The Principle of Integration in Portugal

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II. To what extent has the integration principle become part of the constitution or general principles and practises of law-making in your MS?

Consider for this purpose that the integration principle could have
- a narrower or broader scope of objects
- more or less precise and extensive criteria
- a more or less far-reaching character of guidance
  - enabling/ directing
  - procedural
  - substantive

Consider further that the integration principle overlaps with the principle of sustainable development. Therefore, if sustainability appears in your legal system do include its analysis into your report to the extent it can be understood as meaning integration in the sense of Art. 6 EC.

Questions that may guide your research

1. Are there any direct provisions or references to the principle of integration in the Constitution, a framework environmental act or other act of general application, and if the answer is positive, how is it formulated?

1. The integration principle in fundamental laws

1.1. Integration in the Constitution: horizontal integration

The constitutional text in force in Portugal dates back to 1976, although it has, until the present days, been subjected to more six revisions. In its birth it suffered the influences of a post-revolutionary period and, since then, a number of new environmental references has been introduced. We will briefly follow the slow greening of the Portuguese Constitution during more than 30 years.

For six years, until the first revision, in 1982, there was only one article (no.66) on environment and quality of life where prevention, rational use of resources, and nature conservation for human purposes were the dominant ideas.

In 1982, the protection of the environment was received (in article no.9) as a duty of the State, side by side with national independence, fundamental rights and freedoms, democracy, equality and quality of life.

To every individual is recognized the right to promote the prevention and ceasing of any factor of environmental degradation and the right to a compensation (article 66, no. 3).

In 1989, the State is attributed a new duty, and article 9 gains a new number. This time it's the duty to defend nature and the environment, to preserve the natural resources and to guarantee a correct territorial planning.

In 1997, the State is compelled to create the conditions necessary for the economic, social, cultural and **environmental** rights to be effective. The novelty here is precisely the environment.

Also in 1997, more substantial changes in article 66: the principle of solidarity between generations is added, urban environment and environmental education are referred to and, for the first time, a direct provision regarding the integration principle is included in the Constitutional texts.

Article 66º no.2 f), under "environment and quality of life", prescribes that, in the framework of a sustainable development, it is a duty of the State, (with the involvement and participation of the citizens), "to promote the integration of environmental goals in the various sectoral policies".

Such a clear statement of the integration principle in the Constitution can only be found once again, yet in the context of a different policy. Article 78, on cultural policy, receives a sort of a *cultural integration* principle. It is a duty of the State (in cooperation with the cultural agents) to harmonize[1] the cultural policy and the other sectoral policies.

However, indirect references to integration of the environment in other policies are also present in other parts of the Constitution.

In what concerns the economic and social tasks of the State, it is the State's duty to adopt a national energy policy, which preserves the natural resources and the ecological balance (article 81º).

In the field of the agricultural policy, the State shall promote territorial planning, agricultural reconversion and forestal development, all in accordance with the ecological and social conditions of the Country (article 93º).

Interesting enough, these are not the only references to integration. Indeed, integration is also mentioned with regard to taxing and planning.

1.2. Integration in the Constitution: vertical integration

A particular emphasis is given to fiscal policy as an instrument of integration: "fiscal policy shall conciliate[2] development with environmental protection and quality of life" (article 66º 2 h).

[1] The expression used is "to articulate".
[2] The expression used is "to make compatible".

The plans are another instrument of integration. When defining the aims of the social and economic development plans, the integration of environmental concerns is among its objectives. Article 90: "the aim of the social and economic development plans is to promote economic growth, harmonious and integrated development of sectors and regions, fair individual and regional distribution of national product, the coordination of economic policy with social, educational and cultural policies, with the defense of the rural world, with the preservation of the ecological balance, with the protection of the environment and with the quality of life of the Portuguese people".

In conclusion, we find, in the Constitution, both horizontal and vertical integration. Horizontal integration, meaning the duty to consider the environmental effects of the sectoral policies.

Vertical integration in the sense of the use of instruments that are not specific to the environmental policy but which can be used to promote integration.

These instruments can act as incentives or dissuaders conducting the economy and the society, through positive or negative stimulus, to the path towards sustainability.

The range of what we could call "integrative instruments" is quite wide: from fiscal to planning instruments, from educational to informational instruments, from financial support[3] to technical support, just to name some.

1.3. Integration in the Framework Environmental Law

The Framework Environmental Law (Law no. 11/87), approved by the Parliament on the 7th April 1987, set, for the first time, the basis of the environmental policy, in accordance with article 66 of the Constitution. Considered as a very modern law at the time, the Framework Environmental Law is now criticized for some lack of conceptual precision.

Article 3 establishes environmental principles (called "specific principles") from prevention to liability, from participation to cooperation.

One of the principles, called "equilibrium principle" is a draft of the integration principle: in order to guarantee the integration between social and economical growth policies on one hand, and nature conservation policies on the other, the adequate means shall be created, with the aim of achieving an integrated, harmonic and sustainable development.

[3] An interesting case which deserves to be mentione here is a system of incentives for the investment of the firms, aproved by the Decree-law no. 287/2007, of the 17th August. By this system, private business projects are suported if they develop stretagies resting on sectoral, inter-ssectoral or territorial logics, for activities inter-related and organized in clusters or nets having positive externalities.

A more recent framework law is the law establishing the bases of territorial planning and urban development[4]. This law also stresses the importance of promoting the integrated valorization of the diversities of the territory.

The principles mentioned in this law are sustainability, intergenerational solidarity, economy, subsidiarity, equity, participation, responsibility, contractualization, juridical safety and coordination. What the law calls *coordination principle* corresponds to the integration principle, and implies coordination, articulation and compatibilization of territorial planning with the social and economical development as well as sectoral policies with reflexes on the territory[5].

2. Are there any references to making integration a legal principle on the level of federal/national/regional, etc. environmental policy papers (e.g. National Environmental Action Plan) or sectoral environmental policies (climate change, waste, etc.) and if the answer is positive, how is it formulated ?

2. The integration principle in policy papers

2.1. The National Strategy for Nature Conservation and Biodiversity

In the National Strategy for Nature Conservation and Biodiversity approved in 2001[6] and foreseen in the Framework Environmental Law since 1987, the integration principle is extensively referred.

