



**REPORT ON THE EXPERIENCE GAINED IN THE
APPLICATION OF DECREE-LAW No. 147/2008
OF 29 JULY 2008**

April 2013



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Decree-Law No. 147/2008 of 29 July 2008**

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Data sheet:

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1 Introduction

This report is an official document drawn up by Portugal to comply with the obligations resulting from implementation of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 which approved the environmental liability regime applicable to the prevention and remedying of environmental damage based on the "polluter-pays" principle, as amended by Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 concerning extractive industries and by Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 which established a general framework for the geological storage of carbon dioxide.

The aim of this report is to inform the European Commission by 30 April 2013 of the experience gained in Portugal in the application of the Environmental Liability Directive (ELD), transposed into national law by Decree-Law No 147/2008 of 29 July 2008, as amended by the Decree-Law No. 245/2009 of 22 September 2009, Decree-Law No. 29-A/2011 of 1 March 2011 and Decree-Law No. 60/2012 of 14 March 2012 ("the EL Act").

Pursuant to Article 29 of Decree-Law No. 147/2008 of 29 July 2008, the Portuguese Environment Agency, a public institute ("the APA") is the competent authority for the purposes of the implementation of this legal regime. Pursuant to Article 36 of that law, it applies to the Autonomous Regions of the Azores and Madeira, without prejudice to the necessary adaptations to the specific structure of the bodies of the respective regional administrations. Their representative bodies were consulted for all intents and purposes, namely the Regional Secretariat of the Environment and Sea of the Regional Government of the Azores and the Regional Secretariat of the Environment and Natural Resources of the Regional Government of Madeira.

The competent authority is responsible for drawing up the report pursuant to Article 31 of the EL Act.

2 Aims

Article 18 (Reports and review) of the Environmental Liability Directive provides that Member States must report to the Commission on the experience gained in the application of this Directive by 30 April 2013 at the latest. The aim of this report is to give the information requested, reflecting Portugal's experience of implementing the national law that has been in force since 1 August 2008.

3 Structure and content

The structure and content of the report were defined on the basis of the criteria laid down in Annex VI to the ELD (Annex VI to the EL Act) and the guidance given in the documents entitled "*Cover Note*" and "*Non-Binding Guidance for MS Reports Under Article 18(1) in Conjunction with Annex VI ELD*" dated 12.7.2012 (Ref. Ares(2012) 1068439), drawn up by the European Commission.

The report referred to in Article 31 of the EL Act must therefore include a list of cases of environmental damage and cases of liability under that act, with the following information and data for each case:

- 1) Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under this Directive;
- 2) Activity classification code of the liable legal person(s);
- 3) Whether there has been resort to judicial review proceedings either by liable parties or qualified entities, specifying the type of claimants and the outcome of proceedings;
- 4) Outcome of the remediation process;
- 5) Date of closure of proceedings.

The competent authority may include in the report any other information and data they deem useful to allow a proper assessment of the functioning of this act, specifically:

- 1) Costs incurred with remediation and prevention measures, as defined in the EL Act:
 - Paid directly by liable parties, when this information is available;
 - Recovered ex post facto from liable parties;
 - Unrecovered from liable parties, specifying the reasons for non-recovery;
- 2) Results of the actions to promote and the implementation of the financial security instruments used in accordance with the EL Act;
- 3) An assessment of the additional administrative costs incurred annually by the Public Administration in setting up and operating the administrative structures needed to implement and enforce the EL Act.

4 Cases of environmental damage

4.1 1st case of environmental damage (Filling station)

- Q1.** Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under this Directive:

Case of a leak of 95 unleaded petrol from an underground tank into the subsoil at a filling station. This case was monitored by the competent authority under the EL Act, following notification of the imminent risk of environmental damage by the operator who caused the damage.

The date of the occurrence was March 2009 and the environmental damage was confirmed in December 2009 after an environmental risk assessment was carried out.

Date on which proceedings were initiated: the preventive measures taken by the operator following the petrol leak started in March 2009 with the decommissioning of the tank, the soil testing and recovery of the free product.

The remediation plan was submitted to the APA in January 2010 and the measures were launched in February 2010.

The proceedings have been concluded but the post remediation monitoring plan is continuing (see Q5).

- Q2.** Activity classification code of the liable legal person(s):

Economic activity classification code (CAE Rev.3): 46711 (Wholesale of petroleum products), approved by the 327th Deliberation of the Supreme Statistical Council on 19 March 2007 and by Decree-Law No. 381/2007 of 14 November 2007, pursuant to Regulation (EC) No. 1893/2006 of the European Parliament and of the Council of 20 December 2006, amending Council Regulation (EEC) No. 3037/90.

Occupational activity in Annex III of the ELD: point 7.

