



# Portugal's legal regime on marine spatial planning and management of the national maritime space



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## ABSTRACT

This article examines the legal regime and overall implications of Portugal's Law n. 17/2014, 10 April, which established the legal basis for Portugal's policy on marine spatial planning and management of the national maritime space. To allow a comprehensive analysis, this article includes an unofficial translation of the law.

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## 1. Introduction

The past years have witnessed important changes in Portugal's approach to its immense national maritime space. Amongst such changes, one of the most significant was the approval of this country's legal regime on marine spatial planning and management of the national maritime space.

In 2014, the Portuguese Parliament approved with great political consensus the Law. 17/2014, 10 April ("LBOGEM")<sup>2</sup>, which is the law that established the legal basis and the general guidelines for Portugal's policy on marine spatial planning and management. Notwithstanding spatial planning being a competence of the Parliament<sup>3</sup> there was ample cooperation with the Government.

As a programmatic law, LBOGEM required subsequent legislation to develop its legal norms,<sup>4</sup> which happened only just recently with the Government's approval of the Decree-Law n. 38/2015, 12 March, that also transposed the European Union's Directive 2014/89/EU, 23 July 2014, establishing a framework for maritime spatial planning.<sup>5</sup> In this respect, it is interesting to note that LBOGEM was published three months before the approval of this directive, and the Decree-Law n. 38/2015 approved a year and half before the date established for its transposition (*i.e.* 18

September 2016). The directive, in its own right, was the result of a remarkable work undertaken by Member States, in which Portugal was also profoundly involved. Therefore, in this respect, the entry into force of LBOGEM and of the Decree-Law n. 38/2015 is innovative too at the level of the European Union, placing Portugal at the forefront of ocean governance, together with a handful of Member States, some of which with significant experience.<sup>6</sup>

Additionally to Portugal's impressive track-record on classification of marine protected areas,<sup>7</sup> the new regime introduced the legal framework that allows the implementation of marine spatial plans in the whole national maritime space, including the continental shelf beyond 200 nautical miles. Indeed, with the entry into force of LBOGEM, it is the first time that Portugal enacted legislation applicable to the whole maritime space adjacent to its mainland and archipelagos, including the continental shelf beyond 200 nautical miles. In so doing, it introduced a new and larger concept of the Portuguese territory while recognizing, at the same time, that uses and activities in the national maritime space must be subject to coherent and efficient spatial planning and

<sup>6</sup> Charles Ehler, *A Guide Evaluating Marine Spatial Plans*, IOC Manuals and Guides, n. 70, ICAM Dossier n. 8, Paris, UNESCO, 2014, p. 2.

<sup>7</sup> Vasco Becker-Weinberg (et al.), "Marine protected areas: a strategy for Portugal", in: 5 *Maria Scientia*-Institute of Political Studies of the Portuguese Catholic University (2013), pp. 73–82. Also see Marta Chantal Ribeiro, "The "Rainbow": the first national marine protected area proposed under the high seas", in: 25-2 *International Journal of Marine and Coastal Law* (2010), pp.183–207. On the evolution of classification of marine protected areas in Portugal, see Marta Chantal Ribeiro, *A Proteção da Biodiversidade Marinha através de Áreas Protegidas nos Espaços Marítimos sob Soberania ou Jurisdição do Estado: Discussões e Soluções Jurídicas Contemporâneas. O Caso Português*, Coimbra Editora (2013), pp. 289–398.

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<sup>2</sup> Portuguese acronym commonly used to refer Law n. 17/2014, 10 April.

<sup>3</sup> Lit. (z) of article 165(1) of the Portuguese Constitution.

<sup>4</sup> Article 30.

<sup>5</sup> Article 1(2) of Decree-Law n. 38/2015.

management.

Before LBOGEM and its developing legislation there was no effective legal implementation of an integral spatial planning and adequate management of the maritime space in Portugal that took into consideration, at the same time, the environmental, social and economic dimensions. Authorizations, concessions and other rights of use of the maritime space were granted without much concern for the safeguard of two fundamental aspects that characterize the maritime space and differentiate it from land: its interconnectivity and tri-dimensionality, divided between surface, water column, seabed and subsoil. Indeed, as recognized in the preamble of the United Nations Convention of the Law of the Sea (“UNCLOS”), “the problems of the ocean space are closely interrelated and need to be considered as a whole”.<sup>8</sup>

The EU Commission identified as one of its main goals the need to adopt an integrated maritime policy of the EU, in view of the planning of the maritime space and the adoption by Member-States of maritime policies that recognize the interdependence of all matters connected with the sea and that safeguard its treatment as a whole. It underlined the need for coordinated planning of competing maritime activities and the strategic management of the different maritime areas.<sup>9</sup>

The EU Commission further identified the fundamental aspects for efficient planning of the maritime space: a predictable legal regime, internal coordinating structures for maritime affairs, avoidance of duplication of regulatory powers of different national or regional authorities, and replacing overlapping and redundant decision-making by a one-stop-shop approach.<sup>10</sup>

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) also recognized that the governance of the maritime space must be integral and not merely sectorial or restricted to the preservation of the marine environment in certain areas. UNESCO expressly referred the need for the adoption of governance models that include, on the one hand, planning measures that allow for sustainable development in time and space of different uses and activities, and on the other hand, implementation measures, control, monitoring, evaluation, research, stakeholder participation and identification of financial resources.<sup>11</sup> Likewise, the Secretariat of the Convention on Biological Diversity underlined the importance of implementing area-based management that addresses multiple management objectives and that improves decision-making.<sup>12</sup>

<sup>8</sup> Made in Montego Bay on 10 December 1982 and entered into force on 16 November 1994, published in 1833 UNTS 3. Portugal approved UNCLOS and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, on 3 April 1997, see Resolution n. 60-B/97, Decree n. 67-A/97, Official Gazette, 1st Series (Suppl.), 14 October 1998.