It is, first of all, referred as the grounds for the adoption of the Strategy for Nature Conservation itself; it is referred as one of the nine principles underlying the strategy; and finally, it is referred as one of the ten strategic options set out in the Strategy.

2.1.1. Integration as motivation

According to its authors, this Strategy has been adopted first, because of a recent (at the time) Ministerial change, that led the Ministry of the Environment to include, from then on,

[4] Law no. 48/98 of the 11th August.
[5] Article 5.
[6] Council of Ministers Resolution no. 152/2001, of the 11th October.

environmental competences side by side with *territorial planning* competences, thus fulfilling and giving practical execution to the integration principle.

Second, this Strategy has seen the light because Portugal, as Contracting Party to the Convention on Biological Diversity was supposed to develop strategies, plans and programmes in favour of the preservation of biological diversity and to "integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies" [7].

It is somehow strange to notice that the integration principle is not so obvious as we had thought in the beginning: its application in internal law is not an evidence in itself but rather must be justified by international agreements celebrated by the State.

2.1.2. Integration and the relevant policies

The integration principle is one out of nine principles shaping the National Strategy for Nature Conservation and Biodiversity. The principles, which this Strategy rests on, are: high level of protection, sustainable use of biological resources, precaution, prevention, recovery, liability, integration, participation and international cooperation.

The integration principle is hereby understood to mean that the Strategy shall be supported[8], in a coordinated manner, by the relevant sectoral policies.

For the first time we see a material limitation to the integration principle on the side of the policies in which the environment shall be integrated: only the *relevant* policies are concerned. Additionally, the Strategy gives us more than a mere hint on the circle of relevant policies. Further along the document, we find a precise list of relevant policies: research, education, health, territorial planning, coastal, water resources, regional development, agriculture, forestry, hunting, fishing, tourism, energy, transport, communications, industry, defense and security.

The Strategy goes on giving a brief explanation on the interactions between nature conservation and the relevant policies of the exhaustive list.

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[7] Article 6 of the Convention: "Each Contracting Party shall, in accordance with its particular conditions and capabilities:
(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
(b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies".

[8] The expression used is „shall be assumed".

Support to **research** and **education** is the first strategic option, raising from the recognition that nature conservation and biodiversity policy must rest on a solid scientific ground and technical knowledge on the natural heritage. In the words of the Strategy, "we can't protect what we don't know".

GMOs and their implications on biodiversity, food safety and public health are the major concerns for **health** policies.

Surveillance of the territory (namely maritime surveillance and forest fire prevention and fight) is the reason for the environmental relevance of **defense** and **security** policies.

In the context of **industrial** policy, laws on environmental impact assessment, integrated prevention and pollution control, industrial areas, air quality, water quality, effluent emissions and noise, link industry and environment.

Energetic policy, through the promotion of energetic efficiency, through energy consumption reduction and through stimulation of renewable energies, as explained in the Climate Change National Strategy, is also considered crucial to achieve the objectives of nature conservation.

The same thing goes for **transport** policy and the necessary conciliation of mobility (via public and alternative transportation) with the avoidance of habitat fragmentation and the preservation of natural heritage.

Other policies deserve a more detailed explanation about the linkages with Nature Conservation.

It is the case of territorial planning, coastal, water resources, regional development, agriculture, forestry, hunting, fishing and tourism.

Territorial planning is recognized to be closely linked with nature conservation and biodiversity, considering that when regulating the occupation of the territory, the geographical distribution of the natural values must be taken into account.

Among the instruments to be used in such a policy there is the National Programme for the Territorial Planning Policy and the Regional Territorial Plans.

In **coastal** policy, some of the actions already taken must be prosecuted and intensified. The recovery of coastal cliffs, the fight against erosion (namely on the beaches), requalification of estuary and lake areas are the top priorities for coastal areas. Coastal plans are considered to be a powerful instrument for intervention in the coastal area, with regard to the protection of coastal ecosystems.

In **water** policy, a good example of harmonization is the concept of ecological flow of the river waters down the stream (further away from an hydraulic engineering project like a dam), satisfying the needs of aquatic ecosystems.

Here, some strategic sectoral plans are also of great importance for the integration of environment in water policy. First of all, the National Water Plan, then the river basin plans, the dam management plans, and finally the strategic plan for water supply and waste water management. All these plans set more or less in detail conditions for the prosecution of human activities potentially incompatible with water protection.

In what concerns **regional** policy, the National Plan for Economic and Social Development points at sustainability as a pillar of the development strategy for the Country. The regional development model tries to conciliate socio-economic development with nature conservation, securing peoples' welfare without compromising the needs of future generations.

To prove it, not only the European structural funds always include environmental protection in the sectoral support programs, but also the Minister of the Environment is present in the negotiation, management, scrutiny and assessment of the structural funds implementation.

After centuries shaping the landscape, and changing it into a highly humanized landscape, agriculture has created new ecosystems which have replaced the natural pre-existing ones, thus generating new ecological equilibriums. An important heritage of both domestic and wild species is now associated with the traditional agricultural systems. Biodiversity and, in the long run, the very survival of this genetic heritage depends on the maintenance of the economically fragile rural areas and traditional agriculture. **Agricultural** policy has the important task of promoting sustainable use of genetic resources.

The large areas of forest in Portugal, as well as the exuberant biodiversity dependent upon it give a very special relevance to the **Forestry** Policy.

The Plan for Sustainable Development of National Forest points at a model for forest management which has revealed to be compatible with nature conservation.

In **hunting** policy, a wide variety of measures to make hunting compatible with nature conservation and biodiversity is proposed. Measures like sustainable management of hunting fields, preservation of shelter areas and areas where hunting is forbidden, strict control over hunting practices, and motivation and capacitating of hunters for the need to preserve nature are analysed.

Also in **fishing policy**, the sustainable exploitation of marine biological resources is a major concern, which is supposed to be prosecuted through better regulation of fishing activities, reducing the impacts of professional and non professional fishing, valorization of fishing products, and so on.

