



**Mandate of the Special Rapporteur on the human rights to safe drinking water and sanitation**

**Report to the 75th session of the UN General Assembly in 2020**

**AEPSA**

Association of Portuguese companies in the environmental sector

Jan 2020



## Questionnaire - non-State actors

The Special Rapporteur would welcome answers to the following questions:

1. Please describe briefly the role and responsibilities of your organization in the water and sanitation sector, particularly concerning assessment or promotion of private provision.

AEPSA, Association of Portuguese Companies in the Environmental Sector, is a business association, established in 1994, whose purpose is to represent and defend the collective interests of private companies operating in the environmental sector, establishing itself as an essential key player and dynamic developer of the environmental sector market.

AEPSA proposes to achieve key objectives through careful planning such as expansion and promotion of the participation of Portuguese private economic agents in the environmental markets, recognition in all instances of AEPSA as an effective representative of Portuguese private companies in the environmental field, definitive exposition of the public sector and the private sector functions in Environmental markets in Portugal.

AEPSA represent, promote and defend the collective interests of Portuguese private companies operating in the environment sector, in the following areas:

- Water supply
- Wastewater and waste,
- Use and production of energy,
- Reusable and / or recyclable materials and products,
- New technologies, innovation, contaminated soils, among others, as well as those companies whose object is the recovery of products that can be reused or recycled, designated, but not exclusively the transformation and preparation of ferrous, non-ferrous materials, paper, cardboard, ELV ( end-of-life vehicles), and all complementary, similar and related materials subject to treatment, in the context of the circular economy and in compliance with the Sustainable Development Goals, promoting Research, development and Innovation, enhancing and encouraging cooperation between various entities, public and private, national and non o national, intervening in both the national and international markets.

AEPSA represents today: the Entire Environment value chain in Portugal, an Annual turnover of about EUR 1.5 billion, 43 associates spread over 5 Sectorial Colleges, and 10,000 workers.

AEPSA welcomes this initiative of the Special Rapporteur on the human right to water and sanitation to focus this 2020 report on the private sector participation and the human rights to water and sanitation.

The private sector started operating in water service concessions in 1995, currently serving around 20% of the population (2,000,000 inhabitants).

For a better framing and understanding of the sector's operation in Portugal, a presentation is attached as an annex to this questionnaire.

## Current situation and trends

2. In your view, what the role has the private sector played in the water and sanitation provision in the countries your organization works in (or at the global level)? How has this role evolved in recent decades? Please provide examples.

In Portugal, water supply and sanitation are statutory responsibilities of municipalities, which have freedom of choice for water/ wastewater operations.

The private sector started operating in water service concessions in 1995, currently serving around 20% of the population (2,000,000 inhabitants).

The National Plan for Efficient Water Use (PNUEA) is an instrument that integrates various policies, given the interconnections between power, water, industry and agriculture. Its goal is to reduce water losses and optimise water use as part of measures to protect Water Resources, which is essential in a country where climate variability generates situations characterized by conflicting uses. The PNUEA establishes the targets to be met in terms of water losses per sector by 2020: 20% for the urban sector; 35% for the agricultural sector and 15% for the industrial sector.

The strategy for the water supply and wastewater treatment sector, embodied in the Strategic Water Supply and Wastewater Sanitation Plan 2020 (PENSAAR 2020), sets the goal of 99% safe water by 2020. The quality of the water for human consumption has shown steady and sustained improvement year after year, achieving, in 2017, a percentage of 98.72% safe water at the consumer's tap (an indicator of controlled, good-quality water), which, within an increasingly demanding regulatory framework, represents an effective improvement in water quality in recent years. Only in the supply areas with less than 500 inhabitants hasn't the 99% target for the safe water, yet been reached.

For the past 19 years, the implementation of WSS sector reforms in Portugal has been guided by three successive strategic plans: PEAASAR 2000–06 (PEAASAR I), PEAASAR 2007–13 (PEAASAR II), and PENSAAR 2020–A New Strategy for the Water Supply and Wastewater Sector, still under implementation. The monitoring committee (CdA) to draft the latter strategic plan was established by the Secretary of State for Environment and Spatial Planning through order 9304/2013 of July 6, 2013. The motto of this plan is “a strategy to serve the people: quality services at a sustainable price.”

