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ENVIRONMENT AND LAND TRANSPORTATION LAW IN PORTUGAL

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QUESTIONNAIRE:

I. NATIONAL LEGISLATION - PORTUGAL

1. GENERAL QUESTIONS ON NATIONAL TRANSPORT POLICIES AND LAWS

Describe the key national legislation to promote a sustainable transport policy.

Being a peripheral country, national concerns related to transport in Portugal are not so much connected with crossings (by road or rail) as with local pollution and accessibility.

The legal document where the sustainability of transport policy is more strongly present is the national sustainable development strategy. One of the seven objectives of the strategy is to improve the international connectivity of the country, reducing the effects of the peripheral location. The aim is to create infrastructures to ensure the quick access to international transport networks. Ports, airports and high speed train are considered crucial for this purpose. For the moment, the crisis and the Troika Memorandum have suspended these projects.

One of the weakest aspects pointed out to the Portuguese transport system is the strong dependence of the mobility model on road transport. Traffic jams, noise and air pollution are the main problems.

In the big metropolitan areas the priority is to replace private by public transportation (regardless of the fact that the service is supplied by public or by private companies), reconverted to cleaner fuels (electric or biofuels). However, be it because of the strong symbolic connotation of personal road transport, be it because of the huge investments made in infrastructures without an economic payback, every year the public transport companies suffer great losses and accumulate a growing deficit.

In what concerns environmental protection associated with transport, air pollution and noise are the biggest concerns in Portugal.

There are some scarce municipal initiatives to promote car sharing and carpooling systems mainly in historic centers (ex. Évora, world heritage). In various cities some streets or even all the historic center are closed to traffic.

To what extent, environmental issues are taken into account in national transport policy? Does national transport policy set specific goals in order to reduce especially negative impacts from road traffic, e.g. emission goals, road traffic relocation on rail etc.?

Environmental issues are taken into account:

- **in the moment of transport infrastructure construction for which an environmental impact assessment is required.**
- **In the taxation of vehicles. Besides VAT, there are two taxes on vehicles: one is paid in the price in the moment of buying and the other is paid every year. Both taxes depend (at least in part) on the potential environmental impacts of the vehicle.**

The tax on vehicles is set according to the principle of fiscal equality, taking into account "the costs for the environment, for the road infrastructures and for the road accidents". Indeed the tax is based on the use of the car (transportation of persons or goods); on the cylinder capacity, measured in cubic centimeters (for a 1400cm3 car the amount is almost 2200€) ; and on the CO2 emissions, measured in grams per kilometer (for 200gr/km the amount to pay goes up to 2200€).

Similarly, the circulation tax also respects the principle of fiscal equality and takes into account "the environmental and road costs". The tax is based on the cylinder capacity (for a 1400cm3 car the circulation tax is 55,22€ per year) ; and on the CO2 emissions (for 200gr/km, it's 84,59€ per year). Added, the amount goes up to 139,81 per year.

In 2010 a new resolution on climate change was passed. It requires that each Ministry shall approve a low carbon plan with specific emission goals. For transport it hasn't yet been approved.

a. What are important constitutional law provisions?

There are very few references to transport policy in the Constitution. In the context of housing and urbanism policy, however, the existence of a transport network is mentioned as a condition of livability in urban areas. In fact, the State has the mission of drawing up and implementing a housing policy through the adoption of territorial development plans and urbanization plans which ensure the existence of an adequate network of transport and social facilities.

Nevertheless, one must not forget that one of the constitutional objectives of the environmental policy is to promote the integration of environmental objectives in various sectors of policy, thus, also in transport policy.

b. What are the most important legislative acts in the field of road and rail transportation?

There are several disperse legal acts in the field of road and rail transport. There isn't a framework law on any of the sectors.

