The Environment and Climate Change Law Review

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EDITOR'S PREFACE

Environmental law is global in its reach. Multinational companies make business plans based on the laws and regulations of the countries in which they are headquartered and have manufacturing facilities as well as the countries in which they distribute and sell their products. Moreover, multinational companies have global environmental, health and safety goals and practices that tend to be worldwide in their scope for reasons of policy and operational consistency.

For these and other reasons, this first edition of *The Environment and Climate Change Law Review* is timely and significant. This book offers a review, by leading environmental lawyers, of significant environmental laws and issues in their respective countries around the world.

Climate change continues to dominate international environmental efforts, and we have also witnessed efforts to promote sustainability. Many countries are making efforts to promote conservation and renewable or green energy. Changes in reliance on coal and nuclear energy have impacts on the demand for other energy sources. All of these changes have impacts on efforts to reduce greenhouse gases.

Environmental law continues to change and evolve, as new regulations are adopted and existing rules are amended or challenged in courts or interpreted by agencies. In the United States, 2017 will witness a new President and an administration that is expected to have different priorities in the related areas of environment and energy. Future editions of this book will focus on changes and developments.

This book presents an overview and of necessity omits many details. The book thus should be viewed as a starting point rather than a comprehensive guide. Each chapter of this book, including mine, represents the views of the author in his or her individual capacity, and does not necessarily reflect the views of the authors' firms or clients, or the authors of other chapters, or my views as the editor. This book does not provide legal advice, which should be obtained from the reader's own lawyers.

I wish to thank the many authors who contributed their time and expertise to the preparation of the various chapters to this book. I also wish to thank the editors at Law Business Research for conceiving of this project and seeing it through. We hope this book helps you to gain a better understanding of environmental law in various countries around the globe.

Theodore L Garrett
Covington & Burling LLP
Washington, DC
January 2017

Chapter 12

PORTUGAL

Manuel Gouveia Pereira[1]

I INTRODUCTION

The Portuguese economy is recovering from the EU/IMF Economic Adjustment Programme for Portugal. The Programme, which covered the 2011–2014 period, provided official sector financing by the European Union, the eurozone Member States and the IMF of approximately €78 billion, for Portugal's possible fiscal financing needs and support to the banking system.

Although the programme succeeded in improving public finances, stabilising the financial sector, and setting the economy onto a path towards recovery, the Portuguese economy remains vulnerable and faces many challenges to become competitive, agile and resilient.

Nonetheless, throughout the implementation of the programme, public policies regarding environment and climate change continued to be enforced and significant changes to the legal framework occurred.

At end of 2015, the socialist party, backed by the other left-wing parties in Parliament, formed a new government, overthrowing the coalition of right-wing parties in power since 2011.

As of December 2015 the new government has been focused on reversing austerity measures adopted during the Economic Adjustment Programme and on strengthening the economy. Few noteworthy legal regimes focused on environmental issues have been published since, the majority of them have originated from EU law or were published in order to comply with EU targets and objectives.

In this context, during 2016, the most relevant legal framework includes the new legal regime for multi-municipal high-end water management services, the National Air Strategy, the creation of two funds: the Blue Fund (development of the economy of the sea, scientific research and protection and monitoring of the marine environment) and the Environmental Fund (comprising the former Portuguese Carbon Fund, Environmental Intervention Fund,

1 Manuel Gouveia Pereira is managing associate at Vieira de Almeida & Associados.

Water Resources Protection Fund and Biodiversity and Nature Conservation Fund), a new national water plan, the ratification of the Paris Agreement on Climate Change and new rules regarding packaging waste management entities and waste sorting targets and prices.

As regards planned legislative initiatives, we would highlight the circular economy strategy, the revision of the 2020 Urban Waste Strategic Plan (PERSU 2020) in order to meet the new targets of the EU Circular Economy Action Plan, the Coastal Zone Protection Action Plan 2016–2020, the improvement of the 2020 funding programme, the simplification of legislation related to the economy of the sea (including aquaculture activities) and the revision of the Climate Change Adaption Strategy.

II LEGISLATIVE FRAMEWORK

Environmental protection and climate change laws and regulations originate mainly from three sources – international treaties or conventions, EU law and national law.

International treaties and conventions, once signed, must see their ratification approved by a Resolution of Parliament and ratification itself shall occur by means of a Decree of the President of the Republic. Portugal is a party to all of the main treaties and conventions regarding environmental protection and climate change.

