

Innovation of Legislative Process

07.

Streamlining
the Governmental
Legislative
Procedure

João Tiago Silveira

07 Streamlining the Governmental Legislative Procedure

Lisbon Law School and Lisbon Centre for Research in Public Law

Professor João Tiago Silveira^{*,**}

I Introduction

This article aims to respond to the following question: “How to streamline governmental legislative procedures?”. Its main focus is therefore to identify topics or measures to improve, rationalize and simplify the procedures to approve governmental legislation. The Portuguese practice shall be specially considered, but other countries’ practices will also be considered when relevant.

In general, parliaments in western countries are the main legislative bodies. However, governments usually have the competence to approve legislation and administrative regulations.

For example, in Portugal the Parliament/*Assembleia da República* is the only entity entitled to approve laws in matters listed in Articles 164 and 165 of the Portuguese Constitution. In other issues both the Parliament and the Government may approve laws (Articles 161-c) and 198-1-a) of the Portuguese Constitution).¹⁾⁻²⁾ The Government and the members of the

* Professor (PhD) at Lisbon Law School/*Faculdade de Direito de Lisboa* and researcher of the Lisbon Centre for Research in Public Law/*Centro de Investigação de Direito Público* (<http://www.icjp.pt/cidp>).

** This article corresponds to an intervention made in the International Association of Legislation/Korea Legislation Research Institute International Conference (18 September 2014) on the subject of “Streamlining the governmental legislative procedure”.

1) In matters listed in Article 165-1 of the Portuguese Constitution, the Parliament may authorise the Government to legislate by means of a law granting such authorisation.

2) On what concerns its internal governance, the Government is the only entity entitled to approve laws

Government themselves may also approve different types of administrative regulations which obviously have to comply with the laws in force.³⁾⁻⁴⁾

In France, the Government may also be authorised by the National Assembly to approve legislation by means of an *ordonnance* as well as in the United Kingdom where secondary legislation/statutory instruments may be approved by the Government under parliamentary bills.⁵⁾

Thus, governments are commonly entitled to enact legislation and regulations. To do so, procedures aimed to set the steps and formalities are provided. This article is aimed at identifying with ways of streamlining said procedure.

The enactment of legislation should not be carried out too often but only when necessary. Therefore, streamlining the procedure to approve a bill is not always a critical concern and it is definitely not as relevant as what regards administrative decisions (e.g., issuing of licenses for economical activities). Notwithstanding, unnecessary steps or formalities in law making may also create burdens which increase costs for people, companies and public entities aimed to deal with legislative procedures.

Several good examples show how streamlining governmental legislative procedure is a relevant concern.

In Portugal the Government has enacted a decree-law (*decreto-lei*) on bullfighting events with several unnecessary provisions. Some of them regulate issues that should be left

(Article 198-2 of the Portuguese Constitution).

- 3) *Decretos-Regulamentares, resoluções, portarias* and *despachos normativos* are different types of administrative regulations approved by the Government. The first is approved by the Council of Ministers, and the President of the Republic enacts it. The second is approved by the Council of Ministers but is not subject to the promulgation by the President of the Republic. The third and fourth types are approved by the ministers or secretaries of state (deputy ministers) and are not enacted by the President of the Republic.
- 4) Other entities are entitled to approve administrative regulations when the law states so. This is the case of municipalities, parishes and other administrative bodies.
- 5) Greenberg, Daniel – Laying down the law, A discussion of the people, processes and problems that shape acts of Parliament, 1st edition, Sweet & Maxwell, 2011, p. 201-215; Mc Leod, Ian – Principles of Legislative and Regulatory Drafting, Oxford and Portland, Oregon, 2009, p. 159; Xanthaki, Helen – Drafting legislation, Art and Technology of Rules for Regulation, Oxford and Portland, Oregon, 2014, p. 257; Zander, Michael – The law making process, 7th edition, Bloomsbury, Oxford and Portland, Oregon, 2015, pp. 105-114.

