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Portuguese Trends on Better Regulation

João Tiago Silveira

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João Tiago Silveira*

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* Lecturer at Lisbon Law School – University of Lisbon Consultant at Morais Leitão Galvão Teles, Soares da Silva & Associados

1. Introduction

This article deals with Portuguese policies on Better Regulation in the last fifteen years, the current trends in this subject and possible future trends.

It aims to address policies and measures concerning the simplification and improvement of laws and regulations. However, it does not intend to address other Better Regulation policies and measures to cut red tape or to simplify administrative procedures which do not necessarily involve laws and regulations. This is important because policies with relevant impact as the SIMPLEX programme were carried out at this level and they will not be analysed in this paper.¹⁾

Thus, this article deals with Portuguese policies on Better Regulation concerning the improvement and simplification of laws and regulations but not with other Better Regulation policies mainly concerned with the simplification of administrative acts and procedures for the reduction of administrative burdens.

There are three main reasons to address this subject. First, in the past years Portugal has adopted important measures on Better Regulation to improve the quality of legislation. Second, some of these policies and measures are innovative and therefore deserve to be studied. Third, Portuguese speaking countries and regions share trends on new policies and legislation. So, new Portuguese trends on Better Regulation may have effects on other relevant legal frameworks involving more than 230 million native speakers in several countries and regions such as Angola, Brazil, Cabo Verde, Guinea-Bissau, Macao, Mozambique, São Tomé and Príncipe and Timor-Leste.

1) Under the SIMPLEX programme relevant measures to simplify administrative acts and procedures were approved as i) one stop shops to incorporate companies, to buy/sell/register real estate, for inheritance issues and others, ii) elimination of public deeds before notaries, unnecessary administrative requirements and paper certificates issued by the Public Administration, iii) e-gov IT systems to incorporate companies and to register other acts of companies, to register properties, to register the new owner of vehicles, etc, and iv) online access to the permanently updated information on registrations of companies, properties, vehicles, etc.

The article describes the main Portuguese programmes and efforts on Better Regulation in the last fifteen years, including the practices and efforts of the Legal Policy and Planning Office of the Ministry of Justice (*Gabinete de Política Legislativa e Planeamento do Ministério da Justiça*), the studies of the Commission for the Legislative Simplification (*Comissão para a Simplificação Legislativa*), the Strategical Programme for the Quality and Efficiency of Governmental Laws and Regulations (*Programa Estratégico para a Qualidade e Eficiência dos Atos Normativos do Governo*), the Programme Better Legislation (*Programa Legislar Melhor*) and the SIMPLEGIS programme.

Finally, the new trends are addressed. On one hand, the paper refers new Better Regulation measures which recently have entered in force. On the other hand, future trends and policies to be considered in a near future are suggested.

2. Former Portuguese Better Regulation Programmes and measures

The first comprehensive efforts to build up Better Regulation policies in Portugal started in the early 21st century. Since then, this issue has increasingly been included in political agendas and relevant new measures were prepared and executed.²⁾

To a certain extent, these agendas were determined by European Union policies on Better Regulation and reduction of administrative burdens, but relevant measures were conceived and executed at the national level and therefore present original and innovative features. The present part of this article aims to identify the more relevant policies and efforts on Better Regulation in Portugal between the beginning of the century and 2011.

2) For an overview of the former Portuguese Better Regulation programmes see Diana Ettner/João Tiago Silveira – 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>.

a) Practices and efforts of the Legal Policy and Planning Office of the Ministry of Justice (*Gabinete de Política Legislativa e Planeamento do Ministério da Justiça*)

The Legal Policy and Planning Office of the Ministry of Justice was the department of this Ministry entitled to prepare new policies and relevant bills on justice. Its creation aimed to bring together the creation and planning of new policies, the production of statistical data in issues regarding justice and law making.³⁾ This had a dual purpose: First, to make clear that law making was not a task to be undertaken solely by jurists but also by other specialists using different sources, data and information (as statistics) rather than just the law. Second, that law reform was not only about producing a piece of legislation. In addition, it should be carefully planned and executed, namely taking into consideration whatever is necessary to put the law into action.⁴⁾

This new practice in law making based on previous impact assessment, analysis of statistics, previous public discussions, prior planning and planned execution was namely carried out in three major law reforms prepared by this office: i) the reform of the procedures before administrative courts, ii) the reform of the enforcement of sentences legal framework and iii) the reform of the legal framework for State and Public Administration liability.

In all these reforms prepared between 1999 and 2002 innovative tools were used such as the following: i) stakeholders and specialists were listened to and public

3) The Legal Policy and Planning Office of the Ministry of Justice/*Gabinete de Política Legislativa e Planeamento do Ministério da Justiça* is now General Directorate for Justice Policy/*Direção-Geral da Política de Justiça*. Its competences have increased and it now also deals with matters on international relations and alternative dispute resolution. The Decree-Law 163/2012 of 31 July regulates the General Directorate for Justice Policy.

4) João Tiago V. A. da Silveira, *Gabinete de Política Legislativa e Planeamento do Ministério da Justiça*, *Legislação - Cadernos de Ciência da legislação* n.º 28 (abril/junho 2000), INA, p. 33f.

discussions were carried out, ii) the impact of the measures was previously assessed and reports were undertaken, iii) the means required to put the legal framework in force were carefully assessed, namely on what concerns humans resources, infrastructures and IT systems and iv) innovative approaches were used, such as a study prepared by a consultant for the reform of administrative court procedures on how to better manage and streamline court procedures using company practices.⁵⁾ ⁶⁾

This department of the Ministry of Justice has also produced new tools to improve law making which are still used in Portugal as the main resources for legal drafting and law impact assessment.

