AVOSETTA QUESTIONNAIRE

ENVIRONMENTAL LIABILITY DIRECTIVE

Ghent, 1-2 June 2007.

I. Can you give some concise information about your national environmental liability system?

- Are there special provisions on civil liability for environmental damage?

Yes, there are. The most important provisions are contained in the Framework Environmental Law, adopted in April 1987, and in the Popular Action Law (*actio popularis*), of August 1995.

1. Background

Before the Framework Environmental Law and the Popular Action Law were adopted, the only provisions on civil liability were included in the 1966 Civil Code. There were mainly three sets of norm which were used for environmental purposes: norms on non contractual fault liability, on strict liability and neighbourhood norms.

1.1. Non contractual fault liability in the Civil Code

On non contractual fault liability the Civil Code sets the general principle according to which "anyone who, either intentionally or with mere fault, disregards illicitly someone else's right, or any legal norm designed for the protection of the rights of others, is obliged to compensate the injured for the resulting damage" (article 483).

In this case the compensation shall consist, as a first option, in the rebuilding of the previous situation (*status quo ante* article 562) and only when this is either impossible, or does not cover all the damages, or is too burdensome for the debtor, the indemnity is admitted (article 566) as a second best option.

1.2. Strict liability in the Civil Code

Since in Portuguese law strict liability is the exception and not the rule, it can only be used as grounds for a compensation suit in the few cases specified in the law.

The Civil Code sets five cases of liability for activities involving a considerable level of risk: liability of the committer (for the damages caused by the commissioner), liability of the State (for the damages caused by organs, agents or representatives), liability of the

animal owner (for the damages caused by the pet or cattle), liability of the owner of a vehicle (for the damages resulting from the use of the vehicle), liability of the responsible for an electric or gas installation (for the damages resulting from the use of the installation).

Although none of these activities deals directly with the environment, these norms can be given a broad interpretation in order to allow its use for environmental protection.

1.3. Neighbourhood restrictions to property in the Civil Code

According to these Civil Code provisions, any real estate owner can oppose to smoke, soot, vapour, smell, heat, or noise emissions as well as to the production of vibrations and any other similar fact coming from a neighbouring property, as long as such facts cause a substantial damage to the use of his property and do not result from the normal use of the neighbouring property (article 1346).

Besides, no real estate owner can build or keep in his property any works, installations or deposits of corrosive or hazardous substances if they are likely to cause noxious effects forbidden by law on the neighbouring property (article 1347, no.1).

In the case that the works, installations or deposits have been authorised by the competent authorities or the special conditions foreseen in the law for its construction or maintenance have been observed, the destruction of such constructions is allowed from the moment the damage becomes effective (article 1347, no.2).

In any case, an indemnity for the damage suffered is due (article 1347, no.3).

Finally, the real estate owner can dig mines, wells or excavations as long as he doesn't deprive the neighbouring properties from the necessary support to avoid collapsing or landslides (article 1348, no.1).

Neighbours shall receive compensations even when the necessary precautions have been taken (article 1348).

Again a broad interpretation of the concept of neighbour has proven to be useful when relying on these norms for environmental protection.

1.4. Other relevant aspects of civil liability in the Civil Code

To understand the national legal system concerning liability in the Civil Code one must be aware of some additional aspects.

a) In what concerns fault, it is judged according to the diligence of the *bonus pater familiae*. As a general rule, it's the plaintiff who has to give evidence of the defendant's fault (article 487).

b) Anyone not having understanding capacity is not liable for damaging acts he caused. It is, namely, the case of youngsters until 7 years of age, or of anyone suffering from mental

illnesses (article 488). It is, unfortunately, relatively usual to have mentally disabled people hired, seduced or convinced to practice some serious actions, which often assume criminal nature, like forest burning.

c) Immaterial (moral) damage can also be pleaded as long as the moral damage is serious enough to deserve legal protection. In case of death not only the victim's immaterial damage is to be considered but also the immaterial damage suffered by the victim's family (article 496).

d) In case there is more then one liable person the rule is solidarity (article 497).

e) When calculating the compensation not only the actual damage and loss is taken into account but also future damages and losses, as long as they are predictable (article 564).