EU law is one of the main sources of environmental legislation, consisting mainly of Regulations and Directives. Regulations are directly enforceable in domestic law and do not need to be enacted. However, it is very common for a decree-law to be published in order to ensure the execution of the obligations of the Regulation into Portuguese law. Directives are subject to enactment into Portuguese law within a specific time frame. Many Directives, however, are enacted after the term has elapsed. Enactment occurs by means of publication of a decree-law in the Portuguese Official Gazette. The main legal regimes on environmental protection, including climate change, are a result of the enactment of EU Directives and of EU Regulations.

In relation to national law, the Constitution of the Portuguese Republic establishes that both Parliament and the government have legislative powers divided according to the specific matter at stake. While certain matters are of the exclusive competence of Parliament others are competence of the government, exclusively or subject to a legislative authorisation granted by Parliament. As regards the legislative acts themselves, laws are issued by Parliament while decree-laws, regulations, resolutions, regulation decrees, ministerial orders, ministerial dispatches, among other acts, are issued by the government. Legislative acts are published in the Portuguese Official Gazette.

III THE REGULATORS

The main regulatory agencies responsible for enforcing environmental legal framework are the following:

i The General Inspection of Environment, Spatial Planning, Agriculture and Sea

The General Inspection of Environment, Spatial Planning, Agriculture and Sea (IGAMAOT) is the main environmental inspection body. It carries out inspections regarding all activities and all public and private entities with environmental relevance, imposing the measures that prevent or eliminate situations of severe danger to human health, safety of persons, of goods

and of the environment. The IGAMAOT carries out specific functions equivalent to those of a criminal police body whenever an environmental crime may be at stake and may also initiate and decide misdemeanour procedures according to the Environmental Misdemeanour Framework Law. It may act and carry out inspections without previously being informed by other entities of a possible breach of environmental legislation and may enter any premises and carry out the inspections it deems necessary. It is normal for industrial operators to have their installations inspected without previous notice at least once every three years. The IGAMAOT is hierarchically dependent of the Deputy Minister to the Prime Minister, of the Minister of the Environment, of the Minister of Agriculture, Forests and Rural Development and of the Minister of the Sea.

ii The Portuguese Environment Agency

The Portuguese Environment Agency (APA)'s mission is to propose, develop and monitor the integrated and participated management of environmental and sustainable development policies, in tandem with other sectorial policies and in cooperation with public and private entities seeking the same purpose taking into view a high level of environmental protection and the rendering of high-quality services to citizens. The main functions of this regulatory body are (1) to propose, develop and monitor environmental policies, especially as regards climate change, management of water resources, waste, ozone layer protection, air quality, recovery and remediation of contaminated sites, integrated pollution prevention and control, noise prevention and control, prevention of major industrial accidents risks, environmental and population safety, ecological labelling, voluntary environmental compliance systems, as well as environmental impact assessment and environmental assessment of plans and programs; (2) act as National Water, Waste and Dam Authority; (3) develop and ensure the implementation strategic options, policies and measures envisaging a low carbon economy, in particular the mitigation of greenhouse gas emissions and adaptation to climate change, and to act as National Authority for the EU emissions trading system and as National Authority for the implementation of the Kyoto Protocol; (4) act as National Authority for integrated pollution prevention and control and for strategic environmental assessment; and (5) act as competent authority for the environmental liability regime. As regards the enforcement of climate change policies, the APA and the IGAMAOT are the most important agencies. The APA is subject to the control of the Minister of the Environment.

iii The Water and Waste Regulatory Authority

The Water and Waste Regulatory Authority (ERSAR) ensures the regulation and supervision of the water and waste services and aims to increase the efficiency and effectiveness of the provision of these services. It is responsible for establishing the water and waste tariffs and for ensuring the regulation of quality of service rendered to end users by management entities. ERSAR is an independent administrative agency according to the Regulatory Entity Framework Law and is not subject to governmental control.

iv The Institute for Nature Conservation and Forests

The Institute for Nature Conservation and Forests (ICNF)'s mission is to propose, develop and ensure the execution of nature conservation and forests policies, taking into view the conservation, sustainable use, recovery, use and recognition of the natural assets. Its main functions are (1) to act as National Authority for nature and biodiversity conservation and as National Forest Authority; and (2) to ensure the management of the national network

of protected areas and the implementation of the Natura 2000 network, including marine protected areas. The ICNF is subject to the control of the Minister of the Environment, the Minister of Agriculture, Forests and Rural Development, and the Minister of the Sea.