A handbook on how to draft legal texts was prepared by the Legal Policy and Planning Office during the period 2000-2002: the “Legística” handbook. It set the main rules for legal drafting in Portugal and provided explanations and examples on how to draft properly.⁷⁾ It is still the main Portuguese resource on this subject and is commonly used in Portugal as well as in other Portuguese speaking countries. In addition, a practical guide on how to carry out legislative impact assessments was produced years later.⁸⁾

Finally, this office has also created new tools to make the justice legal framework more transparent and accessible as the Laws of Justice/Leis da Justiça project aimed to present and update in a permanent basis providing on the Internet the legal framework for justice.⁹⁾

5) For an overview of how the reform of the administrative courts' procedures was carried out see João Tiago V. A. da Silveira – A Reforma do Contencioso Administrativo, *Revista Jurídica* n.º 25 (abril 2002), AAFDL, Lisboa, p. 441-444.

6) The studies and reports for the reforms of the administrative court procedures and legal framework on State and Public Administration liability are published: *Reforma do Contencioso Administrativo*, vols. I, II and III, Coimbra Editora, Coimbra, Ministério da Justiça, Gabinete de Política Legislativa e Planeamento, 2003; *Responsabilidade Civil Extracontratual do Estado – Trabalhos preparatórios da reforma*, Coimbra Editora, Coimbra, Ministério da Justiça, Gabinete de Política Legislativa e Planeamento, 2002.

7) David Duarte/Alexandre Sousa Pinheiro/Miguel Lopes Romão/Tiago Duarte - *Legística – Perspectivas sobre a Concepção e Redacção de Actos Normativos*, Almedina, Coimbra, 2002.

8) Carlos Blanco de Moraes (coordenador) – *Guia de Avaliação de Impacto Normativo*, Almedina, Coimbra, 2010.

Thus, the Legal Policy and Planning Office of the Ministry of Justice has introduced new practices for law making in the justice area and has also created tools for legal drafting and impact assessment which were designed to be used in any policy regardless of its field.

b) The studies of the Commission for the Legislative Simplification (*Comissão para a Simplificação Legislativa*)

At the same time the Legal Policy and Planning Office was preparing and executing law reforms using new procedures to hear stakeholders and to study their impact, a commission to study policies on Better Regulation/legislative simplification was created by the Resolution of the Council of Ministers 29/2001 of 15 February/*Resolução do Conselho de Ministros* 29/2001 of 15 February.

This commission aimed to i) identify legal frameworks to be amended, ii) undertake studies and produce recommendations to improve the quality and to simplify laws and regulations, iii) analyse measures in order to ease the access to laws and regulations, iv) analyse and present cases where laws and regulations should be repealed (namely where self-regulation could be accepted) and v) study how to simplify procedures for the approval of laws.

The commission was created under the Ministry for the State Reform and Public Administration and was composed of a president, appointed members and representatives of several ministries.

The efforts of the commission did not produce any immediate result. Studies were carried out and published but no new measures or tools were adopted in direct result of these works.¹⁰⁾ However, it may be accepted that these studies had the effect

9) Alexandre Sousa Pinheiro - "Leis da Justiça", Recolha e tratamento de legislação vigente na área da Justiça: Relatório, *Scientia Juridica*, Tomo LVI, n.º 309 (abril/junho 2000), INA, p. 127f.

10) Relatório da Comissão para a Simplificação Legislativa, Para uma melhor Legislação, vol. 2, Ministério

of increasing the relevance of Better Regulation concerns and measures for the future.

c) The Strategical Programme for the Quality and Efficiency of Governmental Laws and Regulations
(Programa Estratégico para a Qualidade e Eficiência dos Atos Normativos do Governo)

Under Dispatch 12017/2003/*Despacho* n.º 12017/2003 of the Ministry of the Presidency, published in the II series of the Portuguese National Gazette/*Diário da República* of 23 June 2003 and Dispatch 26748/2005/*Despacho* 26748/2005 of the Secretary of the Presidency for the Council of Ministers, published in the II series of the Portuguese National Gazette/*Diário da República* of 28 December 2005, a Technical Commission was created to prepare the Strategical Programme for the Quality and Efficiency of Governmental Laws and Regulations.¹¹⁾

This Commission has prepared several proposals to improve the quality of laws and regulations and some of them have been adopted under the Better Legislation/*Legislar Melhor* programme which will be addressed subsequently. In fact, the Commission has suggested measures in the following areas of Better Regulation:

- i) Legislative impact assessment framework, including when *ex ante* impact assessment should be held and which entities would be responsible for such assessment, mandatory and non mandatory impact assessment and types of impact assessment;
- ii) Governance for the preparation of drafts and entities within the ministries

da Reforma do Estado e da Administração Pública.

11) For an overview of the works of this Commission see Carlos Blanco de Moraes – Manual de Legística, Critérios científicos e técnicos para legislar melhor, Verbo, 2007, p. 272-278, 588, 610-611, 628 and annexes V, VI, VII and VIII.

which should be responsible for legal drafting and the preparation of proposals;

- iii) New procedures for the transposition of European Union Directives;
- iv) Legal consolidation and compilation;
- v) Standards for legal drafting adopted by means of an annex to the Internal Regulation/*Regimento* of the Council of Ministers, prepared on the basis of the rules set in the “Legística” handbook produced by the Legal Policy and Planning Office of the Ministry of Justice.