2. Framework Environmental Law (1987)

2.1. Strict liability in the Framework Environmental Law

By the time the Law 11/87, of the 7th April, was adopted it was a rather revolutionary law, recognising, for the first time, the existence of strict liability for environmental damages: "there is an obligation to compensate, regardless of fault, whenever the agent has caused significant damages to the environment, by virtue of a specially dangerous action, in spite of the fact that applicable norms have been respected (article 41).

This is a particularly important disposition which has not been regulated by another law and therefore leaves the judge a large margin for discretion.

Additionally, those who develop activities involving a high level of risk for the environment, and classified as such, are obliged to subscribe a civil liability insurance (article 43).

2.2. Liability in general

In what concerns liability in general, including fault based liability, the Framework Environmental Law states that "the citizens, whose right to a healthy and ecologically balanced environment is being directly threatened or damaged, can ask, in the general conditions of the law, for the ceasing of the causes of violation and the respective indemnity" (article 40, no.4).

As we will see later on, the possibility to ask for compensation is also valid when the environmental threat or damage had its origin in an act of a public authority.

2.2.1. Prevention (of environmental damage)

It is clear that the author of an *actio popularis* can ask for preventive measures to avoid environmental damage before it happens. How that will be done, using which judicial instruments is still an unclear matter. In the wording of the law: "those who feel offended in their right to a healthy and ecologically balanced environment may ask for the immediate suspension of the damaging activity (…)" (article 42).

This norm is usually interpreted as suggesting the use of non specified interim measures to impose the defendant to abstain from a certain conduct.

2.2.2. Remedying environmental damage

The law still adds that "the municipalities and the citizens, who are affected by activities capable of impairing the use of environmental resources, have the right to receive compensations awarded by the entities responsible by the damages caused" (article 40, no.5).

3. The particular case of State liability

Apart from the environmental provisions, but applicable to the environment, is the forward-looking regime established by Decree-Law 48051, of the 21st November 1967 which determines a legal obligation to compensate individuals who suffered damage due to a State act, in the context of public management: "the State and every other public entity is liable for the offences of rights or legal norms aiming at the protection of the interests of others, when such offences result from illicit and faulty acts performed by their organs or administrative agents in the exercise of their functions and because of them" (article 2).

On the contrary, there is direct civil liability of the members of the organs and the administrative agents of the State when these ones exceed the limits posed by their functions or if they acted with deceit (*i.e.* intention to cause damage) (article 3). In this case there is solidarity between the State and the member of the public organ or the public agent (article 3).

According to this law, an illicit act is any juridical act that does not respect the legal norms, regulations or general principles applicable, as well as any material act which disregards either these norms and principles or the technical and common prudence rules to be observed (article 6).

Furthermore, it's important to say that this law establishes an early form of strict liability: the State is liable for "special and abnormal" damages resulting from the operation of "exceptionally dangerous" administrative services, objects or activities (article 8).

The only exception to this regime is *force majeure* and victim's fault.

Finally, the State is also liable for licit acts when these gave origin to "special and abnormal" burdens or damages of the individuals (article 9).

4. Popular Action Law (1995)

4.1. Introduction

Actio Popularis has been in the Portuguese Constitution since its adoption, in 1976, but it was not regulated by law until 1995.

In 1989, in the second constitutional revision, the short statement recognising *actio popularis* in article 49 ("the right to popular action is recognised in the cases and in the terms prescribed in the law") is replaced by a longer version, where the environment is admitted as one of the grounds for *actio popularis*.