v Regional spatial planning commissions

There are five regional spatial planning commissions (CCDRs) within the Portuguese continental territory. Their mission is to execute the environment, planning, cities and regional development policies. They are responsible for executing, assessing and inspecting, at a regional level, the environmental and planning polices, in tandem with the other regulatory bodies of the Ministry of Environment. As regards environmental issues, their competences include, at a regional level, environmental assessment of projects, industrial licensing, soil decontamination operations, licensing of waste operations, air quality management and air pollution prevention, noise prevention, integrated pollution prevention and control, environmental assessment and licensing of quarries. The CCDRs are subject to the control of the Minister of Planning and Infrastructure, the Deputy Prime Minister and the Minister of the Environment.

vi The Directorate-General for Natural Resources and for Maritime Services and Safety

The mission of the Directorate-General for Natural Resources and for Maritime Services and Safety (DGRM) is to execute the policies for preservation and knowledge of natural marine resources, for fisheries, aquaculture, transformation industry and related activities, development of maritime services and safety, including the maritime ports sector. Some of its competences are:

a to ensure a framework of knowledge regarding the available marine resources within the Portuguese territory, regarding inventory, use and planning of the maritime space;
b to authorise and license structures and productive activities regarding maritime fishing and aquiculture;
c to exercise its functions regarding the prevention of pollution from ships;
d to propose, in tandem with the ICNF, the creation of protected marine areas; and
e to license and inspect the use of waters located in protected marine areas.

The DGRM is subject to the control of the Minister of the Environment and of the Minister of the Sea.

As regards the enforcement of environmental legislation by the courts, Portuguese courts traditionally tend be somewhat lenient and often reduce the amount of the fines determined by public regulatory authorities or of the criminal sentence proposed by the Public Prosecutor's Office, whenever they consider said amount or sentence to be exaggerated. Furthermore, it should be noted that environmental misdemeanour procedures and crimes deal with matters that are of a very technical nature and the courts are not always comfortable to decide based on very specific technical and scientific details. Finally, as regards environmental misdemeanours, it should be noted that courts may decide differently from the regulatory authority that applied the fine and decide to apply a fine of a higher amount considering that the prohibition on imposing a heavier or stricter decision does not apply to the environmental misdemeanour procedures of the Environmental Misdemeanour Framework Law.

IV ENFORCEMENT

Whenever a violation of environmental laws and regulations occurs, different types of liability may arise.

As regards civil liability, the applicable regime under the Civil Code establishes that whoever, with wilful misconduct or negligence, causes damage to a third party must pay compensation to that party. Therefore, should any action resulting from an industrial operator, any individual or any activity cause damages to a third party, the latter will be entitled to request compensation. It should be noted that according to the causality principle under the civil liability regime, a causal link between the damage caused and the action or activity at stake must always exist. Strict liability will only apply whenever expressly foreseen by the law.

Administrative liability in relation to the state due to pollution or damage caused to the environment will also exist. Considering the 'polluter pays' principle, the liability and the recovery principles established in the Environmental Framework Law, any person or industrial operator that causes pollution or environmental damages will be liable for the damages caused, must bear the costs related to said damages including the costs associated with any prevention and control measures, must pay compensation whenever foreseen in the law and must also restore the environment to its previous state. Furthermore, for the purposes of administrative liability, the environmental liability regime is a key piece of legislation that must be taken into account. According to this legal regime, which enacted EU Directive 2004/35/EC, whenever environmental damage or the imminent threat of environmental damage occurs, the liable party must adopt prevention and repair measures and bear the associated costs. Strict liability will apply whenever the damage caused by the operator was a result of an activity listed in Annex III of the legal regime that contains a list of the activities considered to present a greater risk to the environment and to be more susceptible to causing environmental damage or threats. Additionally, mandatory financial guarantees must be put in place by operators that carry out the activities listed in Annex III in order to guarantee said measures. Third parties are also entitled to request compensation under the general rules of civil liability.

Misdemeanour liability due to pollution or environmental damage must also be taken into account. The vast majority of misdemeanours due to environmental damage are governed by the Environmental Misdemeanour Framework Law. According to this law environmental misdemeanours can be considered light, serious or very serious, depending on the gravity of the infraction.

