Recent developments in Portuguese environmental law

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During 2009 over one hundred environmental laws and regulations have been adopted in Portugal. Most of them consist of transposition of EU directives or amendments to previous laws covering every field of environmental legislation, from water to air, from noise to waste.
I will focus on four recent laws to illustrate both the implementation deficits and the implementation efforts in Portugal.

1. Implementation deficit - The dissonance between the formal obligations in the law and the practical implementation of the rules.
The Decree-Law 137/2009, postpones the delay to adapt existing water uses and installations to the environmental requirements of water law.
Legal context: the water framework directive, which should have been transposed until December 2003, was transposed only in December 2005 by the law 58/2005. The adaptation of existing uses to the new law, provided therein, depended on specific regulation to be adopted (hopefully in a short time) by the government. When it was finally adopted, in 2007, the decree-law 226-A/2007 gave a two year delay (until June 2009) for the existing beneficiaries of water services or users of water bodies[1] to adapt to the environmental requirements of the 2005 water law. However, the water administrations of the different water districts to which the water uses were to be notified weren't created until 2008. As a consequence, in 2009, the delay (given in 2007) was postponed again to May 31 2010.
This shows the gap between *theory* and *practice* and the difficulties in making reality fit the law… or vice-versa.

2. Environmental regress - Lowering the level of environmental protection.
Another amendment act that poses serious questions of environmental effectiveness and jeopardises the obligation to ensure proper enforcement of EU environmental law is Law 89/2009 amending the previous 50/2006 Law on administrative sanctions imposed in cases of infringement of environmental laws. A large discussion took place at the Parliament before the approval of this law (which has been approved in spite of all the votes against it by the opposition parties) because it lowers the levels of protection which had been in force for three years.

A table can summarise the main amendments introduced in 2009:

	Minimum		Maximum	
Article 22 (fines)	L.50/2006	L.89/2009	L.50/2006	L.89/2009
Small infractions				
Individuals/negligence	500€	200€	2500€	1000€
Individuals/deceit	1500€	400€	5000€	2000€

[1] In March 2001 the collapse of a bridge due to excessive and uncontrolled sand extraction in Douro River killed 60 people and emphasised the importance of an accurate knowledge of existing economic activities having effects on water bodies for the purpose of controlling the compatibility of these activities with environment protection and, of course, with human safety.

Article 22 (fines)	Minimum		Maximum	
	L.50/2006	L.89/2009	L.50/2006	L.89/2009
Companies/negligence	9000€	3000€	13000€	13000€
Companies/deceit	16000€	6000€	22500€	22500€
Serious infractions				
Individuals/negligence	12500€	2500€	16000€	10000€
Individuals/deceit	17500€	6000€	22500€	20000€
Companies/negligence	25000€	15000€	34000€	30000€
Companies/deceit	42000€	30000€	48000€	48000€
Very serious infractions				
Individuals/negligence	25000€	20000€	30000€	30000€
Individuals/deceit	32000€	30000€	37500€	37500€
Companies/negligence	60000€	38500€	70000€	70000€
Companies/deceit	500000€	200000€	2500000€	2500000€

Moreover, in the new version of the law, disrespect of legal commands issued by a public authority isn't a serious infraction anymore, but only a small infraction. Failure to follow an administrative order in the case of a formal notification is no longer a very serious infraction but a serious one.
Besides, a new possibility was created to reduce the fine in 25% below minimum, as long as the illegal behaviour has stopped and the defendant is not relapse.
Additionally, liability is excluded when the company proves that it has fulfilled all its duties and still wasn't able to prevent its workers or agents from committing the infringement.
Finally, the article of the law in its original version, which allowed the government to update the fines on a yearly basis, was abrogated. This proves that all this was the result of a highly political decision,
The justification for the much softer regime is again "realism" and protection of small and medium enterprises. In the press release issued upon the approval of the law the argument was "the aim of this law is to adapt the administrative sanctions regime to the socio-economic framework of the country, adjusting the punishment to the need of not jeopardizing the subsistence of individuals and small or medium companies". The questionable logic underneath this argument is that *the smaller the company, the smaller the infringement*.
The practical effects of this law are still to be seen, but I'm afraid that it will be interpreted as a *go ahead* sign leading the small companies to act accordingly.
In the middle of the year the Inspectorate General of the Environment published a report revealing that an infringement process can take years from the first notice to the final Court decision. Furthermore, almost half of the processes taken to Court are lost by the Ministry of the Environment, the author of the infringement cases. In 80% of the cases, the Court lowered the fine proposed by the Ministry and the average fine was, finally, 2640€.
In two years, 5389 processes were judged. The results were condemnations amounting to 14,2 million Euros in fines, but only 7,6 million Euros were "voluntarily" paid after condemnation. And 735 processes of non compliance of condemnatory judicial decisions had to be sent for judicial enforcement. Since the processes are too long, it is estimated that each inspector spends 3,6% of his working time in Court.

3. An environmentally and socially sustainable cost of water: the social protection of destitute people and the right to water consumption

The economic regime of water of the WFD has been received in Portugal by the Law 58/2005. The law proclaimed a so called "principle of the social value of water": "everyone has the right of access to the water to the basic human needs, at a socially acceptable cost which does constitute a factor of discrimination or exclusion". Yet, nothing was said on how to calculate the "socially acceptable cost" of water because it hadn't been regulated.