Since then, a new rephrased and renumbered constitutional article (52 no.3) goes a little further in the shaping of *actio popularis*: "everyone has the right to popular action either personally or through the intervention of associations for the defence of the interests at stake, in the cases and terms prescribed in the law, namely the right to promote the prevention, the suspension or the judicial persecution of infractions against public health, environmental degradation, quality of life or cultural heritage degradation, as well the right to require the corresponding compensation to the victim or victims"[1].

4.2. Interests to be protected through *actio popularis*

Five years later, in 1995, *Actio Popularis* Law (Law 83/95 of the 31 August) was finally adopted giving full effect to the constitutional prevision.

In the wording of the law, *actio popularis* can be used for the protection *namely* of public health, environment, quality of life, consumer (of goods and services) protection, cultural heritage and public domain (article 1, no.2).

4.3. Judicial capacity

The core issue of *actio popularis* – judicial capacity - is dealt with in this law in very broad terms: those entitled to appeal to *actio popularis* are, on one hand, any citizens in full enjoyment of their civil and political rights and, on the other hand, associations and trusts having the scope of protection of the above mentioned rights regardless having or not a direct interest in the case (article 2, no.1).

[1] In 1997 the Constitution has undergone another revision whose effects have not yet been felt in the law. Two new grounds for popular action have been added to the 1989 listing: protection of consumer rights and protection of public goods belonging to the State, to the autonomous regions or to the local municipalities..

This idea is reinforced by the Law on Environmental Non Governmental Organisations - ENGO, (Law 35/98, of the 18th July) where it is clearly said that the ENGO are legitimated to go to court in the defence of environmental rights, regardless of having or not a direct interest in the demand (article 10).

Lastly, still according to the *Actio Popularis* Popular Action Law the municipalities can also use *actio popularis*, although in more limited terms, for the protection of the same interests when its holders reside in their area of competence (article 2, no.2).

Petitions based on *actio Popularis* can be presented both before administrative and before civil (judicial) courts. All forms of administrative actions and appeals on the grounds of illegality, as well as all forms of civil claims, are admitted (article 12).

4.4. Representation, scope and effects of the decision

In *actio popularis* the author represents, on his own initiative, all the other holders of rights and interests (article 14), as long as they did not exercise their right to exclude themselves in the terms explained further ono. This means that no mandate is needed and that the *res judicata* effects of the decision are applicable, besides the authors, also to all those other holders (article 19).

In order to allow the exercise of the self exclusion right, after the reception, by the court, of the author's request, all the other presumed interests holders are cited by means of announcements or of edicts. The announcements, to be used when the case is about general interests, shall be published in the mass media. The edicts shall be used when it's about interests with clear geographical bounds (article 15 no.1 and 2).

In any case there is no need to identify the addressees personally. Both in the announcements and in the edicts it's enough to refer them as holders of the interest at stake (public health, environment, quality of life, consumer protection, cultural heritage or public domain), mentioning a circumstance or a quality that is common to them, the geographical area of residence, or the group or community they belong to (article 15, no.3).

The final decision of the court is also published in two newspapers presumably read by those holders of rights or interests who did not exclude themselves and the costs of the publication are borne by the defeated party.

Those who do not intend to be represented by the author of the *actio popularis* must expressly declare so, in written, before the court, so that the decisions are not applicable to them (article 15, no.1 and 4). Therefore, all the courts' (administrative or civil) decisions have *res judicata* effects, not only on the authors but also on all those other persons who did not exclude themselves. There is only one exception to this rule: when the author's request is overruled for lack of evidence, the overruling decision is not generally binding (article 19, no.1).

4.5. Compensation

When the judicial decision grants a certain amount as compensation for damages for the disregard of interests, whose holders were not identified individually, the indemnity is arbitrated globally and no destination for this sum is stipulated in the judgement. The right to the compensation payment prescribes in scarce three years after the verdict and only

when this prescription happens does the law say that the Ministry of Justice shall use it for payment of attorney costs and for supporting the access to the law of those *actio popularis* authors who require this support. This solution is different from the "public civil action" in Brazil, where the money goes to a Fund to support environmental actions to reconstitute the damaged goods.