According to the Country Report Portugal 2019: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews (Commission Staff Working Document (SWD(2019) 1021 final - 27.2.2019), “Portugal still faces considerable environmental challenges and investment needs in the area of water and waste management, air quality and nature protection, as highlighted in the Commission’s Environmental Implementation Review (...) Despite the progress achieved in recent years in water management, challenges remain, for instance with water governance and the need to close gaps in water investments, especially for wastewater and water body rehabilitation. At the municipal level, the sector remains highly fragmented and the reorganisation of the water and wastewater services has not yet shown its full potential.(...) Portugal still faces considerable challenges with water management. Investments needs have been identified to promote sustainable water management, and in particular to: promote an efficient use of water resources throughout the whole water cycle; support the collection and treatment of waste water; support water body rehabilitation; support ecosystem-based measures to promote natural water storage and purification, including in a cross border and transnational context.

It is also important to highlight the position of the Court of Justice of the European Union (Case C-557/14 - Commission v Portugal) that the Court concluded Portugal has failed to comply with the judgment of 2009 and the Court decides to impose financial penalties on Portugal in the form of a penalty payment and a lump sum payment. Regarding the penalty payment, the Court considers that the lack or shortage of urban waste water treatment systems is likely to harm the environment and must be regarded as particularly serious. For all those reasons, Portugal is ordered to pay a lump sum payment of € 3 000 000 and a penalty payment of € 8 000 per day of delay.

The European Environment Agency Report nº 3/2019 related about bathing water quality in 2018, indicating where the quality of bathing water is expected to be good in 2019. The report is a joint production of the European Environment Agency (EEA) and the European Commission was compiled using information from more than 21 000 bathing waters in the 28 EU Member States.

At the moment, there are three infringement proceedings against Portugal, namely: sensitive areas; normal areas; small agglomerations. The only agglomeration (Matosinhos) remaining in the proceedings concerning the normal areas for non-compliance with DARU's article 4, which led to the condemnation of the Portuguese State through the payment of wages, has been in full compliance with the requirements of the DARU since the end of 2017. The proceedings regarding sensitive areas were resolved in March 2019 and the proceedings relating to small agglomerations are expected to be completed by the end of 2019. With regard to the small agglomerations proceedings, out of the 44 agglomerations initially included in the ECJ judgment of January 2016, only 10 still didn't meet all the DARU's requirements in 2018, and by January 2019 only 7 had measures in place.

The number of litigation proceedings brought against Portugal has declined very significantly and, in recent years, there has been a strong commitment to resolving all situations, with a greater focus on the most serious ones, concerning larger agglomerations.

The Portuguese Country Report "Bathing water quality in 2018" The number of bathing waters identified, mandatorily subjected to water quality control for bathing, has grown considerably over the last decade, going from 514 in 2011 to 608 in 2018. Of the latter, 480 (79%) are coastal or transitional bathing waters and 128 (21%) are inland bathing waters.

Of the 608 bathing waters identified in 2018, 554 (91.1%) presented 'excellent' quality, 9 (1.5%) 'acceptable' quality and 2 (0.3%) were classified as "poor" quality. It should be noted that 14 waters were considered 'unclassified' (were monitored, do not yet have the required 16 samples), which correspond to 2.3% of all bathing identified waters. For inland bathing waters, the assessment carried out in 2018 also showed that the number of waters classified as 'excellent' is very high, 101 (78.9%), and that 13 (10.2%) were classified 'good' and four (3.1%) were considered 'acceptable'. In 2018, two (1.6%) inland bathing waters were classified 'bad'. Eight (6.3%) of inland bathing waters were considered 'unclassified' (that is, even though they were submitted to water quality control, they do not yet have the required set of 16 samples).

Regarding the number of Blue Flag bathing areas, in 2019, 352 beaches were awarded this distinction (20 more than in 2018), distributed as follows: 88 in the Algarve; 75 in the North; 54 in the Tagus Region; 44 in the Centre; 39 in the Azores; 35 in Alentejo and 17 in Madeira.

This distinction, which assesses a set of criteria, such as water quality (which has to be classified as 'excellent'), environmental information and education, environmental management, safety and services, among others, was also awarded, by the international jury, to 17 marinas and recreational ports and to 9 ecotourism boats. In total, there was an increase of 6.5% in the number of flags awarded, when compared to 2018.