<sup>9</sup> Directive 2014/89/UE of the European Parliament and of the Council, 23 July 2014, establishing a framework for maritime spatial planning, published in the Official Journal of the European Union, L 257/135, 28 August 2014. Article 3(2) the Directive defines maritime spatial planning as “a process by which the relevant Member State’s authorities analyze and organize human activities in marine areas to achieve ecological, economic and social objectives.” Also see Communication from the Commission-Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU, 25 November 2008, COM (2008) 791, and Charles Ehler and Fanny Douvère, *Visions for a Sea Change. Report of the First International Workshop on Marine Spatial Planning*. Intergovernmental Oceanographic Commission and Man and the Biosphere Program. IOC Manual and Guides No. 48, IOCAM Dossier, No. 4. Paris, UNESCO.

<sup>10</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions-Guidelines for an integrated approach to maritime policy: towards best practice in integrated maritime governance and stakeholder consultation, 26 of June 2008, COM (2008) 395 final.

<sup>11</sup> Online: [http://www.unesco-ioc-marinesp.be/marine\\_spatial\\_planning\\_msp](http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp) (accessed on January 2015). Also see Charles Ehler and Fanny Douvère, *Marine Spatial Planning: a Step-by-Step Approach towards Ecosystem-based Management*, IOC Manuals and Guides, n. 53, ICAM Dossier n. 6, Paris, UNESCO, 2009, pp. 19–24.

<sup>12</sup> Secretariat of the Convention on Biological Diversity and the Scientific and

The new regime also seeks to bolster Portugal’s sea-economy. Indeed, for some time, entities of both the private and public sectors in Portugal had acknowledged the need for the development of integration mechanisms of different activities taking place at sea, often considering the lack of coordination as one of the main reasons for the small number of offshore activities and consequently the feeble expression of the sea-economy in Portugal’s gross national product.<sup>13</sup> As a result, the Government of Portugal expressly mentioned in its National Ocean Strategy 2013–2020 (“NOS”) that the entry into force of LBOGEM and its developing legislation is decisive for the increase of the country’s sea-economy, by creating “an effective legal framework for reconciling compatibilities between uses or competing activities, contributing towards a better and more economic use of the marine environment, allowing for the coordination of public authorities actions and private initiative, minimizing the impacts of human activities in the marine environment, en-route towards sustainability.”<sup>14</sup>

Prior to the adoption of LBOGEM, attempts had been made to organize and coordinate the different uses and activities of the maritime space, the most prominent being the proposal of a plan for marine spatial planning: *Plano de Ordenamento do Espaço Marítimo* (“POEM”).<sup>15</sup> However, this plan was not legally binding, nor was it enforceable as a sectorial plan. It was furthermore not able to adequately plan the different uses and activities taking place at sea, particularly considering the said tri-dimensionality of the maritime space and the fact that a certain area or volume may encompass, simultaneously, different uses or activities. Nonetheless, as it will be subsequently observed, the work of POEM may be useful for the initial implementation of the new legal framework, in particular for the elaboration of the national marine plan, which is referred as the “situation plan” in Portuguese.

## 2. The national maritime space

The entry into force of LBOGEM did not alter the limits or legal nature of the different maritime areas over which Portugal exercises rights of sovereignty or jurisdiction or, for that matter, the baselines from which the territorial sea is measured. These are identified, respectively, in Law n. 34/2006, 28 July, and Decree-Law n. 495/85, 29 November.<sup>16</sup>

Law n. 34/2006 did not include the continental shelf beyond 200 nautical miles. As already mentioned, the reference to the whole maritime space where Portugal exercises rights of sovereignty or jurisdiction took place for the first time with LBOGEM. Although there are presently no economic activities in the

(footnote continued)

Technical Advisory Panel, *Marine Spatial Planning in the Context of the Convention on Biological Diversity: A Study carried out in Response to CBD COP 10 Decision X/29*, Montreal, Technical Series No. 68, p. 11.

<sup>13</sup> *O Hypercluster da Economia do Mar. Um domínio de potencial estratégico para o desenvolvimento da economia portuguesa* (SAER/ACL, Lisbon, 17 February 2009). Also see *Programa do XIX Governo Constitucional*, online: [http://www.portugal.gov.pt/media/130538/programa\\_gc19.pdf](http://www.portugal.gov.pt/media/130538/programa_gc19.pdf) (accessed on January 2015).

<sup>14</sup> *Estratégia Nacional para o Mar 2013–2020*, Resolution of the Council of Ministers n. 12/2014, Official Gazette, 1st Series, n. 30, 12 February 2014, p. 1317, online: [http://www.dgpm.mam.gov.pt/Pages/ENM\\_2013\\_2020\\_EN.aspx](http://www.dgpm.mam.gov.pt/Pages/ENM_2013_2020_EN.aspx) (January 2015), p. 44. Marine spatial planning was also included as one of the strategic actions identified in the previous National Ocean Strategy 2006–2016, Resolution of the Council of Ministers n. 163/2006, Official Gazette, 1st Series, n. 237, 12 December 2006, pp. 8316–8327.