To promote a sustainable **tourism**, a stronger effort has to be done in order to reach equilibrium between nature conservation and touristic demand. The touristic product called "nature tourism" must be revalorized and the touristic offer must be requalified. Rural tourism is also important to fight against the human desertification of some regions. Sustainable options for all side-activities, directly or indirectly connected with tourism, must be presented: sustainable transport, sustainable advertising, sustainable accommodation, sustainable animation, and sustainable restaurants.

2.1.3. Integration as a strategic option

Strategic option number six is to promote the integration of nature conservation policy and the principle of a sustainable use of biological resources in the territorial planning policy and in the various sectoral policies.

Still according to the document, what this strategic option for integration means is that all the (other) strategic options must be shouldered[9] by the sectoral policies, regardless of which governmental department, which service or which organ is responsible for it.

The other (partially overlapping) strategic options are: the promotion of scientific research, the creation of a nature conservation network, the promotion of protected areas, the conservation of natural heritage, the management of species and habitats, the cooperation between central, regional and local administration, promotion of education, information and public participation and intensification of international cooperation.

[9] The expression iused is „assumed".

To ascertain the feasibility of this option the role of support and coordination will be taken by an *Inter-ministerial Commission for Biodiversity*, created in 1999.[10]

Integrating the objectives, the options and the orientations of the present strategy and of the nature conservation policy in the different relevant sectoral policies is now considered to be a fundamental condition for the success of the strategy.

In this point we should stress yet another step in the process of approaching the contents of the integration principle: what should be integrated are not only the objectives, but also the options and even the orientations. It is not clear from the Strategy, but it looks like that between these three concepts - objectives, options and orientations - there is a relation of concretion: the objectives being more general and the orientations the most concrete of all.

In fact, the National Strategy identifies only three very general **objectives**:

a) to preserve nature and biological biodiversity,

b) to promote a sustainable use of biological resources,

c) to contribute for the prosecution of international objectives, namely of biological diversity.

As explained before, is proposes ten strategic **options** (one of which is integration) and an undetermined number of policy **orientations**.

2.2. Integration and the relevant policies in the General Options for National Planning

The General Options for National Planning, approved in 2005[11] by the Parliament (and valuable for the period 2005-2009) the major national legislative organ stresses the idea that any development strategy has to be prosecuted "in the context of a rational use of natural resources, of nature valorization and preservation, of the adoption of **environmental and citizen friendly sectoral policies**". This depends on the strengthening of the integration of environmental concerns in the different sectoral policies.

[10] Council of Ministers Resolution no.41/99 of the 17th, May.
[11] Law no. 52/2005 of the 31st August, adopting the called "Big Options for the National Plans".

Like the National Strategy for Nature Conservation and Biodiversity, the General Options for National Planning also circumscribes the circle of sectoral policies considered to be "essential for sustainable development".

In this case it's the policies of mobility and communication, energy, tourism, agricultural and rural development, fisheries and aquaculture, and lastly, sea affairs.

Comparing this list with the one included in the National Strategy for Nature Conservation and Biodiversity, there seems to be an institutional consensus, between the Government and the Parliament, on a core of seven relevant policies. This *minimum integration* includes mobility (or transport) and communication policy, energy, tourism, agricultural and rural (or regional) development and fisheries.

However, in the case of the Parliament act, six policies are totally left out[12]. In fact, although the Government considered as relevant the research, education, health, territorial planning, industry, defense and security policies, the Parliament simply (and in some cases, strangely) ignored them.

One possible explanation could be the fact that the scope of the documents is quite different, but looking closer, this can't be the exact explanation because the shortest set of relevant policies is related with the broadest text (the General Options for National Planning, applicable to all policies), and the largest set, with the more restrict text (the National Strategy, which only applies to Nature Conservation and Biodiversity).

[12] One may consider the other six policies to be included in the first set of minimum integration policies: aquaculture, sea affairs, coastal and water resources policies may be included in fisheries policies, taken in a broad sense. Forestry and hunting may be included in a wide understanding of agricultural and rural development policy.

Comparative table

Policies	GONP	NSNCB
	Parliam	Govern
Mobility/transport	X	X
Communication	X	X
Energy	X	X
Tourism	X	X
Agriculture	X	X
Rural/regional development	X	X
Fisheries	X	X
Aquaculture	X	
Sea affairs	X	
Research		X
Education		X
Health		X
Territorial planning		X
Industry		X
Defense and security		X
Coastal		X
Water resources		X
Forestry		X
Hunt		X

2.3. Integration in the National Strategy for Sustainable Development

Few references are made to integration in the National Strategy for Sustainable Development, in force for the period 2005-2015, and in its implementation plan, approved in 2007[13].

Being a privileged instrument of integration in itself, the Strategy for Sustainable Development consists of a document with a strong economic bias. It analyses, through SWAT methodology, the three pillars of sustainability.

The third objective of the Strategy, "an efficient and preventive management of the environment and natural heritage", makes very brief references to three environmental strategic vectors.

The first comprises nature conservation, biodiversity, rural world, water and the oceans.

The second, water policy, including quantity, quality, and strategic safety of the national waters.

The third, waste policy based on reduction, reuse and recycling principles.

Energy is the main environmental challenge, and climate change is seen as the biggest environmental threat but, at the same time, a shift to more sustainable energy production/consumption patterns is the environmental opportunity which can't be wasted.

[13] The implementation plan for the Strategy was approved by the Council of Ministers Resolution no.109/2007 of the 20th August.

2.4. Integration in the Programme for the National Territorial Planning Policy

The Programme for the National Territorial Planning Policy[14] is a strategic territorial development instrument which sets the main options for the organization and development of the territory, and for territorial cohesion.

The Programme "articulates" territorial planning with economic and social development policies as well as with sectoral policies having impacts on the territory. The conciliation results from a correct balancing of the public and private interests involved.

The first of the six strategic objectives set out in the Program is related to the *preservation and to valorisation of biodiversity, of natural resources and of natural, landscape and cultural heritage; to the sustainable use of energetic and geological resources; to the prevention and minimization of risks.*

In its Report, the Programme refers to the National Strategy for Nature Conservation and Biodiversity, reminding the integration principle, such as it has been received there: nature conservation policy (according to the principle of sustainable use of biological resources) has to be integrated, firstly, in the territorial planning policy; and secondly, in the other sectoral policies.