- Q3.** Whether there has been resort to judicial review proceedings either by liable parties or qualified entities, specifying the type of claimants and the outcome of proceedings:

There were no judicial review proceedings.

- Q4.** Outcome of the remediation process.

The remediation plan included primary remediation measures, namely:

- Elimination of the hydrocarbon free phase by application of the vacuum-enhanced bioslurping technique at the level of the piezometers inside the plume by means of multiphase extraction equipment;

- Infiltration/extraction - mobilisation of the hydrocarbon in the ground towards the vacuum extraction points by means of the controlled injection of water as a surfactant;
- Elimination of VOCs: vacuum extraction at the level of the piezometers installed.

The measures adopted allowed to reach the target concentrations of hydrocarbons determined by the environmental risk assessment, taking the residential use of the ground into account.

Q5. Date of closure of proceedings:

The remediation measures were completed in August 2011.

4.2 2nd case of environmental damage (Spillage of a mixture of water and fuel oil)

Q1. Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under this Directive:

The case concerned the overflow of the content of a basin for collecting waste produced by the separation of hydrocarbons, in particular fuel oil. The spillage of the mixture of water and fuel oil affected a ground area of approximately 13 000 m². After an environmental risk assessment, it was established that the situation caused environmental damage to the land. This case was monitored by the competent authority under the EL Act, following notification of the imminent risk of environmental damage by the operator who caused the damage.

The spillage occurred on 16 October 2011.

The proceedings were initiated in October 2011 with the adoption of the first preventive measures, namely removal of the soil visibly polluted by fuel oil.

The remediation plan was submitted to the APA in April 2012 and the measures were launched in June 2012.

The proceedings have been concluded as all the remedial measures have been carried out.

Q2. Activity classification code of the liable legal person(s): Economic activity classification code: 40110 (Electricity production), approved by the 327th Deliberation of the Supreme Statistical Council on 19 March 2007 and by Decree-Law No. 381/2007 of 14 November 2007, pursuant to Regulation (EC) No. 1893/2006 of the European Parliament and of the Council of 20 December 2006, amending Council Regulation (EEC) No. 3037/90.

Occupational activity in Annex III of the ELD: point 7.

Q3. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities, specifying the type of claimants and the outcome of proceedings:

There were no judicial review proceedings.

Q4. Outcome of the remediation process:

The remediation consisted of the adoption of primary remediation measures with the removal of the crops, ground cover and plants as well as the contaminated soil up to the target levels of intervention determined by the environmental risk assessment for total petroleum hydrocarbon fraction range C16-C35. The soil was also replaced, given the agricultural use of the land.

Q5. Date of closure of proceedings:

The remediation measures were terminated in June 2012.

5 Additional information (optional)

5.1 Imminent threats examined under the EL Act

Cases affecting the natural resources falling within the scope of the EL Act were reported to the APA, in particular cases concerning waters and soils that are classified as imminent threats of environmental damage and monitored by the competent authority pursuant to Article 14 of the EL Act. The cases examined are set out in **Table 1**.

It should be noted that the occurrences identified as I to IV in the abovementioned table were originally mentioned as cases of environmental damage under the EL Act in the voluntary questionnaire sent to the European Commission by email on 26.1.2010. On that date, all the cases that were being assessed under the Act were included in that questionnaire, irrespective of their classification as an imminent threat or environmental damage. However, the monitoring of the cases and the information obtained subsequently determined the classification of the abovementioned cases as imminent threats of environmental damage pursuant to the EL Act.

Table 1 – Cases of an imminent threat of environmental damage

Case	Type of iminente threat	Date of the occurrence or discovery of the threat	Activity under Annex III	Preventive measures adopted
I	Spillage of fuel oil at the waterline	September 2008 (occurrence)	1	<ul style="list-style-type: none"> – Placement of containment booms; – Removal of surface water and vegetation contaminated by hydrocarbons; – Cleaning of existing structures.
II	Contamination by waste disposal	January 2009 (discovery of threat)	2	<ul style="list-style-type: none"> – Removal of waste and contaminated soil.
III	Hydrocarbon contamination of soils and groundwater	November 2008 (discovery of threat)	1	<ul style="list-style-type: none"> – Removal of contaminated soil; – Extraction of infiltrated product; – Drawing up of a human health risk analysis.
IV	Aniline leakage into soil and groundwater	April 2009 (occurrence)	7	<ul style="list-style-type: none"> – Extraction of infiltrated product; – Drawing up of a human health risk analysis.
V	Hydrocarbon leakage into soil and groundwater	May 2011 (discovery of the threat)	7	<ul style="list-style-type: none"> – Removal of contaminated soil; – Extraction of infiltrated product; – Drawing up of a human health risk analysis.