<sup>15</sup> *Despacho* n. 32277/2008, 18 December, Official Gazette, 2nd Series, n. 244, 18 December 2008, and *Despacho* n. 14449/2012, 30 October, Official Gazette, 2nd Series, n. 216, 8 November 2012. The POEM is available online: [http://www.dgpm.mam.gov.pt/Pages/POEM\\_PlanoDeOrdenamentoDoEspacoMarinho.aspx](http://www.dgpm.mam.gov.pt/Pages/POEM_PlanoDeOrdenamentoDoEspacoMarinho.aspx) (accessed on January 2015).

<sup>16</sup> Decree-Law n. 495/85 wrongly considered the waters adjacent to the archipelagos of Azores and Madeira as archipelagic waters.

continental shelf beyond 200 nautical miles, the legal regime put forward by LBOGEM creates the conditions for such rights to be granted in the future, with due regard for the freedom of the high seas.<sup>17</sup> It is therefore a case of the law anticipating the economic reality, which makes LBOGEM also innovative in this regard. Due to this newly founded dimension, the designation 'national maritime space' was adopted, as opposed to 'maritime space' used in Law n. 34/2006.

These two legal regimes have distinct goals. While Law n. 34/2006 defines the limits of the maritime areas where Portugal exercises rights of sovereignty or jurisdiction and the powers of the State in these areas and in the high seas; LBOGEM establishes the basis for the policy on marine spatial planning and management of Portugal's national maritime space. For example, article 2 of LBOGEM does not refer the contiguous zone with respect to the different maritime areas included in the national maritime space, however, without the purpose of excluding this maritime area. The contiguous zone identified in article 7 of Law n. 34/2006 integrates the EEZ for the purpose of planning and management of the maritime space. Moreover, the legal regime of the contiguous zone is irrelevant in this case seeing that it only regulates matters pertaining to the infringement of customs, fiscal, immigration or sanitary laws and regulations within the territory or territorial sea, as well as the protection of archaeological and historical objects found at sea.<sup>18</sup> It should also be noted that article 2 reflects the regime included in UNCLOS, being the reference to baselines for measuring the territorial sea considered an indication that these may be normal or straight baselines, as referred in articles 5 and 7 of UNCLOS and also in article 5 of Law n. 34/2006.

Reference should also be made to Law n. 58/2005, 29 December,<sup>19</sup> which establishes the framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater, including the granting of rights of use of the maritime space in the first nautical mile.<sup>20</sup> As a result, with the entry into force of LBOGEM and of the respective developing legislation, Law n. 58/2005 will be amended seeing that the first nautical mile is included in the national maritime space.<sup>21</sup>

Another aspect to consider with respect to the national maritime space is the fact that the approval of LBOGEM and of the Decree-Law n. 38/2015 occurs before the conclusion of the procedure for the extension of the Portuguese continental shelf submitted on 11 June 2009.<sup>22</sup> Notwithstanding, the reference to the whole maritime areas is based on Portugal's legal title.<sup>23</sup> In fact, the same recognized legal principle was the basis for the Government to enact legislation applicable to the greater part of the national maritime space regarding the protection of marine biodiversity and of vulnerable marine ecosystems and other natural values, as well as preserving the seabed from the adverse impacts the fishing activity.<sup>24</sup>

### 3. The maritime public domain

The maritime public domain is identified in Law n. 54/2005, 15 November,<sup>25</sup> in accordance with article 84(2) of the Portuguese Constitution. Seeing that lit. (a) and (d) of article 3 of Law n. 54/2005 refers as being part of the maritime public domain, amongst other, the "coastal and territorial waters" and the respective seabed, as well as the "maritime depths contiguous to the continental shelf, including the whole [EEZ]"; it would seem that, *contrarily*, the contiguous zone and the water column of the EEZ are not included.

Another observation is that the strict literal interpretation of this provision could result in excluding from the maritime public domain the maritime depths contiguous to the continental shelf beyond 200 nautical miles. Yet, as there is only 'one' continental shelf and the rights of coastal States are identical before and after the 200 nautical miles limit, this provision should be read as including 'all' of the continental shelf. Any distinction would be contrary to UNCLOS<sup>26</sup> and the Portuguese Constitution, since it refers that the "territorial waters with its seabed and contiguous maritime depths" are part of the public domain. The Portuguese Constitution further determines that the law shall define the realities included in the maritime public domain of the State, the autonomous regions and the municipalities, and their respective regime, conditions and limits.<sup>27</sup>

In what concerns the exclusion of the EEZ from the maritime public domain, this is the result of its "sui generis"<sup>28</sup> legal nature with respect to the territorial sea and the high seas. However, this does not prevent Portugal from issuing rights concerning uses and activities in the EEZ, as long as they conform to its legal nature and applicable international regime.<sup>29</sup> Indeed, there is a substantive integration between the EEZ and the continental shelf with respect to the seabed and subsoil,<sup>30</sup> according to which, activities in this area are subject to the continental shelf regime. Moreover, installations and structures within the context of continental shelf activities are subject, with the necessary changes, to the EEZ regime.<sup>31</sup>

### 4. The utilization of the national maritime space

LBOGEM refers in article 1(2) that the policy on planning and management seeks the utilization of the national maritime space. It does not include any reference to the development of economic activities, with exception of article 28, which is the result of the intent to simplify the legal regime applicable to aquaculture, namely by applying the new licensing regime included in the developing legislation. It should too be referred that article 1(3) must be interpreted as not applying to activities of national defense or internal security of the State. This distinction between utilization and activities is also reinforced in article 1(4).

