AVOSETTA QUESTIONNAIRE PORTUGAL

ENFORCEMENT OF EC ENVIRONMENTAL LAW IN PORTUGAL

1. Please describe generally the most import tools for the enforcement of environmental law in your country. Also describe the relative "weight" of private law, administrative law and criminal law for the enforcement.

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

In practice, the most important tool is administrative law. Private law is rarely used and criminal law suits are almost absent.
This doesn't mean that criminal law is not adapted to the protection of the environment. Actually, the criminal includes two specific environmental crimes: crime for damage against nature and crime of pollution.

Criminal Law

Article 278

There is a crime of damage against nature when someone, disregarding laws, regulations or orders of administrative bodies applying those norms,

a) eliminates an important number of individuals of fauna or flora, or from a protected species or threatened by extinction;
b) destroys a natural protected habitat or destroys a natural habitat causing loss of legally protected wild fauna or flora or loss of an important number of individuals of fauna or flora;
c) seriously affects the soil or the subsoil resources;
shall be punished with imprisonment up to 3 years or fine up to 600 days.
2. Anyone who trades or possesses for trade an individual of a protected species of fauna or flora , dead or alive, shall be punished with imprisonment up to 6 month or fine up to 120 days.
3. If committed with negligence the conducts foreseen in n.1 shall be punished with imprisonment up to 1 year or fine.

Article 279

There is a crime of pollution when someone disregarding laws, regulations or orders of administrative bodies applying those norms:

a) pollutes the waters or soil or, in someway, degrades its quality
b) pollutes the air through the use of technical aparatus or instalations; or
c) Causes noise polution by using technical aparatus or instalations, specially using machinery or any terrestrial, fluvial, maritime, or aerial vehicules;
in a serious way, shall be punished with imprisonment up to 3 years or fine up to 600 days.
2. If committed with negligence the conducts foreseen in n.1 shall be punished with imprisonment up to 1 year or a fine.
For the purposes of the previous numbers the agent acts in a serious way when he:
a) impairs damages in a long lasting way the well-being of peoples in their right to enjoy nature
b) prevents in a long lasting way the use of a natural resource; or

c) poses a danger of dissemination of a micro-organism or a substance that is noxious for people's body or health.

A comparative table showing the penal sanctions for other crimes can give a slight idea of how heavy (or light) these sanctions are:

Crime	Prison	Fine
Against nature	Up to 3 years	Yes, up to 600 days
Pollution	Up to 3 years	Yes, up to 600 days
Stealing	Up to 3 years	Yes
Physical damage	Up to 3 years	Yes
Damage to property	Up to 3 years	Yes
Violation of privacy	Up to one year	Yes, up to 240 days
Disrespect of national symbols	Up to 2 years	Yes, up to 240 days
Kidnapping	From 2 to 8 years	No
Serious physical damage	From 2 to 10 years	No
Murder	8 to 16 years	No

Both individuals and legal persons can be charged for criminal offences.
The attempt to commit a crime is also punished.
The criminal procedures can be started by the Public Prosecutor (on his own initiative or after complaint or notification), by the victim or by environmental NGOs.
The new law, transposing the environmental liability directive introduces new concepts
In practice, not only many polluting activities are socially accepted but also there isn't a culture of denunciation. To denounce a crime is to blame someone that you can need in the future, or that can retaliate (namely, simulate accidents or dismiss workers).