As said, some of these proposals were subsequently adopted by the Better Legislation/*Legislar Melhor* programme that will also be addressed in this article. The standards for legal drafting were the only proposal of the Commission to be approved prior to this programme. Although with recent exceptions, from 2004 on the Internal Regulations/*Regimentos* of the Council of Ministers have adopted this document and this has been commonly accepted as the standard for legal drafting of governmental laws and regulations since then.¹²⁾

12) The annex with standards of legal drafting was approved by the Internal Regulations/*Regimentos* of the XVI, VXII, XVIII, XIX and XX Constitutional Governments (Internal Regulation/*Regimento* 126-A/2014 published in the I serie B of the National Gazette/*Diário da República* of 3 September 2004; Internal Regulation/*Regimento* 82/2005, published in the I serie B of the National Gazette/*Diário da República* of 15 April 2005, amended by the Resolution/*Resolução* of the Council of Ministers 186/2005 published in the National Gazette/*Diário da República* of 6 December 2005, by Resolution/*Resolução* of the Council of Ministers 64/2006 published in the National Gazette/*Diário da República* of 18 May 2006 and Resolution/*Resolução* of the Council of Ministers 198/2008 published in the National Gazette/*Diário da República* of 30 December 2008; Internal Regulation/*Regimento* 77/2010 published in the I serie of the National Gazette/*Diário da República* of 11 October 2010 and Internal Regulation/*Regimento* 29/2011 published in the I serie of the National Gazette/*Diário da República* of 11 July 2011, amended by the Resolution/*Resolução* of the Council of Ministers 51/2013 published in the I serie of the National Gazette/*Diário da República* of 8 August 2013; Internal Regulation/*Regimento* 90-B/2015 published in the I serie of the National Gazette/*Diário da República* of 9 November).

The Internal Regulation/*Regimento* of the XXI Constitutional Government, approved by the

d) The Programme Better Legislation (*Programa Legislar Melhor*)

In 2006 the Resolution/*Resolução* of the Council of Ministers 63/2006 of 4 May, published in the I series of the National Gazette/*Diário da República* of 18 May approved the Better Legislation/*Legislar Melhor* programme.¹³⁾ The programme was then executed by means of several laws, regulations and orders.

This was the first comprehensive Better Regulation policy to be prepared and executed in Portugal. Until then, there were good practices and positive measures adopted and implemented but not a complete and integrated policy aimed to improve the quality of laws and regulations and simplify the legal framework. The Better Legislation/*Legislar Melhor* programme has provided for the following measures:

- i) Using of IT tools to support the workflow in the approval of governmental laws;
- ii) Acceptance of the electronic version of the Portuguese National Gazette/*Diário da República* as the common way of publishing laws and regulations and elimination of the paper version;
- ii) Free access to the electronic version of the Portuguese National Gazette/*Diário da República* and improvement of the data included in such electronic version

Resolution/*Resolução* 95-A/2015, published in I series of the National Gazette/*Diário da República* of 17 December 2015 does not set forth standards for legal drafting. Those standards are set in internal documents that were not made available to public knowledge yet.

13) For an overview of the Better Legislation/*Legislar Melhor* programme see Carlos Blanco de Moraes – O programa “Legislar Melhor”, Dois anos depois, *Legislação, Cadernos de Ciência da Legislação* n.º 50 (outubro/dezembro 2009), INA, p.61f; Carlos Blanco de Moraes – Manual de Legística, Critérios científicos e técnicos para legislar melhor, Verbo, 2007, p. 273, 279-285, 591-605, 628-631; Carlos Blanco de Moraes – Novas políticas públicas no domínio da legislação: um comentário ao programa “legislar melhor”, *Legislação, Cadernos de Ciência da Legislação* n.º 44 (outubro/dezembro 2006), INA, p. 31f; Diana Ettner/João Tiago Silveira – 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>.

- with information of other data basis as DIGESTO;
- iii) Mandatory *ex ante* legislative assessment on administrative simplification by means of the SIMPLEX test, inspired by the KAFKA Belgian test;
 - iv) Approval of new rules for the hearing of private and public entities;
 - v) Approval of measures on the transposition of European Union directives and execution of laws by means of implementing decrees;
 - vi) Approval of new rules on legal consolidation, compilation and codification.

This programme has produced important results and improvements which were underlined by the Organisation for Economic Cooperation and Development (OECD) in its report “Better Regulation in Europe” concerning Portugal, approved in 2009. In this report it is mentioned that Portugal has made impressive progress in the development and implementation of policies for Better Regulation in a very short time frame, namely on what concerns easier access to regulations (websites of the Official Gazette and the Parliament), codification, and publication of rules of procedures for the preparation of regulation.¹⁴⁾

e) The SIMPLEGIS programme

The SIMPLEGIS programme was conceived and executed in 2010 and 2011. It was the second comprehensive Better Regulation policy adopted in Portugal.¹⁵⁾

SIMPLEGIS was aimed to go further and deeper than Better Legislation/*Legislar Melhor* and targeted three main goals mainly regarding governmental laws: i) to

14) Better Regulation in Europe, OECD, 2010, p.14-15, available in <http://www.oecd.org/gov/regulatory-policy/betterregulationineuropeportugal.htm>.

15) For an overview of the SIMPLEGIS programme see Diana Ettner/João Tiago Silveira – 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>; Susana Brito/Diana Ettner – SIMPLEGIS, Fewer laws, more access, improved enforcement, Quality of Legislation, Proceedings of the Ninth Congresso f the International Association of Legislation (IAL) in Lisbon, June 24th-25th, 2010, Nomos, 2011, p. 129f.

reduce the number of laws and simplify the legal framework, ii) to improve the access to and the transparency of laws and regulations and iii) to enhance the enforcement and execution of laws and regulations.

For each one of these goals several measures were adopted.

On what concerns the reduction of the number of laws and regulations and the simplification of the legal framework strict criteria was set to assess the need for a new governmental law. In addition, bills dealing with similar or close matters should be integrated in a single law therefore avoiding the approval of two laws instead of just one. In order to better execute those two guidelines, the ministries were obliged to inform the Presidency of the Council of Ministers on a monthly basis regarding which bills were being prepared. With this information the ministries and the secretaries of state were allowed to discuss the need for these bills prior to their submission for approval and also to decide in advance if different bills being prepared in similar or close matters should be integrated into one.