For rail there is a decree law transposing the 2008 directive (changed in 2011) on interoperability of the rail system within the Community, a decree law transposing the 2004 directive on rail safety, another decree law on safety improvement; several decree laws and

ordinances on the transport of dangerous goods; a decree law on the legal regime applicable to the contract for rail passengers, luggage, portable volumes, pets, bicycles and other goods; a regulation on the calculation of passenger tariffs; several ordinances with special regimes for students, elderly people, judges, military, etc.; a law on the infractions and sanctioning regime, and several decree laws and ordinances on accident investigation. There were even various legal measures adopted in view of the high speed train which in the end looks like it is not going to pursue.

For road transport, the same legal dispersion is the main feature. There over 30 laws and decrees on heavy vehicles for passenger transport, almost as many for light vehicles for passenger transport (private or professional), around 30 for transport of goods, 6 on the digital tachograph, 15 on transport of dangerous goods.

2. INSTRUMENTS TO MANAGE AND REDUCE ROAD TRAFFIC

Is there a national debate on the sense and nonsense of traffic tolls and other instruments to manage and reduce road traffic, and if so, has this led to changes or corrections of the regulatory framework?

An interesting episode of the toll story in Portugal was the introduction of roads with exclusively electronic tolls. The creation of "electronic toll only" roads was presented as a great advance in the simplification of the citizen's life but in many cases it is a strong barrier to the free circulation of people and goods around the country.

The "official" presentation of the electronic toll system in the website www.portugaltolls.pt only shows the good part of the system.

> "The widespread implementation of the electronic toll system offers great advantages in terms of efficiency, convenience and safety, not only in the payments but also in the travels.
>
> The electronic identification of the vehicle is made at the moment of crossing the point of collection, dispensing the physical barrier of the toll, which ensures greater speed of circulation, improved road safety and reduction of environmental impacts in terms of CO2 emissions and noise.
>
> Circulation on these roads is subject to a system of toll collection using an exclusively electronic system without the possibility of manual payment on site. All lanes with electronic toll only are properly identified in advance, through a signpost".

However, the bad side of the electronic tolling system is that to benefit from these advantages the vehicle must be equipped with an electronic device which costs 30€ (and can only be used in one vehicle). The device can also be rented but the difficult part is to get it since it is only sold at certain places.

There are, of course, other alternatives that are all very cumbersome especially for someone who is in vacation and even the most obvious option isn't effective at all. In fact, paying afterwards is the natural decision for someone who arrives by car (mostly Spanish tourists) and didn't buy/rent the electronic device. However, he will soon find out that he can't pay on the same day because the information on the payment (how much he should pay) takes two or three days to get to the places where people are allowed to pay. Nevertheless, if the payment isn't done within the short delay given, the fine is higher than the toll.

There complexities of the system lead to large public protests and demonstrations and even to terrorist attacks directed at the electronic tolling equipment. Throughout the country, several electronic detectors installed in the 11 motorways that have the electronic tolling system installed were set on fire.

Since then, the regulatory framework hasn't changed.

a. Tolls and user charges

aa) To what extent is the Directive 1999/62 being implemented in the national legal systems?

It is implemented. There is a single circulation tax which has replaced, in 2008, the municipal tax on vehicles, the circulation tax and the truck tax.

The new circulation tax is paid once every year by the owners of all the vehicles having a Portuguese license.

- Are user charges and/or tolls being levied for the use of infrastructure?

Yes.

- If so, on which roads are they levied?

In the motorways and in some bridges. For motorways there are usually there are alternative free roads (increasingly used, due to the crisis).

- On which vehicles are user charges/tolls being levied (minimum weight etc.)?

With some exceptions, all vehicles have to pay. The exceptions are: vehicles owned by the government, municipalities, fire departments, ambulances, foreign diplomats, museum vehicles, funerary vehicles, taxis. Also disabled people are exempt.

Payment is proportional to the number of kilometers as well as to the height and number of axis of the vehicle.

There was a period when tolls weren't charged in some new motorways giving access to the main cities (Lisbon and Porto), for social reasons, but now they are all paying.

- In case of a toll, which costs, infrastructure costs and/or external costs are taken into account?