However, article 28 only refers to transition waters, as defined in Law n. 58/2005, thus excluding the coastal waters that are considered as being part of the national maritime space when located before the baselines from which the territorial sea is measured. As a result, the applicability of this rule may lead to some confusion as to which licensing procedure is applicable to

<sup>17</sup> Article 87 of UNCLOS.

<sup>18</sup> Articles 33 and 303 of UNCLOS.

<sup>19</sup> Official Gazette, 1st Series, n. 105, 31 May 2007.

<sup>20</sup> Article 1(1) and lit. (b) of article 4 of Law n. 58/2005.

<sup>21</sup> Article 33.

<sup>22</sup> Vasco Becker-Weinberg, "Plataforma Continental", in: *Enciclopédia das Relações Internacionais*, Nuno Canas Mendes and Francisco Pereira Coutinho (org.), Dom Quixote: Lisbon, 2014, pp. 391–395. The Portuguese submission and the notes verbal from Spain and Morocco are available online: [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission prt\\_44\\_2009.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission prt_44_2009.htm) (January 2015).

<sup>23</sup> On the legal entitlement of coastal States, see Vasco Becker-Weinberg, *Joint Development of Offshore Hydrocarbon Deposits and the Law of the Sea*, Springer Verlag (2014), pp. 110–111.

<sup>24</sup> *Portaria* n. 114/2014, 28 May, Official Gazette, 1st Series, n. 102, 28 May 2014.

<sup>25</sup> Official Gazette, 1st Series-A, n. 219, 15 November 2005.

<sup>26</sup> Articles 76 and 77 of UNCLOS.

<sup>27</sup> Lit. (a) of article 84(1) and (2) of UNCLOS.

<sup>28</sup> Robin R. Churchill e Alan Vaughn Lowe, *The Law of the Sea*, Manchester University Press (Manchester: 1999), p. 166.

<sup>29</sup> Lit. (a) of article 13 of Law n. 34/2006.

<sup>30</sup> Article 56(3) of UNCLOS.

<sup>31</sup> Article 80 of UNCLOS.

aquaculture in these areas and which entity will be competent to issue the respective rights of private use. This issue is one that will necessarily be settled in subsequent legislation amending Decree-Law n. 38/2015.

Also concerning the utilization of the national maritime space, the Decree-Law n. 38/2015 includes provisions on coordination with licensing procedures, such as those concerning economic activities. Such coordination strives to achieve administrative efficiency, without jeopardizing the integrity of the spatial planning and management of the national maritime space. Although all uses and activities that take place in the national maritime space must be duly reflected in the instruments of marine spatial planning, the need for coordination should not result in excessive bureaucracy or complex administrative procedures.

An example of coordination after the entry into force of LBO-GEM can be seen in the regulation applicable to archaeological works in maritime areas. Decree-Law n. 164/2014, 4 November, provides in article 7(2) that the request for archaeological works in maritime areas must be submitted with all the legal elements required with respect to the spatial planning and management of the national maritime space.

Also, the recently approved Law n. 54/2015, 22 June, determines in article 10(2) that the offshore prospecting and development activities of geological resources depend on the granting of the respective right of private use of the national maritime space.

## 5. Competence for spatial planning and management of the national maritime space

The title over the maritime public domain belongs exclusively to the State, with exclusion of any other entity.<sup>32</sup> The autonomous regions of the Azores and Madeira, in accordance with lit. (b) of article 227(1) of the Portuguese Constitution, are prevented from legislating on matters concerning the definition and regime of the assets included in the public domain, including the maritime public domain. Yet, this does not mean that the autonomous regions do not take part in the definition of the policies regarding the territorial waters, the EEZ and the maritime contiguous depths.<sup>33</sup> Indeed, without prejudice of the State's exclusive entitlement with respect to the maritime public domain, article 4 provides that the Government must coordinate with the autonomous regions the definition of these policies, within the framework of “shared management”.

However, the concept of “shared management” has not yet been fully developed in Portuguese law and, in the case of LBO-GEM and the Decree-Law n. 38/2015, its use has not been without controversy, particularly regarding the autonomous region of the Azores.<sup>34</sup> The implications are not merely restricted to the matter of issuance of rights for the utilization of the national maritime space, but also regarding the economic and financial regime and overall law enforcement.

Some aspects related to the implementation of this concept have been partly referred in a recent decision of the Portuguese Constitutional Court concerning the legislation enacted by the Azores.<sup>35</sup> In its decision, the Court stated that the powers of

management granted to the Azores consisted of a shared exercise with the Government, which demanded that the necessary procedures be put into place to allow for the participation and agreement between the Government and the Azores.<sup>36</sup> The Court underlined that for an effective shared management it is indispensable some form of collaboration or coordination.<sup>37</sup>

Whatever the outcome, it must inevitably take into consideration the constitutional framework and the established legal competence for spatial planning and management of the national maritime space, as well as the legal regime applicable to the maritime public domain.

## 6. Sea-land coordination

The coordination between planning of the maritime and terrestrial space is extremely important to achieve coherent and effective planning. LBOGEM determines the coordination and compatibility between the different instruments regarding the sea and land, whenever they fall on the same area or demand integral coordination.<sup>38</sup> Such coordination and compatibility are detailed in the developing legislation, including with respect to the invalidity of planning instruments that do not take into consideration this coordination and compatibility.