VI	Hydrocarbon leakage into soil and groundwater	February 2012 (discovery of the threat)	7	<ul style="list-style-type: none"> - Extraction of infiltrated product; - Drawing up of a human health risk analysis.
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5.2 Implementation of financial security instruments

The national act laid down the obligation for operators who carry on the occupational activities listed in Annex III of the EL Act to furnish financial securities enabling them to assume the environmental liability inherent in the activity that they carry on (Article 22). The obligation entered into force on 1 January 2010 (Article 34).

In connection with the enforcement of this obligation, operators and business associations have informed the competent authority of difficulties encountered in obtaining financial security instruments that are suitable for the whole range of operators covered. Simultaneously, with regard to conditions of insurance, it was pointed out that coverage was very limited and that the costs of taking out insurance were high.

It was however established that the obligation to furnish financial securities to cover environmental damage helped to raise the various stakeholders' awareness of the EL regime.

5.3 Activities to promote the implementation of the EL regime

On account of its recent character and the innovatory concepts introduced by this legal system, and taking account of the questions identified in the period of application, the APA (as the competent authority) carried out the following activities:

- Drafting and publication in October 2011 of the Guide for Imminent Threat and Environmental Damage Assessment which is available to the public via the APA's internet portal. The aim was to clarify some concepts, identify the criteria determining the scope of the act, explain some technical aspects of its implementation and highlight the obligations of the operators covered;
- Creation on the APA internet portal of a specific section for the environmental liability regime providing information about its implementation and the form for reporting occurrences of imminent threats or environmental damage, as well as replies to frequently asked questions;
- Establishment of the Consultative Council for Environmental Liability (CC-RA) composed of representatives of business, industrial and agricultural associations, associations of municipalities, representatives of the insurance and banking sectors, non-governmental environmental organisations and civil defence and representatives of ministries with responsibility for the environment, agriculture, regional planning, health, the economy, transport and representatives of the Autonomous Regions;

- Signing of a Protocol with the Portuguese Association of Oil Companies (APETRO) for establishing and developing technical guidelines (already published) for the application of the regime to the distribution and marketing of petroleum products, published and available on the APETRO site (in www.apetro.pt);
- Participation and organisation of explanatory meetings and seminars on the topic of environmental liability.

6 Constraints and limitations

When implementing the ELD, some limitations and constraints resulting from the introduction of new concepts were observed, in particular those concerning the "baseline condition", "imminent threat of environmental damage" and "environmental damage".

It should be noted that there is some underlying subjectivity with regard to the concepts of "imminent threat of environmental damage" and "environmental damage" due to the complexity of the technical criteria for assessing cases, which resulted in increased difficulty in applying these concepts to situations in the initial stage of implementation of the regime.

The Standing Committee for Monitoring Environmental Liability (CPA-RA), which incorporates competent bodies in the spheres of water, soil and protected species and natural habitats, was set up to provide technical support for assessing cases.

The APA devised a strategy for implementing this legal regime in order to define its mission as competent authority for the purposes of implementation of the EL Act and to identify the current constraints and future challenges resulting from the entry into force of the EL Act. The aims to be achieved, the actions to be carried out and the main related tasks were identified in that document, as well as a timetable for action/implementation of the actions. The work referred to in subchapter 5.3. of this report was carried out under the scope of the strategy.

7 Conclusions

This report gives information concerning the cases which occurred in mainland Portugal and the Autonomous Regions of the Azores and Madeira. To date, the situations reported pursuant to the Act have solely concerned the mainland territory of Portugal.

In the sphere of application of the EL Act, two situations of environmental damage were reported to the APA, both following the spillage and leakage of hydrocarbons into the ground. The situations were initially reported to the competent authority as imminent threats of damage, however, the existence of unacceptable risks to human health confirmed by a risk assessment carried out turned both cases in environmental damages. The remedial measures taken focused on the removal or decontamination of the soil up to the target values set in the risk assessment.

Six situations of imminent threats of environmental damage were also reported.

The experience gained in implementing the EL regime highlighted its positive contribution towards raising operators' awareness of issues connected with the environmental risks involved in the pursuit of their activities, in particular for: identification of the risks and ways to reduce them. It should be noted that the obligation to furnish financial securities initially proved to be an instrument with a significant impact for increasing the various stakeholders' awareness, despite the difficulties in making the financial mechanisms effective.

During that period there were also difficulties in applying the concepts laid down in the Directive, in particular the definition of "imminent threat of environmental damage", "environmental damage" and "baseline condition". A Guide for the assessment of cases that have occurred has been produced in order to overcome those constraints, harmonise the operators' and authorities' approaches to those technical concepts and list information and guidelines that can provide support to the application of those concepts.
