

FLEXIBILITIES WITH REGARD TO MEETING EU REGULATORY OBJECTIVES AND REQUIREMENTS

Regulation has often been criticised as being too rigid, particularly with regard to the needs of businesses. As a way out, well designed exemptions have been considered a proper tool for making regulation more flexible. However, it appears that over the years, flexibility mechanisms have become ever stronger, possibly to an extent that they undermine regulatory objectives; the concept of regulation thus needs to be more thoroughly reconsidered. This is proposed as the subject of our next meeting. We will start with more general policies of prioritising economy and ecology, and then discuss various more specific instruments of regulatory flexibilities, looking at different sectors where they appear to provide illustrative examples.

Accordingly, the following questionnaire is divided into two parts: **Part I** includes **an introductory question** on policies of prioritising economy and ecology in your country. Within **Part II**, you are asked to answer **the questions on exemplary flexibility mechanisms in the field of climate change, industrial emissions and water management**. For those who feel they are in a position to spend time on top of that on the questionnaire, a set of questions on flexibility mechanisms in biodiversity management (Natura 2000) is marked as 'optional' at the end of Part II.

I. Policies of prioritising economy and ecology

1. Are you aware of similar initiatives, current or planned, in policy- and/or decision-making in your country which result in prioritising economic activities over environmental interests? If so, please provide examples.

The theory:

Economic development has always been on the top of the governmental priorities in Portugal regardless of the ideological orientation¹ of the Governments. Yet, considering that environmental protection is both a constitutional and a European goal, it is not politically admissible to deny it or go against it. Therefore, in the public discourse, Green Economy is on the agenda (in 2017 the Plan of Action for the circular economy was approved²) and even the most economy-driven policies integrate environmental concerns — **at least in theory**.

Example 1

One of the best examples is the National Reform Program started in 2016 and updated in April 2018³, launched under the impulse of the Annual Growth Survey of the European Commission⁴, and will be valid until 2022. The three priorities of the National Reform Program are well expressed in its motto: „more growth, better employment, greater equality“. In more detail, the axes of the reform are promoting more education and training for young people and adults (namely by promoting digital competences), promoting employment and fighting precariousness, promoting economic innovation, modernizing the State, reducing the indebtedness of the economy, strengthening social cohesion and equality and fostering territorial development. Although the objectives of the Program are mostly economic and social, at least some environmental concerns are present in the design of the program: “modernization of the economy implies a strong intervention on the territory in order to promote territorial cohesion, but also environmental sustainability, decarbonisation and resilience of the

¹ More left wing oriented the present Government (2015-2019), more right wing the previous Government (2011-2015).

² Resolution of the Council of Ministers no. 190-A / 2017 of December 11.

³ <https://www.portugal.gov.pt/upload/ficheiros/i007132.pdf> .

⁴ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Brussels, 26.11.2015 COM(2015) 690 final.

territory”⁵. Renewable energy and electric transport are two strong areas contributing for territorial development.

The practice

Yet, in practice, it seems clear that the economic development of the country, exploiting resources, attracting investment and creating jobs is the driving force of the public and private activity. Fortunately, European environmental standards (on waste, water, biodiversity EIA, SEA, IPPC, etc.) act as a limit to full disregard. The ultimate example is the special licencing scheme for Projects of Potential National Interest.

Example 2

The legal regime for Projects of Potential National Interest was created 2008⁶ and since then it was changed a few times to enlarge it further.

Today it is still in force⁷ and the motivation is still purely economic: „the creation of a favorable context for private investment is a priority of the XIX Constitutional Government, since the ultimate goal of sustainable economic growth depends on it. Attracting new investors and strengthening existing investments requires a continuous effort to improve the business environment and reduce the cost of context, following best practices within the Organization for Economic Co-operation and Development (OECD)“.

From the beginning it was conceived to be „a fast track for investments in the sectors of goods that can be exported for projects exceeding 10 million euros“, implementing the Resolution of the Council of Ministers on the „Initiative for Competitiveness and Employment“⁸. Later the value of the minimal investment was raised to 25 million euros, but in several situations the required amount can be lower.

