree Law No 127/2013, the legal framework of industrial emissions applicable to integrated pollution prevention and control;
- Law No 58/2005, the Water Law;
- Decree Law No 102-D/2020, the general framework of waste management;
- Decree Law No 39/2018, the legal framework of prevention and control of emissions of pollutants into the air;
- Decree Law No 12/2020, the legal framework for greenhouse gas emission allowance trading;
- Decree Law No 140/99, the legal framework of the conservation of wild birds and the conservation of natural habitats and wild flora.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

The key regulatory bodies with authority in environmental matters are the following: the Minister of the Environment and Climate, the Portuguese Environmental Agency (APA), the Minister of Maritime Affaires, the Inspectorate General of the Environment (IGAMAOT), the Portuguese Nature and Forest Conservation Institute (ICNF), the Portuguese Institute of the Sea and Atmosphere (IPMA), and the Commissions for Regional Coordination and Development, one

for each region – North, Centre, Lisbon and Tejo Valley, Alentejo and Algarve (CCDR-N, CCDR-C, CCDR-LV, CCDR-Alentejo and CCDR-Algarve).

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

Regulatory Authorities' Investigative Powers

Some of the entities listed in **2.1 Key Regulatory Authorities** have powers of control, inspection and monitoring of compliance with environmental legislation. In exercising these powers, they may request the collaboration of the police authorities. Whenever a situation of serious danger to the environment or human health is detected, they may adopt, as a preventive measure and with immediate effect, the precautionary measures that, in each case, are justified to prevent or eliminate the hazardous situation. These include: the suspension of the installation's operation; the closure of all or part of the installation; or the seizure of all or part of the equipment. In particular, IGAMAOT has the right to free access to the operators' facilities, to request examinations, expert examinations, document collection and consultation.

In principle, IGAMAOT is also the entity responsible for bringing and deciding administrative offence proceedings. It can also carry out precautionary seizures and apply accessory penalties.

3.2 Environmental Permits

Environmental Permits

In general terms, an environmental permit is required whenever an activity may significantly affect components of the natural environmental, such as the soil, the subsoil, water resources, the sea, the air, biodiversity and the landscape.

The main environmental licences/authorisations are the following:

- Environmental Impact Statement (DIA) and Declaration of Conformity of the Execution Project (DCAPE);
- Environmental Permit;
- Greenhouse Gas Emissions Permit;
- Waste Management Operator Licence;
- Title for Use of Water Resources;
- Landfill Operating Licence;
- Installation and Operation of Integrated Centres for Recovery, Valorisation and Disposal of Hazardous Waste Licence;
- Air-Pollutant Emissions Title;
- Water Reuse Licence.

Environmental Licence Procedure

Environmental licences must be obtained prior to carrying out an activity that has environmental impacts.

Obtaining a licence implies the submission of an application on an electronic platform, SILiAmb, followed by the payment of a fee. The main environmental permits are incorporated in the Single Environmental Permit (TUA), which is an electronic title that gathers all the information about the licensing and previous administrative control acts on environmental matters to which each operator is subject.

Challenging Rights

Under the Constitution of the Portuguese Republic, any citizen – as well as associations and foundations defending the environment, regardless of whether they have a direct interest in the claim – may administratively and judicially appeal environmental licences. Local authorities also have the right to appeal such licences in relation to interests held by residents in their area of jurisdiction.

The granting of licences in environmental matters is also subject to public consultation, as a way of ensuring greater involvement of citizens in decision-making on environmental issues that concern them. As a way of enabling citizens to exercise the right to public consultation, the government has created a website, Participa, allowing the public to consult ongoing environmental licensing procedures and related documents. It also allows people to submit opinions, which must be analysed prior to the licensing decision.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

There are two main types of liability for environmental damage or breaches of environmental law. Specifically, there is punitive liability (administrative offence liability and criminal liability) and restorative liability (civil liability and environmental liability).

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage

Historical Environmental Incidents

The extent of liability for non-compliance with environmental standards can be analysed from two different perspectives: (i) the subjects to whom the liability might be attributed, and (ii) the period during which the liability subsists.

The liable party

The general principle on liability is that the unlawful act is attributed to the person that commits it, precisely because its subjective imputation is performed according to the person that causes the environmental damage. This means that the responsibility is attributed to the subject that caused the damage.

Indeed, environmental law is built on a logic of accountability, which determines the assumption, by polluting agents, of the consequences of their actions and omissions on natural resources.

In other words, the criterion for attributing liability is not necessarily of the current (or purchasing) operator or landowner, but rather of the subject to whom the harmful activity of the environment is attributed.

Liability limitation period

Administrative offence liability

The limitation period for administrative offences is a maximum of five years from the commission of the offence, without prejudice to the causes of interruption and suspension provided for in the law. This means that, in practice, this period might be extended up to eight years.

Civil and environmental liability (for environmental damage)

In relation to the limitation period for civil and environmental liability (for environmental damage), there is the problem of the latency period for the causes of environmental damage, since this damage can manifest itself long after the fact or facts at their origin. As a result, the applicable legislation came to establish the extension of what would be the ordinary limitation period; it determined that liability for damage caused by any emissions, events or incidents that happened more than 30 years ago is time-barred.