In addition to the reduction of the approvals, the repeal of unnecessary laws which were never revoked was put in place. The purpose was not only to revoke unnecessary laws but also to clarify which laws were effectively in force by revoking expressly those ones which were never considered as such. Thus, laws were approved by the Government and presented to the Parliament to repeal unenforced laws as well as laws which have never been expressly revoked.¹⁶⁾

As a result of those policies, in 2010 and 2011 the number of laws approved decreased in comparison with the previous ten years.¹⁷⁾ For example, the number of decree-laws and implementing decrees/*decretos regulamentares* approved by the Council of Ministers was of 207 in 2010 when the average for the period 2000-2009

16) The Decree-Law/*Decreto-Lei* 70/2011 of 16 June has repealed 233 unnecessary laws. The bill 40/XI presented by the Government to the Parliament was aimed to revoke 433 decree-laws. The latter has never been published because the Prime Minister resigned and new elections were called before its approval. This practice of repealing unnecessary laws was not continued.

17) Observatório da Legislação Portuguesa, Faculdade de Direito da Universidade Nova de Lisboa, CEDIS, Boletim n.º 6 (Fevereiro 2015), <http://www.fd.unl.pt/Conteudos.asp?ID=1456>.

was 352. In 2011 the number has decreased again to 139. The general number of all the laws and regulations approved in Portugal in 2010 and 2011 was also been much lower than the previous ten years (2.203 in 2000, 1.749 in 2010 and 658 in 2011).¹⁸⁾

Also regarding legislative simplification, measures and procedures were put in place to reduce the number of errors in laws and regulations approved by the Government and to reduce the time frame to transpose European Union (EU) directives. On what concerns the correction of errors, procedures were adopted to increase the number of reviews and reviewers of the bills approved prior to their publication. Regarding the transposition of EU directives, procedures for management of the transposition works were set, IT tools to monitor such works were created and the date for the meeting of secretaries of state where such bills would be discussed and approved (prior to the Council of Ministers) was set months in advance so that the ministries knew the calendars for their works and the time frame within which their tasks had to be performed. In addition, the Secretary of State of the Presidency of the Council of Ministers and the Secretary of State for European Affairs were entitled to enforce these procedures and to speed up the approval of laws to transpose EU directives.¹⁹⁾

As a result of this, the percentage of decree-laws and implementing decrees/*decretos regulamentares* without formal and grammatical errors has raised from 89% to 95, 88% therefore reducing the need for formal corrections.²⁰⁾ In 2010 the delay for the transposition of directives regarding internal market has also been reduced from

18) Observatório da Legislação Portuguesa, Faculdade de Direito da Universidade Nova de Lisboa, CEDIS, Boletim n.º 6 (Fevereiro 2015), <http://www.fd.unl.pt/Conteudos.asp?ID=1456>.

19) In Portugal, as for the other European Union countries, a relevant number of approved laws result from the transposing of EU directives. In general, between 10,88% to 31,71% of the laws aim to transpose European Union Law. See Observatório da Legislação Portuguesa, Faculdade de Direito da Universidade Nova de Lisboa, CEDIS, Boletim n.º 6 (Fevereiro 2015), <http://www.fd.unl.pt/Conteudos.asp?ID=1456>.

20) Diana Ettner/João Tiago Silveira – 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>.

13 months to 5,1 months and put Portugal better placed than the EU average and the deficit of transposition has also decreased to 0,9% in line with the EU target of 1% in force by that time. In 2015 the deficit transposition was 0,3% and the delay for transposition 7,9 months.²¹⁾

Another goal of the SIMPLEGIS was to ease the access and transparency regarding laws and regulations.

One of the targets was to eliminate the publication in the National Gazette/*Diário da República* types of regulations that were constantly being published there due to their very high number. This presented different types of problems. On one hand, it made the access to other laws and regulations more difficult for readers because the search was harder. On the other hand, important laws and regulations were frequently published in a number of issues of the National Gazette/*Diário da República* where several less relevant regulations were also published and therefore their content could go unnoticed. Finally, the access to information on these types of laws and regulations was not user friendly because it was only published and listed in each National Gazette/*Diário da República* therefore not allowing for enhanced ways of web searching.

Under this measure, several types of regulations were deregulated and/or their publication began to be made on internet websites dedicated to their subject matter instead of the National Gazette/*Diário da República*. This was the case in the so-called “gaming regulations” aimed to create gaming areas, the regulations for the creation of forest intervention areas and regulations for the creation of stamps. As a result, the number of approved regulations has decreased dramatically and the search both for laws and regulations in the National Gazette/*Diário da República* and for these other acts was made easier.²²⁾

21) Internal Market Scoreboard 22 and Single Market Scoreboard 2015, available in http://ec.europa.eu/internal_market/score/index_en.htm and Diana Ettner/João Tiago Silveira – 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>.

22) As stated, the general number of laws and regulations in 2011 was of 658 when in previous years

Also to ease the access to information on laws and regulations the publication of decree-laws and implementing decrees/*decretos regulamentares* started to be made with informative summaries of their content in plain language both in Portuguese and English. This was in force between 13 October 2010 and 31 December 2011 but was discontinued then.

A new website for the National Gazette/*Diário da República* was prepared with i) enhanced search engines, ii) complete information on each published law (if it was in force or not, EU directives on the basis of Portuguese legislation, regulations aimed to execute it, etc), iii) a translator of legal terms, iv) a legal dictionary and v) laws and regulations since 1910. With the Better Legislation/*Legislar Melhor* programme access to the website of the National Gazette/*Diário da República* was made free but not the advanced searches using words or other data. For these reasons, this new website access was supposed to be absolutely free of charge. In addition, consolidated versions of the main laws and regulations were prepared and were supposed to be made accessible to everyone on this website.