For very serious environmental misdemeanours the applicable fine ranges between €10,000 and €200,000 for individuals and between €24,000 and €5 million for companies. Whenever the presence, emission or release of one or more hazardous substances seriously affects the health, safety of persons and goods and the environment, the minimum and maximum limits of the above-mentioned fines may be elevated to double the amount.

For serious environmental misdemeanours the applicable fine ranges between €2,000 and €40,000 for individuals and between €12,000 and €216,000 for companies.

In case of light environmental misdemeanours the applicable fine ranges between €200 and €4,000 for individuals and between €2,000 and €36,000 for companies.

Ancillary penalties can also be applied alongside very serious and serious environmental misdemeanours, comprising, among other things, the:

a prohibition to apply for subsidies and public benefits;

b prohibition to participate in public tenders;

c the suspension of licences and authorisations;

d the closing down of industrial establishments or sites subject to authorisation or licence issued by a public authority;
e the sealing of equipment; and
f the seizure of animals.

As regards the misdemeanour procedure itself, once an individual or operator is notified of an environmental misdemeanour procedure, he or she must present his or her defence to the regulatory authority that initiated the procedure within a maximum term of 15 working days. The final decision of the regulatory authority may be challenged in court.

Finally, the Criminal Code establishes the situations where criminal liability may arise due to the practice of environmental crimes as a result of damage to the environment or to nature.

The environmental crimes section of the Criminal Code establishes the following crimes:

a Crime of damage to nature (Article 278): damage to biodiversity and serious damage to subsoil resources is punished with up to five years of imprisonment. Furthermore, the trading of protected wild fauna or flora species, alive or dead, is punished with imprisonment of up to a maximum of two years or with a fine of up to 360 days. The possession of said species is punished with imprisonment of up to a maximum of one year or with a fine of up to 240 days.
b Crime of pollution (Article 279): if the agent pollutes the air, the water and the soil, he or she will be punished with up to five years of imprisonment. If the conduct of the agent does not cause pollution but is susceptible of affecting the air, water or soil quality or fauna or flora, it will punished up to a maximum of three years of imprisonment or with a fine of up to 600 days.
c Crime of pollution with common danger (Article 280): whenever a conduct foreseen in Article 279 causes danger created to life or to the physical integrity, to other people's assets with a high value or to cultural or historical monuments, it will be punished with imprisonment ranging from one to eight years if the conduct and the creation of danger is intentional and of up to a maximum of six years if the conduct is intentional and the creation of danger is due to negligence.

Companies and not only individuals may be considered subject to criminal liability due to the practice of an environmental crime under the terms foreseen in the Criminal Code.

V REPORTING AND DISCLOSURE

Portuguese law does not contain a general rule or procedure regarding the disclosure of permit violation, contamination or climate change. However, the main environmental legal regimes establish the obligation to report any breach, violation or malfunction to the competent authorities and to adopt all necessary measures to prevent or repair environmental damage.

Any industrial operator holder of an environmental licence (integrated pollution and prevention control) under the Industrial Emissions Regime must report to the authorities any breach or violation of legislation or of the applicable emission limit values (including emissions to water, soil or air), any malfunction of the industrial establishment or any complaint received. Furthermore, these operators are under the obligation to send to the APA, until 30 April each year, an annual environmental report containing all information regarding

the functioning of the industrial installation in the previous year, any breaches of legislation, malfunctions, complaints and any other information related to environmental compliance. The Industrial Emissions Regime establishes that any event that may significantly affect the environment must be notified to the authorities within 48 hours.

Under the environmental liability regime, whenever an imminent threat of environmental damage occurs, the operator must immediately adopt, irrespective of any notification or request by the authorities, the necessary and adequate prevention measures and inform the APA immediately of all details associated to said threat and of the measures taken. If environmental damage occurs, the legal regime foresees a maximum term of 24 hours within which the APA must be informed of all details related to the occurrence and the operator must immediately adopt, irrespective of any notification or request by the authorities, all feasible measures in order to control, contain, eliminate or manage pollution and contamination.

As regards the sale and purchase of property where pollution and contamination exists, there are no legal duties to disclose potential liabilities to purchasers. However, under the Civil Code there is an obligation to negotiate and execute contracts according to good faith principles. There is no legal obligation to disclose environmental liabilities in financial statements or reports.