Moreover, this liability is not applicable to damage cause by any emissions, events or incidents prior to 1 August 2008 or to damage caused by any emissions, events or incidents that occurred after 1 August 2008 due to a specific activity performed or concluded before that date. In these cases, it will be necessary to resort to the

traditional civil liability rules of the Portuguese Civil Code. Under these rules, non-contractual civil liability expires three years from the date the injured party became aware of their right, and contractual civil liability expires in 20 years.

Criminal liability

The statute of limitations for crimes depends on the applicable penalty and the specific crime in question. In the worst-case scenario, criminal liability expires after 15 years from the commission of the act.

5.2 Types of Liability and Key Defences

Types of Liability

The violation of legal and/or regulatory provisions in environmental matters might constitute an administrative offence, entail the civil liability or the environmental liability of the offender, or be considered an environmental crime.

Administrative offence liability

This type of liability is the most common way to punish behaviour that violates environmental legal provisions.

In fact, most breaches of environmental law, as well as of the provisions established in the permits, trigger environmental administrative offences. Administrative offence proceedings can lead to the application of fines of between EUR2,000 and EUR5 million, depending on the type of offence, its perceived seriousness and the infringer's degree of guilt. In the case of presence or emission of one or more dangerous substances that seriously affect health, the safety of people and property, and the environment, the above range of fines can be doubled. Additionally, in the most serious situations, apart from the fines, ancillary sanctions may be applied, such as a ban on carrying out the activity or the loss of public subsidies.

Civil liability

If an environmental offence causes damage to a third party, the perpetrator is liable to pay compensation intended to repair the damage caused to people and property.

Environmental liability (for environmental damage)

This type of responsibility arises from Directive No 2004/35/EC of the European Parliament and of the Council. It is designed to repair the damage caused to the environment itself, specifically, significant damage caused to protected species and natural habitats, water resources and soil. Causing an environmental damage, or an imminent danger of such damage, while pursuing any activity carried out in the context of any economic activities – regardless of its public or private nature, profitable or not – might lead to the liability of the perpetrator. Liability for environmental damage implies the obligation to implement preventive and repair measures, and to bear the associated costs.

Criminal environmental liability

The Portuguese Criminal Code includes four environmental crimes:

- damage to nature;
- pollution;
- activities that are dangerous for the environment; and
- pollution that causes a common danger.

In the worst-case scenario, environmental crimes may lead to the application of a five-year custodial sentence. In case of death or offences involving physical injury, both the minimum and maximum thresholds are increased by one-third.

For the crimes they commit, legal persons and similar entities are subject to the main penalties of a fine or of dissolution. The minimum and maximum limits of the fine applicable to legal

persons and similar entities are determined with reference to the term of imprisonment provided for natural persons. For legal persons and similar entities, one month's imprisonment corresponds to ten days' fine. Each day's fine corresponds to an amount between EUR100 and EUR10,000, which the court sets according to the economic and financial situation of the convicted person and its costs regarding employees.

Limits and Conditions on Civil, Environmental and Administrative Liability

Civil liability

Civil liability is traditionally dependent on meeting five requirements, specifically:

- the fact;
- the illegality;
- the fault (in cases where the liability is not strict liability);
- the damage; and
- the causal connection between the fact and the damage.

These conditions are cumulative, so the failure to meet any one of them is sufficient for there to be no liability.

With regard to the causal connection and fault, there are some specifics in relation to the traditional civil liability rules to bear in mind. Under the general civil liability rules, proving the causal link between the fact and the damage depends on greater certainty, on adequate causality. However, in this kind of civil liability, the assessment of the evidence of the causal link is based on a criterion of likelihood and probability that the harmful act can cause the damage in question.

Concerning guilt, it should be noted that, for some economic activities, this type of responsibility is applicable regardless of the existence of guilt or intent. Moreover, if several persons are liable, all are jointly and severally liable for the damages, even if one or more are at fault, without prejudice to the correlative right of recourse that they may exercise reciprocally. When it is not possible to individualise the degree of participation of each of the responsible parties, they are presumed to be liable in equal shares.

Environmental liability (for environmental damage)

Environmental liability is traditionally dependent on meeting the same five requirements as listed above in 'Civil liability'; these conditions are likewise cumulative.

With regard to causation and fault, there are some specifics in relation to the traditional civil liability rules to bear in mind. Under the general civil liability rules, proving the causal link between the fact and the damage depends on greater certainty, on adequate causality. However, in this kind of liability, the assessment of the evidence of the causal link is based on a criterion of likelihood and probability that the harmful act can cause the damage in question.

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Another important issue is that the operator is not obliged to pay the costs of preventive or restorative measures when it can demonstrate that there was no intention or negligence on its part and that the environmental damage was caused as a result of an event expressly permitted by the issued licences or that it was dam-

age that, at the time, given the state of scientific knowledge available, was not likely to occur.