Although the works were carried out in 2010 and 2011, the website was not brought to public access as prepared. In the following years the project was amended to improve the National Gazette/*Diário da República* website with some of the above mentioned tools but not with all of them and not with free search for laws and regulations.²³⁾

SIMPLEGIS was also aimed at improving the execution of laws.

For this, new procedures and training for legislative impact assessment was set. For the regular impact assessment, the SIMPLEX test was substituted. The submission by electronic means of proposals for consideration by the Council of

its number was much higher. Diana Ettner/João Tiago Silveira – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publ.ca.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>.

23) Diana Ettner/João Tiago Silveira – Programas de Better Regulation em Portugal: o SIMPLEGIS, E-pública, Revista eletrónica de Direito Público, ICJP/CIDP, n.º 1, 2014, /<http://www.e-publ.ca.pt/artigosimplegis.html> in <http://www.e-publica.pt/artigosimplegis.html>.

Ministers was made mandatory and a form with data for impact assessment was prepared to be completed with data on the number of administrative procedures created/eliminated, public expenditure, etc. Thus, the data for prior impact assessment was no longer only based on administrative simplification issues but also on additional information. For more complex impact assessments, more than 50 public officers from different departments of the ministries were selected and trained. A programme for the first ten full *ex post* impact assessment of laws was also agreed upon ministries and put in place. However, there is no evidence that such assessments have been effectively carried out in the following years.

Another SIMPLEGIS measure to enhance the enforcement of laws was the preparation of Q&A handbooks for the execution of laws which would be made accessible to public officers entitled to execute them and to the public by means of the new website of the National Gazette/*Diário da República*. These guidelines would be especially relevant for the execution of laws which would have to be applied by a high number of entities and officers and they would have been an important tool to provide for more equal legal treatment and standardised practices. Unfortunately, there is no evidence that this measure has produced effects.

3. New Portuguese Better Regulation trends

Since the Better Legislation/*Legislar Melhor* and the SIMPLEGIS programmes in 2006-2009 and 2010-2011, no new comprehensive policies on Better Regulation concerning laws and regulations have been held. Partially this may be explained because governments between 2012 and 2015 were more focused on implementing austerity policies than in development policies.

Although no new policy was announced and brought to public knowledge, several measures on Better Regulation were adopted in the last quarter of 2015 and in 2016. This may suggest that efforts on Better Regulation are starting again.

This part of the article deals with such new measures and aims to forecast and/or suggest new targets and measures for Better Regulation future policies.

a) New measures already in force

The Internal Regulation/*Regimento* of the Council of Ministers of the XXI Constitutional Government, approved by means of Resolution/*Resolução* of the Council of Ministers 95-A/2015, published in I serie of the National Gazette/*Diário da República* of 17 December 2015 introduced some relevant new measures.

In order to decrease the number of approved laws, an internal guideline was set stating that laws and regulations should only be approved by the Council of Ministers in one of its weekly meetings within the period of a month. This is obviously aimed at focusing the ministers on political issues and to prevent them from submitting bureaucratic proposals or laws and regulations without added value for people and companies.

In fact, after the period where SIMLEGIS was in force it is generally accepted that the production of laws and regulations has increased again and new measures to reduce this number are requested once more.²⁴⁾ This explains why efforts regarding the reduction of the number of approved bills are on the rise.

To improve the access and knowledge of new laws and regulations which may have an impact on companies, two dates were set for their entry into force. Although some exceptions are accepted, these bills will now have to enter into force on the 1st of January or on the 1st of July each year, therefore reducing the number of times that a company will have to deal with a new legal framework within a year. Finally, on what concerns the improvement of the execution of new bills, an important measure was also taken. Proposals of laws to be considered in the weekly

24) The number of laws and regulations approved by the Government has increased in 2012 and 2013. See Observatório da Legislação Portuguesa, Faculdade de Direito da Universidade Nova de Lisboa, CEDIS, Boletim n.º 6 (Fevereiro 2015), <http://www.fd.unl.pt/Conteudos.asp?ID=1456>.

meetings of the Council of Ministers shall not be accepted and included in its agendas without the drafts of the regulations aimed to execute them. The purpose is obviously to avoid that a law is approved but its execution is retarded or not properly put in place due to missing regulations aimed to implement it. Additionally, the assessment of the impact of the proposal is also improved because data and information on how the bill shall be executed are provided and presented before its approval.

In addition to these measures already in force, there is public evidence that the execution of some of the measures of the SIMPLEGIS programme are now being completed or reintroduced as for example the free of charge access to the website of the National Gazette/*Diário da República*, the plain language summaries of the published laws and regulations and the regular approval of laws to revoke unnecessary legislation.

b) Possible future trends and measures

The previous Better Regulation programmes, the new measures already put in place in recent months and the EU and OECD trends and recommendation on Better Regulation suggest that new important efforts in this field are about to commence in Portugal. This part of the article is intended to forecast what may be at stake in the near future, to suggest which are the areas that still require additional measures and to provide examples of measures that could be adopted.

Fighting the pressure for the approval of unnecessary laws is an absolute need. It is true that with the SIMPLEGIS programme the number of approved laws and regulations has decreased and that a new focus on reducing the number of bills approved exists. However, these efforts should continue and new ways of avoiding unnecessary approvals and reducing the legislative stock should be made because the pressure to approve bills even when they are obviously unnecessary still exists.

For example, Decree-Law 52/2016 of 24 August has recently provided a new set of rules for granting medals for Maritime Police officers. In 2014, article 26 of Decree-Law 89/2014 of 11 June ruled on bullfights and stated 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 it. In addition, it stated that a bugle should be kept near the Director of the bullfight. So, avoiding the approval of unnecessary laws is still necessary and requires permanent efforts.

A strict criteria to approve laws and regulations and assessments of the drafts being prepared by the members of Government should be put in place again, as when the SIMLEGIS programme was in force.