VI ENVIRONMENTAL PROTECTION

i Air quality

The legal framework regarding air quality is set forth in Decree-Law 78/2004, as amended, which establishes the regime on prevention and control of pollutants into the atmosphere, applicable to industrial activities, production of electricity and heat, maintenance and repair of vehicles, combustion installations integrated in industrial, commercial or services establishments (including health services, education establishments and other public establishments) and to fuel storage activities.

The emission limit values regarding emissions to air are set forth in three ministerial orders:

a Ministerial Order 80/2006 (as amended), setting the minimum and maximum mass thresholds that define the monitoring conditions of emissions of pollutants to the atmosphere.

b Ministerial Order 675/2009 (as amended), setting the general emission limit values applicable to the majority of installations and establishments.

c Ministerial Order 677/2009 (as amended), setting the emission limit values for combustion installations.

It should be noted that for combustion installations which capacity is superior to 50MW, the applicable emission limit values are the ones set in the Industrial Emissions Regime, which enacted Directive 2010/75/EU and, therefore, as regards these installations, the emission limit values of Ministerial Order 677/2009 will not apply.

Operators do need to obtain a specific licence or authorisation for emissions to the air. However, the operation permit and, whenever applicable, the environmental licence, contain a specific reference or chapter with the emission limit values for atmospheric emissions and with the mandatory monitoring conditions. Monitoring obligations may be periodic or continuous. Whenever the mass flow emission is situated between the minimum and maximum mass thresholds set forth in Ministerial Order 80/2006, monitoring will be periodic and must occur

twice a year or, in certain particular situations, according to a different schedule. Continuous monitoring of atmospheric emissions is mandatory whenever the mass flow emission exceeds the maximum mass thresholds set forth in Ministerial Order 80/2006 or whenever the licence or authorisation for the functioning of the industrial establishment expressly determines that this type of monitoring must be carried out.

The Industrial Emissions Regime contains the emission limit values regarding emissions to the air to be complied with in relation to combustion installations whose capacity is more than 50MW, installations that use organic solvents and issue organic volatile compounds and installations that produce titanium dioxide.

According to the polluter pays principle and to Decree-Law 78/2004, an operator that causes damage to the environment through air pollution is under an obligation to pay compensation to the state and may also have to pay compensation to third parties under civil liability rules. The breach of this legal regime is a misdemeanour, which can be considered light or serious depending on its gravity, and determines the payment of fines. Public authorities can also force the operator to adopt the necessary measures in order to prevent or eliminate air pollution or an imminent threat situation, such as the suspension of activity, closing down the installation or seizure of equipment.

Whenever the breach refers to emission limit values contained in an environmental licence issued under the Industrial Emissions Regime, an environmental misdemeanour will be at stake and fines will apply, alongside with possible ancillary penalties.

We highlight that the environmental liability legal regime does not apply directly to damages caused to the air.

Finally, we would like to mention that emission limit values for air emissions are considered to be quite strict and it is not rare for operators to have difficulties in complying with the applicable legal framework.

ii Water quality

The Water Law (Law 58/2005), which enacted the EU Water Framework Directive (Directive 2000/60/EC) and the Water Use Legal Regime (Decree-Law 226-A/2007) are the two key legal regimes regarding water management, use and protection.

As regards quality standards, Decree-Law 236/98 establishes the rules, criteria and quality objectives with the purpose of protecting water quality. The annexes of this legal regime contain:

a the emission limit values to be observed in relation to the discharge of waste water to the water or to the soil taking into view their protection against pollution;

b the maximum values for the different parameters in water considering its use; and

c the environmental objectives for water resources.

Quality standards vary according to the type of water (surface water, groundwater, bathing water, fishing water, etc.) and to its purpose (e.g., human consumption). Annex XVIII contains the emission limit values for the discharge of wastewater.

These standards generally apply to all industries and activities and are in line with EU water quality standards set forth in EU Directives.

In relation to permits, the use of water resources and the occupation of the public hydric domain is subject to the previous obtainment of a water use title, which, depending on the type of use, can be a licence, a concession or an authorisation, issued by the APA, which

is the National Water Authority. The discharge of wastewater is normally subject to a licence. In case of industrial installations, subject to an environmental licence under the Industrial Emissions Regime, the use of water resources demands the separate obtainment of a water use title that will be annexed to the environmental licence.