In this context, the Standing Committee on Investor Support created in 2013 is composed of 9 elements: a) Agency for Investment and Foreign Trade of Portugal; b) Agency for Competitiveness and Innovation; c) General Directorate of Economic Activities; d) Regional Coordination and Regional Development Committee; (e) the Employment and Vocational Training Institute; f) Tourism of Portugal; g) Portuguese Environment Agency; (h) Institute for the Conservation of Nature and Forests; i) Tax and Customs Authority⁹.

Standing Committee on Investor Support is responsible for various aspects of the „highway approval“ regime. Standing Committee on Investor Support has competences to:

- a) Assess the applications received, verify compliance with the requirements defined in Articles 5 and 6 and ensure the follow-up of the investment projects;
- b) Recognize investment projects as a PIN;
- c) Monitor, in articulation with the respective Process Manager, defined in accordance with article 12, the projects being monitored and the overall compliance with the schedules;
- d) Meet with the other entities intervening in the procedure and with the promoter whenever this proves necessary;

⁵ Page 6.

⁶ The regime was adopted during a socialist government (Decree-Law no. 174/2008, of 26 August) but has survived the social democratic government and is still in force.

⁷ Decree-Law No. 154/2013, of November 5.

⁸ Resolution of the Council of Ministers n.º 101-B / 2010 of 27 December.

⁹ Article 4 of Decree-Law No. 154/2013, of November 5.

- e) To investigate in order to eliminate any blockages evidenced in the procedure and ensure the proper speed of the same;
 - f) Report to the structure referred to in Article 2, through a summary report, the insurmountable blockages, as well as any non-compliance with the accompanying regime provided for in this Decree-Law;
 - g) Inform the promoter of the progress of the process;
 - h) To prepare quarterly reports of its activity, identifying, among other things, among the projects that accompany those that await a decision by some of the entities that make up the Public Administration for more than 12 months, and send them to the knowledge of the structure referred to in Article 2;
 - i) Maintain an updated list of all investment projects accompanied by the CPAI, with autonomous reference to the projects that are awaiting a decision by some of the entities that make up the Public Administration for more than 12 months and the projects being recognized PIN;
 - (j) maintain an up-to-date list of the focal points referred to in Article 30.
- The projects likely to be approved via the highway approval system are those that simultaneously respect some formal and material requirements:

- „(a) represent an overall investment of EUR 25 million or more;
- (b) create a number of direct jobs equal to or greater than 50;
- c) They are presented by promoters of recognized suitability and credibility.

While at the same time they:

- a) Contribute to the creation or maintenance of the number of direct jobs;
- b) have proven economic viability;
- c) Are susceptible to adequate environmental and territorial sustainability;
- d) have a positive impact on at least three of the following areas:
 - i) Establishment of a productive base, with strong national incorporation, creating gross added value;
 - ii) Production of tradable goods and services of an innovative character that will give them a competitive advantage in the global market;
 - iii) Introduction of innovative technological processes or developed in collaboration with recognized entities of the scientific and technological system;
 - iv) Insertion in the region's intelligent specialization strategies and / or contribution to the dynamization of territories with low economic density;
 - (v) external economic balance, in particular in increasing exports or reducing imports;
 - (vi) energy efficiency or the promotion of renewable energy sources;
 - (vii) entrainment effects in upstream or downstream activities, particularly in small and medium-sized enterprises.

For smaller investments (less than EUR 25 million and / or creating a number of direct jobs below 50), the attribution of national interest investment is also possible in the following cases:

- a) Internal Research and Development (R & D) activity of at least 10% of the company's turnover;
- b) Strong component of applied innovation, translated in a significant part of its activity anchored in a patent developed by the company;
- c) Manifest environmental interest;
- d) Strong export vocation, translated by a minimum of 50% of its turnover directed to the international market;
- e) Relevant production of tradable goods and services.

