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CONTAMINATED SOIL  
NOW AND IN THE FUTURE

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## CONTAMINATED SOILS: THE PROBLEM

The issue with contaminated soil is, from time to time, discussed in Portugal. It is mainly associated with the conversion of old industrial areas: when old contamination is detected in the soil during the execution of construction works.

Directive 2004/35/EC, of 21 April, on environmental liability regarding prevention and remedying of environmental damage was transposed in Portugal through Decree-Law 147/2008, of 29 July, which approved the legal framework of liability for environmental damage ("RJRDA").

However, this regime fell short of what was expected, and the issue with contaminated soils and environmental liabilities remained largely unsolved. The RJRDA even excluded administrative responsibility for the prevention and repair of environmental damage caused by harmful occurrences:

- Prior to 1 August 2008, the date of its entry into force; and
- Occurred after 1 August 2008, but which resulted from an activity carried out and concluded before that date.

That same legal framework also states that damages caused by any emissions, events or incidents that have occurred more than 30 years before the damage occurred are time-barred.

In 2015, the Portuguese Environment Agency ("APA") placed under public discussion the draft decree-law on the prevention of contamination and remediation of contaminated soils ("*Prosolos* Project"), an initiative considered globally positive by the participants in the consultation even though it has not been implemented to date.

In May 2021 the Portuguese Parliament approved a resolution recommending its publication to the Government.

When recent news indicated that *Prosolos* Project will finally see the light of day, we gathered the main aspects of the legal framework in force as well as some of the most relevant known features of the *Prosolos* Project and wrote this article.

# LIABILITY FOR ENVIRONMENTAL DAMAGE

In general terms, RJRDA:

- Applies to environmental damage caused as a result of the exercise of any activity developed within the scope of an economic activity, no matter its public or private nature or if it generates profit or not;
  - It also applies when there is an imminent threat of such damage, that is, a sufficient probability of environmental damage occurring in the near future;
  - It is based on the polluter pays principle established by Directive 2004/35/EC of 21 April;
  - Determines that the causal link between the fact and the damage is based on a criterion of likelihood and probability;
  - Establishes two types of liability: the civil liability of whoever causes damage to people and property through an offence against the environment and the administrative liability for the prevention and remedying of environmental damage aimed at repairing the environmental damage itself, caused to society as a whole;
- Establishes that, in any activity, the operator is responsible for environmental damage when he has acted with intent or negligence;
  - Establishes that, when the activities indicated in Annex III of RJRDA are in question, the responsibility - civil and administrative - is objective, in other words, it exists regardless of the fault of the agent (operator) because they are especially dangerous activities;
  - Foresees joint liability in various situations, namely of the members of the administrative body when the operator is a legal person and of the parent company and controlling company when the operator is a company in a group or dominion relationship and there is abusive use of the legal personality or fraud against the law;
  - Obliges operators who carry out the activities listed in Annex III of RJRDA to provide a financial guarantee to cover the environmental liability that comes with the activity developed.

## LIABILITY FOR ENVIRONMENTAL DAMAGE, IN PARTICULAR, TO SOIL (I)

Regarding administrative liability, environmental soil damage is *"any soil contamination which creates a significant risk to human health as a result of the direct or indirect introduction, in or on the soil, of substances, preparations, organisms or micro-organisms"*.

The reference concept for soil damage is thus human health.

If the operator causes environmental damage, or an imminent threat of damage, to soil (including surface and subsoil):

- Through an activity listed in Annex III of RJRDA, he/ she must implement measures to prevent and remedy the damage or threats caused regardless of the existence of fault or intent;
- Through an activity not covered by Annex III of RJRDA he/ she must implement measures to prevent and repair the damage or threats caused if he/ she has acted with intent or negligence.

When damage has already occurred, the operator shall adopt measures to prevent further damage from occurring, whether or not the operator is obliged to repair the damage.

When there is an imminent threat of damage, the preventive measures shall be adopted immediately and without the need for any notification or act by the competent authority.

Soil remediation operations are subject to licensing with the competent Regional Coordination and Development Commission ("CCDR"), and the General Regime of Waste Management approved by Decree-Law no. 102-D/2020, of 10 December, amended by Law no. 52/2021, of 10 August, applies to them.

## LIABILITY FOR ENVIRONMENTAL DAMAGE, IN PARTICULAR, TO SOIL (II)

As mentioned, RJRDA excludes administrative responsibility for the prevention and repair of environmental damage to the soil caused by harmful occurrences:

- Prior to 1 August 2008, the date of its entry into force; and
- Occurred after 1 August 2008, but which result from an activity carried out and concluded before that date.

It should be noted, however, that Directive 2004/35/EC of 21 April establishes 30 April 2007 as the reference date for application of the environmental liability framework.

In [Guidelines](#) establishing a common understanding of the concept of 'environmental damage' within the meaning of Article 2 of that Directive, published on 7 April 2021, the Commission further considered that the Directive's requirements on environmental liability must, as a minimum, be met in every respect.

APA makes available on its [website](#) several technical guides and recommendations on soil contamination prevention and remediation.