All costs are considered but the tolls don't fully cover all the costs. A large part is paid by the Government budget *via* compensation payments.

- Does national law fix a maximum amount for user charges/tolls (infrastructure costs/external costs)?

Yes.

- Is there a possibility for a mark-up for special infrastructure/regions?

Yes. The price per kilometer for the same vehicle is not uniform all around the country.

bb) Do you have a road toll system "other" than the one foreseen by Directive 1999/62, e.g. on other roads, transport of persons etc.?

I don't think so.

cc) To what extent external costs are being charged in the rail-sector?

I don't think so.

b. Emission Trading

aa) Does there exist an emission trading system on vehicles and how does it function?

No.

bb) If not, to what extent adaption of national law will be necessary in order to introduce an emission trading system on vehicles?

An important adaptation would be needed.

c. Transit Exchange System

aa) Does there exist a transit exchange system and how does it function?

No.

bb) If not, to what extent will the adaption of national law be necessary in order to introduce a transit exchange system, such as the Alpine Crossing Exchange for example?

An important adaptation would be needed.

3. INSTRUMENTS TO PROMOTE RAIL TRAFFIC AND COMBINED TRAFFIC?

a. Is there any specific legislation promoting rail traffic and combined traffic, such as regulation, price control, subsidies etc.?

There are subsidies.

b. How are infrastructure costs for rail traffic financed?

Government budget.

4. CASE LAW

a. To what extent have the following rulings of the Court of Justice also been of relevance in your countries?

- CJUE, C-195/90, Commission/Germany (Toll and heavy goods vehicles)
- CJUE, C-205/98, Commission/Austria (Brenner-Toll).
- CJUE, C-320/02, Commission/Austria (Sectoral driving ban I); CJUE, C-28/09, Commission/Austria (Sectroal driving ban II)

b. Is there any national case law on transport issues where EU issues came into play?

- relating to tolls and user charges?
- relating to driving bans (e.g. night lorry ban in London)?

Most cases concerning transport have to do with liability for accidents incurred due to bad road construction, or during maintenance works on the road; payment of expropriated soil for road construction, etc. There are also cases regarding disagreements during the public tenders; contractual liability, etc.

A. LAND-USE PLANNING AND ENVIRONMENTAL IMPACT ASSESSMENT

1. Are there different levels of the planning of transportation infrastructure? If so, which ones and how do they differ from each other?

There is a National road plan (first approved in 85, reviewed in 2000) and there are municipal transport plans.

The National road plan focuses its attention on the definition and layout of the most important roads connecting the main cities and regions: main itineraries (motorways and similar roads with a total length of 3000km), complementary itineraries (7500km) and national roads (16 500km).

Municipal transport plans are broader in scope. They don't have to do only with infrastructure planning but also with management, functioning and maintenance of intra-urban and regional roads (5000 km of secondary roads) and means of transport.

2. If there is road construction planning on a higher level, are the different transportation modes (roads, railways, air transportation, waterways etc) weighed against each other with a view to select the least environmentally burdensome?

No. This level of alternative testing is broader than mere alternatives to the project's size or location. The balancing of strategic alternatives is quite recent and limited to the plans and programs adopted after the transposition of the SEA directive, in 2007. For the moment 100 strategic assessments have taken place in Portugal, and only three out of 100 are transport plans. The other 97 are urban, industrial or energy plans. The strategic assessment of transports plans covered 2 roads and 1 airport.

In one of the roads no alternatives were studied because according to the authors of the environmental report there were no alternatives available, since it was a detail plan.

In the other road alternative testing was limited to alternative routes.

In the airport plan, alternative testing was limited to the two possible locations given by the government, both less than 50km away from Lisbon, one to the north-west and the other to the south-west.

Concerning the approval of individual road construction projects: Is there a test of need for more roads?

No. The existence of more roads is always considered to be beneficial, though practice has sporadically proved the uselessness of some empty roads.

If so, is it taken into consideration that new roads may trigger further individual transportation?