Administrative offence liability

Administrative offence liability is based on the same five requirements as for civil liability. However, in this case, it is always necessary to establish the guilt of the perpetrator. Therefore, in this respect, the same logic that underlies civil liability applies, in the sense that the failure to meet any one of those requirements is sufficient for there to be no liability.

Administrative offences correspond to a social and administrative censure whose reason to exist is the subsidiarity of criminal law and the need to sanction illicit behaviour that is subject to a lighter social disapproval. This is the reason why the administrative offence liability framework, although with many specifics of its own, is, in a certain way, close to criminal law.

In a purely exemplary exposition, it is important to underline that only the fact described and declared to be subject to a fine by a law prior to the time it was committed is punishable as an administrative offence. Moreover, if the law in force at the time the act was committed is subsequently changed, the law that is more favourable to the defendant will apply.

The fine may be specially reduced when there are circumstances prior, subsequent to, or contemporaneous with, the commission of the administrative offence which markedly reduce the unlawfulness of the act, the culpability of the perpetrator, or the need for the fine. In these cases, the minimum and maximum limits of the fine are reduced by half.

In some circumstances, voluntary payment of the fine at the minimum amount or with a 25% reduction is allowed.

This kind of liability is also subject to a limitation period, as referred to above, regarding historic environmental incidents.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

Corporate Liability

Administrative offence liability

As far as administrative offences are concerned, legal persons are liable if the damaging activity is attributable to them. The general rules specifically state that legal persons or equivalent are responsible for administrative offences committed by their bodies in the performance of their duties.

Civil liability and environmental liability (for environmental damage)

Regarding civil liability and environmental liability, legal persons are liable if the damaging activity is attributable to them.

Criminal liability

Legal persons or equivalent are liable for environmental crimes when they are committed:

- on their behalf and in the collective interest by persons occupying a leadership position; or
- by whoever acts under the authority of the persons referred to in the preceding paragraph, by virtue of a breach of their duties of vigilance or control.

It is understood that the bodies and representatives of the legal entity and whoever has the authority to exercise control over its activity occupy a leadership position.

The criminal liability of legal persons and similar entities is excluded when the agent has acted

against express orders or instructions from those in charge.

This criminal responsibility of the legal person does not exclude the individual liability of the actual perpetrators, nor does it depend on their liability.

6.2 Shareholder or Parent Company Liability

Administrative Offence Liability

Given the legal provisions of the framework law for environmental administrative offences, it is not clear that this type of liability cannot also extend to shareholders.

Civil Liability and Environmental Liability (for Environmental Damage)

Regarding civil liability and environmental liability, if the operator is a commercial company that is in a group or control relationship, the environmental liability extends to the parent or controlling company when there is abuse of legal personality or fraud against the law.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

Environmental Administrative Offences

Directors, managers and other persons who hold, even if only de facto, management position in legal entities, even if irregularly constituted, and any other similar entities, are responsible on a subsidiary level:

- for fines imposed for infractions for acts that took place during the period they held their positions, or for previous acts when it was their fault that the company's assets or the legal person became insufficient to pay the fine;
- for fines due for previous acts when the definitive decision to apply them is notified during the term of office and the failure to pay is attributable to them;
- for the procedural costs resulting from the proceedings brought under the Framework Law for Environmental Administrative Offences.

If there are several individual persons responsible for the wrongful acts or omissions that result in the insufficiency of the assets, their responsibility is joint and several.

Civil Liability and Liability for Environmental Damage

When the harmful activity is attributable to a legal person, the obligations arising from the Legal Framework on Liability for Environmental Damage are jointly and severally levied on its managers, directors or persons with leading functions.

Environmental Crimes

Without prejudice to the right of recourse, persons occupying a leadership position are liable on a subsidiary basis for the payment of fines and compensation for which the legal person or equivalent entity is convicted, in relation to crimes:

- committed during the period they held those positions, without their express opposition;
- committed previously, when it was their fault that the assets of the legal person or equivalent entity became insufficient to pay the fine in question; or
- committed previously, when the final decision to apply them has been notified during the period they held their position and the failure to pay is imputable to them.

If there are several individual persons responsible under these terms, their responsibility is joint and several.

7.2 Insuring against Liability

Directors' and officers' liability insurance may include administrative, civil and environmental liability, even if this is achieved by negotiating tailor-made insurance with the insurer. Typically, such insurance covers civil liability and administrative liability. Environmental liability is not normally included in standard insurance, but it can be negotiated.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability

As referred to in **5.1 Liability for Historical Environmental Incidents or Damage**, liability fall upon the operator to which the activity that harmed the environment is attributed. Therefore, financial institutions or lenders are not, in principle, liable for the offences the operator commits.

The Legal Framework on Liability for Environmental Damage determines that some operators (depending on the activity they carry out) are obliged to set up one or more financial guarantees of their own, which are autonomous, alternative or complementary to each other, that enable them to assume the environmental liability inherent to their activity.

Financial guarantees can be constituted by taking out insurance policies, obtaining bank guarantees, participating in environmental funds, or constituting own funds reserved for this purpose. If the financial guarantee is constituted through bank guarantees, the financial institution will be liable under the terms established in the guarantee.