In August 2009 Decree law 194/2009, fixed the legal regime of the water management systems. It will only enter into force on the 1st January 2010 but it sets the rules on access to water for end users. In September 2009 the Institute for the Regulation of Water and Waste (autonomous public body having the function of supervising the entities responsible for water distribution and waste management) issued a Recommendation on the calculation of the tariffs to be applied to end users. This Recommendation proclaims yet another "principle": the principle of economic accessibility, meaning that "the tariffs should take into account the economic capacity of end users, wherever necessary to maintain the universal access to water and waste services".

For this purpose specially reduced tariffs are applied to end users whose family's income is lower then double the guaranteed minimum wage. The form of tariff reduction is through exemption of fixed tariffs and application of the lower variable tariffs. The composition and dimension of the family can also be taken into consideration. Private institutions for social solidarity (charitable organizations) and non profit NGOs can also benefit from this reduction as long as their social objectives justify this treatment.

This regime should be widely diffused among the consumers, its application should be simple to request and it will be applicable for 3 years.

This consideration of income or volume of affairs is the exception which should be used in the mentioned cases of social tariffs and no other cases.

4. Some environmental progress... at what cost? What is left for the polluter to pay?

Three public funds were created in order to give full effect to environmental laws, namely the laws creating obligations of public prevention of environmental damages (like the environmental liability law), or obligations to recover the lost quality of water bodies (like the water law) or obligations to compensate for loss of habitats (like the law on Natura 2000).

The first one was the fund for environmental intervention (FEI), created in 2008, and is suited for general interventions for environmental protection.

In 2009, two more funds were created, each one with specific purposes and applying to a specific field: one for water protection and the other for nature conservation. In all the cases, the funds come from the environmental fines applicable to environmental infractions, from environmental taxes and fees, as well as from the State budget.

If we compare the aims of the three funds we see that the Fund for Environmental Intervention has very broad and general objectives. It is intended to:

- prevent serious and imminent threats to the environment resulting from natural catastrophes or accidents,
- to eliminate past environmental burdens,
- to compensate for environmental damage when environmental liability is not applicable,

- to act in any other case of delay, difficulty or impossibility to find the person responsible for an environmental damage or to impose him the duty to compensate for damages.

The Water Fund was created:

- to support projects for the improvement of water catchments, water use and distribution,
- for the reduction of pollution present in waste waters,
- for the reduction of environmental impacts of the public uses of water,
- for the improvement of water ecosystems,
- for flood control, and
- other projects for the protection or improvement of the quality of water resources.

As for the Nature Conservation Fund, it is intended:

- to support nature conservation projects to be held in classified areas,
- to promote studies on the enlargement of the number of classified areas,
- to give incentives for projects on internationally threatened species conservation,
- to support the public acquisition or renting of private nature conservation areas,
- to give loans for biodiversity,
- to support education campaigns in favour of biodiversity protection,
- to support scientific research on biodiversity,
- to promote communication, exhibitions and visits to classified areas,
- to support business initiatives for nature conservation in classified areas,
- to support the re-naturalisation of degraded areas.

Court cases

1. The *Freeport* case is still under police investigation in Portugal and in the UK. This is a paradigmatic case of large scale environmental corruption for the construction of a Shopping Centre in a Special Protected Area for the Birds. The newspapers disclose names and amounts of money involved and the list of accused increases every day. The involvement of members of the government, and likely also the Minister of the Environment at the time, seems to unveil a large network of private interests and corruption[2].

For further information see: http://www.dailymail.co.uk/news/article-1133106/Edward-Sophie-Portugals-PM--4m-corruption-row-giant-mall-built-British-firm.html

Or Freeport outlet controversy at

http://en.wikipedia.org/wiki/Jos%C3%A9_S%C3%B3crates

2. The *Co-incineration* case goes up to the Supreme Administrative Court again.

This old case refers to a polemic government decision taken in 2006 (based on a environmental impact assessment dating from 1998) to incinerate dangerous industrial waste in cement kilns (http://www.endseurope.com/14217?referrer=search) that has been decided by the Supreme Court in 2007 and 2008.

[2] The Freeport case refers to a change in the boundaries of a special protection area for the birds in the Tejo estuary, near Lisbon, and the simultaneous declaration of no environmental impacts of a large project, 3 days before the 2002 legislative elections. These favourable steps (both said to be motivated by corruption and illegal payments to Portuguese civil servants and members of Cabinet) allowed a British developer (Freeport, now owned by Carlyle) to build the largest outlet shopping centre in Europe (75 000 m^2).

Now, in 2009, the case was again accepted for judgement by a decision of the Supreme Administrative Court take last May, recognizing the need of a procedure for Extraordinary Review.

According to the law, the Extraordinary Review is to be used only in cases of extreme "legal or social relevance" or when the Review is "clearly necessary for the better application of the law".

In the words of the Supreme Court, the procedure of Extraordinary Review should be possible in matters of extreme importance and used only as "safety-valve". In the co-incineration case the Supreme Administrative Court decided that:

a) first, the decision to incinerate dangerous wastes in cement kilns assumes a specially qualified social relevance and
b) second, the previous processes and judgement in this case revealed very relevant legal questions like the dispense of witnesses, the inquisitorial system, the applicability of the "so called precaution principle" and the *periculum in mora*.