According to the Water Law and to the Water Use Legal Regime the following activities are prohibited:

a use of water resources without the necessary title. Deliberate dilution of wastewater so as to comply with emission limit value;

b discharge of sludge in superficial or in underground waters;

c immersion of waste in breach of the environmental objectives for the water bodies;

d abandonment or unauthorised discharge of radioactive waste in superficial, underground, transition, coastal and sea waters and in wastewater drainage systems; and

e according to Decree-Law 236/98, the direct discharge into groundwater of certain hazardous substances is also prohibited.

A new National Water Plan was recently published under Decree-Law 76/2016. This plan is foreseen in the Water Law and its purpose is to establish the strategic options of the national water policy to be implemented by the river basin management plans for the 2016–2021 period and by the associated specific measure programmes. Water management under this plan envisages three main objectives: (1) the protection and recovery of the status of aquatic ecosystems and also land ecosystems and wetlands dependent therefrom, as regards water necessities, (2) the promotion of a sustainable, balanced and equal use of water of a good-quality status, considering its various uses and its economic value, based on a long-term use of available water resources, and (3) the mitigation of the effects of flood and droughts.

The contents of this new plan will most probably determine, in the short run, the amendment of water quality standards in a stricter manner in order to ensure that Portugal meets water quality standards set at EU level.

iii Chemicals

Decree-Law 82/2003 (as amended) approved the Regulation on Classification, Labelling, Packaging and Safety Data Sheets of Dangerous Mixtures. According to the Regulation, the mixtures can only be placed on the market if they are classified, labelled or packaged under the terms of the Decree-Law and of the Regulation.

This Decree-Law also establishes the obligation to provide information to the Directorate General for Economic Activities, to the Poison Information Centre and to the National Institute for Medical Emergency, to be carried out by the person or entity responsible for the placement of the mixture in the market.

Decree-Law 98/2010 establishes the regime on Classification, Labelling, Packaging of Hazardous Substances for human health or the environment taking into view their placement in the market. This legal regime (1) transposes Directive 2006/121/EC in order to adapt it to the Council Regulation (EC) No. 1907/2006, of 18 December, related to the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH Regulation); (2) guarantees the execution of Article 55 of Regulation EC 1272/2008, of 16 December, regarding the classification, labelling and packaging of substances and mixtures (CLP Regulation); and (3) enacts, in part, Directive 2008/112/EC.

Futhermore, Decree-Law 293/2009 ensures the implementation and execution of the obligations arising from REACH Regulation, which establishes a European Chemicals Agency and aims to ensure a high level of protection of human health and of the Environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances in the internal market while enhancing competitiveness and innovation.

REACH lays down some specific duties and obligations on manufacturers, importers and downstream users of substances on their own, in preparations and in articles. This Regulation is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market and use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle.

REACH sets out procedures for the registration, evaluation, authorisation and restriction of chemicals, as follows.

The registration provisions should require manufacturers and importers to generate data on the substances they manufacture or import, to use said data to assess the risks related to these substances and to develop and recommend appropriate risk management measures. Registered substances should be allowed to circulate on the internal market.

The evaluation provisions should provide for follow-up to registration, by allowing for checks on whether registrations are in compliance with the requirements of REACH and if necessary by allowing for generation of more information on the properties of substances.

The authorisation provisions should ensure the good functioning of the internal market while assuring that the risks from substances of very high concern are properly controlled. For these purposes and in order to ensure that substances of very high concern are progressively replaced by suitable alternative substances or technologies, all manufacturers, importers and downstream users applying for authorisations shall analyse the availability of alternatives and consider their risks, and the technical and economic feasibility of substitution.

The restriction provisions should allow the manufacturing, placing on the market and use of substances presenting risks that need to be addressed, to be made subject to total or partial bans or other restrictions, based on an assessment of those risks.

Manufacturers and importers are also obliged to register relevant information in a central database (European Chemicals Agency (ECHA).

REACH entered into force in 2007 and its provisions are being phased-in over 11 years.

As regards national requirements, according to the REACH Regulation the person or entity responsible for the placement of dangerous substances in the market shall: (1) provide relevant information on those substances to the Poison Information Centre and to the National Institute for Medical Emergency, prior to placing them in the market; and (2) make available the relevant information on the substances classified as hazardous, to the IGAMAOT and to the Authority for Economic and Food Safety.

All permit applications must be complete and truthful and all permit requirements carefully followed. Required environmental controls and equipment shall not be neglected (except as allowed by and in compliance with the law).

iv Solid and hazardous waste

The Waste Management Legal Regime (Decree-Law 73/2011 as amended) is the framework legal regime regarding waste management, applicable to both hazardous and non-hazardous waste.