4.6. Legal costs

The authors of an *actio popularis* do not have to bear neither first costs nor any legal costs provided that the decision is favourable or at least partially favourable to them (article 20, no.1 and 2).

In the case that they loose the case they will incur in a payment of an amount of legal costs arbitrated by the judge between one tenth and half the normal legal costs to be paid in similar cases (article 20, no.3).

Only if the author is condemned for bad faith litigation the legal costs are calculated according to the general law (article 20, no.3).

4.7. Judicial powers

In an *actio popularis* judgement, the powers of the judge are quite far reaching namely in collecting evidences and in suspending the effects of the refuted act.

Firstly, the judge is not bound by the evidences presented by the parties but he can collect further evidence on his own initiative (article 17).

Secondly, even when the law does not grant suspensive effects to the appeal, the judge himself can do so, suspending the act or the decision under judgement (article 18).

4.8. Scope of demand

In a civil suit the author can ask for compensation (indemnity) based either on fault liability or on strict liability. In the terms of the law: "there is an obligation to compensate damages regardless of any fault whenever an offence of rights or interests protected by this law is the result of the agent's actions or omissions in the context or in the sequence of an "objectively dangerous" activity (article 23). Yet, there is no legal list or legal exemplification of "objectively dangerous" activities.

Should we consider activities submitted to environmental impact assessment or to integrated pollution prevention and control as objectively dangerous activities? Probably, but shouldn't other activities be considered as well? Maybe. This is still unsolved matter since there are no clear legal criteria.

In penal suits, the author of an *actio popularis* can also participate, as assistant[2], in spite of not being the victim of the environmental crime[3] (article 25).

[2] In Portuguese law the assistants, in a penal suit, have vast powers, namely to intervene during inquiry and instruction providing evidences and requiring diligences, to promote prosecution and make the suit proceed even when the Public Ministry did not charge the defendant and to apply from the decision when he is affected by it.

[3] There are two environmental crimes in the Penal Code: the crime for damages against nature and the crime of pollution. Both crimes are the result of contempt for environmental protection laws. In the case where there is no

- Are there other (administrative type of) special provisions and procedures concerning the prevention and remedying of environmental damage? Do they have a general nature or are they only applicable in one or another environmental field (e.g. soil pollution) ?

1. History

Until August 2006 there were no general administrative provisions on the prevention or remedying of environmental damage, although administrative law was the priority form of protection in environmental law, according to the Framework Environmental Law (article 47).

However, in each environmental field (water, air, waste, nature, noise, and so on) and related to each legal instrument (licensing, concessions, impact assessment, etc.), there were special provisions determining the preventive or sanctioning measures applicable thereon. These provisions had an administrative nature.

2. Administrative Law

On the 29th August 2006 a Framework Law on Infractions to Administrative Environmental Norms was adopted (Law 50/2006).

This law adapts the general regime applicable to all administrative infractions (Decree-law no. 433/82) to the specific needs of environmental infractions. In fact, the new 2006 statute constitutes a deviation from the classical system and it means, in practice, a shift towards a much *greener* regime.

There are five noteworthy features of the 2006 Framework Law on Infractions to Administrative Environmental Norms:

2.1. The broad scope of liability:

a) liability covers not only the individuals but also of companies, associations and collective persons with or without corporate entity[4], for the infractions committed by their organs, representatives or workers, under the company's name or on its account. In this case the partners, administrators or managers are responsible *in solidum*, together with the company, for the payment of the fine.