On April 5, 2019 was published the second Environmental Implementation Review to improve the implementation of European environmental policy and commonly agreed rules in all EU Member States. This report writes that over the years, Portugal has had difficulty in meeting its obligations under the Urban Waste Water Treatment Directive (UWWTD). According to the last available data, 99.8 % of Portugal's waste water is collected, while 76.9 % of the load collected is subjected to secondary treatment. Finally, 66 % of the waste water load collected undergoes more stringent treatment. Portugal is the only EU Member State to have identified 'less sensitive' areas<sup>78</sup>, that is, areas whose intrinsic features mean that they are, in principle, not adversely affected by wastewater discharges<sup>79</sup>. Current investment in collecting systems and treatment plants to ensure compliance is estimated at an average EUR 49.5 million annually (EUR 5 per inhabitant.) Such investment takes no account of the funds needed to renew and extend existing infrastructure, specifically the collecting systems<sup>80</sup>. According to this latest report, the final projects are expected to be completed by 2018-2019, a long time after the final 2005 deadline which the Directive set for Portugal. The Commission is engaged in follow-up with agglomerations that have failed to meet their obligations under the UWWTD, launching infringement proceedings where necessary. (...) In Portugal, agriculture account for about 80% of total water consumption. Although the amount of water used in farming has fallen in recent years, significant scope remains for saving water. While much depends on improving water pricing policy, there is also significant potential for water savings through innovation. Despite the progress achieved in recent years in water management, challenges remain, for instance with water governance and the need to close gaps in water investments, especially for wastewater. At the municipal level, the sector remains highly fragmented and the reorganisation of the water and wastewater services has not yet shown its full potential.“

For more complete information see attached presentation.

### 3. Why do public authorities allow or even attract privatization of water and sanitation services? What would be the alternatives for public authorities?

In Portugal, there isn't privatization of water services, only concession of services.

The municipalities, authorities responsible for water management, launch concession tenders for private companies to attract investment capacity and know-how, in order to improve service to users.

Private operators have been clamoring for new opportunities in contractual and institutional public-private partnerships (in addition to new outsourcing and performance-based contracts). Yet the market has been stagnant or even decreasing, and private companies are not expected to make any additional contribution toward reaching the objectives of PENSAAR 2020 — for instance, by financing investments

Through the performance indicators published annually by the Regulator, it appears that the private concessionaires have the best efficiency and quality of service in the different indicators, in fact, the private companies always win the largest number of awards attributed by the regulator to reward the quality of the service.

The market structure associated with the water sector is a natural monopoly due to the high entrance costs associated with construction investments as well as the high maintenance costs. Due to the public nature of the service, the water system is mainly managed by the government

Until 1993, delivery of drinking water supply and sanitation (WSS) services (WSS) in Portugal was the exclusive responsibility of local authorities. The 1993 policy reform has transformed the market

structure by creating new models for delivering the services through larger and financially more solid public utilities; opening the market to the private sector; and allowing public and private concessions. The market was split into upstream, or bulk providers of water abstraction and treatment and wastewater collection and treatment services to the municipalities; and downstream, or retail providers of services to the final customers.

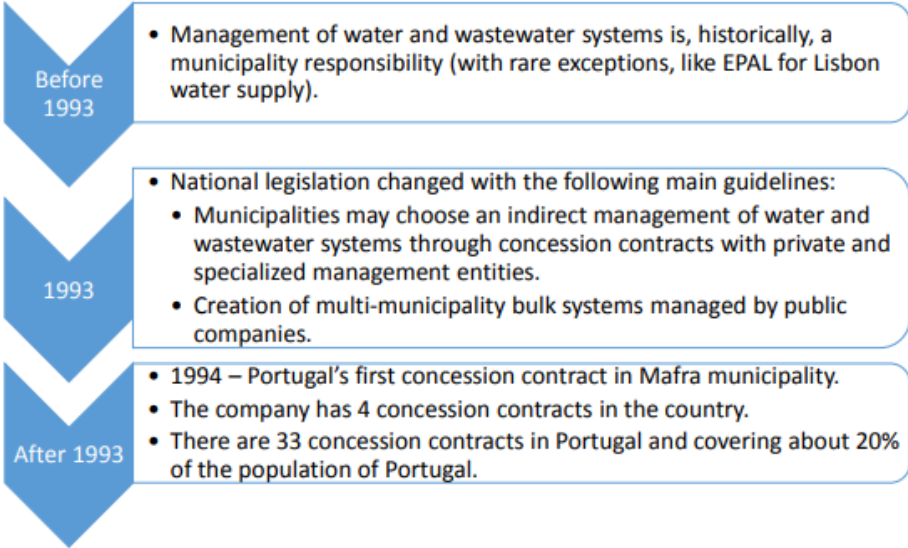
Since 1993, the WSS sector has undergone a genuine revolution, based on four major reforms:

- Aggregation of bulk supply services and creation of municipal service providers with autonomy
- Private sector participation in the form of municipal concessions
- Establishment of a regulatory agency
- Comprehensive sector planning.