unregulated or determined by tradition rather than law. Article 26 of Decree-Law 89/2014 of 11 June provides a good example: it states that the participation of a band is mandatory before the show, during parts of it, whenever the director of the bullfight determines so and when the public requires. In addition, it states that a bugle should be kept near the Director of the bullfight.⁶⁾

At the European Union level the already repealed Commission Regulation (EC) 2257/94 of 16 September 1994, published in the Official Journal L 245 of 20 of September 1994 laying down quality standards for bananas, is commonly referred to as an example of what legislation should not include: it stated that bananas should be “*free from malformation or abnormal curvature of the fingers*”. This is obviously an issue that should be left for the market to decide or, at least, objective and clear provisions should define what is a malformation or an abnormal curvature of the fingers.

A good *ex ante* assessment (or just common sense) would be able to avoid such kind of unnecessary governmental legislation. Thus, streamlining governmental procedures to produce legislation is a relevant matter and is worth analysing as to how to achieve such purpose.

II Ways of streamlining governmental procedure

There are many different ways of streamlining the legislative procedures including on what concerns governmental legislation. In this article the following three ways are identified: i) simplifying the procedure to approve governmental legislation, ii) avoiding unnecessary legislation and iii) increasing the level of transparency.

⁶⁾ In Portuguese the wording is as follows:

Artigo 26.º

Bandas de música e cornetim

1 – Nos espetáculos tauromáquicos, com exceção das variedades taurinas, é obrigatória a atuação de uma banda de música antes do espetáculo, durante as cortesias, sempre que o diretor de corrida o determine e, a pedido do público, durante a lide e na volta à arena.

2 – É obrigatória a existência, junto do diretor de corrida, de um cornetim para efetuar os toques tradicionais, que lhe são ordenados por aquele.”

For each of these ways to streamline the governmental legislative procedure specific measures are presented.

1. Simplifying the procedure to approve governmental legislation

An obvious way to streamline procedures to approve governmental laws is to ease the procedure itself. There are acceptable ways of doing so. However, one should always bear in mind that a deregulated way of approving legislation may lead to untested or unnecessary laws which ultimately may increase burdens and red tape. Thus, measures to simplify procedures to approve governmental legislation should be carefully identified in order to target what really is a burden but not what is a proper procedure to assess the need of a new law.

Three examples may help to determine what may be a burden in governmental legislative procedures.

A memorandum to be presented along with the proposed piece of legislation is frequently required to submit a draft for governmental approval. This is useful and should be kept, taking into account that it usually provides information for a proper assessment. However, it may have unnecessary or repeated requirements. For instance, Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December stated in an old version of Article 26-1-b), e) and f) that such memorandum (*nota justificativa*) should include, amongst other information, an overview of the content of the proposal, the current status of the legal framework on the subject and a statement of the grounds for the proposed amendment.⁷⁾ In practice, the text for each of these requirements tends to be the same or very close.

Another example of an unnecessary procedure in Portugal is the signing of a governmental bill by the ministers after its approval by the Council of Ministers. The Portuguese Constitution requires the ministers to sign approved bills prior to sending to the President of the Republic for

⁷⁾ Subparagraphs b) and f) were repealed and the current version of the Internal Regulation of the Portuguese Council of Ministers does not have the same problem. Resolution/*Resolução* 95-A/2015, of 17 December was amended by Resolution/*Resolução* 44/2017, of 24 March and Resolution/*Resolução* 171/2017, of 13 November.

promulgation (Article 201-3 of the Portuguese Constitution). Such signature shall be made by the ministers entitled to deal with the subject of the approved bill. However, they have already assessed whether or not the bill should be approved in the Council of Ministers' meeting and in addition this signature cannot be refused. Therefore, such signature has no added value to the approval procedure and should be eliminated. The same applies to the signature of the Prime-Minister (*referenda*) after the promulgation by the President of the Republic and prior to the publication in the Official Gazette (*Diário da República*). The requirement that the Prime Minister sign the bills approved by the Parliament and the Government after the promulgation by the President is merely a bureaucratic step before publication (Article 140 of the Portuguese Constitution).