Civil Law

Until the transposition of the directive on environmental liability, in 2008, Civil law hadn't been changed to adapt to environmental protection requirements. The main instrument before the courts used to be the classical concept of "neighbourhood relations" according to an enlarged interpretation of "environmental neighbour" proposed by the doctrine.
The civil code also regulates damages caused by dangerous activities. The owner is obliged to compensate the damages, except in the case that he proves he has used all the means imposed by the circumstances to prevent them.
In 2008, Decree-law 147/2008, transposing the Environmental Liability Directive, reaffirms the subjective liability rule for damages caused by some professional activities (listed in annex III, similar to the Directive): who intentionally, or at least at fault, offends the rights or interests of others though damage to an environmental component, shall repair the damages caused by the offense (article 7) .
In what concerns objective liability, the Civil Code regulates it saying that there can only be liability without fault in the cases foreseen in the law (article 483 doesn't give any examples). One of these cases was the framework environmental law (Law 11/1987) which stated the duty to compensate severe environmental damages due to blameless but yet especially dangerous activities, even when the legal rules applicable have been respected. According to this law, the criteria for estimating the compensations would be approved by a subsequent law which has never been approved. For this reason, for years it was not clear whether in Portugal there was a system of civil objective liability or not. In 2008 the same Decree-law 147/2008 reasserts objective liability for the prevention and

compensation of damages caused by the professional activities covered by the law. This general rule has exceptions and they are listed in article 20, corresponding to article 8, nº3 and 4 of the directive.

The operator is not obliged to bear the costs of prevention and compensation measures when he can prove that the environmental damage or imminent threat of such damage:

- was caused by a third party and occurred despite the fact that appropriate safety measures were adopted; or
- resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities; or
- he didn't act neither with intention nor with negligence and the environmental damage was caused by:
    - an emission or event expressly authorised in accordance with an authorisation identified in annex III and respected the conditions of the authorisation and implemented the legislative measures applicable at the date of the emission or event; or
    - an emission, an activity or any form of use of a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

There is still no relevant case law to assess the practical application of the law.

Administrative Law

Until 2006 the general rules on administrative sanctions were applicable without changes to environmental law infractions. In 2006 a new law regulates in detail the administrative powers to sanction offenses of environmental laws. Compared with the previous regime, this was a much more effective and preventive one.

Some important aspects of the law were:

- Broad scope of application of the law: both negligent acts and failed attempts are punishable.
- Joint liability of collective persons and partners, administrators and directors
- Wide range of accessory sanctions (just to give some examples: loss of fiscal benefits, measures to prevent or environmental damages or to restore the previous situation, publicity of the condemnation, etc.)

Short prescription terms

Prescription...	... of procedure	...of fine and accessory sanctions
Serious/very serious offenses	5 years	3 years
Light offenses	3 years	2 years

In 2009, three years after the entry into force of the 50/2006 Law, it was amended by Law 89/2009.

[1]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:

Article 22 (fines)	Minimum		Maximum	
	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€
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 a 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

[1] This is the same text included in the report on recent developments in Portuguese environmental law.

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.

In sum, in what concerns administrative law, there is a low effectivity rate. There are difficulties of proof due to an excessively rigid process, prescriptions are not at all unusual and condemnations are rare.

2. Please answer sub-questions I-IV **for each situation listed as a-i below**. Also indicate whether you know of national cases where these issues have been dealt with: **I:** Which sanctions are provided under national law (criminal, administrative etc.)?

3. **II:** Can NGOs and/or citizens challenge the enforcement – or lack of enforcement – by the competent authority, or is it within the full discretion of the competent authority to decide whether and how offences should be sanctioned? (If NGOs and citizens can challenge such decisions and omissions, including failures of a procedural character, please describe how.)

The "public having interest on the subject" as well as any environmental NGOs can judicially attack any illegal decision, act or omission.
"Public having interest on the subject" = any holders of subjective rights or legally protected interests or whoever may be affected by the decision, namely ENGOs.
Actio Popularis is applicable (see below, answer to question 3 on the Aarhus convention)

III: In light of European Community law, including the possible direct or indirect effect of directives, does national law grant NGOs and/or affected citizens the right to take direct enforcement measures against the polluter?

Yes

IV: Could the competent authority under national law be held liable for erroneous acts and for omissions (non-enforcement) in the cases listed below? If so, how?