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law protecting a certain environmental feature, element or site, there can be no criminal conduct associated to its abuse. Article 278 of the Penal Code defines the crime of damages against nature: "anyone who, disregarding laws or regulations, eliminates fauna or flora individuals or destroys a natural habitat or exhausts resources from the underground, in a serious way, shall be punished with imprisonment up to 3 years or fine up to 600 days". Article 279 defines the crime of pollution: "anyone who, in an inadmissible way: a) pollutes the waters or soils or in any way degrades its qualities; b) pollutes the air using electrical appliances or installations, or c) causes noise pollution using electrical appliances or installations, specially machines or land, fluvial, maritime or aerial vehicles of any nature, shall be punished with imprisonment up to 3 years or fine up to 600 days".
Worthy of note is the fact that penal protection is the exception and administrative protection is the rule in environmental law, as the framework environmental law states in article 47.

[4] In french "avec ou sans personalité juridique".

Here are the amounts of the fees to be paid according to the subject and the seriousness of the infraction:

	Light infractions		Serious infractions		Very serious infractions[5]	
	negligence	deceit	negligence	deceit	negligence	deceit
Individuals	€500 to €2500	€1500 to €5000	€12500 to €16000	€17500 to €22500	€25000 to €30000	€32000 to €37500
Companies	€9 000 to €13000	€16000 to €22500	€25000 to €34000	€42000 to €48000	€60000 to €70000	€500000 to €2500000

b) liability also applies to the individuals working or rendering service in any collective persons in their quality of members of administrative organs as well as of responsible person for the direction or surveillance of areas where administrative infractions are committed. The sanction applicable to the directors or supervisors is almost the same as the one applicable to the direct authors of the environmental infraction.

c) violations can be sanctioned either if they were committed with deceit or with negligence, and any attempt to cause a serious or very serious infraction is also punishable.

2.2. The large inspection powers of the competent authorities.

Inspecting authorities (*maxime*, the General Inspection on the Environment and Territorial Planning) have free access to the establishments or places where the activities to be submitted to an inspection occur. They also have free right to inspect documents, books, registers or any other relevant elements and to get all the necessary information. In case of resistance or lack of collaboration, the police forces are called to remove such obstruction.

2.3. The vast set of preventive measures

Preventive measures can also be applied when it is necessary to protect health or the security of people and the environment.

These interim measures can assume the form of:

a) notification to stop the harmful activities;

b) suspension of certain activities;

c) equipment sealing;

d) seizure of equipments, licences, certificates and similar documents, animals or plants illegally possessed;

e) operation suspension;

f) preventive shutting down of the polluting unit;

g) resumption under certain conditions;

[5] These amounts are doubled in the case of hazardous substances that can cause serious damage to health or to the safety of people or the environment.

h) mandatory technical recommendations;

i) any other measures appropriate to prevent of environmental damage, to restore the previous situation (*status quo ante*) or minimize the harmful environmental effects.

If these measures are not fully respected by the defendant, the competent authorities determine the interruption of the electrical supply to the installation.

2.4. The severe sanctioning scheme

Besides the fees mentioned above, eleven additional sanctions can be determined:

a) activity interdiction;

b) loss of objects or values;

c) loss of public subsidies, grants or fiscal aids;

d) denial of the right to participate in conferences, fairs, or markets;

e) denial of the right to participate in public auctions or public competitions (for works, for supplying goods or services, for concession of public services or for permits)

f) shutting down the establishment dependent of an authorization;

g) permit suspension;

h) equipment sealing;

i) any other measures appropriate to prevent environmental damage, to restore the previous situation (*status quo ante*) or minimize the harmful environmental effects.

An original record, functioning in way similar to a criminal record although without criminal nature, is part of the sanctioning scheme.

The National Cadastre keeps record of the sanctions (main and additional), of the preventive measures and of the contents of the judiciary decisions pronounced.

The record is kept for five years in the case of serious or very serious infractions and for three years in light infractions.

2.5. The setting up of a Fund for Environmental Intervention

The Fund for Environmental Intervention gathers 50% of the revenues resulting from the environmental fees and shall be used for the prevention or reparation of damages resulting from activities harmful to the environment whenever the responsible persons can't redress such damages in reasonable time.

- Is your country party to the international conventions listed in the annexes IV and V of Directive 2004/35/EC?