In the action programme, four strategic options promise to turn Portugal into a sustainable space:

1. Preservation of nature and landscape, particularly water resources, coastal areas, forest and areas of agricultural features;
2. Management and valorisation of classified areas integrating the network of conservation areas;
3. Coordination of "open spaces" (having environmental and landscape nature) with the urban system and infrastructure network;
4. Promoting de development of new urban areas far from the coast, hindering the urbanization trends and shortening the gap between the developed regions next to the coast and the undeveloped regions next to the borders with Spain.

3. The principle of integration or some part of it has it ever been interpreted by the judiciary? If the answer is positive, please provide a short summary!

It has been mentioned "by the way", but not subject to exhaustive interpretation.

4. Are there governmental institutions playing an environmental watchdog-role in the legislatory process?

3. The integration principle in the legislative process

[14] Law 58/2007 of the 4th September.

3.1. Introduction

Since 2006 the legislative process has undergone some important changes after the adoption of some acts on better regulation and simplification.

In 2006, the Simplex, approved by the Council of Ministers, was the first programme on administrative and legislative simplification, presenting a set of 333 measures to render public administration more efficient and to strengthen citizens' trust in the public services. This objective was to be achieved by means of an ex-ante impact assessment (preventive simplification), and an *ex-post* impact assessment (corrective simplification). The most charismatic feature of Simplex 2006 was the "Simplex test", a form to be filled in, whenever adopting a new legal act, to measure, in Euros, the total costs to be borne both by the Administration and by the citizens, as a consequence of the law.

In 2007 and in 2008 new versions of Simplex were approved, putting in force new hundreds of simplification measures.

One of the measures implemented since 2007 is the free access to the electronic version of the official journal through a dedicated website (www.dre.pt). This was presented as a strongly environmental friendly measure. The Council of Ministers Resolution on better regulation[15] analyses this measure in terms of direct gains deriving from the dematerialization of the publication (estimated in 4 million Euros) but also in terms of environmental gains: a reduction of 1400 tons of paper per year (the equivalent to 28 000 eucalyptus aged 10), not to mention the avoidance of chemicals and packaging plastics.

3.2. Integration, the legislative process and the lost opportunities

In Portugal the legislative power is shared by the Parliament and by the Government. The procedural rules for the adoption of Decree-laws by the Government are much more detailed than those used in the Parliament to vote the laws. We will, therefore, focus mainly on the first ones.

The Council of Ministers internal regiment[16] foresees the obligation of an impact assessment procedure (according to Simplex 2006 rules) previous to the adoption of any legal project. However, this procedure is not oriented towards the assessment of environmental impacts, but rather economic, administrative or social burdens resulting from the new piece of legislation.

[15] No. 63/2006, of the 18 th May, 2006.
[16] Approved by the Council of Ministers Resolution no.64/2006, of the 18th May.

On the other hand, consultation procedures are also mandatory in some cases. Specific Ministers have to issue their opinions on the legal project before it is adopted. Yet it is never the case of the environmental minister.

The **Minister of Finance** has to be heard whenever public services, entities or organisms are created, extinguished, restructured or merged; civil servant posts are created, restructured or redefined; new rules on retirement are to be adopted, rules on public participation in the legal and administrative procedure are involved, efficiency and rationalization of the public management is at stake.

A government act implying raising expenses or lowering the income, can only be approved if the Minister of Finance approves it.

The **Minister of Internal Affairs** has to give an opinion on all the projects dealing with creation, extinction, restructuring or merging of public services, entities or organisms or with the efficiency and rationalization of the public management.

The **Minister of Foreign Affairs** has to give an opinion on all the acts intended for the transposition of European directives or accomplishment of European obligations.

There is also the possibility of internal or external consultation procedures.

The internal consultation procedure happens when the Minister proposing the legal project asks the competent ministers to give an opinion.

Here, the Minister of the environment **can** and **should** be heard. However, not only the delay is quite short (three to eight days) but also the impossibility of issuing the opinion in such a short delay does not have any consequences, and the project can be circulated and approved without it.

By decision of the proposing Minister, other entities - public or private (through the government website) – can also be heard. This is the external consultation procedure, where environmental agencies **can** be heard.

Another lost opportunity to take the environment into account in the legislative procedure is the moment when the legal project is circulated among the Ministers.

The Council of Ministers' regiment gives an exhaustive list of documents that must go together with the project.

Most of the documents are merely procedural. This is the case all the opinions gathered, all the existing laws applicable to the same subject, a comparison between the new and old regime (in the case of legal reforms), the Simplex test, the laws that will be abrogated, an exposé of the relations with the Government Program and with European Union Law, just to name some.

None of these documents reflect any material considerations or balance any important values that may be at stake when the project is approved.

Still, two other documents deserve a special reference: the legal project shall be circulated together with an assessment of the project's impacts on *gender equality* and another similar assessment on the social integration of *disabled citizens*.

These are the only substantial documents to be added to the legal project. They both reflect social concerns of a similar nature to that of the environment.

Here is the reason why we consider this to be, indeed, a lost opportunity to integrate the environment in the legislative procedure.

Finally, the successive impact assessment is the very last chance to put the environment on stage. But, unlike the Simplex previous impact assessment (before the law is passed), the successive impact assessment (after the law is passed) is not mandatory.

In fact, successive impact assessment is so exceptional that the decision to carry on such an assessment must balance seven circumstances enumerated in the law and must be carefully motivated. These circumstances are: the economic, financial and social importance of the act; the degree of innovation of the law, when it entered into force; the administrative hostility to the law; the existence of judicial disagreements on the interpretation or application of the law; the number of changes since it entered into force; the correspondence to the aims that lead to its approval; the technical complexity and the financial costs of the assessment.

3.3. The Interministerial Coordination Commission as an environmental watchdog

There is no governmental organ or institution playing a watchdog or a similar role, in general, for all environmental affairs.

There is, nevertheless, an *Interministerial Coordination Commission* for nature conservation and biodiversity, created in 1999[17]. The purpose of this Commission is to guarantee the cooperation in the implementation of the Nature Conservation Strategy as well as the promotion of integration, in the measure possible and in an adequate manner, in the

[17] Council of Ministers resolution no.41/99, of the 29th April.

plans, programmes, and sectoral or inter-sectoral policies, in accordance with article 6 of the Convention on Biological Diversity.