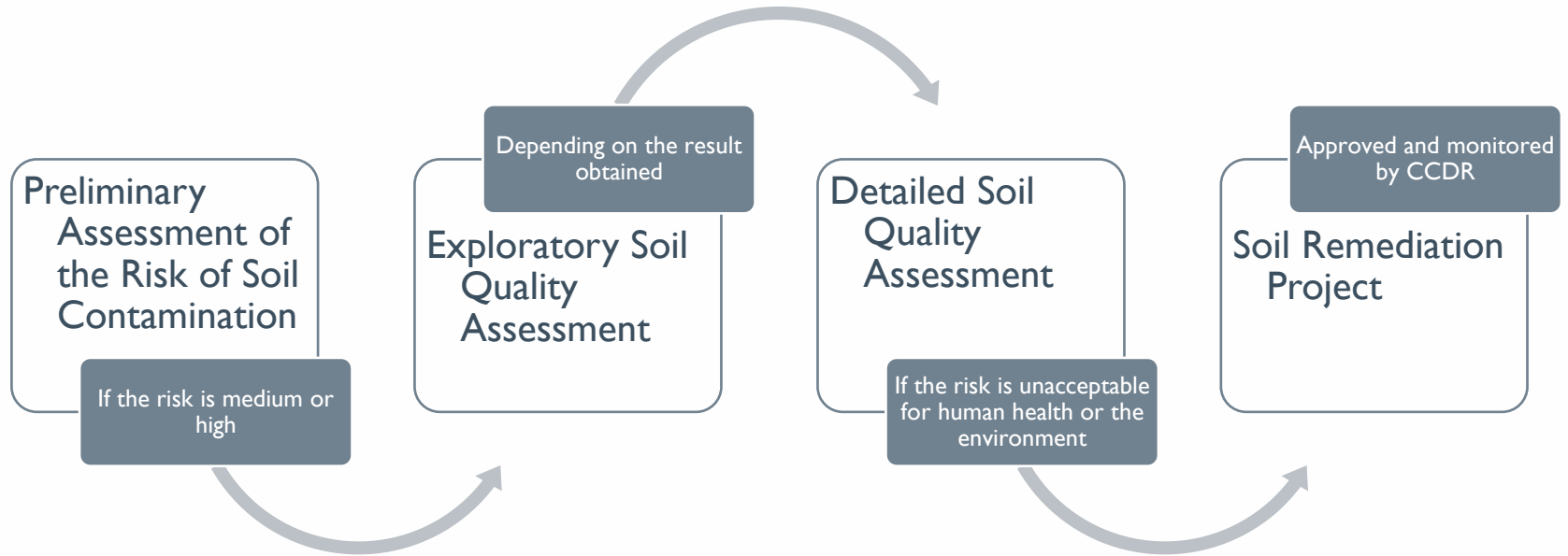
In particular, in the event of transfer of ownership rights of a soil where a potentially contaminating activity is or has been carried out, or where there are indications or evidence of contamination, APA recommends that a soil quality assessment be carried out.

## PROSOLOS PROJECT: OUTLINES

### *Prosolos Project:*

- It is based on 3 cornerstones: assessment of soil quality, remediation and accountability for contamination;
- It applies to operators who develop one of the activities listed in Annex I and to those responsible for contamination or potential contamination of the soil when one of these activities has been developed or when hazardous waste has been abandoned or when accidents have occurred, among other situations;
- Provides for the preparation of a Soil Quality Atlas, bringing together information available on contaminated and remediated sites and aggregate information on potentially contaminating activities, types of contamination and remediation techniques;
- Regulates situations of environmental liabilities, establishing the State's responsibility for the assessment of soil quality and possible remediation if such liabilities constitute imminent danger to public health and/or the environment and it is not possible to identify the polluter or to apply the principle of liability;
- Defines who is responsible for carrying out the soil quality assessment and its remediation;
- Establishes the soil quality assessment process, consisting of four stages (see next page), the reference values and criteria to be considered in the different assessments that are part of it and the issue of the Soil Contamination Risk Statement and Soil Quality Certificate;
- It relates soil quality assessment to the licensing of the activities covered by the regime (the activities cannot begin without the operator carrying out a soil quality assessment and, where appropriate, soil remediation) and with changes of soil use to a more restrictive use (a Soil Quality Certificate is required in the case of a change from industrial use to urban or agricultural use or from urban to agricultural use);
- Establishes, in an innovative way, restrictions to the transfer of the right of ownership of the soil and land registry requirements, also relating them to the assessment of soil quality.

## PROSOLOS PROJECT: THE SOIL QUALITY ASSESSMENT PROCESS





## PROSOLOS PROJECT: LIABILITY AND TRANSFER OF OWNERSHIP

The operator carrying out at least one of the activities listed in Annex I shall be presumed responsible for conducting the soil quality assessment and for its possible remediation.

This liability may be waived when it is proven that the contamination predates the beginning of its activity or that it does not originate from the activity it carries out. If one of these situations occurs, the responsibility for carrying out the soil quality assessment and its possible remediation lies with:

- The previous operator of the activity carried out on the site or a third party, provided that it is proven that it was the activity that contaminated the soil; or
- The current owner of the soil, if it is impossible to identify the operator or if the person causing the potential contamination no longer exists.

Exceptions to this rule are situations where it is proven that the contamination resulted from compliance with an order or instruction issued by a public authority.

The transfer of the right of ownership of a soil:

- Where one of the activities referred to in Annex I is carried out must be preceded by a preliminary or exploratory assessment and is subject to the presentation by the transferor, for the purposes of land registration, of the Soil Contamination Risk Declaration or the Soil Quality Certificate as the case may be;
- Where any of the activities referred to in Appendix I have been carried out, or where hazardous waste has been abandoned, or where accidents have occurred, among other situations, is subject to the presentation by the transferor, for the purposes of land registration, of the Soil Quality Certificate.

The presentation of the Declaration or Certificate referred to above may be dispensed with if the buyer declares, at the time of the deed, that he/ she takes responsibility for the possible contamination of the soil.

The acquirer may also declare, at the moment of the deed, that he/ she assumes the responsibility for the evaluation of the soil quality and its eventual remediation, according to the Soil Contamination Risk Declaration or Soil Quality Certificate delivered by the transferor.

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WHO WE ARE & WHAT WE DO

## ABOUT US

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