8.2 Lender Protection

Any liability of the financial institutions can only be safeguarded contractually. Specifically, in the case referred to above, the limits of the financial institution's liability will be stated in the terms of the bank guarantee.

9. CIVIL LIABILITY

9.1 Civil Claims

The injured party may bring an action for damages based on civil liability whenever someone offends their rights or interests by damaging any component of the environment. This is to say that the act committed by the agent is unlawful and, as such, gives rise to civil liability if it violates another person's subjective right – such as the right to property – or if it violates any legal provision intended to protect the interests of others.

In these cases, the agent is obliged to repair the damage resulting from the offence.

9.2 Exemplary or Punitive Damages

The Portuguese legal system does not expressly provide for punitive damages.

Doctrine and case law have resorted to this figure in certain cases when proven useful and, for this purpose, they use the existing legal provisions in which it may be framed.

The concept of punitive or exemplary damages is imported from Anglo-Saxon law and aims to recognise that civil liability has a sanctioning or punitive purpose.

Traditional Portuguese doctrine has accepted the sanctioning purpose of civil liability, but only in an ancillary or secondary way, and always subordinated to the reparatory function. Doctrine bases this sanctioning or repressive purpose on some legal provisions of the Portuguese Civil Code, such as the one that grants the judge the right to reduce compensation equitably in the event of mere fault, considering the degree

of culpability of the agent, the economic conditions of the agent and of injured party and other circumstances of the case. Other provisions that reflect the punitive or repressive nature of civil liability are the one which determines that the distribution of burden of payment of compensation among the various persons responsible is to be in proportion to each one's degree of fault, and the one which determines that the level of compensation, when the injured party is at fault, is to be based on the gravity of the fault of both parties.

Although Portuguese case law has not accepted the concept of punitive damages, in certain specific cases it has attributed to the compensation of non-material damage, a mixed nature of repairing the damage suffered by the injured party and reproving or punishing the conduct of the agent. It does this by calculating the amount of the compensation for non-material damage, taking into account the degree of fault of the agent and its economic situation, and decreasing or excluding the compensation in cases of fault on the part of the injured party.

This means that, in Portugal, the courts do not exactly award exemplary or punitive damages, but they do use the legal provisions at their disposal to accentuate, depending on the circumstances of the case, the punitive or sanctioning function of civil liability. They do this, for example, by awarding higher compensation for non-pecuniary damage in cases where the degree of illegality and the degree of culpability of the agents is very high.

9.3 Class or Group Actions

Popular Actions

The Constitution of the Portuguese Republic recognises the fundamental right to bring a popular action, integrating it in the scope of the rights, liberties and guarantees of political participation. The Constitution expressly lists the preservation of the environment as an asset that can be protected by popular action. This means that, by means of popular action, any citizen, as well as certain associations and foundations can access the justice system to protect legal situations that are insusceptible of individual appropriation, as is often the case with environment-related matters. This protection can be exercised both in the judicial courts and through the administrative procedure themselves.

Institutional parties can bring popular actions and it is important to emphasise the role of NGOs (ONGAs), which have been granted broad legal standing in environmental matters. NGOs are, in principle, exempt from paying court fees and benefit from a 50% exemption from the fees due for access to environmental information.

Whether or not they have a direct interest in the legal action, NGOs have legal standing to:

- bring the legal actions necessary to prevent, correct, suspend and put an end to acts or omissions of public or private entities that constitute or may damage the environment*;
- bring, under the terms of the law, legal actions to enforce civil liability in relation to the acts and omissions referred to above*;
- take legal action against administrative acts and regulations that violate the legal provisions that protect the environment;
- lodge complaints or accusations, act as interested parties (*assistentes*) in criminal proceedings for crimes against the environment, and monitor administrative offence proceedings, when they so request.

9.4 Landmark Cases

In matters of noise, there is case law in Portugal deciding, in general terms, that the rights of the residents should prevail over the rights of the operators of economic activities, and this may happen even if licensing was valid and if

noise limits are not exceeded. Consequently, in such circumstances, operators may be obliged to adopt mitigation measures in order to reduce the noise produced.

Specifically, there is case law in Portugal, dated 11 September 2012, in which the Lisbon Court of Appeal (Case No 2209/08.0TBTVD.L1-1) upheld the right of inhabitants living in the vicinity of a wind farm to have wind turbines removed or their operation suspended at certain time of the day, on the grounds of noise emission and/or the shadows from the wind turbines.

The Portuguese courts have taken the view that, in these situations, there is a collision of rights at issue between the right to rest, sleep and tranquillity of the residents, and the economic right of the wind farm whose wind turbines emit noise and/or shadow to operate as a business.

In the abstract, it is considered that the rights of the residents should prevail over the rights of the economic operator. However, even if the economic activity is licensed, it has been held that this assessment should be made taking into account each specific case. Therefore, the residents are required to demonstrate definitively that the location in question is their home and that they are truly affected by the noise in question.