To what extent have alternatives to be taken into account?

The Castro Verde Case, where the ICJ considered that Portugal had failed to consider alternatives to a road crossing a SPA for the birds is very well known. The internal judicial incidents make this a good example of non-functioning justice[1].

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[1] **The long history is worth mentioning. It is a story of successive actions against the State challenging the construction by a public company – Brisa – of a section (the section Aljustrel - Castro Verde) of a new motorway (called A2), crossing a special protection area for the birds (a SPA in the sense of the birds' directive) in the municipality of Castro Verde. This motorway is the second biggest in Portugal and connects Lisbon to the south of the country, the touristic region of Algarve. The road has been concluded and opened to the public in July 2001.**

In 2004 the European Commission started an infringement procedure against Portugal due to the fact that Portugal chose the route that affected most the Natura 2000 site of Castro Verde, ignoring the negative conclusions of the environmental impact assessment and discarding the study of possible alternative solutions for that section Aljustrel - Castro Verde of the A2 motorway.

The European Commission considered that the Portuguese authorities had not explained why alternative routes located outside the Castro Verde SPA and away from residential areas had not been studied, considering that Castro Verde is a flat region with a very low population density where the construction of a road has neither technical difficulties nor disproportionate economic costs. On the contrary, Portugal argued that it was up to the Commission to propose such an alternative route, to define and characterize it, demonstrating the existence and the viability of an alternative less harmful to the environment.

Very clearly, in its judgment of the 26th October 2006, the 2nd Chamber of the Court of Justice confirmed the interpretation of the European Commission, declaring the responsibility of the Portuguese State for violation of the European law.

Meanwhile, in Portugal, several court proceedings contesting the same road from different points of view were brought to administrative courts. Seven of them reached the Supreme Administrative Court.

In 2000 (lawsuit no. 46262A), the first appeal was on an injunction requested by two NGOs asking for the suspension of the administrative act of approval, by the *Secretary of State of public construction works*, of the section of the road crossing the Castro Verde SPA. The request was denied because the *Secretary of State* denied the existence of any final decision on the matter and the Supreme Court judges decided that they could only judge on the basis of a formal written document which the appellant failed to obtain.

In April and June 2002 (lawsuits no. 46058 and no. 46499), the second and third appeal by the NGOs and by different appellants requested the judicial review of an opinion, issued by the

Secretary of State of public construction works. The opinion was favorable to the section of the road crossing the Castro Verde SPA, but the appeal was denied because the opinion of the *Secretary of State* was not binding to the licensing authority and therefore the opinion was not *per se* harmful to the environment.

In March 2006 (lawsuit no. 46262), the fourth appeal concerned a ministerial dispatch by the *Secretary of State of public construction works* approving the cartographic plans authorizing the expropriation of land necessary to the execution of the section of the road crossing the Castro Verde SPA. The appeal was denied because, at the time the lawsuit was brought to the first instance Court, the EIA was still pending and so the final decision approving the road project had not yet been issued. The ministerial dispatch of the *Secretary of State* was merely a preparatory and instrumental act and thus not appealable.

In May 2006 (lawsuit no. 47310), the fifth appeal addresses a slightly different subject: the appellants contested the road because it represented the impermeabilization of large areas of soil contrary to the regional territorial management plans in force. Once again the appeal was denied because it was not obvious that the construction of a road would represent an impermeabilization of large areas of soil and even less that the road would affect the protected watersheds in violation of the regional plans.