The law on State liability (law 67/2007), covers different aspects of liability for acts and omissions of the State or other public legal persons. The State (*latu sensu*) must compensate for:

- damages caused by specially dangerous State operated activities
- illegal authorisations infringing the conditions posed in the law
- severe judiciary mistakes, such as clearly unconstitutional or illegal court decisions, or serious error in the judgement of the facts.
-

a. When an EIA project is established without an EIA permit.

If there is no permit at all, the project can be stopped as soon as it is noticed.

If any other kind of permit (IPPC, industrial permit, etc.) has been issued by the competent authorities (ex. Ministry of Economy, a Municipality, etc), without the required EIA, this act is null and void.
The following sanctions apply to cases of intentional action, negligence or attempt:
- a fine from €498,79 to €3740,98 (in the case of individuals), and from €2493,98 to € 44 891,81 (in the case of legal persons).
- If the operator has obtained an economic gain the fine can be raised up to 1/3 of the maximum limit to neutralize the benefit.
- eventually accessory sanctions (like loss of objects related with the infraction, loss of right to subsidies or other public advantages, suspension of activities or professions or closure of the installation for two years) are applicable to the operator.
All the sanctions are to be publicised and the advertisements supported by the operator.
Additionally the operator is, in any case, obliged to the reconstitution of the *status quo ante*.
In case he refuses, the State carries it out through the services of the Ministry of the Environment and charges it on the operator.
If it is not possible, then the operator must reduce or compensate the impacts registered.
If he refuses to do so, or in the case of remaining damage, he is obliged to compensate the State.

b. When conditions attached to the EIA decision, granting a development consent, are disregarded.

The same sanctions applicable to the establishment of and EIA project without an EIA permit.

c. When an IPPC facility is established without an IPPC permit.

It's considered a very serious infraction. In the case where the sanction is higher than half the higher limit, the sanction shall be publicised at the expense of the operator.

Author:	Individuals		Legal persons	
Intentionality:	Negligence	Deceit	Negligence	Deceit
Very serious infraction	from 20000 to 30000 €	from 30000 to37500 €	from 38500 to 70000 €	from 500000 to 2500000 €

In case of very serious infractions, when the infraction involves the emission of dangerous substances causing damage to health, safety of people, goods, and the environment, the limits can be doubled.
Also accessory sanctions are applicable, like: seizure of documents and goods related with the infraction, loss of right to subsidies, aids or credits, loss of the right to participate in conferences, trade fairs, auctions, work contracts, suspension of activities or professions or closure of the installation for three years, and publicity of the condemnation.

d. When an IPPC facility is permitted without prior assessment in accordance with article 6(3) of the Habitat Directive.

The permit is null and void.

e. When an IPPC facility is operated in violation of conditions of an IPPC permit.

Serious infraction.

Author:	Individuals		Legal persons	
Intentionality:	Negligence	Deceit	Negligence	Deceit
Serious infraction	from 2500 to 10000 €	from 6000 to 20000 €	from 15000 to 30000 €	from 30000 to 48000 €

f. When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive.

Payment of 100€ per ton of carbon dioxide released. (Until 1 January 2008 it was 40€).

If this amount is not paid the emission license will be suspended in the following year.

Publicizing, in the official webpage of the Ministry, of the names of the law breaker polluters.

There is a serious infraction if:

- the operator omits or forges the information
- the operator does not monitor the emissions
- the operator does not send the report

Accessory sanctions can also be applied.

g. When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in article 6(2) of the Habitat Directive.

A fine ranging from 250€ to 3740€, for individuals, and from 3990€ to 44890€ for legal persons.

h. h. When water plans adopted under the Water Framework Directive – or for the moment existing water quality standards laid down in the "old" water directives – are not complied with.

If there is a permit, it is null and void.

If there is no permit and it is just a *de facto* situation, different fines are applicable according the cases:

In the case of constructions (ex. building an IPPC installation) a higher fine is due, in the case of uses not involving any construction (ex. emissions), and a lower fine.