Portugal has ratified

-the 1960 Paris Convention on civil liability, in 1977;

-the 1963 Complementary Convention, in 1984 and

- the 1962 Brussels Convention on civil liability of ship owners for nuclear vessels, in 1972[6].

Portugal has not ratified

-the 1963 Vienna Convention,

-the 1997 Convention on complementary indemnity for nuclear damage;

-the 1988 Protocol for the application of the Paris and Vienna Conventions.

- the 1971 Convention on civil liability for maritime transport of nuclear material.

II. Implementation of Directive 2004/35/EC

2.1. General status of implementation:

- Has Directive 2004/35/EC already been fully implemented?

No.

- If not, is it under way?

Probably yes, but no project became public yet.

- Have deficiencies of the Directive been identified during national discussions ?

There has been no consultation on the future implementing law.

2.2. General approach of implementation:

- Has your country reduced the level of environmental protection as a consequence of the Directive ?
- Did your country opted for a comprehensive piece of legislation to transpose the Directive? A Separate Act or a new Chapter of a General Act?
- Did your country opted for amending several pieces of legislation?
- Did your country opted for a combination of these 2 approaches?
- Did your country opted for a mere transposition of the minimum requirements of the Directive or introduced stricter provisions?

2.3. Options taken during the transposition process (please focus on innovations in your country legislation with respect to the text of the Directive)

2.3.1. Definitions

- How is the definition of environmental damage implemented?
- Did your country included in the notion 'protected species and natural habitats' habitats or species, not listed in the Annexes of the Birds and Habitat Directives? (art. 2.3 (c))

[6] Not included in the list of the directive but similar to the 1971 Convention on civil liability for maritime transport of nuclear material.

- Is land damage protected just in case of significant risk of adverse effect on human health?
- When is the conservation status of a natural habitat taken as favourable?
- What about the definition of "operator"? Are persons 'to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of the permit or authorization for such an activity or the person registering or notifying such an activity" included? (art. 2.6)

2.3.2. Scope

- Did your country opted for a double system of liability (strict and fault based) or for a more stringent regime as allowed by art 3.2?

2.3.3. Exceptions

- Which are the exceptions to the scope of the liability regime in your country? (art 4)
- What about the permit defence and the state of the art defence (art. 8.4)?

2.3.4. Preventive and remedial actions

- When are preventive (art 5) and remedial (art 6) actions taken by the operator?
- Which is the role of the competent authority?
- Is there any way for environmental organisations to participate in the negotiations between the polluter and the administration on the restoration ? Are these discussions public ?
- Are there provisions to develop in further details the common framework concerning the remedying of environmental damage (Annex II)?

2.3.5. Preventive and remedial costs

- Is there a system of security over property or other appropriate guarantees (art. 8.2)? Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?
- Is there a special provision to give effect to art. 8.3, *in fine* (appropriate measures to enable the operator to recover the costs incurred in cases the operator shall not be required to bear the cost of preventive or remedial actions)? Must the operator in such cases nevertheless take the remedial measures? Or are they taken by the authorities ?

2.3.5. Cost allocation

- Are there national provisions within the meaning of article 9?

2.3.6. Competent authority

- Which authority or authorities were designated for the purposes of article 11?
- Which remedies are available when preventive or remedial measures are imposed? (art. 11.4)

2.3.7. Request for action

- Which of the alternatives listed in art. 12.1. were chosen ?
- Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damager ? (art. 12.5)
- What type of review procedure is available under national law ? (art. 13)

2.3.8. Financial security

- How was article 14 implemented?

2.3.9. National law

- Were additional activities included in the scope of the regime? Were additional responsible parties identified?(art. 16.1)
- Are there special provisions to prevent a double recovery of costs in cases of concurrent action ? (art. 16.2)

2.3.10. Temporal application

- How was article 17 implemented?

2.3.11. Transboundary environmental damage

- How the system works in case of environmental damage in a transboundary context ?