Although the spatial planning of sea and land areas could have been regulated in one legal act, the Government decided to include similar provisions on sea-land coordination in LBOGEM and Law n. 31/2014, 30 May, which establishes the basis for the policy of land spatial planning.<sup>39</sup> In fact, at a certain point, these two laws were being drafted under the umbrella of the same ministry, the then Ministry of Agriculture, the Sea, the Environment and Spatial Planning.<sup>40</sup>

The decision not to regulate the spatial planning of sea and land areas in one single law was based on the recognition of the specificity of the maritime space and the fact that it often includes at the same time and in the same area different uses and activities. It was also the recognition that the compatibility between different planning instruments would be best achieved in each case, when elaborating or amending such instruments and making decisions.

The two legal regimes include similar provisions on coordination between different spatial planning instruments. Article 45 (1) of Law n. 31/2014 is identical to article 27(1), which determines that the territorial programs and instruments ensure the coordination and compatibility with the planning instruments applicable to the national maritime space whenever they fall upon the same area or areas, which by their structural or functional interdependence of its elements, require an integrated coordination of planning. Indeed, article 1(2) of Law n. 31/2014 determines

(footnote continued)

pdf (accessed on January 2015). Also see Decision n. 131/2003, 11 March 2003, Official Gazette, 1st Series, n. 80, 4 April 2003, online: <http://dre.pt/pdf1s%5C2003%5C04%5C080A00%5C22232231.pdf> (accessed on January 2015); Decision n. 402/2008, 29 July 2008, Official Gazette, 1st Series, n. 158, 18 August 2008, online: <http://www.dre.pt/pdf1sdip/2008/08/15800/0569605733.PDF> (accessed on January 2015); and Decision n. 654/2009, 16 December 2009, Official Gazette, 1st Series, n. 30, 12 February 2010, online: <http://dre.pt/pdf1sdip/2010/02/03000/0043800450.pdf> (accessed on January 2015).

<sup>36</sup> *Ibid.*, p. 2855.

<sup>37</sup> *Ibid.*

<sup>38</sup> Article 27(2).

<sup>39</sup> Official Gazette, 1st Series, n. 104, 30 May 2014.

<sup>40</sup> Decree-Law n. 86-A/2011, 12 July, Official Gazette, 1st Series, n. 132, 12 July 2011, which approved the organization of the XIX Constitutional Government. In 2014, the Ministry of Agriculture, the Sea, the Environment and Spatial Planning was divided in the Ministry of the Environment, Spatial Planning and Energy, and the Ministry of Agriculture and Sea, see Decrees-Law n. 17/2014 and n. 18/2014, 4 February, Official Gazette, 1st Series, n. 24, 4 February 2014.

<sup>32</sup> Article 4 of Law n. 54/2005, 15 November.

<sup>33</sup> Lit. (s) of article 227(1) of the Portuguese Constitution.

<sup>34</sup> For a critical view, see Francisco Noronha, *O Ordenamento do Espaço Marítimo-Para um Corte com uma Visão Terrestrialmente Centrada do Ordenamento do Território*, Coleção Monografias n. 2, Instituto do Conhecimento AB, Alameda (Coimbra: 2014), p. 162.

<sup>35</sup> Decision n. 315/2014, 1 April 2014, Official Gazette, 1st Series, n. 93, 15 May 2014, pp. 2852–2854, online: <https://dre.pt/pdf1sdip/2014/05/09300/0284102860>.

that this law is not applicable to the spatial planning and management of the national maritime space, without prejudice of the coherence, coordination and compatibility between the different policies. There is also no hierarchy between the two laws or their respective planning instruments.

## 7. Planning instruments

### 7.1. Outline

The planning and management system referred in article 6 mentions two distinct types of instruments: strategic instruments and planning instruments. The first have a political or policy-making nature, dealing mostly with marine policy, while the second a strictly legal one.

The option to include a reference to strategic or policy-making instruments was the result of the consensus reached in the Parliament that planning and management of the national maritime space would become an integral part of the Government's policy. This option is also reflected in the scope of LBOGEM, which creates the basis for the policy on marine spatial planning and management of the national maritime space.<sup>41</sup> Moreover, LBOGEM refers that the financing of public policies on planning and management will be made through the State budget, EU funds and revenues resulting from the granting of rights for uses and activities of the national maritime space.<sup>42</sup>

There is also no hierarchy between the two instruments, particularly in light of their different natures and purposes. NOS merely refers to the need to create an effective legal framework for the compatibility of concurrent uses or activities, considering the sustainable economic, social and environmental development of the national maritime space, without legal relevance for the purpose of planning and management of the national maritime space. Only the planning instruments, namely the situation plan and the allocation plans, have the ability to do so.

### 7.2. National marine plan (“situation plan”)

The national marine plan, referred in Portuguese as the “situation plan”, represents and identifies the distribution in space and time of the existing and potential uses and activities in the national maritime space. LBOGEM refers in particular that the situation plan identifies the areas for the protection and preservation of the marine environment, including marine protected areas or those pending classification, as well as the distribution in space and time of the uses and activities for one or more areas or volumes of the national maritime space.<sup>43</sup> Presently, these activities are predominantly aquaculture, exploration and exploitation of energy resources and raw-materials, marine scientific research, sports, leisure and tourism.<sup>44</sup> Other relevant elements include those necessary for navigation, such as traffic separation schemes, offshore installations and structures, artificial islands and reefs, ports, coastal works, cables and pipelines, and shipwrecks. Likewise, although LBOGEM is not applicable to activities that exclusively envisage national defense or the internal security of the State,<sup>45</sup> it is clear that the areas or volumes of the national maritime space that are allocated to these activities and their respective infrastructures

must be duly identified, if not contrary to the interests of the State and as long as in conformity with the applicable legal regime. It is in this respect that the work carried out for the purpose of the POEM, as well as all the relevant available information on the national maritime space, including both regional and national, may be useful for the preparation of the situation plan.<sup>46</sup>