The first four utilities under public concessions were created in 1995 to provide services to about 45 percent of the population, mainly in large urban areas; a second group of utilities was created to provide services to about 35 percent of the population, mainly in low density areas . Today, Portugal Water Services Company (Águas de Portugal) operates these companies through 16 utilities (5 percent of the 337 providers serving the market). Twelve are public concessions, three are public-public partnerships, and one is a state-owned utility, providing upstream services.

At a municipal level, PPP activity took place through the launch of several projects for municipal water supply, wastewater treatment and waste management. There are 33 concession contracts in Portugal and covering about 20% of the population of Portugal., with considerably less tenders for the concession of water services in the last 10 years

**Legal context:**



4. In your view, have International Financial Institutions (IFIs) recently encouraged privatization? Could you provide concrete examples?

The private sector has never had difficulty securing the necessary financing for the execution of investment plans, either through equity or through bank financing.

For example, Santa Maria da Feira concession, which had an investment plan of more than € 100 million, was financed by the EIB (European Investment Bank) in an amount of about € 65 million.

5. In case of economic crises, have the promotion of privatization increased?

In Portugal, after a financial crisis in 2008, there was no increase in public tenders for concessions due to adverse political conditions.

The main reason for launching concession tenders is the necessity to improve the efficiency and quality of the service with stable and contractually controlled prices.

### **Private provision**

6. In your experience, if the private sector is involved in provision of water and sanitation services, what process was undertaken prior to the decision to adopt this model of provision? What types of concerns have been considered in such decisions?

In Portugal, it is mandatory to carry out economic studies prior to launching a concession tender in order to verify which management model is most appropriate, which should be controlled by the regulator.

For a better understanding of the public tender process for a concession contract, see slide 7 of the attached presentation.

When launching the public tender, the Municipality can define what it is intended (investments, income for the Municipality, tariff structures, social tariffs, etc.) provided it is framed in the national legislation.

In concession contracts, the risk matrix of the Concessionaire (Municipality) and the Concessionaire is exhaustively defined, as well as the tariff trajectory throughout the entire contract.

Private concessions in Portugal are the most transparent water service management entities, as they are the only ones that go to international competition.

7. How could public authorities use the features of private providers to foster the realization of the human rights to water and sanitation (HRtWS)? Is private provision positive for the progressive realization of the human rights to water and sanitation? If yes, in which circumstances?

Municipalities that launch public concession tenders are free to define in the contract all the requirements they intend to guarantee the human rights to water and sanitation (HRtWS).

In Portugal, private providers (water and sanitation operator companies) fully agree with HRtWS, only being necessary to define contractually the resulting implications, in order to maintain the company and services financial sustainability, as well as the environmental sustainability of water resources, paying particular attention to the predictable effects of climate change.



8. How have instruments and mechanisms in place allowed the users (and non-users) to complaint and get remedy from private providers?

Portuguese legislation is very clear in the defense of the user, being supervised by the regulator. It is mandatory the existence of a Complaints Book in all entities, that must be sent to the Regulator for verification of response and resolution.

The indicator of timely responses to complaints is highlighted, comparing the public and private sectors.

	Private	Public
Complaints answered in time (22 working days) (%)	99,68	89,49

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The Public Contracts Code (PPC), approved by Decree-Law 18/2008 of January 29th, is the key legislation regulating public procurement and government contracts in the Portuguese legal system.

There are other relevant diplomas, namely: the Administrative Procedural Code (approved by Decree Law no. 4/2015, of 7 January), which contains the general rules on administrative procedures; and the Procedural Code of the Administrative Courts (approved by Law no. 15/2002 of 22 February and amended by Decree Law 214-G/2015 of 2 October), which contains the rules on litigation regarding pre-contractual procedures and public contracts

PCC has special rules regarding procurement by awarding entities in the water, energy, transport and postal services sectors. The PCC is applicable to all contracts where the object of which is, or may be subject to, competition. In this regard, the PCC states especially that the following contracts are considered to be subject to competition: public works contracts; concessions of public works; concessions of public services; lease or supply of goods; rendering of services; and company incorporation contracts.

The principles and procedures set out in Decree Law 111/2012, of 23 May 2012, shall govern the relationship of the state with the private sector in these agreements. Moreover, with regard to contracts between the state and private entities, the rules of public procurement set out in the Public Procurement Code must be complied with, PPP contracts being typically awarded pursuant to public tender procedures. These agreements are normally required to be subject to the prior audit of the Audit Court for purposes of approval of the associated public expenditure. Furthermore, any amendments to these agreements that may involve an increase in costs or obligations of the state or state-owned entities must also be subject to such audit.