Finally, another option for the simplification of the procedure of governmental bills is to consider the use of electronic means by adopting a fully electronic procedure for their approval. This includes electronic procedures as the following: i) e-filing to present drafts to be submitted for governmental approval, ii) electronic sending of an agenda of the meetings where drafts are to be considered for approval and draft versions of the proposed laws, iii) electronic sending of the approved bills to the President of the Republic and iv) the electronic signature of the ministers and electronic promulgation by the head of state after approval.

Electronic procedures have important advantages that must be underlined. In general, they reduce costs, increase efficiency and allow for more secure procedures. In fact, they avoid unnecessary paper copies and allow paperless procedures. In addition, electronic procedures allow a better understanding of amendments and versions of proposed drafts. The tracking of a procedure is easier, and it also provides for more accurate statistical data.

Electronic publication of approved governmental laws in official gazettes should also be considered. This allows for a swifter publication of bills, and they may even be published as soon as they are ready for publication instead of using the traditional publication as an edited "journal format".⁸⁾ In addition, electronic publication in electronic official gazettes is

⁸⁾ <http://eur-lex.europa.eu/homepage.html?locale=en>, www.legifrance.fr and www.legislation.gov.uk are good examples of free of charge web search engines for legislation.

important to provide information to enhanced web search engines which can therefore detect amendments and identify revoked bills in an easier way. Thus, electronic publication helps to provide more accurate and transparent information on which laws are in force.

To sum up, the elimination of some acts and procedures, the use of electronic means and the improvement of publication in official gazettes are possible ways of targeting that goal.

2. Avoiding unnecessary legislation

Unnecessary laws generally mean additional burdens for citizens and companies, and therefore efforts should be made to avoid a legal framework with more laws and regulations than effectively required.⁹⁾⁻¹⁰⁾ Thus, a streamlined procedure on law making should be carefully shaped to avoid unnecessary laws.

On what concerns the criteria to impede unnecessary legislation, some guidelines may be set. In general, a piece of legislation is unnecessary in the following cases:

- If there is not a relevant political decision to be taken or social need to be addressed;
- If the policy measure is already in force by means of a previously approved law or other act;
- If there is no need to adopt the policy measure by means of a law because there are other ways of implementing it, namely by means of self-regulation, agreements between public and private entities and administrative decisions or regulations;
- If different proposals are submitted on closely connected issues, allowing for a single law which addresses all the relevant issues instead of several new laws or amendments to laws.

⁹⁾ European Commission Communication 543 (2010) on Smart Regulation in the European Union (<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC0543>).

¹⁰⁾ Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>; Xanthaki, Helen – Drafting legislation, Art and Technology of Rules for Regulation, Oxford and Portland, Oregon, 2014, pp. 46-48 and 331-351.

In order to avoid unnecessary legislation different ways to block its approval may be taken into consideration.

A member of the government may be appointed to repeal unnecessary proposals. His mission would be to convince or force other members of the government to legislate as little as possible and to push for the use of alternative ways of approving political measures. This member of the government would have the power to impede the approval of a bill if evidence is presented that the measure is not required or if there is an alternative way of achieving the targeted result.

In Portugal the Secretary of the Presidency of the Council of Minister (*Secretário de Estado da Presidência do Conselho de Ministros*) has this authority. He is a deputy minister with enhanced authority, namely because he attends the Council of Ministers and has some ministerial power. He is also entitled to organize the meetings of the Council of Ministers, to ensure that bills are ready to be approved from a juridical standpoint and that the political issues to be discussed on what concerns the proposals have already been agreed or are clearly identified. The law grants him some power to repeal proposals (Article 34 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). In addition, he has *de facto* such authority because he is entitled to prepare the draft agenda for the meetings of the Council of Ministers and the meetings of the deputy ministers (Articles 5-1 and 16 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). He is also entitled to amend the draft proposals submitted for approval and negotiate the text of the drafts with the ministry which has presented the proposal and the other ministries involved (Articles 37-1 and 39 of Internal Regulation (*Regimento*) of the Portuguese Council of Ministers approved by the Resolution/*Resolução* 95-A/2015, of 17 December). Therefore, he has relevant powers to prevent a bill from being submitted for approval or to amend it.¹¹⁾