The situation plan is a dynamic instrument, being updated and revised considering the available information, in addition to corrections and alterations that may be necessary. Suspension measures may also be adopted similarly as it happens on land.<sup>47</sup> However, the situation plan is not a mere record of the existing reality of the national maritime space. As it identifies the distribution in space and time of the uses and activities that are susceptible of being developed in the areas and volumes included in the plan, rights may be granted with respect to such potential uses and activities as predicted in the situation plan, either through a simplified administrative procedure or a public tender.

This possibility of rights being granted based exclusively on the situation plan requires that, as the national marine plan, it also includes management actions, for example, such as those dealing with marine natural resources or the protection and preservation of the marine environment. Furthermore, the Decree-Law n. 38/2015 includes the creation of a consultation committee for the primary purpose of promoting the compatibility of interests in the preparation and implementation of the situation plan. In this respect, the situation plan, as it is proposed by the new legal regime, is more than a mere forecast of existing and potential uses or activities. It is in fact the national maritime plan.

It is therefore necessary to safeguard the transparency and legal certainty and security of the information included in the situation plan and of the procedures for the granting the rights of private use.<sup>48</sup> In effect, LBOGEM determines that the data regarding planning and management of the national maritime space must be made freely available through means of communication and information.<sup>49</sup>

The situation plan includes the necessary graphic elements regarding existing and potential uses and activities, the identification of relevant temporary or permanent restrictions and limitations of public and environmental nature, the characterization report of the area or volume in question, as well as an environmental report in accordance with applicable Portuguese legislation. In what concerns sea-land coordination, the situation plan must also include the appropriate measures *vis-à-vis* programs and plans applicable on land.

### 7.3. Amendment or alteration of the situation plan (“allocation plans”)

The allocation plans is the Portuguese terminology used to identify the second planning instrument referred in lit. (b) of article 7(1). The allocation plans are essentially the instrument used for amending or altering the situation plan, by means of which uses and activities are assigned to an area or volume of the national maritime space.

Although the allocation plans may not seem at first a planning instrument, they contain all the necessary elements of the national marine plan, including the relevant management actions. In practice, the allocation plans constitute the planning instrument for a certain part of the national maritime space, which seeks to amend or alter the situation plan for the purpose of undertaking a use or activity that is not foreseen as either existing or potential.

<sup>41</sup> Article (1).

<sup>42</sup> Article 26.

<sup>43</sup> Lit. (a) of article 7(1).

<sup>44</sup> For an overview of current offshore economic activities taking place in Portugal's national maritime space and their contribution to its sea-economy, see NOS, *supra* note 14, pp. 50–57.

<sup>45</sup> Article 1(3).

<sup>46</sup> Article 4(4).

<sup>47</sup> Article 10.

<sup>48</sup> Article 4(3).

<sup>49</sup> Article 29(1).

Although the legal regime applicable to the situation plan and the allocation plans is detailed in the Decree-Law n. 38/2015, lit. (a) and (b) of article 7(1) and article 17(1) indicates that the granting of rights for the private use of any area or volume of the national maritime space depends on its predictability in the situation plan. On the other hand, article 7(3) determines that the approval of an allocation plan automatically integrates the situation plan. Therefore, if any use or activity is not foreseen in the situation plan, an allocation plan must be elaborated and approved in order to amend the situation plan.<sup>50</sup> However due to the fact that the allocation plans once approved automatically integrate the situation plan, there is no hierarchy between the situation plan and the allocation plans, seeing that the two planning instruments do not coexist.

The State, the autonomous regions or any other entity interested in developing a use of activity not foreseen as existing or potential in the situation plan may elaborate allocation plans.<sup>51</sup> In this regard and aside of the inherent costs of preparing an allocation plan, the developing legislation determines the terms and conditions applicable to the elaboration of an allocation plan by a private person, namely the legal nature of the relation between the State and the said person. In any case, a private person may always request the State to promote the elaboration of an allocation plan. In any of the aforementioned situations, the State always approves the allocation plans.<sup>52</sup> Notwithstanding, allocation plans are preceded by an environmental evaluation.<sup>53</sup>

Given that the approval of the allocation plans will result in the integration of the latter in the situation plan, the content of the allocation plans are similar to those included in the situation plan.<sup>54</sup> These include, for example, measures of sea-land coordination, such as when an offshore installation requires connecting with an onshore installation.<sup>55</sup> In these cases, it would be necessary to ensure that the measures of sea-land coordination are adopted to safeguard the applicability of land planning instruments, before issuing a right to place an offshore installation.

The allocation plans are also subject to material corrections and are published in the Official Gazette (*Diário da República*). Although LBOGEM does not expressly refer to the binding nature of the spatial planning instruments of the national maritime space, they have a regulatory nature and are therefore binding upon both public and private entities.<sup>56</sup>

#### 7.4. Elaboration, approval, alteration, revision and suspensions of planning instruments

Article 8 provides that the Government elaborates, with prior consultation of the autonomous regions, the situation plan and the allocation plans with regard to the area between the baselines and the outer limit of the territorial sea, the EEZ and the continental shelf up to 200 nautical miles. The situation plan and the allocation plans regarding the maritime areas adjacent to the archipelagos of the Azores or Madeira may be elaborated by the autonomous regions, with prior consultation of the Government.