Waste management activities are subject to a licensing procedure directed by the APA or by the CCDRs.

Whenever a waste management activity is carried out in installations included in the thresholds of Annex I of the Environmental Impact Assessment Legal Regime the licensing authority will be the APA. In all other situations, including soil decontamination operations, the licensing authority will be the CCDR. A specific licence will be issued in relation to the waste management activity (e.g., collection, transportation, recovery and elimination).

As regards waste elimination, operators of landfill sites must obtain an environmental licence according to the Industrial Emissions Regime, as well as two insurances: (1) insurance to cover closure and post-closure obligations; and (2) insurance to cover accidental pollution events. These operators must also have a fully paid up share capital of at least:

a €250,000 (for inert waste landfills); and

b €1 million (for hazardous or non-hazardous waste landfills).

It should be noted that the elimination of hazardous waste in specific facilities is subject to an autonomous legal regime.

Furthermore, operators that carry out the collection, transportation, recovery and elimination of hazardous waste must hold a financial guarantee to cover their environmental liability under the environmental liability regime.

v Contaminated land

Although this matter has been extensively discussed by various governments and by various sectors of society, Portugal does not have a specific legal regime for contaminated land. Whenever it is necessary to carry out soil decontamination operations they will be subject to previous licensing under the Waste Management Legal Regime by the CCDRs.

In 2011, the APA issued a non-binding guide regarding the assessment of imminent threat and environmental damage according to the Environmental Liability Regime (Decree-Law 147/2008). The guide contains a specific chapter on how to assess damages to soil and soil contamination situations, including prevention measures, risk analysis and repair and monitoring plans. The Ontario Rules for soil decontamination are the reference used to assess the level of contaminants in the soil.

Landowners are not required by law to investigate and assess the contamination level of their property although regulatory authorities can order assessments and clean-up operations whenever a pollution or contamination event is verified or comes to their knowledge.

According the polluter pays principle, the operator responsible for causing pollution or environmental damage is liable and must carry out and pay the costs associated to environmental damage and clean up, adopting the necessary measures to prevent further threats and damages to the environment. However, in cases where the owner of the land was not the polluter, if there is an imminent threat or serious danger to the environment, authorities can demand that the current owner carry out the environmental investigation and clean up, including prevention and remediation measures. In these cases, the owner shall have a right of redress in relation to the liable party. Public authorities may also carry out the clean-up and decontamination operations directly with right of redress in relation to the liable party.

The majority of the environmental legal framework applicable to activities that are most likely to cause pollution demand operators to hold financial guarantees to cover their liability in relation to pollution events, including the Environmental Liability Regime.

Whenever environmental damages are caused and this legal regime applies the operator must adopt prevention and remediation measures. In case the operator does not have the capacity or know-how to carry out *in situ* decontamination he or she may hire a specialised company to carry out the operation or, alternatively, remove the contaminated soil from the site or installation and deliver it to a duly licensed waste management operator. The failure to adopt prevention or remediation measures when directly determined by the APA is a very serious environmental misdemeanour. The failure to immediately adopt prevention or remediation measures, when an imminent threat or environmental damage occurs, is a serious environmental misdemeanour.

In September 2015 the APA disclosed a legislative proposal regarding a legal regime for the prevention of soil contamination and for soil remediation and launched a public hearing open to all citizens. Up to the present date, however, there has been no news from public authorities or from the Ministry of Environment regarding this proposal.

VII CLIMATE CHANGE

Portugal's carbon trading scheme is set forth in Decree-Law 38/2013, enacting Directive 2004/101/EC amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (the Amended Emissions Trading Directive).

Operators subject to this legal regime must hold a permit allowing them to emit greenhouse gases (GHG). GHG emissions must be monitored and certified annually and this information sent to the APA. The permit is annexed to the environmental licence of the operator issued under the Industrial Emissions Regime. The auctioning of allowances is also foreseen and is carried out according to the EU Emissions Trading Scheme Auctioning Regulation (Regulation 1031/2010).

According to the Climate and Energy Package 2020 for the 2013 to 2020 period, Portugal must limit the increase of GHG emissions for the sectors not included in the EU Emissions Trading Scheme to 1 per cent in relation to 2005. For renewable energies in the raw final consumption of energy, a new goal of 31 per cent has been adopted, 10 per cent of which is allocated to transport. A general goal to reduce the consumption of primary energy to 25 per cent and a specific goal for the public administration of reduction to 30 per cent has also been adopted.