In addition, a new rule could be considered to determine that for each law approved at least one similar shall be repealed. In the UK, a similar rule was adopted in order to avoid the setting of new costs resulting from new regulations. Under the “one in, two out” (OITO) rule for every pound of additional net cost imposed on business by new measures that regulate or deregulate business, departments must find two pounds of net savings from deregulatory measures.²⁵⁾

Moreover, legislative assessments should also be undertaken on a permanent basis in order to identify unnecessary legislation. This task could be held by a watchdog as in the Netherlands.²⁶⁾

On the administrative regulations side there was a strong reduction in the number of approved regulations due to the deregulation of the approval of gaming areas and other regulations. However, other issues still require the approval of regulations even when the subjects do not justify such a relevant act. Efforts to identify areas where administrative regulations are not required should be therefore undertaken. For instance, there are still regulations (approved by the Council of Ministers) on

25) Better Regulation framework manual, Practical Guidance for UK Government Officials, March 2015, available in <https://www.gov.uk/government/publications/better-regulation-framework-manual>.

26) Better Regulation in Europe, OECD, 2010, p.48, available in <http://www.oecd.org/gov/regulatory-policy/betterregulationineuropenetherlands.htm>.

what concerns the dimension, size and very detailed characteristics of mailboxes (Implementing Decree/*Decreto Regulamentar* 8/90 of 6 April, amended by Implementing Decree/*Decreto Regulamentar* 21/98 of 4 September) as well as a regulation on the concept and accepted characteristics of bread (*Portaria n.º* 52/2015 of 26 February).

The fact that a relevant part of Portuguese laws and regulations results from EU legislation and that administrative burdens cannot always be eliminated exclusively by the the Portuguese State is making decision makers more aware that EU law issues should be addressed in the future.

It would be unfair not to recognise the EU efforts on Better Regulation policies and its measures to reduce administrative burdens.²⁷⁾ However, the European Commission still presents proposals and adopts acts which introduce serious and unjustified administrative burdens, namely on agriculture and environmental issues. In the near future one may expect a stronger attitude when discussing this kind of initiatives from the Portuguese Government side. Procedures to detect and avoid the creation of administrative burdens by EU regulations and directives by means of an early intervention of the Portuguese decision makers is something that may be expected.

Still concerning EU law, the “gold plating” process is becoming a concern for decision makers and one may expect procedures and measures to reduce its impact. This phenomenon is the excess of form, guidelines and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such regulation.²⁸⁾ In practice, it is the adoption of unrequired

27) Helen Xanthaki – *Drafting legislation, Art and Technology of Rules for Regulation*, Hart publishing, Oxford and Portland, Oregon, 2014, p. 338-342.

28) Matteo Bocci/Jan Marteen De Vet/Andreas Pauer/Roland Blomeyer/Antonio Sanz/Elena Saraceno - Gold-plating in the EAFRD: To what extent do national rules unnecessarily add to complexity and, as a result, increase the risk of errors?, European Parliament, Directorate General for Internal Policies, Policy Department D, Budgetary Affairs, 2014, [http://www.europarl.europa.eu/thinktank/pt/document.html?reference=IPOL-JOIN_ET\(2014\)490684](http://www.europarl.europa.eu/thinktank/pt/document.html?reference=IPOL-JOIN_ET(2014)490684).

regulations in addition to EU directives requirements when transposing them.

Better regulation policies should not only be based on the elimination and reduction of unnecessary laws but also on streamlining acts and procedures to enact them. Two issues could be addressed on this subject for a new Better Regulation policy in Portugal.

A relevant number of administrative regulations require the signature of several members of the Government. This is the case when a certain issue involves matters that are related to different ministries. Having many members of the Government signing administrative regulations does not necessarily mean more quality or added value. In fact, joint work between them is not the common practice. Usually, the regulation is prepared by one of the members of the Government that subsequently sends the draft to the others for signature. The main effect of having many ministers or secretaries of state signing a regulation is therefore the delay of the approval rather than a Better Regulation. So, a possible improvement would be the reduction of the number of entities entitled to sign certain regulations and the adoption of new procedures for a joint drafting work when necessary.

Another issue that may be expected to be addressed is on streamlining the internal procedure for the approval of international conventions. This procedure that shall be held after the signature of international conventions usually takes very long and there is no special reason to justify it rather than diplomatic bureaucracy. Taking into account that relevant international agreements on important issues as human rights, investment, trade and environment are regularly signed or amended, one may expect that sooner or later measures to streamline them may be put in place.

The search for more equal treatment under the law and the standardisation of procedures and acts is another field where new measures may take place.

Handbooks and manuals for the execution of laws such as the Q&A handbooks included in the SIMPLEGIS programme may be a common practice in the future. Such practice is not systematic yet but there are a few good examples of how this

tool may be useful and provide more equal treatment and increased standardised application of law. So, one may expect efforts to set procedures to determine when such handbooks should be produced.

On what concerns more standardised laws and regulations, there is an academic research project being currently held that may produce a relevant outcome in the future. This research project of the Lisbon Centre for Research in Public Law (www.icjp.pt/cidp) of Lisbon Law School/University of Lisbon aims to identify common standards for legal drafting for Portuguese speaking countries and regions by bringing together scholars and specialists from those countries and regions. If the research is successful and common standards are produced and accepted from an academic standpoint, one may expect that at least some of them are adopted considering that a closer legal framework for these countries and regions helps to create a better environment for living, studying and investing in their common area.

Another subject that is increasingly being studied in Portuguese law schools, particularly in the Lisbon Law School, is the creation of templates of more common types of laws and regulations such as the ones aimed at establishing a new administrative entity or regulating an administrative procedure. These types of laws follow a pattern but they result from common practices rather than from the definition of a template previously studied and defined to provide the best possible law on the involved subject.