The Commission can be presided by the Foreign Affairs Minister (in this case it is called external coordination group) or by the Minister of the Environment (called, in this case, internal coordination group).

The external coordination group's tasks are:

1. To coordinate the preparation of the national position in the conference of the parties;
2. Promote the preparation of (mandatory) national reports;
3. Prepare cooperation actions with the Community of countries having Portuguese as the Official Language, and with the European Union countries;
4. Developing joint actions with Spain and with Mediterranean countries in favour of Conservation and sustainable use of biodiversity.

It is up to the external coordination group to:

1. Dynamise, coordinate and to follow the implementation of the National Strategy for Nature Conservation and Biodiversity;
2. Coordinate the mandatory national reports;
3. Promoting the integration of the conservation and biodiversity sustainable use principles in the sectoral policies.

The Commission is composed of the following Ministers: foreign affairs; environment; finance; equipment, planning and territorial planning; economy; agriculture, rural development and fisheries; education, health, science and technology.

When necessary, the Commission can invite , for these tasks, other governmental or non governmental entities; local and regional representatives or external experts.

The existence of an *interministerial coordination commission* is not an extraordinary option in Portugal. This solution has also been adopted in other fields and other policies: there is an interministerial coordination commission for sea affairs, an interministerial commission for youth policies, an interministerial commission for European affairs, an interministerial commission for cooperation, an interministerial commission for external policy, an interministerial commission for migration and Portuguese communities, and finally, between

2000 and 2004, there was an interministerial commission for the European football championship.

This coordination effort is not only felt at the central level. The Commissions for Coordination and Regional Development, the regional administrative authorities of the five Portuguese Regions also have coordination organs.

The *Inter-sectoral Coordination Councils* have, among others, the following tasks: promoting the technical execution of the central administration policies, articulating the strategic options of territorial planning, and planning of the economic, social and environmental interventions, in a perspective of "sustainable and integrated development", proposing conciliating measures for the different sectors.

3.4. Integration in the functioning of the Ministry of the Environment, territorial planning and regional development

With the objective of promoting citizenship, economic development and the quality of public services, the central administration of the State was systematically restructured. This was done soon after the approval of a Programme for the Restructuration of the State Central Administration, in 2006[18].

Like all the others, the Ministry of the Environment, territorial planning and regional development, was also restructured. This internal reorganization observed some guidelines like simplification, efficiency, and… integration.

From the analyses of the law, we will go further in the unveiling of the concept of integration.

In the words of the Organic Law of the Ministery[19], "the Government places environmental, territorial planning and regional development policy in the centre of its strategy for the development of the Country, which implies strengthening the integration of environmental and territorial concerns in the different sectoral policies. This objective assumes a larger importance in the sectors covered by international agreements. (…)".

[18] Council of Ministers resolution no.39/2006, of the 21st April.
[19] Decree-law no.207/2006, of the 27th Octobre.

The relevance attributed to international agreements in the context of integration gives us a clue of what the real reasons for protecting the environment are: it is important to promote the environment through integration, because an international compromise was assumed. It looks like environmental protection is not a self imposed obligation (like a categorical imperative) but a superior imposition (faced rather like a question of honour to be respected or even a burden to be borne bravely).

We are here again before the same thought that came to our mind when analysing the Strategy for Nature Conservation and Biodiversity: the need for integration was not an obvious idea recognized as necessary inside the State, but as an imposition from outside, a rule dictated by the international Community.

A little further, but still in the preamble of the organic law, the statement "This vision implies a great capacity of coordination and integration of policies" raises the question of whether there is a meaningful difference between "coordination", "integration" or even "articulation", the expression used most of the times in Portuguese law.

My suggestion is that both "coordination" and "articulation"stand for a negative approach to integration in the sense that major conflicts between environmental policy and the other policies should be avoided.

Quite differently, "integration" stands for a positive approach: synergies between the environmental objectives and the sectoral objectives should be promoted.

In one case, the sectoral policies shouldn't hinder the prosecution of environmental goals, in the other case, the sectoral policies are used as tools for the prosecution of environmental goals.

Lastly, the mission of the Ministry is to "(…) mobilize and coordinate the integration of the environmental and territorial dimensions in the conception, implementation, and assessment of the different public policies in the medium and in the long term (…)".

Here are three steps of the integration process:

First, the environmental impacts should be assessed beforehand and taken into account in the very conception of the other policies; then, the environment should be the framework or the boundary in which the human activities are developed (in other words: it should be present in the implementation of the measures), and finally the environment is the (or at least one of the) criteria to assess the results of those measures.

In an integrated approach, the role of the environment is to shape the other policies into compatible figures (configuration), to limit the freedom of movements of human activities (implementation), and to correct for the future the different policies considering the unpredicted or unavoidable effects (assessment).

Looking closer at the Ministry, and namely at the Institute for Nature Conservation, hierarchically dependant of the Minister, we see that one of its tasks is to guaranty the integration of the objectives of nature conservation and biodiversity in the instruments of territorial planning at the national, regional or local level[20].

3.5. Integration in the National Strategic Reference Framework

The National Strategic Reference Framework defines the strategies for the national implementation of the European policy of social and economic cohesion and gives guidelines for the application of structural funds.

The ministerial coordination and the political direction of the National Strategic Reference Framework are committed to a so called *Ministerial Commission for the Coordination of the National Strategic Reference Framework*[21]. This *Ministerial Commission* is composed by the Minister of the environment, territorial planning and regional development and the relevant ministers, in accordance with the matters to be decided.

5. Are there general requirements as to inviting environmental agencies to comment on or cooperate in the rule-making and individual administrative action by environmentally remote agencies[22]?

It is up to the Presidency of the Council of Ministers to promote inter-ministerial coordination between the various governmental departments[23]. This central coordination is supposed to happen regardless of the subject involved, be it the environment or not.

Besides this, there is no general requirement as to inviting environmental agencies to comment on or cooperate in the rule-making and individual administrative action by environmentally remote agencies.