In May 2007 (sixth appeal) an appeal of the March 2006 judgment (lawsuit no. 44262) was brought to the plenary section of the Supreme Administrative Court. This time the appellants were recognized the right to reformulate their first 2006 request. The reasoning and the conclusions of the court are interesting enough to be reproduced here:

a) Until 1989 the constitutional criterion to ascertain the possibility to challenge an act was merely formal: the act had to be final, conclusive and enforceable.

b) After the constitutional amendment in 1989 a new material criterion was adopted: now, the act must be capable of harming rights or legally protected interests.

c) The ministerial dispatch by the *Secretary of State of public construction works* approving the cartographic plans authorizing the expropriation of land necessary to the execution of the section of the road crossing the Castro Verde SPA is merely preparatory of the final decision and hence is not actually harmful (confirmation of the 2006 decision).

d) However, to enhance the effectiveness of the right of judicial protection in administrative disputes, the interpretation of procedural legality should be in the sense that is more favorable to the attainment of a decision on the merits.

e) Considering that the error of the appellant in identifying the act to be attacked was not due to careless litigation but to the difficulty in identifying the act which contains the final decision to be attacked then the appellant shall be authorized to correct its request and identify correctly the challengeable act.

As a consequence of the recognition of the right to correct the application, the proceedings started all over again in the lower courts.

Finally, in March 2010 the NGOs, contest a different dispatch of the *Secretary of State of public construction works* before the plenary section of the Supreme Administrative Court. Now it's the ministerial dispatch of the 2nd February 2000 declaring the public utility and urgency of the expropriation of land necessary to the road construction of the section Aljustrel - Castro Verde of the A2 motorway which is under scrutiny. The appellants requested the act to be declared null and void based on the violation of the fundamental constitutional right to the environment due to the fact that the birds' community of the Castro Verde SPA would be severely harmed by the construction of the motorway.

Additionally, they also requested the annulment of the act on various grounds:

a) violation of law because the act doesn't respect the principle of proportionality (written in article 266 no.2 of the constitution and article 5º of the code of administrative procedure) considering that there were alternative routes to the road which were less harmful to the environmental values at stake;

b) violation of Natura 2000 Law (Decree-Law no. 140/99 of the 24th April) because there were alternative routes, less harmful to the environmental values at stake, and because no act of the Minister of the Environment was adopted recognizing the existence of imperative reasons of overriding public interest for the construction, namely public health and safety;

c) violation of Natura 2000 Law (Decree-Law no. 140/99 of the 24th April) because the Directorate General on forests was not asked for an authorization to the deforestation activities.

The first question for the court to analyze was the timeliness of the action. Of course, in an ordinary case, the plaintiffs have 2 months to start proceedings and that period had gone by May 2000. However, considering that the NGOs were pleading for the declaration that the act was null and void (and not only annullable), the Court accepted the case on the ground that an act can always be attacked when it suffers from a severe invalidity such as the one invoked in the first place (violation of a constitutional right).

As for the other three causes of invalidity the Court considers that the period lodging a complaint was until the 3rd May 2000 and the proceedings were brought before the lower level court on the 29th May 2000.

The second question was whether there was even a need for the Court to decide, considering that according to the Government, the motorway was concluded and fully operational since July 2001 "with the applause of all Portuguese, therefore no citizen would understand and would consider an absurd at this point, to destroy or close the section of the road, especially when after long years of operation there were no news that any birds have disappeared, gone away or died". The Court didn't agree with the government position and considered that it was still important to decide on the merits of the case.

Lastly, the third question, and the only material one to be analyzed by the Court, was on the violation of the fundamental and constitutional right to the environment. The arguments of the Court were the following: the fundamental right to the environment (article 66 of the Portuguese Constitution) has a positive and a negative dimension. The positive dimension gives the citizen the right to ask the state for positive actions to defend the environment and control harmful activities. The negative dimension gives the citizen the right to compel the State and other entities to refrain from adopting environmentally harmful activities. The question of knowing whether the road affects or not the *hard core* or *essential part* of the fundamental right to environment was judged in the light of this negative dimension and taking in account the fact that the right to the environment is not an absolute right but rather a right which admits some restrictions. In sum, the Court concluded that the existence of an environmental impact assessment and the imposition by the environmental authorities of compensation measures were enough to conclude that the impacts were irrelevant and thus the *essential part* of the fundamental right to environment had not been affected.

In sum, the ENGOs didn't win the case and the road is still there.