Portugal approved the Green Growth Commitment (CCV), imposing certain goals to be achieved in 2020 and 2030. For 2030, the main goals are the following:

a to reduce GHG emissions between 30 and 40 per cent (52.7 to 61.5 million metric tonnes of carbon dioxide equivalent ($MtCO_2e$)) in relation to 2005;

b to increase the share of renewable energies in the final consumption of energy to 40 per cent; and

c to increase energy efficiency through a reduction of 30 per cent over the energy baseline in 2030 translated into an energetic intensity of 101 tep/MEUR GDP.

The Strategic Framework for the Climate Policy (QEPiC), approved in 2015, provides that Portugal must reduce its GHG emissions to values of -18 to -23 per cent in 2020 and to -30 to -40 per cent in 2030, compared with 2005 values, depending on the results of European negotiations.

Portugal has also created the National Action Plan for Renewable Energies (PNAER), establishing the goals regarding the share of Portugal's energy supply from renewable sources for energy consumption in 2020, as well as the National Action Plan for Energy Efficiency (PNAEE).

Regarding energy efficiency, Portugal has implemented an energy certification system for buildings (destined for housing or commercial purposes), with the purpose of improving the energety performance of buildings and making the obtainment of energy certificates mandatory.

Additionally, through the EU 2020 funding programme, Portugal approved an Operational Programme of Sustainability and Efficiency in the Use of Resources (POSEUR), that focuses, among other issues, on available funding in order to achieve the goal to increase energy efficiency in the housing sector and to reduce the annual estimated GHG emissions, limiting, for 2023, the value of GHG emissions to 80.640T CO_2e.

The National Air Strategy (ENAR 2020) was recently approved by Resolution of the Council of Minsters 46/2016, focusing on the improvement of air quality, by protecting human health, the quality of life for citizens and ensuring the preservation of the ecosystems. It imposes the following goals:

a compliance with the emissions and air quality goals in 2020;

b compliance with air-quality improvement targets in 2020;

c establishment of a plan to achieve the air-quality goals recommended by the World Health Organization in the long term; and

d cooperation with climate policy in order to ensure that the measures concerning air pollutants and greenhouse gas emissions will benefit the air quality and climate change.

As a final note, the Paris Agreement on climate change was adopted in December 2015, and entered into force on 1 November 2016. Its central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius. The Paris Agreement also aims to strengthen the ability of countries to deal with the impacts of climate change.

Portugal ratified the Paris Agreement on 30 September 2016.

VIII OUTLOOK AND CONCLUSIONS

We anticipate that one of the greatest challenges for Portugal will be the revision of the 2020 Urban Waste Strategic Plan (PERSU 2020) and the amendment of the current environmental legal framework in order to meet the new targets and objectives of the EU Circular Economy Action Plan. In this respect it should be highlighted that the government is also preparing a National Circular Economy Strategy.

Finally, and although this a matter that tends to be controversial considering the financial impacts for the industry and for landowners, we expect that in the short term a specific legal regime for the prevention of soil contamination and for soil remediation will be published.

Appendix 1

ABOUT THE AUTHORS

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Manuel Gouveia Pereira is managing associate of the environment practice at VdA. He has a law degree from Lusíada University of Lisbon, Faculty of Law, a masters degree in administrative law from the University of Lisbon, Faculty of Law and a postgraduate degree in planning and environmental law from the University of Coimbra, Faculty of Law. He teaches environmental law in the seminar of Politics and Innovation in Environment, in the integrated masters course of Environmental Engineering, and at the Sciences and Technology faculty (FCT) of the New University of Lisbon (UNL). He also teaches the planning law module in the postgraduate course on real estate management and assessment at the Portuguese Institute for Development and Economic, Financial and Corporate Studies (IDEFE) – ISEG. Manuel is part of the Portuguese Sustainable Growth Think Tank (PCS). He is frequently invited to talk to the press on environmental matters, being a monthly commentator on waste issues, and is the coordinator of VdA's Green Project, the firm's environmental sustainability project. Before joining the firm he worked as legal adviser to two cabinets of the Minister of the Environment and Spatial Planning, between 2007 and 2011. He is actively involved in several transactions in Portugal and abroad, focused on environmental compliance, namely in the waste and water sectors, energy (including renewables), oil and gas, mining, aquaculture, agriculture and the economy of the sea.

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