[20] Article 4 of the Decree no.530/2007, of the 30th April 2007.
[21] Decree-law no. 312/2007 of the 17th Septembre.
[22] By this we mean administrative agencies in charge of policies which prima facie do not impact on the environment but do so indirectly or upon deeper consideration.
[23] The Organic Law of the Council of Ministers Presidency was adopted on the 27th Octobre 2006, by the Decree-law no.202/2006.

5. Are there general official advisory boards or scientific groups which reflect, discuss and recommend policies, measures or actions on environmentally remote legislatory or administrative action?

The National Council for Environment and Sustainable Development is a consultative organ who may issue opinions or recommendations on any questions related with environmental policy and sustainable development. This organ was created in 1997[24] and although it is formally integrated in the structure of the Ministry of the Environment, it is an independent organ. It is an organ with a mixed composition.

Its more than 30 members are designated by the Council of Ministers, by the municipalities, by the autonomous regions, by industrial, commercial, agriculture and tourism associations, by trade unions, by consumer associations, by associations of professionals in the field of environment, by the Council of Rectors of the Portuguese Universities, by entities belonging to the scientific community, by the NGOs, and finally chosen by the designated members among well known specialists in the fields of environment and sustainable development.

Looking now at the proportionality among the members, 13 represent politics, 11 economy and society, 10 science and technology and 3 the environment.

The mandate lasts three years and during that time the members can't be changed, unless they "loose the mandate" (due to a judicial condemnation followed by a statement of incompatibility by the court, or due to repeated absence from the meetings), and, of course, in case of death or renouncement.

Besides the classical "opinions", the National Council for Environment and Sustainable Development produces documents called "comments", "reflections" and "letters" addressed to the Ministers.

The "opinions" are issued upon request; in the "comments" the Council gives his opinion on a proposed act; in the "reflections" the Council expresses a reasoned opinion on some concerning fact or situation; the "letters" are recommendations and questions posed to a certain Minister.

[24] By the Decree-law no.221/97, of the 20th August, changed on the 3rd August 2004 by the Decree-law no. 136/2004.

Between 1999 and today the Council produced 75 documents[25] on subjects like GMOs, energy, transport, coastal areas, fisheries, forests, biodiversity, waste, environmental impact assessment, access to information, IPPC, and so on.

[25] Available, in portuguese language, at www.cnads.pt.

III. How has the SEA Directive 2001/42/EC been implemented in your country?

The SEA Directive comes closest to an instrument of alerting sectoral policies to environmental implications. We will not look at all details of understanding and implementation but will focus on the question whether experiences made with this instrument allow to conclude that it should be extended to further policy areas and even further forms of governmental action including legislation and rule-making. Questions of interest are the following:

4. Implementation of the SEA directive in Portugal

1. Was the SEA directive properly been transposed into national law? (see e.g. C-108-06)

4.1. Proper transposition

It was transposed very late with a delay of almost three years (on the 15th June 2007, by the Decree-law no.232/2007), but the transposition is now quite complete.

2. In Art. 2 (a) there is a broad definition for 'plans and programmes'. How has this definition been adopted ? Copied and pasted, or with some more words attached to them and even extending the scope?

4.2. Definition for 'plans and programmes'

The wording has been slightly changed but the meaning is quite the same.

The definition for "plans and programs" is now a result of the agglutination of article 2 (a) and article 3 no.8 and no.9. The scope has been extended only in what concerns the concept of public authorities.

Decree-law no. 232/2007

"For the purposes of this Decree-law, it is understood by:

(...)

b) «plans and programmes», the plans and programmes, including those co-financed by the European Union:

i) which are subject to preparation, alteration or revision by national, regional or local authorities ***or other entities exercising public powers***, or which should be approved through a legislative procedure, and which are required by legislative, regulatory or administrative provisions; and

ii) which don't have the sole purpose to serve national defence or civil emergency, don't have a financial or budget nature and are not financed under the programming periods for Council Regulations (EC) No 1260/1999, and (EC) No 1257/1999".

Directive 2001/42/EC

For the purposes of this Directive:

(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

- which are required by legislative, regulatory or administrative provisions;

8. The following plans and programmes are not subject to this Directive:

- plans and programmes the sole purpose of which is to serve national defence or civil emergency,

- financial or budget plans and programmes.

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods(11) for Council Regulations (EC) No 1260/1999(12) and (EC) No 1257/1999(13).

3. What is the general understanding of the concept of the 'authority' ? What kind of organisations are included ? (See on public services, eg. C-188/89 Foster and others v British Gas)

4.3. Concept of "authority"

The concept of "authority" is also very broad. It includes not only public authorities formally included in the public administration (either centralized or decentralized, either concentrated or not concentrated, like institutes or public trusts) but also private authorities exercising public powers in the sense of powers of authority. This is namely the case of concessionaires of public goods or services, like firms who are invested in functions like water supply, energy supply, waste management, highway exploitation, and so on.

The public business sector (including public undertakings and private undertakings with public participation) is also considered to be a part of the concept of "authority". The powers of authority of these public companies (or, similarly, of private companies with public participation) comprise the following rights: expropriations for public utility, infrastructure management and permissions or concessions for the use of public domain[26].

4. In Art. 3 (2) there is a special list of issues, which provide the automatic application of SEA. Is there any debate related to the content of this list ? Is it understood as a limitation of the definition of Art. 2 (see the different wording in Art. 3 (2): "and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC") ?

The list has been copied and pasted.

Article 3 (2) is taken to be an exemplification of kinds of plans or programmes included in article 2, thus the regime being the same.

5. In what way does the outcome of the SEA procedure affect the final decision-making? (see Art. 4 (2))

[26] Decree-law no.558/99, of the 17th December, modified by Decree-law no.300/2007, of the 23rd August.

4.4. Legal force of SEA ("shall be taken into account")

Unlike the classical environmental impact assessment for projects (under Directive 85/337), the outcome SEA procedure is *not binding* for the final decision-making, although the environment must be balanced in the procedure of adoption of the plan or project.

In fact, under EIA, if the outcome of the procedure is negative (i.e. the project is likely to have meaningful environmental impacts), this result it is binding for the authority responsible for the final authorization of the project. This means that the project cannot be authorised and if it does get to be approved (either by mistake or in bad faith), the act of approval is void[27] and there may be State liability for unlawful acts[28]. In case of a positive EIA (the project's environmental impacts are inexistent or at least, acceptable), responsible authorities keep their discretionary power to authorize or not to authorize the project.