Concerns on how to increase the access to laws and regulation and enhance the level of transparency of the legislative procedure may be also on the agenda in the future. On one hand, the quality of democratic institutions and more demanding citizens require additional efforts on providing information about laws and regulations and innovative channels for them to participate in. On the other hand, EU policies on Better Regulation set ambitious goals on this subject.²⁹⁾ Therefore,

29) Smart Regulation in the European Union – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM 2010 (543) of 8 October 2010, available in

one may expect new measures on Better Regulation on this field.

We have already underlined that full access free of charge to the website of the National Gazette/*Diário da República* may finally be granted. In addition, this website may be improved with several new tools, such as the already mentioned plain language summaries, enhanced search engines, Q&A handbooks and other sources for the execution of laws and regulations as well as other information on laws and regulations. Improvements to ease access to this website and increase the information that it already provides to citizens and companies are something that will probably be seen in the future.

As the regulations are becoming more technical, there is also an increasing demand for clearer laws as citizens no longer accept not being informed and not made aware of the innovations brought by laws and regulations. This is one of the reasons why we consider that plain language summaries will be put in place again. Notwithstanding, the issue of plain language may be raised on what regards the text of laws and regulations³⁰⁾.

However, laws and regulations must be more informative and clearer. As said, Q&A handbooks help to standardise procedures on the application of law and they also improve the disbursement of information and the access of citizens and companies to their content. In addition, other measures such as workflow diagrams published along with the law by means of an annex may help to understand its content, especially when the law sets forth a procedure.

In general, it is accepted that a thorough and transparent involvement of stakeholders helps to produce better laws and regulations. In Portugal there is a legal framework on hearings when producing pieces of legislation but new challenges

<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC0543>.

30) About the using of plain language in legal drafting see Daniel Greenberg – Laying down the law, A discussion of the people, processes and problems that shape acts of parliament, 1st edition, Sweet & Maxwell, 2011, p. 217-225; Helen Xanthaki – Drafting legislation, Art and Technology of Rules for Regulation, Hart publishing, Oxford and Portland, Oregon, 2014, p. 108-131; Ian McLeod – Principles of Legislative and Regulatory Drafting, Hart publishing, Oxford and Portland, Oregon, 2009, p. 63-65.

may be faced. However, the next years will probably require going deeper.

One foreseeable issue is how to establish enhanced procedures in order to allow the citizens and small and medium companies to present their suggestions for reducing regulatory burdens that they experience in their daily lives. In other words, how can public hearings and discussions be used to solicit the opinions of common people and companies instead of creating channels just for well organised lobbyists and avoid its capture by influential interest groups? This is a critical issue because a public hearing will not create an increase in citizens' confidence in the institutions entitled to legislate if the procedure does not provide them an effective way of presenting their views and assess the results of their participation. Websites and social networks are obvious channels to promote their being heard, but the challenge is not only about the channel itself, but also about how the end results reflect the involvement of participants on the hearing and how to provide them feedback.³¹⁾

Another issue which may be faced is the issue of bringing to public knowledge the agendas and proposals submitted to governmental meetings to approve legislation. The agendas of the meetings of the Council of Ministers are not public knowledge nor are the drafts submitted for approval. However, public hearings and request for opinions regularly authorise the stakeholders to access the content of a draft prior to its inclusion in the agenda of the Council of Ministers. Therefore, it is not uncommon that public or private entities are aware of versions of drafts prior to the discussion inside the governmental entity authorised to approve them.

Bringing the agendas and the drafts to public knowledge would have the advantage of providing more information to the public and grant additional opportunities to participate in law decision making. However, it should be taken into account that the public and private entities and persons most likely to use these channels and information are well organised lobbies rather than common people.

31) Patricia Popelier – Consultation on Draft Regulation – Best Practices and Political Objections, Quality of Legislation, Principles and Instruments, Proceedings of the Ninth Congress of the International Association of Legislation in Lisbon, June 24th-25th, 2010, Nomos, p. 140.

For this reason, a measure as this one may reduce the strength of governmental power to approve essential political measures.³²⁾ In addition, some relevant political decisions must be taken without prior public knowledge to produce effective results.

Therefore, bringing governmental procedures and drafts on laws and regulations to public knowledge is an issue that probably will have to be considered sooner or later, but extreme care should be taken if it is decided to implement this measure. At least, exceptions should be taken into consideration.

Finally, the introduction and improvement of legislative impact assessment is something that should also be expected. First, because this is an issue where EU and OECD are always pushing forward and requesting additional measures at the national level.³³⁾ Second, careful planning and assessment prior to the amendment of bills is more requested than ever and people are less inclined to accept new unjustified legislation. Third, because there are some good examples of *ex ante* and *ex post* impact legislative assessment but procedures to set when, how and under which conditions should it be undertaken are still missing. Finally, there are published studies on how to carry out legislative impact assessments and public officers are already trained so that conditions to perform these studies are already in force.

For these reasons, one should expect to have more legislative impact assessments in the future as well as procedures setting rules on how and when to perform them.

4. Conclusions

Portuguese Better Regulation and policies tend to follow EU and OECD trends

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

33) Smart Regulation in the European Union – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM 2010 (543) of 8 October 2010, available in <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC0543>; Recommendation of the Council on Regulatory Policy and Governance, OECD, 2012, available in <http://www.oecd.org/governance/regulatory-policy/2012-recommendation.htm>.

but they also present some original measures. For instance, Portuguese experience presents innovative measures on what concerns the reduction of the approval of laws and regulations and the using of plain language.

Since the beginning of the 21st century two comprehensive programmes for Better Regulation were put in place addressing almost all the Better Regulation relevant issues such as i) the reduction of the number of laws and the stock of legislation, ii) streamlining the procedure to approve laws and regulations, iii) easier access to laws and enhanced information on laws and regulations, iv) improving transparency of the procedure to approve bills, v) legislative impact assessment, vi) using of IT tools and vii) ways to improve the execution of laws and regulations. In addition, several isolated measures and good practices were held since then.