However, this case was a half victory because in 2010 at least the Supreme Administrative Court finally judged the case, based two arguments:

1. **The action was brought before the Court in time. Why? Because the ENGOs were claiming that a constitutional and fundamental right was being disrespected: the subjective right to the environment, laid down in article 66 n. 1 of the Constitution1.**
   If this were indeed the case (in the end it wasn't!!), then the consequence would be the annulment of the act (and not merely declaration of invalidity). The annulment can be done at any time.
2. **Although the road was already fully operational, socially accepted (in the words of the government "applauded"), and proven environmentally harmless (in the words of the government "no birds have disappeared, gone away or died") since 2001 (that's 9 years!), it was still important to decide on the merits of the case.**

The defeat part, was the judgment on the merits of the case: the Court considered that the duty to refrain from environmentally harmful activities had been respected. Why? Because:

a) **the environment is not an absolute right,**

What is the legal basis of alternatives testing: SEA and EIA? Natura 2000?

All.

a. Do these alternatives include "other" projects (e.g. rail construction, instead of road construction)?

Not at all. Only alternative routes.

b. Does/should the "zero-option" need to be taken into account?

In EIA it is mandatory but is hardly relevant.

c. What is provided for on national basis in additon to EU requirements?

Nothing.

B. PRODUCT LABELING (EXCURSUS)

1. To what extent is long-distance travelling taken into account in the Eco Management and Audit Scheme-Regulation (1221/2009)?

Travelling is one of the direct environmental aspects to take into account when establishing and implementing an environmental management system by an organization, so should be considered.

2. To what extent does national law provide for product labeling in order to reflect long-distance transportation and thus energy-consumption of products?

Not regulated at the national level.

Does EU law set any (and if so which) limits to such a labeling?

Can labeling be seen as a restriction to the free circulation of goods?

3. How can this labeling be done nationally without breaching EU rules? Is adaptation of EU-law necessary?

Example: bananas from Ecuador (8 500 000km) arrive in the market at half the price of bananas from Madeira, Portugal (973.000 km from Lisbon).

Any reference to preferences towards national products *versus* imported products should be omitted. Proposals:

Create a logo similar to the energy consumption logo. Green for closer products, red for the farthest.

Create a conversion table from kilometers to average CO2 emissions (something like: "This mango traveled 5000km. That's equivalent to 1 ton CO2")

Whenever there are equivalent short and long distance products, mandatory separation in supermarket shelves (although for GMOs this was not authorized).

NATIONAL REPORTS – RECENT DEVELOPMENTS IN PORTUGUESE ENVIRONMENTAL LAW

The change in the Ministry's name reflects the dramatic changes occurring in environmental law. The new Ministry of Agriculture, Sea, Environment and Territorial Planning (MAMAOT), clearly gives priority to the first two activities then to the latter. Furthermore, due to the

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b) there had been an environmental impact assessment imposing compensation measures
So, the Court could easily conclude that the impacts are irrelevant and that the essential part (core) of the right to the environment had not been affected.

cuts and reductions agreed with the Troika, numerous organisms and services have been suppressed in different Ministries, but from all Ministries, it was the MAMAOT who suffered the most with over 40 entities (national, regional or local) being merged or suppressed. With a lower budget and less human resources it is difficult to perform the ordinary statuary functions, namely supervision and control.

In the name of simplification and support of economic activities, several legal requirements have already been removed and more are yet to come. A good example is a much contested legal project to authorize planting eucalyptus and other speed growing forest, even in protected areas. This new law, if/ when approved will aim at revitalizing the national pulp and paper industry. Playing an important role in the national economy, this industry is obliged to import raw materials because there is not enough internal supply. The project was opened for public discussion until the summer and the main cause of protest was the fact that not only the law will allow for reforestation activities with eucalyptus (which used to be forbidden or at least very conditioned in the past) but also the authorization of the reforestation activities will be tacit, taking the responsibility away from the administration. In fact, no one has to sign anything, even public participation can be missing, and the eucalyptus plantation will appear.