Individuals		Legal persons	
Illegal constructions disregarding water plans	Illegal uses of the soil or of legal installations	Negligence	Deceit
from 2500 to 100000 €	from 1500 to 50000 €	Up to 125000€	Up to 250000 €

i. When air plans under the Air Framework Directive are not complied with.

No binding air plans

Please, comment on whether you find the national means of enforcement adequate, and if, based on the national experiences, you have any general suggestions for improving the enforcement.

There are national means of enforcement but they are not sufficient.

It would require cleverer and more effective inspections.

4. How is article 9(3) of the Aarhus Convention, regarding access to administrative or judicial procedures for members of the public to challenge violations of environmental law, complied with? In which situations is it NOT complied with?

In Portugal there are no obstacles on access to justice on environmental matters. *Actio popularis* is in the Constitution since 1976 (article 52). This right hasn't been regulated until 1995 and the doctrinal debate for almost 20 years was on whether it has direct effect and whether the citizens could rely on it before the courts. The answer depended on judicial interpretation. Since the approval of the Law 83/1995, regulating the conditions in which it can be exercised, this possibility has been largely used.

Article 52 of the constitution on "right to petitions and action popularis" has been amended and its scope has been gradually enlarged. The present wording is the following:

> Article 52
> **Right to petitions and *actio popularis***
>
> 1. Every citizen has the right to present, individually or collectively, (...) to any authorities petitions, protests, claims, or complaints, for the defence of his rights, of the constitution, of the laws or of the general interest, as well as they have the right to be informed, in a reasonable delay, on the result of the appreciation.
>
> 2. The law shall establish the conditions in which the petitions presented before the national Parliament and the regional parliaments are to be appreciated in plenary meeting.
>
> 3. Everyone has the right, personally or through associations for the defence of the interests at stake, of *actio popularis* in the cases foreseen in the law, including the right to ask for compensation for damages to the victims, and namely to:
>
> A) promote the prevention, ceasing or judicial prosecution of offenses to the public health, to the rights of the consumers, to the quality of life and to the preservation of the environment and cultural heritage;
>
> B) defend the goods of the State, of the autonomous Regions and of the local autarchies.

According to law 83/1985 (article 2) the holders of this right are "every citizen[2] as well as associations and foundations for the defense of the same interests, regardless of having or not a direct interest in the plea".
For associations and foundations, the law requires them

a) to be constituted as legal persons,
b) to have competence, according to their statutes, for the protection of the interests at stake,
c) not to carry out any professional activity in competition with private companies or

[2] The law speaks about "every citizen enjoying his civil and politic rights", but the doctrine is unanimous to say that since there are no condemnations on loss of civil or political rights anymore, as sanctions of any crime, then article 2 should be read as simply mentioning "every citizen".

learned professions.

A specific Law on **environmental NGOs** – called ENGO - (Law 35/1998) states clearly the conditions in which these associations have access to justice.

> Article 10
> **Process legitimity**
> The ENGO, regardless of having or not a direct interest in the plea, are legitimated to:
> a) propose law suits for the prevention, correction, suspension and ceasing of acts or omissions of public or private entities which can constitute a cause of environmental degradation,
> b) propose civil liability law suits against the mentioned acts and omissions
> c) start administrative suits against administrative acts or regulations which infringe the laws for protection of the environment
> d) To lodge complaints or indictments, as well as to be assistants[3] in criminal procedures for crimes against the environment and follow the administrative processes for imposing fines through memorandum, technical opinions, suggesting exams, or other proof diligences until the end of the process."

Furthermore, except in case of malicious litigation, this law exempts the ENGO from the payment of any court fees (article 11)

5. Please identify possible factors, such as costs, length of procedures or other practical matters, that may prevent effective access to justice for members of the public.