In SEA, the final environmental impact report and the results of the mandatory consultations "***shall be balanced*** in the procedure of preparation of the final version of plan or project to be approved" (article 9 of Decree-law no.232/2007). After the approval of the plan or program, the authority responsible for the plan or project must send it to the Portuguese Environmental Agency, together with an ***environmental statement***[29].

The ***environmental statement*** comprehends:

- an explanation on the way in which the environmental questions ***were integrated*** in the plan or program,
- the observations presented during consultations (public consultation and institutional consultation) and the results of the balancing of this observations,
- in case this observations weren't accepted, a justification for the non acceptance,
- the results of the consultation of other member states,
- the reasons for the approval of the plan or program, considering other reasonable alternatives studied during its preparation,

[27] Article 20 of Decree-law no.69/2000, of the 3rd May, modified on the 8th Novembre 2005, by Decree-law no. 197/2005.
[28] Article 7, 9 and 10 of Law 67/2007 of the 31st December, establishing the conditions for civil liability of the State.
[29] The *environmental statement* is made available to the public through the Internet in the web pages of the authority responsible for the approval and of the Portuguese Environmental Agency.

- control measures to prevent or reduce the environmental impacts of the plan or program.

From the contents of the ***environmental statement*** we can conclude that the responsible authorities can, in the last instance, approve a plan or programme after a negative SEA, as long as they give a reasoned justification for the approval and a likely explanation for discarding reasonable alternatives.

Furthermore, the plan or programme can be approved with total disregard of the institutional observations as well as of the observations of the public, again as long as a thorough justification is given.

Finally, if the plan or programme is not in accordance with the results of the consultation so the Member States, no justification must be given.

6. If you have had personal experience with SEAs or if there are reports on how SEA was used in practise: what are the conclusions, and do they encourage to extend the instrument to further sectors and even to law-making and sublegal rule-making in general ?

Decree-law no.232/2007 hasn't been in force long enough.

7. Were there/or are there any similar requirements in force in your county before/since the entering into force of the Directive ? In case of a positive answer, please provide a short introduction, mainly in connection with the relationship of the two types of requirements !

No, Decree-law no.232/2007 introduces an unprecedented assessment system for plans and programs.

8. Do you have any information on any ongoing cases or judicial decisions in connection with the implementation of SEA requirements ? Please, provide a summary, if there is any example!

No.

IV. Where do you see deficiencies of environmentally remote legislation and implementation with regard to environmental concerns, and what legal rules and institutions could improve the situation?

Dear Colleagues and Friends, please select one or max. two items of the list below, which is most interesting to you of which may provide good experiences for us. You may select from this pool, but you may add other areas, which may serve a better example.

Possible areas of policies: Sectoral policies: agriculture, fisheries, transport, energy, climate, energy, tourism, etc.

Horizontal policies: contract law, company law, consumer protection, intellectual property, insurance, finance, public procurement, privatisation, subsidies, research funding, etc.

4.5. Deficiencies of energy legislation

4.5.1. Energy, environment and sustainable development in Portugal

Energy is a cross cutting issue present in all the strategic documents. We will just remind what some of them say on the energetic issue.

In the Programme for the National Territorial Planning Policy[30] the national potential for developing renewable energy sources (RES) like water power, wind energy, solar energy, bio-energy or wave energy, is highlighted.

In contrast, the National Strategy for Nature Conservation and Biodiversity defends that the solidification of the environmental dimension of energetic policy is crucial for the objectives of Nature Conservation and Biodiversity.

The National Strategy for Sustainable Development talks about a "strategic threat" in Portugal, due to the Country's dependence on imported energy and to our energetic inefficiency. This trend has to be reversed and the target is achieving 39% of energy produced from renewable sources of energy in 2010.

In the General Options for National Planning, energy is one of the politics considered to be essential for sustainable development and the objective is to support an energetic sector that is dynamic, modern, competitive, and trustable. For this purpose, the diversification of electric sources is important, and the investment on RES is a priority.

Furthermore, energy has a strategy of its own, approved in 2005[31].

In the National Strategy for Energy, one of the objectives is to assure the environmental compatibility of all the energetic process, reducing the environmental impacts at a local, regional and global scale.

[30] Law 58/2007 of the 4th September.
[31] Resolution of the Council of Ministers no. 169/2005, of the 24th October.

The Strategy is clear: "the aim of the energetic policy is the welfare of the populations and the 'articulation' with the environmental policy, being a part of the Strategy for sustainable development of the Country".

The investment[32] in RES, and namely in wind energy (the one having less production costs associated), is considered to have primacy over the other investments.

Yet, the promotion of RES has controversial aspects.

4.5.2. The controversial RES projects

In order to facilitate the investment of new RES projects, a priority measure included in the Programme for the National Territorial Planning Policy is to simplify and accelerate the procedures for the authorization of infrastructures and equipments for energy production from renewable sources, namely the procedures acting in the interface of economy and environment.

In 2006, the programme on administrative and legislative simplification, Simplex, proposed to suppress the need of a joint Ministerial Dispatch for the recognition of the public interest of electrical infrastructures to be placed in environmentally protected areas...

In 2007, a Decree-law implements some of the measures presented in the National Strategy for Energy and also the Simplex proposals.

The point is to simplify the authorization procedure of new RES projects to be installed in nature conservation areas, subject to EIA. In the case of a favourable EIA statement, the opinion of the Institute for Nature Conservation, (organism of the Ministry of the Environment responsible for the management of classified sites) is no longer necessary. If the EIA statement is not favourable either the opinion is presented in a delay of 20 days or the procedure goes on without it presuming that the opinion is favourable.

In practice, we know that there is a certain political manipulation of the results of an EIA, and we know that it is easier to install a RES project in a classified site, far away from the populations who fear these projects and are, very often, against them.

This is the reason why so many wind mills are now functioning in Natura 2000 sites, and the reason why a complaint has been presented to the European Commission about a large dam to be built in the last wild river in Portugal (Sabor river, to the northeast of the Country, the only river whose bed and discharge haven't been changed by Man nowhere along its course) and which will affect Natura 2000 sites and priority species.