Regarding environmental law in Portugal, the main authority is the Portuguese Environmental Agency (APA), which oversees and monitors the public policies for the environment, with a scope of intervention ranging across the water, waste and chemicals sectors. The APA is also in charge of environmental assessments and interventions, which are typically and transversally required in all sectors. With regard to health and safety, projects being carried out in Portugal must comply with the general rules set out in Portuguese legislation, and are also subject to routine inspections and assessments by the Authority for Work Conditions, a governmental body whose mission is to enforce the relevant regulations and ensure that they are being complied with concerning employment terms and health and safety measures.



9. Do private providers advocate for stronger regulation? If so, why?

In Portugal, private providers (water and sanitation operator companies) have always advocated strong, independent regulation that promotes equity between entities, safeguarding the interests of users and respecting constitutional principles, which define that municipalities are the entities responsible for the management of water services (which can manage by their own means or lease).

10. How has been the relationship between private providers and public authorities at the local level? What are potential concerns public authorities and users face vis-à-vis private providers?

In Portugal, in most concessions, the relationship between public entities (municipalities) and private providers (water and sanitation operators) has been generally good, because there are complete contracts safeguarding all parties' interests (Municipalities, users and concessionaires).

In Portugal, the only (few) cases in which there were more serious problems were because public entities with unilateral resolution incurred a contract, for example, lowering tariffs, for political reasons related with elections.

Public authorities (municipalities) only must inspect the concessionaire's (private providers' s) compliance with the contract.

11. How have private providers contributed to or harmed the realization of the HRtWS? Please give examples.

Private providers have contributed to HRtWS, mainly by:

- a) Strong investments in new networks, which allowed the populations' access to services (increased service coverage);
- b) Incorporation of social and large family tariffs in the tariffs;
- c) Tiered tariff for domestic customers, with the first tier (up to 5m<sup>3</sup>) having a very low value, usually lower than the value of buying water upwards (bulk water);
- d) Promotion of diverse social actions in local communities.

12. What is the nature of the information available on service provision? Does it allow for the adequate accountability of private providers and public authorities?

In Portugal, the available information is very complete, namely through many mandatory performance indicators controlled by the Regulator.

There is also the obligation to make water quality control analyzes periodically available, as well as the publication of company reports and accounts.

Contractually, municipalities have the right to consult any document of the private providers.

13. Who monitors the performance of private providers in respect to the normative content of the HRTWS and how? Who intervenes when there are risks of human rights violations and how is it done? Who imposes penalties in case violations occur?

In Portugal there is a wide range of entities that monitor private providers, namely:

- Municipalities as grantors
- The Regulator
- The Court of Audits
- Tax Authority
- In the case of financing, banks
- Consumers' associations

14. What are the main challenges public authorities face regarding availability, accessibility, quality and affordability when private actors provide water and sanitation services? Please give examples.

In situations where municipalities must make investments, the biggest challenge is to make these investments in a timely manner so as not to condition investments under the responsibility of private providers.

As for the rest, the public entity only must inspect what is defined in the contract, with the application of the contractual penalties for any possible non-compliance.

15. Do you know any case of corruption involving private provision of water and sanitation services? Please give the necessary details.

AEPSA has no knowledge of any case of corruption associated with water service in Portugal.

16. Has the private sector shown more capacity to mobilize funds than the public sector? Could you please give concrete examples?

In general, the private sector has much greater access to funding itself in banking than the public sector and to provide the necessary guarantees.

The public sector has very strict debt limits that often do not allow the necessary investments in infrastructure to be made.

On the other hand, in Portugal there has been an inexplicable lack of equity in the distribution of community funds, corresponding that on average:

Public Subsidy for Capex (€ / household served):

Private companies– 1.6

Public sector - 12.8

17. In your opinion, is there power imbalance in a public-private partnership? Could you please give concrete examples of effects of this relationship?

In Portugal, considering the legislation in force and the concession contracts (sustained on very detailed economic and financial models), it is considered that the power of the Parties (public and private) is properly distributed.

18. When there is private participation in the water and sanitation sector, to what extent the private actor brings its own financial resources to the service?

Concession contracts and financing contracts always define the equity financing part (equity)  
Equity can vary between 20% and 40% of the necessary financing.

### **Remunicipalization**

19. Have you studied any case of remunicipalization? Why and how has it occurred? What types of difficulties has the public authority faced to establish the new municipal provider? Please, provide details of those processes.

In Portugal, to date, there has only been one case of remunicipalization, which went softly. It occurred in 2019 for purely political reasons. The municipality has always praised the work of the private provider (concessionaire), demonstrated by the efficiency of the quality of service and the excellent performance indicators.

**For more information,**

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