Despite the fact that the ENGO are exempted from court fines, the fact that barrister's fees still have to be paid is still considered by them as a severe limitation on their right of access to justice.
Although the law gives wide access to court through *actio popularis*, there are not that many environmental law suits. Abstention from going to court can result from a generalized disbelief of the capacity/willingness of the Courts to sue the polluters:

- Very often the courts avoid decisions on the merits and after a very strict analysis of the case they pronounce a formal verdict on the process requirements (expired legal terms, inexistence of certain notices or notifications, inadmissibility of certain proofs or evidence raising, etc).
- Excessively lengthy procedures are not rare. So aren't prescriptions.
- Some judges seem to be more strongly motivated by social and economic issues rather than by environmental matters. Thus, balancing is generally favourable to economic development and unfavourable to the environment. In most cases, the public interest on the implementation of a project is recognized to be higher than the public environmental interest to suspend/give up the same project. Consequently, as a rule, the interim measures required are not granted.

[3] In crimes of public nature, the criminal process is lead by the Public Ministry and the presence of the offended is not necessary but he can, voluntarily, be present in court in the formal position of "assistant".

- When a decision that is both substantial and favourable to the environment is pronounced, after a lengthy procedure, it is likely that the fine will not be paid by the convicted and a new process (this time an executive process) is necessary to make it applicable.

6. Do NGOs and/or citizens have access to injunctive relief and interim legal remedies?

Yes

7. Do you know any national cases which have dealt with this?

Yes. An ENGO has asked for the suspension of incineration of waste elimination/recovery in cement kilns and got it.

8. Are there any examples where a final administrative decision has been reopened because of a complaint based on later case law from the ECJ?

I don't think so.

9. Has there been any national case in which the State or the local authority have been held liable for not remedying environmental damage or other damage in violation of EC environmental law?

There is new law on State liability (law 67/2007 adopted in the 31st December and entered into force on the 1st February 2008) and until now it has been applied in subjects other than the environment. According to this law, the State can now be held liable for damages caused by administrative, judicial and legal or political actions or omissions, including disregard of EC law.

10. Do you now of any significant developments, good practices or failures (e.g. cases, new laws, new institutional arrangements, or new policies) with regard to the enforcement of EC environmental law, not covered by the previous questions, that you would like to highlight?

1. Inspection deficit

There is a serious State failure in the inspection of noxious activities or activities involving risk. The number of inspectors working for the Ministry of the Environment is very low (less than 100 for all the country).

Many environmental offenses are committed during the night or during week-ends, when there is no inspecting capacity. It's the case of illegal emissions of waste waters to rivers. To save energy the pig farming operators turn off the waste water treatment systems and let the sludge go directly down to the river using underground pipes to bypass the treatment system.

Furthermore, the inspectors are often denounced and the industries know beforehand when they are going to be inspected and are never caught by surprise.

On the other hand, the inspectors are not lawyers and the minutes describing the infraction which are the base documents to take the case to court are often not complete and therefore, null and void.

2. Use of expedients to escape legal obligations

For instance the strategic environmental assessment directive not only was transposed late but also boosted a ***wave*** of revisions of Plans and Programs in Portugal, disregarding the standstill effect of directives.
In the case of environmental impact assessment of projects, several artifices were used:
- splitting the projects to make them seem smaller,
- juggling with the actual dimension of the projects to make them look smaller or having less impacts,
- using metaphors like “requalification” or “reconstruction” to disguise real projects and natural interventions
- overstate the deteriorated character of the site to prove the uselessness of protection
- giving up from asking for financial support for one part of the project
- prepare ex post EIAs

Finally, in Portugal a negative EIA decision is binding both for the developer and for every public authority. When the conclusions on environmental impacts are negative the project can’t be authorized or implemented. All administrative acts disregarding the result of a negative EIA are null and void.
In practice there are almost no negative decisions. A large majority of the EIA are favorable, although with conditions imposed on the operator.
To avoid disconformities between the conditions set out in the EIA and the real project to be implemented, a procedure of post assessment has been created.