[32] The investment in renewable energy sources is expected to reach 7000 million Euros by 2010.

In a long motivation by the Ministers of Economy and Environment, in 2004, the major reason of public interest on the construction of the dam for electrical production was thoroughly explained. The National Program for Climate Change and the Kyoto Protocol are among the main reasons. Other justifications are: avoiding floods, creating a strategic water reservoir, achieving energetic self-sufficiency and protecting pre-historical engravings discovered close to another river.

The doubt is whether it is worth or it is sustainable to promote RES while damaging nature...

4.6. Deficiencies of tourism legislation

4.6.1. Tourism, nature conservation and sustaibable development in Portugal

The objective of diversification of the tourism offer and the need to guarantee the implementation of sustained development models is present in the Strategic National Tourism Plan for 2006-201533.

One of the strategic development lines in this Plan is the transformation of urban, environmental and landscape quality into a fundamental component of the tourism product in order to valorise and enhance Portugal as a touristic destiny.

The enhancement of natural and landscape heritage should be fostered, together with bio-diversity, in particular intervening in listed areas, including nature conservation policies and sustainability.

The European Nature Tourism market has achieved sustained growth. In 2004, 22 million trips were made, having this product as main motivation, corresponding to 9% of all trips made by Europeans. According to data for 2006, Nature Tourism represented 6% of the primary motivations for tourists visiting Portugal.

The main challenge facing Portugal consists in developing an offer that respects the environment. The objective is to make it possible to sell the product to tourists, while preserving Protected Areas.

[33] Resolution of the Council of Ministers of the 4th April 2006.

There is one major legal act promoting the integration of tourism and environment. It's Decree-law no. 47/99[34] on *nature tourism*.

Nature tourism is a touristic product composed of establishments, activities and services of accommodation and tourist and environmental animation taking place in areas integrated in classified areas of the network of natural protected areas.

The purpose *nature tourism* is to "offer a diversified and integrated touristic product".

This kind of tourism should be understood in the context of sustainable development, allowing for the economic use of nature today, without compromising the use of natural resources by future generations. It is crucial that the carrying capacity of the ecosystems is taken into account.

Lodging services in *nature tourism* cover rural touristic unities (houses, hotels) and nature houses.

Environmental animation includes animation *strictu sensu*, environmental interpretation and nature sports.

These touristic projects should be environmentally responsible, using non polluting technologies, energetically efficient, saving natural resources (namely water), recycling and reusing raw materials or using alternative means of transport.

All the installations used for *nature tourism* should be correctly integrated in the areas where they are placed in order to preserve, recover and raise the value of the architectonical, historic, environmental and landscape heritage.

Considering this promising scenery, what are the drawbacks?

4.6.2. The controversial PIN projects

The more complex questions on how to conciliate tourism, nature conservation and the environment in a sustainable way come from an exceptional regime specially created to attract large investments in Portugal and which has been used several times for touristic projects.

This regime was proved in 2005[35] and is justified by the fact that "Portugal needs more and better investment. The building of a competitive economy demands strong and dynamic

[34] Adopted on the 16th February, and modified by Decree-law no. 56/2002, of the 11th March.
[35] Resolution of the Council of Ministers no.95/2005, of the 24th May 2005.

firms, socially and environmentally responsible and being capable of competing in a globalized world"[36].

For this purpose the Government decided to create a system for the recognition of and attendance of projects having a Potential National Interest (PIN). The criteria for the qualification of these projects considering their economical, social, technological and energetic value and also considering their environmental sustainability were established.

To be recognised as a PIN, projects must:

- Reveal territorial and environmental sustainability,
- Represent a global investment of more than 25 million Euros
- Have a positive impact in at least four of the following fields:
  a) Production of innovative goods or services for markets with a large potential growth;
  b) Push and pull effects in relation to connected activities
  c) Cooperation with institutions of science and technology
  d) Creation of new qualified jobs
  e) Contribution for the development of less developed regions
  f) Good external economic balance
  g) Energetic efficiency or favouring renewable energies.

Exceptionally, projects smaller than 25 Million Euros can be recognized as PIN regarded that they have a strong component of research and development, that they apply innovation in practice and that they have an obvious environmental interest.
Note that this is an exception to a regime that is already exceptional.
The main advantage of a project being recognized as PIN is the short delay in which the project has to be appreciated and decided by the competent authorities.

For larger projects there is an even more exceptional regime allowing speedy decisions procedures. It is called PIN + and was created in August 2007[37].

Since then, there is a specific provision for touristic projects larger than 60 million Euros in the case that they promote the touristic differentiation of our Country as a touristic destiny and they contribute for the requalification, increased competition and diversification of the touristic offer in its region. The exceptional regime is solely applicable to touristic projects including hotels only of five or more stars, and creating at least 100 direct jobs.

[36] Preamble, §1.
[37] Decree-law no.285/2007, of the 17th August.

In this case the ultra simplified and speedy regime that the project is subject to consists on the existence of only one interlocutor authority; all the different authorities involved must gather to decide; all the delays run simultaneously; in the case where opinions have to be issued there is a presumption that the opinion is positive if it is not issued within the established delay; a single document is produced in the end containing all the opinions, approvals, authorizations, decisions and licences necessary for the project.

But, more important than the procedural consequences, (shrinking of the procedure duration), are the substantive effects of the declaration as PIN+: automatic recognition of the major public interest of the project for the purposes of overcoming some environmental constraints (namely for projects submitted to EIA and projects to be implemented in Natura 2000 sites). In some cases the promoter of a PIN+ project can even request an exemption to the EIA regime and be authorised to .

This is the real reason behind all the requests for recognition as PIN +, and the Court starting to be aware of this and has determined the interim suspension of a decision recognizing a certain touristic project in the cost as PIN+.

To sum up, what were the environmental effects of this concrete integration? Clearly, the integration had as a consequence a disregard for the environment which would for sure have been more protected if the normal regime would have been applied. Yet, the economic and even the social advantages of attracting such huge investments are quite obvious. Once again, it is doubtful whether the final result, in terms of sustainable development, is positive or negative...