¹¹⁾ Regarding UK practices and the lack of scrutiny from the Cabinet and Future Legislation Committee see Zander, Michael – The law making process, 7th edition, Bloomsbury, Oxford and Portland, Oregon, 2015, pp. 8-17.

Another alternative would be to appoint a member of the government to assess the legislation prepared by other ministries. This member of the government would have relevant power to decide whether a draft may be included in the agenda of the Council of Ministers or not and therefore to impede or create impediments to the approval of the bill. Again, the Portuguese Secretary of State for the Presidency of the Council of Ministers is entitled to this power and may consider that a bill is not suitable to be included in the agenda of said meetings.

Adopting *ex ante* assessment procedures is also a way of avoiding unnecessary legislation. This may be one of the methods used by the member of the government entitled to verify if a bill proposed by a Ministry is really necessary to achieve the aimed target. However, other public bodies may have the competence to undertake this type of assessment and decide or present an opinion on whether or not the bill should be considered. The type of *ex ante* assessment may be different, being deeper or less detailed on the basis of criteria previously established.¹²⁾⁻¹³⁾ This may be helpful to balance the need for swift approval of urgent legislation with policies aimed at avoiding unnecessary legislation.

¹²⁾ Countries have adopted different approaches on what concerns *ex ante* legislative assessment. See OECD data and information on <http://www.oecd.org/gov/regulatory-policy/betterregulationineurope-theeu15project.htm>. See also De Francesco, Fabrizio – Diffusion of Regulatory Impact Assessment and Standard Cost Model: a comparative analysis, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 238–250; Garoupa, Nuno – Regulatory Impact Assessment – Economic and Political Dimensions, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 200–207; Gestel, Rob van/Menting, Marie-Claire – The impact of evaluation of legislation: Going Dutch?, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 218–237; Issalys, Pierre – Impact Assessment as a means towards Higher Quality of Legal Norms: beware of blind spots, *Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th–25th, 2010, Nomos*, pp. 208–217; Morais, Carlos Blanco – Guia de Avaliação de Impacto Normativo, Direcção-Geral de Política de Justiça/Ministério da Justiça, Almedina, Coimbra, 2010.

¹³⁾ OECD recommended Member States to “integrate Regulatory Impact Assessment into the early stages of the policy process for the formulation of new regulatory proposals” and that they should “adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation”. See the 2012 Recommendation of the Council of OECD on Regulatory Policy and Governance in <http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>

Undertaking meetings of deputy ministers to prepare the Council of Ministers or other member of the government's meetings where legislation is approved is another suitable method of avoiding unnecessary legislation. This procedure allows a means to filter the drafts to be considered for approval by the ministers because a bill will only be considered as ready to be included in the agenda of the Council of Minister if approved in advance by the meeting of deputy ministers. Deputy ministers will assess, discuss, negotiate and agree on a version to be submitted to the Council of Ministers or reject the draft if they considered it unnecessary.

The prior submission of the bill to the deputy ministers' meetings may be set as a general rule but exceptions to this rule based on special circumstances such as the need for an urgent approval should be accepted.

A detailed and updated overview of the drafts being prepared within the ministries is a critical tool to avoid unnecessary legislation. This allows a member of the government specially entitled to do so to impede the preparation or submission of drafts for approval from the very beginning of the drafting process, thus preventing unnecessary actions.