Concerning the right to civil compensation, Law No 90/88 of 13 August 1988 specifies that the state is liable for compensating all citizens who are directly harmed by actions of Iberian wolves (*Canis lupus signatus Cabrera*). In this context, the Central North Administrative Court decided, on 22 February 2013 (Case No 00242/05.2BEMDL), that when Iberian wolves kill animals owned by citizens, this damage is eligible for compensation by the state, as is any emotional damage suffered by the owners. This is because the above law does not differentiate between property damage or personal injuries, although the complementary legislation in force at the time of the decision (Decree Law No 139/90) referred to damage to animals. This complementary legislation was repealed in the meantime by Decree Law No 54/20063, which now provides much more detailed rules on compensation for damage to animals.

Furthermore, a recent decision from the Central North Administrative Court of 13 March 2020 (Case No 00036/06.8BEPNF) established that the operation of a waste water treatment plant under normal conditions that is licensed for this purpose cannot be grounds to award compensation to people living nearby. The court stresses that aim of these plants is to prevent the contamination of soils and water, and that a public interest objective of this type will prevail over minor inconveniences (which are not even worthy of legal protection) that were eventually suffered by those people. As such, it does not trigger the right to a compensation.

From another perspective, in order to protect a bat colony, the Central South Administrative Court decided, in a protective order (Case No 06793/10), on 31 March 2011, that a windmill in a wind farm could only be constructed and installed at certain times of the day and in certain months of the year. Moreover, its operation could only occur at a certain speed and in specific time periods. This demonstrates that the courts decide on environmental matters regardless of the presence of other legal institutes.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability

It is possible to use indemnities or other contractual agreements to transfer liability – for exam-

ple, from a given date onward – to another party. These transfers of responsibility are subject to the general principles of law, such as good faith and proportionality.

These types of contracts do not have any binding effect on regulators, who will always take into consideration the party responsible for the activity that harms the environment. This follows the accountability and polluter pays principles. In other words, the regulator will always hold the perpetrator of the damage liable, regardless of what is contractually stipulated. The contracts might, however, have an influence on the regulators, especially in a scenario where there is continuation of the damaging activity and where it may be difficult to locate in time the fact that gave rise to the damage and establish a causal link with an operator.

10.2 Environmental Insurance

Environmental insurance is available in the Portuguese legal system. In fact, in some cases, for operators that carry out certain activities, it is mandatory to have a financial guarantee, which can be provided by taking out environmental responsibility insurance.

This type of insurance usually covers multiple risks arising from pollutant discharges in an environmental component and from the activity of the insured:

- costs for the investigation, removal, remediation, monitoring and elimination of contamination of soil, surface water and groundwater;
- damage to protected species and natural habitats, including all biodiversity damage, water damage and soil damage for which the insured is legally responsible, and which gives rise to repair costs;
- physical injury, illness, serious mental disturbance suffered by any person, including death resulting from this;
- physical injury to or destruction of the tangible material property of any third party;
- loss of use, without diminution in value, of tangible property of any third party;
- risks relating to transportation, including movement of cargo to the final place of delivery by the insured, including loading and unloading operations, trips to collect cargo and trips after cargo delivery;
- reasonable and necessary legal fees, costs and expenses incurred by or on behalf of the insured in the investigation, defence, settlement or appeal of any claim;
- expenses arising out of reasonable measures taken at the initiative of the insured in good faith to prevent environmental damage.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

There are no specific laws concerning contaminated land. Although a draft law was under discussion in 2015, it ended up not being published. Nevertheless, the prevention of emissions into the soil is covered by environmental procedures, such as environmental licensing (Decree Law No 127/2013) and the environmental impact assessment (Decree Law No 151-B/2013). Moreover, Decree Law No 147/2008, determines that environmental damage, which include damage to the soil, must be communicated to the appropriate authorities within 24 hours. For further details concerning self-reporting obligations, please see Section **15. Environmental Disclosure and Information**.

Under Decree Law No 102-D/2020, every operation for the remediation of the soil requires a specific licence and all prevention and remediation costs are supported by the operator.

Considering the absence of regulation on this matter, the APA recommends that, in the case of transfer of property on land where potentially polluting activities were carried on, or where there are signs of contamination, a technical quality assessment be carried out.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

The development of the key policies to combat climate change is based on fundamental principles of environmental law, particularly the principle of sustainable development, the "polluter pays" principle and the principle of intergenerational solidarity.

Specifically, to combat climate change, the goals established are a reduction in greenhouse gas emissions, a strengthening of the capacity for carbon dioxide (CO_2) sequestration and adaptation to expectable climate change impacts.