The planning instruments applicable to the continental shelf beyond 200 nautical miles are elaborated by the Government after hearing the autonomous regions. In view of its competence regarding the maritime public domain, all planning instruments are approved by the Government.

LBOGEM also recognizes the possibility of private persons taking part in the planning procedures through the submission of proposals for allocation plans.<sup>57</sup> The right of participation is also recognized to local authorities, thus allowing municipalities to take part and having an active role. This law further provides that those interested may also submit an information request regarding a use or activity not include in the situation plan, the outcome of which will be binding for the State.<sup>58</sup>

In addition to the approval of allocation plans, the situation plan may be altered with the evolution of environmental conditions, namely those resulting from the assessment of the good environmental status of the marine environment and of coastal areas, or whenever the economic and social development conditions so determine.<sup>59</sup> The developing legislation determines the conditions applicable to the revision of the situation plan,<sup>60</sup> as well as, for that matter, those applicable to its suspension.<sup>61</sup>

Other important elements introduced by LBOGEM are the right of access to information and the right of participation in the procedures for elaboration, alteration, revision and suspension of the planning instruments.<sup>62</sup> LBOGEM also recognizes the right of access to the information related to the spatial planning and management of the national maritime space.<sup>63</sup> These rights have been developed in the developing legislation. This is too the case of the implementation of the adequate procedures necessary to ensure the participation of ministries or other public services that oversee the activities undertaken in the national maritime space.

LBOGEM also foresees the creation of instruments for the permanent monitoring and evaluation of the planning of the national maritime space.<sup>64</sup> Similar to the above, the developing legislation determines the conditions applicable to the monitoring of the different uses and activities at sea, or the assessment of the socio-economic and environmental impacts of the plans and their implementation. Also included in the general monitoring of the state of planning and management of the national maritime space is the obligation for the Government to provide Parliament, every three years, with a report on the same, including an evaluation of the good environmental status of the marine environment and of coastal areas.<sup>65</sup>

## 8. Resolution of conflicts between uses and activities

The allocation of areas or volumes of the national maritime space to new uses or activities not identified in the situation plan may result in conflict with existing uses or activities. For this reason, LBOGEM includes in article 11 rules for the resolution of such conflicts and determines which use or activity should prevail. These criteria are only applicable if the uses and activities ensure the good environmental status of the marine environment and of coastal areas. This means that any use or activity that does not ensure the good environmental status will not be considered. This is a prerequisite for the development of new uses or activities in the national maritime space and reiterates the concern reflected across LBOGEM that economic activities at sea are carried out in a sustainable manner. It is also aligned with Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008

<sup>50</sup> Lit. (b) article 9(1).

<sup>51</sup> Article 8(5).

<sup>52</sup> Article 8.

<sup>53</sup> Article 7(2).

<sup>54</sup> Article 7(3).

<sup>55</sup> Article 27(2).

<sup>56</sup> Article 12(3).

<sup>57</sup> Article 8(5).

<sup>58</sup> Article 23(2).

<sup>59</sup> Article 9(1).

<sup>60</sup> Article 9(2).

<sup>61</sup> Article 10.

<sup>62</sup> Article 12.

<sup>63</sup> Article 29(1).

<sup>64</sup> Article 13.

<sup>65</sup> Article 31.

establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).

LBOGEM identifies as preference criteria for the determination of the prevailing use or activity the greater social economic benefit to the country and the maximum coexistence of uses or activities. The latter criterion shall only be applicable if the former is not, or if the outcome of its applicability is not conclusive. If following the applicability of this mechanism an existing use or activity gives way to a new one, it might be relocated in accordance with the conditions to be set in the developing legislation, including with respect to compensation and bearing the costs of relocation, or the options available when relocation is not possible, for example, due to the natural characteristics of the area or volume of the national maritime space where the existing use or activity is located.<sup>66</sup>

## 9. Rights of private use of the national maritime space

LBOGEM makes a distinction between private and common use of the national maritime space. The common use is that which is for public use and benefit in accordance with the law and the conditions established in the relevant planning instruments, as well as the good status of the marine environment and of coastal areas.<sup>67</sup> Private use corresponds to the reservation of an area or volume of the national maritime space, with the purpose of using the marine environment and resources or of the services of the ecosystems that might result in a greater benefit than that obtained by the common use. The right of private use is subject to the rules and principles included in LBOGEM and the developing legislation.<sup>68</sup>

Similar to Law n. 58/2005, LBOGEM foresees three different rights (titles in Portuguese) that may be granted: the license, the concession and the authorization. Each one is subject to different conditions included in the developing legislation.<sup>69</sup> For all three of these rights, LBOGEM includes the obligations of effective use of the national maritime space and the obligation that users adopt the necessary measures to maintain the good environmental status of the marine environment and of coastal areas.<sup>70</sup> In what concerns specifically the obligation of effective use, it should be noted that the developing legislation determines that if the holder of the right fails to initiate the use of the national maritime space within 18 months as of the date of issuance of the said right, or does not exercise that same during a period of 24 months, the respective right will be terminated. This rule of the Decree-Law n. 38/2015 may lead to some degree of confusion concerning what ought to be considered as included in initiating a use. Likewise, in practice, the referred 18 and 24 months periods may prove to be slightly short.