Finally, guidelines may be set to avoid unnecessary legislation such as the following:

- That only one law shall be approved when there are different proposals or drafts being prepared on closely connected issues;¹⁴⁾
- That only one law shall be approved to transpose European Union directives if several

¹⁴⁾ This rule was adopted under the Portuguese SIMPLEGIS programme which was aimed at i) simplify legislation by having fewer laws, making fewer amendments to laws and by having no delays in transposing EU directives; ii) make laws more accessible for citizens and businesses by drafting laws easier to understand, by having greater involvement of citizens in law-making procedures and providing better information about the laws and iii) To achieve a better enforcement of laws by adopting laws that will come with manual of instructions, to ensure that the laws' objectives are achieved and that legislation is evaluated by means of impact assessment.

In 2010 and 2012 the number of laws approved by the Government (decree-laws/decretos-leis) has consequently decreased substantially and the number of repealed laws has increased. For the data see the last report (n. 6) of the Portuguese Observatory on Legislation/ *Observatório da Legislação Portuguesa* in <http://www.fd.unl.pt/Conteudos.asp?ID=1456>. See also Ettner, Diana/Silveira, João Tiago - Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>

transpositions on closely connected issues are required or will be required in the near future;¹⁵⁾

- That for each law approved, at least a similar one shall be repealed;
- That approved laws shall only provide for secondary legislation or administrative regulations when really necessary for execution;
- That legislative assessments shall be undertaken from time to time in order to verify if a law aimed to repeal unnecessary legislation should be approved.¹⁶⁾⁻¹⁷⁾

3. Increasing the level of transparency

To increase the level of transparency of the governmental legislative procedure, public knowledge of agendas and proposals submitted to governmental meetings to approve legislation/councils of ministers should be provided.

This has the advantage of providing more information to the public and grant additional opportunities to participate in law decision making. However, one shall always bear in mind that the entities and persons more keen on using these kinds of tools and information are well organized lobbies rather than the average person and therefore, there is an obvious risk of reducing the strength of the power to adopt necessary political measures.¹⁸⁾ In addition, some political decisions must be taken without prior public knowledge to produce effective results.

¹⁵⁾ This was also a rule set by the SIMPLEGIS programme. See Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>

¹⁶⁾ Laws aimed at repealing unnecessary legislation were approved under the SIMPLEGIS programme in Portugal and in Italy. See Ettner, Diana/Silveira, João Tiago – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publica.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html> and Pacini/Fabio – The Italian “Legislation-Cutting” Tool, *European Journal of Law Reform* (2016) and Il “nuovo” taglia-leggi: un’occasione mancata?, *Quaderni Costituzionali* (2009). Similar programmes started in 2015–2016 (Portugal) and are currently being executed.

¹⁷⁾ The OECD recommended Member States to “conduct systematic programme reviews of the stock of significant regulation”. See the 2012 Recommendation of the Council of OECD on Regulatory Policy and Governance in <http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>

¹⁸⁾ Bergeal, Catherine – *Savoir rédiger un texte normatif*, 4.e édition, Berger-Levrault, Paris, 2001 p. 24.

Thus, providing public knowledge of governmental procedures and drafts to be approved may be considered to increase transparency, but care is advised when adopting such measure. At least, exceptions should be taken into consideration.

III Conclusions

A relevant number of ways and tools to streamline governmental legislative procedures may be considered and be effective. In order to avoid unnecessary legislation: a member of the government may be appointed to repeal unnecessary proposals and to assess the bills prepared by other ministries, *ex ante* assessment procedures may be established, meetings of deputy ministers to prepare the ministers' meetings for the approval of bills may be undertaken, an overview of the drafts being prepared within the ministries should be prepared and regularly updated, and guidelines to avoid unnecessary legislation should be set. However, some other measures should be carefully considered or used in a balanced way. This is the case of measures aimed to simplify the legislative procedure itself (by eliminating acts and formalities or using IT solutions/electronic means) and to provide public knowledge of the governmental procedures and drafts of bills to be considered for approval.