There are important planning instruments to achieve these goals, as follows:

- the European Climate Law (Regulation (EU) No 2021/1119) establishing the framework for achieving climate neutrality in the European Union by 2050, which entails a zero balance between the emissions of greenhouse gases and their removal;
- the *Plano Nacional Energia e Clima 2030* (approved by Council of Ministers Resolution No 53/2020), which arose in the context of the Regulation of the Union's Governance for Energy and Climate Action (Regulation (EU) No 2018/1999), establishes policies for decarbonisation of the economy, energy efficiency and energy transition, as well as goals by sector to reduce greenhouse gas emissions;
- the *Roteiro para a Neutralidade Carbónica 2050* (published by Council of Ministers Resolution No 107/2019), which aims to reach carbon neutrality by 2050 – ie, a neutral balance between the emissions of greenhouse gases and carbon sequestration;
- the *Estratégia Nacional de Adaptação às Alterações Climáticas* (approved by Council of Ministers Resolution No 56/2015, and extended until 31 December 2025 by the Council of Ministers Resolution No 53/2020), which seeks to adopt solutions to adapt various sectors to the effects of climate changes (eg, agriculture, forests, transport);
- the *Programa de Ação para a Adaptação às Alterações Climáticas* (approved by Council of Ministers Resolution No 130/2019), created for the specific implementation of the adaptation measures set out in the *Estratégia Nacional de Adaptação às Alterações Climáticas*; and
- the *Roteiro Nacional para a Adaptação 2100*, still under development, which will carry out an evaluation of Portugal's vulnerability to climate change and will define the guidelines to plan the territorial adaptation and adaptation of the different sectors to climate change.

Furthermore, there is legislation that addresses the emission of greenhouse gases and seeks to achieve the established goals, namely:

- Decree Law No 12/2020, which establishes the framework for the trading of licences for the emission of greenhouse gases, along with Decree Law No 93/2012, which provides such a framework concerning for activities;
- Decree Law No 145/2017 incorporates into Portuguese law Regulation (EU) No 517/2014, and aims to reduce the emission of greenhouse gases, by regulation – for example, of the use of equipment containing such gases.

12.2 Targets to Reduce Greenhouse Gas Emissions

The European Climate Law (Regulation (EU) No 2021/1119) defines that climate neutrality should be reached by 2050. In order to achieve this purpose, a goal is set for 2030 to reduce greenhouse gas emissions at the EU level of at least 55% (compared to the 1990 levels).This law followed the Green Deal, approved in December 2019, and is an increase to previous targets, which were to reduce greenhouse gases by at least 40% until 2030.

In line with this goal, "Fit for 55", a package of proposals was recently published through the Communication from the Commission, dated 14 July 2021. It proposes a comprehensive set of measures to ensure that greenhouse gas emissions are reduced to at least 55% by 2030 (compared to 1990 levels). These proposals are to be inserted into legal texts, which may affect the Portuguese legislation. Other legislation is expected to be published in the meantime that will lead to changes to these goals.

In Portugal, the *Plano Nacional Energia e Clima 2030* – which was approved before the new European Climate Law was enacted – establishes that the reduction of the emission of greenhouse gases has to be between 45% and 55% (by reference to 2005). It also defined the following goals by sector for the reduction of greenhouse gas emissions, by reference to 2005: 70% for services, 35% for the residential sector, 40% for transport, 11% for agriculture and 30% for the waste and industrial waste water sector.

The *Roteiro para a Neutralidade Carbónica 2050* determines that carbon neutrality can only be reached by 2050, if greenhouse gas emissions are reduced between 85% and 90% (by reference to 2005), along with the creation of carbon sinks.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Decree Law No 266/2007 determines that employers must resort to all available means to ensure the exposure of workers in the workplace to dust from asbestos or materials containing asbestos is reduced to a minimum and, in any case, is not above the exposure limit value (0.1 fibre per cm^3, considering a daily period of eight hours).

Furthermore, the removal of material containing asbestos – as well as the wrapping, transportation and management of the corresponding construction and demolition waste – are subject to specific rules (Ministerial Order No 40/2014) and may only be performed by duly licensed waste-management operators.

14. WASTE

14.1 Key Laws and Regulatory Controls

Decree Law No 102-D/2020, which entered into force on 1 July 2021, is one of the key laws governing waste in Portugal, setting out the general rules on waste management. It also establishes the main principles and rules on the attribution of liability for waste management, sets out the applicable economic and financial framework, and details the planning for prevention and management of waste. This legislation also covers waste transport and establishes rules on urban waste, construction and demolition waste, and dangerous waste. Finally, it sets out the main provisions on the licensing procedures for waste management operators.

In connection with this legislation, Decree Law No 152-D/2017 provides the framework for the management of the following specific waste flows:

- packages placed on the market and their waste;
- certain types of oil placed on the market and their waste;
- tires placed on the market and their waste;
- electric and electronic equipment placed on the market and its waste;
- batteries and accumulators placed on the market and their waste;
- vehicles and end-of-life vehicles.

This Decree Law establishes that liability for the management of the waste produced by these products falls upon the product's producer, the packager and the supplier of service packages, which must resort to an individual or integrated system in order to ensure proper management.

14.2 Retention of Environmental Liability

When a producer or a consignor of waste delivers it to a third party, notably to a waste management operator, to an entity responsible for the systems for the management of specific waste flows, or to a municipal/multi-municipal waste management system, liability for waste management is extinguished. However, if it is delivered to a waste management operator, the producer or consignor must make sure that this operator is duly licensed to treat the specific waste and to perform the applicable waste management operations. If it is not, it can be considered that the producer or consignor has committed an environmental offence, punishable with fines and ancillary sanctions.