However, said programmes and measures have not yet addressed all the relevant issues on Better Regulation, and new challenges will now have to be faced. Recently, innovative measures on Better Regulation issues and political statements seem to make clear that this policy is back on track: i) it was decided that laws and regulations should only be approved by the Council of Ministers in one of its weekly meetings within the period of a month, ii) to minimize the negative effects of new laws and regulations over companies it was set that they will have to enter into force on only two dates each year and iii) proposals of laws submitted to the Council of Ministers shall include the draft of regulations aimed to execute them.

In addition to these measures already in force, there is public evidence that the execution of some of the measures of the SIMPLEGIS programme are now being completed or reintroduced as, for example, a free of charge access to the website of the National Gazette/*Diário da República*, the plain language summaries of the published laws and regulations and the regular approval of laws to revoke unnecessary legislation.

Thus, the future may bring new Better Regulation policies and measures in Portugal. Taking into account the EU and OECD agendas and recommendations

and specific issues to be faced at national level, these efforts may include measures as i) a new rule to determine that for each law approved at least a similar one shall be repealed, ii) permanent legislative assessments to identify unnecessary legislation, iii) elimination of Administrative regulation with no added value, iv) procedures to impede EU law to establish administrative burdens, v) procedures to avoid “gold plating” practices when transposing EU directives, vi) a reduction of the number of requested members of Government to sign administrative regulations, vii) streamlining the procedure for the internal approval of international conventions, viii) production of handbooks for the execution of laws and regulations in a more frequent and systematic way, ix) the adoption of common standards for legal drafting in Portuguese speaking countries and regions, x) the creation of templates for more common types of laws and regulations, xi) a full free of charge access and improvements in the National Gazette/*Diário da República* website, xii) the reintroduction of summaries of laws and regulations in plain language, xiii) enhanced procedures aimed at allowing common citizens and small and medium companies to be heard in law making, xiv) discussions on how/if agendas and drafts to be submitted to the Council of Ministers should be made public knowledge and xv) improvements on legislative impact assessment.

Abstract

This article deals with the Portuguese policies in Better Regulations on the last fifteen years, the current trends and possible future trends on this subject.

There are three main reasons to analyse this topic. First, in the last years Portugal has adopted important measures on better regulation and to improve the quality of legislation. Second, because some of them may be considered as innovative. Third, because Portuguese speaking countries and regions such as Angola, Brazil, Cabo Verde, Guinea-Bissau, East Timor, Macao, Mozambique, Portugal and São Tomé and Príncipe commonly share trends on new policies and legislation and therefore new Portuguese trends on better regulation may have effects on other relevant legal frameworks and an impact on more than 230 million people.

The article refers the main Portuguese programs on Better Regulation in the last fifteen years, including the practices and efforts of the Legal Policy and Planning Office of the Ministry of Justice (Gabinete de Política Legislativa e Planeamento do Ministério da Justiça), the studies of the Commission for the Legislative Simplification (Comissão para a Simplificação Legislativa), the Strategical Programme for the Quality and Efficiency of the Governmental Laws and Regulations (Programa Estratégico para a Qualidade e Eficiência dos Atos Normativos do Governo), the Programme Better Legislation (Programa Legislar Melhor) and the SIMPLEGIS programme. It also addresses new measures on better regulation adopted in the last year.

Finally, the article identifies future trends and policies which may be considered in a near future, namely taking into consideration European Union and OECD policies.

Key Words

Portugal, Portuguese Law, Better Regulation, Cutting Red Tape, Simplification, Quality of Legislation, Legal Drafting, Law Reform

국문초록

포르투갈의 좋은 규제 동향

João Tiago Silveira

(리스본대학교 강사)

이 논문은 포르투갈의 좋은 규제 정책에 대한 지난 15년간의 논의와 현재 경향 및 미래 전망을 다루고 있다.

이 주제를 분석하는 이유는 세 가지이다. 첫째, 지난 수년간 포르투갈은 좋은 규제 및 입법의 질 개선을 위한 중요 조치들을 채택해 왔다. 둘째, 그 중의 일부는 혁신적이라 할만하다. 셋째, 앙골라, 브라질, 카보베르데, 기니비사우, 동티모르, 마카오, 모잠비크, 상투메 프린시페 등과 같이 포르투갈어를 상용하는 국가들과 지역에서는 새로운 정책과 입법에 있어서 공통적인 경향을 나타내고 있으므로 좋은 규제에 관한 포르투갈의 새 경향은 다른 관련 법 체제를 비롯해 2억 3천만 명이 넘는 사람들에게 영향을 줄 수 있을 것이기 때문이다.

이 논문은 법무부의 입법정책 및 계획국(Gabinete de Política Legislativa e Planeamento do Ministério da Justiça)의 업무 및 작업, 입법단순화 위원회(Comissão para a Simplificação Legislativa)의 연구, 정부 법안의 품질 및 효율성을 위한 전략적 계획(Programa Estratégico para a Qualidade e Eficiência dos Atos Normativos do Governo), 입법개선 계획(Programa Legislar Melhor) 및 SIMLEGIS 계획 등을 포함해 지난 15년 간 시행된 포르투갈의 좋은 규제 프로그램계획들에 주목한다. 논문은 또한 작년에 채택된 입법 개선 조치도 다루고 있다.

끝으로 이 논문은 유럽연합과 OECD 정책들을 검토함으로써 장래 혹은 가까운 미래에 고려될 수 있는 정책들을 확인한다.

주제어

포르투갈, 포르투갈 법, 좋은 규제, 불필요한 형식의 폐지, 평이화(平易化),
입법의 질, 법안 작성, 법 개혁