LBOGEM further provides in article 21 that the uses developed within the framework of pilot-projects for new uses or technologies or activities, without a commercial character, require an authorization. Those that consist of an uninterrupted use and a maximum duration of 12 months are subject to concession, as provided in article 19 and which cannot exceed the duration of 50 years. The remaining uses that are temporary, intermittent or seasonal and that have a duration between 12 months and 25 years are subject to a license, in accordance with article 20.

The rights of private use expire on the date of their term. Other causes of termination are foreseen in the developing legislation,

such as rights being revoked or the respective holders renouncing to the same. Nonetheless, in accordance with article 17(4), after termination, the holders of the right of private use must adopt the necessary measures for the reconstitution of the physical conditions of the area and or volume that may have been altered and that do not result in a benefit. This has also been further specified in Decree-Law n. 38/2015.

LBOGEM states in article 18 that the rights of private use of the national maritime space do not grant their respective holders the right of use or exploration of marine resources, nor does it exclude the need for obtaining other necessary rights legally required to exercise any use or activity at sea. This highlights the importance of coordination between the different administrative entities and respective procedures and their simplification.<sup>71</sup> In fact, as referred by the EU Commission, the administrative simplification may be achieved with the creation of a one-stop-shop and the dematerialization of the procedures for the attribution of the rights of private use, namely through means of information and communication that include, amongst other, the possibility for submitting requests and documents and receiving notifications, monitoring the status of pending procedures using the Internet, as well as making payments of administrative fees and taxes.

With respect to existing rights prior to LBOGEM, article 32 safeguards that there is no vacuum until the entry into force of the developing legislation, seeing that these rights and their legal regimes remain in force. In this regard the Decree-Law n. 38/2015 includes the possibility of these rights being converted into any of the three included in LBOGEM and eventually benefiting from their extended duration periods. This is the case, for example, of aquaculture licenses issued under the Law n. 58/2005 and that under LBOGEM would adopt the form of a concession with a maximum term of 50 years. This example is particularly relevant seeing that, with the entry into force of LBOGEM, the provisions of the said law that are contrary to the former would be revoked in accordance with article 33.

## 10. The economic and financial regime

LBOGEM does not define the economic and financial regime applicable to the private use of the national maritime space, namely if there will be a new tax or if the tax currently being applicable under Law n. 58/2005 will be extended to the whole national maritime space. It only refers that it shall envisage and promote the economic, social and environmental sustainable use of the national maritime space, as well as the development of marine scientific research activities considered of public interest or related to research programs promoted or supported by the Portuguese State.<sup>72</sup> It should be noted that the said marine scientific research activities are not those referred in Part XIII of UNCLOS. These are subject to a different legal regime.<sup>73</sup>

The Decree-Law n. 38/2015 created the tax on the private use of the national maritime space, which seeks to compensate the benefit arising from the private use, the inherent environmental cost and the administrative costs deriving from the spatial planning and management, maritime security, maintenance and control. The only private uses that are exempt are those under authorizations, as well as regarding geological or energy resources. As for the private use of coastal and brackish waters for aquaculture purposes, these will be subject to the tax established in Law n. 58/2005.

<sup>66</sup> Article 11(4).

<sup>67</sup> Article 15.

<sup>68</sup> Article 16.

<sup>69</sup> Article 17(2).

<sup>70</sup> Article 17(4).

<sup>71</sup> NOS, *supra* note 14.

<sup>72</sup> Article 24.

<sup>73</sup> Article 25.

## 11. Conclusions and outlook

To achieve planning and legal efficiency and simplification of procedures applicable to the whole national maritime space, the implementation of the new regime must have due regard for the concept of shared management between the Government and the autonomous regions. Likewise, it must also ensure the coordination between the different national agencies and entities, as well as the debureaucratization and swiftness of administrative procedures. In this respect, the use of the one-stop-shop concept will be extremely effective. Further coordination will also be required regarding the compatibility between different economic and financial regimes in order to avoid conflicting or overlapping situations.

Secondly, there are also significant challenges for the entity that has competence, at the national level, for the planning and management of the national maritime space: the Directorate-General for Natural Resources, Safety and Maritime Services.<sup>74</sup> It is necessary to ensure that this entity has the necessary human, material and financial resources to fully undertake the tasks of planning and management of the national maritime space. Moreover, there are also challenges regarding the capacity of the administration to monitor and evaluate the execution of the planning instruments. Although monitoring and evaluation are only referred in LBOGEM in article 31 regarding the Government's

accountability before Parliament, these are indispensable elements of marine spatial planning.

Lastly, in addition to the Decree-Law n. 38/2015 adopting measures to safeguard sea-land coordination and specifically the compatibility between different planning instruments, such coordination and compatibility must be ensured at the moment of elaboration, approval, alteration, revision and approval of planning instruments, as well as with respect to the relevant administrative procedures in order to avoid overlapping or lacking administrative procedures and taxation regimes.

In a nutshell, the approval and implementation of Portugal's legal regime on marine spatial planning and management of the national maritime space is a notable achievement with respect to ocean governance, and one that can significantly contribute towards the sustainable use of the oceans. However, the overall success of the spatial planning and management of Portugal's national maritime space is not without its challenges.

## Appendix A. Supplementary material

Supplementary material associated with this article can be found online version at <http://dx.doi.org/10.1016/j.marpol.2015.06.014>.

<sup>74</sup> Lit. (k) of article 12(2) of Decree-Law n. 18/2014, 4 February, Official Gazette, 1st Series, n. 24, 4 February 2014.