Evidence on the proper management and circulation of waste can be found in the documents that waste producers, transporters and final recipients are obliged to fill in, such as electronic waste notes, which must accompany all waste transport operations and set out information on the above players and the waste. Likewise, waste producers must fill in and submit annual waste tables (*Mapa Integrado de Registo de Resíduos*) to inform APA about the waste produced and to whom it was delivered for transport and treatment.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Concerning goods in general, producers must assure that the owners of the goods can obtain the necessary information about the possibility of reusing the goods and their components and about their dismantling, as well as information on substances of high concern.

On the other hand, the management of the specific waste flows listed in **14.1 Key Laws and Regulatory Controls** is subject to the legal principle of the enlarged liability of the producer of goods. This means that the producers are liable in respect of the management of the waste arising from the goods they produce. Specifically, in order to take on such liability, they must sign up to a system created for the management of such waste flows, in which they transfer their liability to the manager of the system by paying a financial contribution. Instead, they can adopt an individual system by carrying out the waste management operations themselves, subject to the prior approval of the APA.

In this context, the production of certain goods is subject to legal requirements. For instance, secondary raw materials obtained from the recycling of packages must be incorporated, whenever possible, into the production of packages, and electrical and electronic equipment must be designed to ease its dismantling and the recovery of its waste, components and materials. The producers of this equipment must also do so bearing in mind the goals of resources efficiency, the reduction of dangerous chemicals products and the durability of the products. The producers of batteries and accumulators must also, among

other requirements, design them in order to progressively contain less dangerous substances (by replacing, for instance, heavy metals such as mercury, cadmium and lead).

Regarding take-back, if the producer of the tires or of the electrical and electronic equipment is simultaneously the seller to the final user, it is obliged, in some circumstances, to take back the waste arising from such goods, at no cost. If the producer is not the seller to the final user, it must provide for the creation and implementation of a collection grid and pay the corresponding costs.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements

When it comes to the self-reporting of environmental incidents or damage to regulators, Decree Law No 147/2008 determines that, in the case of an imminent threat of environmental damage, operators are obliged to immediately inform the competent authorities about the occurrence. They must also provide information about the mandatory prevention measures that were adopted. Furthermore, if environmental damage occurs, this fact must be communicated within 24 hours to the competent authorities. In fact, it is usual for environmental licences to mention these communication obligations, which are preferably sent by electronic means. All prevention and remediation costs are paid by the operator.

Concerning information to the public, the competent authorities must inform health authorities about any imminent threats of environmental damage that could affect public health, but no general warnings to the public are required, unless it is considered a necessary prevention measure.

15.2 Public Environmental Information

The public can obtain environmental information from public authorities and bodies. Law No 26/2016 provides that all people have the right to access administrative documents (including environmental documents) by consulting, reproducing or being informed of the existence and content of any such documents. Applicants do not have to provide a specific interest to exercise this right. However, in the case of documents containing the company's identification, access can only be provided if public interest reasons prevail and only if the desired information concerns emissions into the environment.

Entities Obliged to Disclose Environmental Information

This legal framework applies to all public entities. It also applies to private associations or foundations in which public entities exercise powers of management control or appoint, directly or indirectly, the majority of the members of the administrative, management or supervisory body. Furthermore, it applies to entities responsible for managing public archives and entities actually performing an administrative role or exercising public powers. This includes entities holding concessions or delegations of public services. It also covers documents held or produced by any entities with legal personality that have been created to satisfy in a specific manner needs of general interest, provided they are not industrial or commercial in character, and their activity is mainly financed by any of the entities already mentioned and they are managed by any of the entities referred to so far, whose administrative, management or supervisory bodies are composed, as to more than half, by members appointed by any of the above-mentioned entities.

Moreover, this framework applies to any natural or legal person, of a public or private nature, that belongs to the indirect administration of the organs or entities referred to and has attributions or powers, exercising public administrative functions or providing public services relating to the environment. This includes public corporate entities, invested companies ("*empresas participadas*") and concessionary companies. It also includes any natural or legal person that holds or materially maintains environmental information on behalf or on the account of any of the bodies or entities referred to. Finally, even though they no longer fall within its subjective scope of application, this law still applies to entities that meet the requirements referred to at an earlier time, in relation to the documents corresponding to that period.

The public can also be informed of environmental issues (and participate) during the public consultation periods – please refer to **3.2 Environmental Permits.**

15.3 Corporate Disclosure Requirement

Environmental Information from Companies

If companies are subject to environmental rules, they may be obliged to disclose environmental information in three different ways, as follows.

- To the general public, by making information available on their websites or in their premises. For instance, the legislation on the prevention of major accidents (Decree Law No 150/2015) obliges operators to do this.
- To public bodies, which will analyse it and provide conclusions to the company only. In this regard, Decree Law No 39/2018 requires that operators causing air emissions have to monitor them (usually twice a year) and, subsequently, send the corresponding results to the APA or the CCDR for them to ascertain whether operators are in compliance with the limits for air emissions (and other legal requirements). Similar obligations to report the results of self-monitoring are established in the Water Law Regulation, Decree Law No 226-A/2007.
- To public entities that are obliged to, subsequently, make the information available to the general public. For example, following the requests to obtain an environmental licence (Decree Law No 127/2013 of 30 August 2013) or the ones within the environmental impact assessment procedure (Decree Law No 151-B/2013), the competent entity must disclose information on it through its website.

Specifically on annual reports, if companies engage in activities under Decree Law No 127/2013, they are required to send an annual environmental report to the APA, which must first be confirmed by a certified entity, to demonstrate compliance with all conditions set by the environmental licence.

The management report that companies must prepare under corporate legislation must include, as far as necessary to understand the evolution of the business, the company's performance or position, non-financial information, including environmental matters. In fact, for large companies, which, by the closing of the balance sheet, employ an average number exceeding 500 workers during the financial year, this is mandatory (Decree Law No 262/86).

16. TRANSACTIONS

16.1 Environmental Due Diligence

It is very common to now include an analysis of environmental matters in the scope of the due diligence exercises that precede M&A, finance and property transactions. Moreover, it is also usual to complement the legal due diligence with a technical due diligence.

Some of the environmental issues analysed during a due diligence are:

- environmental impact assessment;
- environmental licence;
- environmental liability;
- waste management;
- specific waste flows;
- contamination of soils and water lines;
- equipment containing ozone-depleting substances;
- equipment containing greenhouse gases;
- water supply;
- waste water.

16.2 Disclosure of Environmental Information

There is no express legal requirement that requires a seller to disclose environmental information to a purchaser. However, this obligation arises from compliance with the principle of good faith in the pre-contractual phase, which imposes duties of information that bind the parties to provide all the clarifications necessary for the honest conclusion of the contract.

17. TAXES

17.1 Green Taxes

The aim of green taxation is to penalise pollution and damage to the environment, reduce energy dependence from abroad, and encourage more sustainable production and consumption patterns. In doing so, green taxation reinforces the freedom and liability of citizens and companies, and promotes efficiency in the use of resources.

From a taxation perspective, there are several ways to pursue environmental sustainability:

- taxes to promote environmental sustainability;
- exemptions for certain persons or entities; and
- incorporation of environmental components in the calculation of tax.

Below is a purely illustrative list of some of these cases, that are currently in force.

Taxes that Promote Environmental Sustainability

- Waste Management Fee, which aims to encourage the reduction of waste production, stimulate compliance with national waste management targets and improve the performance of the sector.
- Water Resources Management Fee, which aims to compensate the environmental cost inherent in activities likely to have a significant impact on water resources.
- Carbon Tax, which is levied on sectors not included in the European Emissions Trading Scheme. This tax is indexed to the price of carbon in the ETS sector.
- Road Vehicle Tax (IUC) and Excise Duty (IEC), which seek to burden the taxpayers in proportion to the environmental cost they cause.
- Tax on light plastic bags.
- Tax on less energy-efficient light bulbs.

Exemptions

- Corporate Income Tax exemption for entities managing integrated systems for to manage specific waste flows, during the entire licensing period for the results which, during this period, are reinvested or used for the purposes legally attributed to them.
- Exemption of Property Transfer Tax and Stamp Duty on acquisitions for value of properties that fall within forest intervention areas.
- Vehicle Purchase Tax exclusion for non-motorised vehicles and exclusively electric vehicles or those powered by non-combustible renewable energies.
- Exemption from Road Vehicle Tax for non-motorised, exclusively electric vehicles or

those powered by non-combustible renewable energies.

Consideration of Environmental Components in the Calculation

- Consideration of energy efficiency and of the insertion in areas of urban regeneration in the calculation of Municipal Property Tax.
- A 50% reduction in the Municipal Property Tax rate when the property is exclusively used in the production of energy from renewable sources.
- Consideration of the particle emission level in the calculation of the Road Vehicle Tax.
- Deductible expenses in higher proportion to their nominal value, such as expenses of car-sharing and bike-sharing systems, with the acquisition of fleets of bicycles, with electricity and vehicular natural gas for vehicle supply, etc.
- The Road Vehicle Tax rates increase on petrol and diesel vehicles, according to CO_2 emissions.

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PLMJ is a law firm based in Portugal that combines a full service with bespoke legal craftsmanship. For more than 50 years, the firm has taken an innovative and creative approach to produce tailor-made solutions to effectively defend the interests of its clients. The firm supports its clients in all areas of the law, often with multidisciplinary teams, and always acting as a business partner in the most strategic decision-making processes. With the aim of being close to its clients, the firm created PLMJ Colab, its collaborative network of law firms spread across Portugal and other countries with which it has cultural and strategic ties. PLMJ Colab makes the best use of resources and provides a concerted response to the international challenges of its clients, wherever they are. International collaboration is ensured through firms specialising in the legal systems and local cultures of Angola, China/Macao, Guinea-Bissau, Mozambique, São Tome and Príncipe and Timor-Leste.

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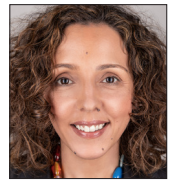

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