What makes the PPNI statute so desirable is the speedy procedure for licensing investment projects. In detail, the project will benefit from:

- (a) simultaneous processing of administrative procedures within the jurisdiction of the central government;

- b) Reduction and simultaneous processing of endoprocedural terms, in accordance with Article 22;
- c) Single period of public consultation for the purposes of the various administrative procedures;
- d) Simplification of procedures related to territorial management instruments relevant to the project;
- e) Tacit positive opinions and tacit deferral under the various applicable procedures;
- f) Simplification of the procedures for the necessary urban operations.

The tacit positive opinions and tacit deferral under the various applicable procedures is, no doubt, the most doubtful legal option in this regime.

The streamlining of procedures does not exempt the promoter from developing the applicable environmental procedures. In fact, the promoter must prepare a full dossier with:

- a) Project framework in the company's overall strategy;
- b) Estimated demonstration of the results of the project in the three years following the conclusion of the investment;
- c) Studies to evaluate the compatibility of the application with the natural values present, namely with protected areas and with the Natura 2000 Network and the characterization of the main environmental impacts of the project in the fields of nature conservation, water conservation, waste and air, where applicable;
- d) Demonstration of the absence of alternative project solutions, if there is a high probability that the project will affect values protected by the Birds and Habitats Community Directives, when applicable;
- e) Demonstration of the absence of alternative solutions of the project, when it affects land under the forest regime;
- f) Descriptive summary of the project framework in the territorial management instruments in force, namely municipal and special territorial planning plans, as well as public utility easements or restrictions that affect the area of intervention;
- g) Extract from the planning and conditioning plans of the municipal plans and special territorial planning plans applicable in the area, with the overlapping of the project implementation area;
- h) Rationale of the planned location, including orthophotomap and aerial photography and cartography with the area of the project implementation and clear and unambiguous identification of zoning and proposed uses, namely areas to build accesses, streets and green areas, elements that must be georeferenced and sent in shapefile format type of area, whenever the geographic area is spotted.

Even if the promoter has to carry out an assessment of the implications of the activity on any Natura 200 site, for instance, the necessary declarations of imperative reasons of overriding public interest are automatically replaced by the PPNI declaration. Besides, the pressure on the competent authorities to approve the project is much stronger.

Until now, precisely 100 projects have been granted the statute of PPNI, corresponding to an average of almost 10 a year. 33 out of the 100 PPNI are tourism projects.

Additional remarks and examples:

In the context of a better regulation policy there have been initiatives to deregulate and simplify¹⁰ administrative burdens on economic activities (in general but also relating to environmentally relevant activities such as construction works, industry and reforestation initiatives). Knowing whether — in practice — the process of simplification led to setting aside environmental interests for purely economic reasons, would require a complex analysis of the environmental results of the economic policies.

¹⁰ For more details see Aragão, Alexandra - Environmental modernization and administrative simplification in Portugal", in: *ELNI Review*, Environmental Law Network International, n.º.1/2016, pp. 10-17.

On the other hand the fact that there are economic instruments designed to support environmental objectives should not be ignored. It is the case of the environmental fund that supports financing for environmental projects of various public and private entities¹¹, or the National Strategy for Ecological Public Procurement 2020¹².

II. Techniques aiming at introducing more flexibility to or even diluting regulation

1. Offsetting regulatory directions

a) EU-ETS

In the current EU emission trading system (EU-ETS) framework, MS are allowed to use credits from outside the EU-ETS within this trading system. Those international credits result either from emission reduction projects in developing countries (Clean Development Mechanism; Art 11a EU-ETS Directive) or from greenhouse gas reduction projects among developed countries (Joint Implementation, Art 11a EU-ETS Directive). These credits are tradable within the EU-ETS and can thus be used to comply with requirements under the EU-ETS. As of 30 April 2016 the total number of international credits (CER and ERU) used or exchanged accounts for over 90 % of the allowed maximum.

1. (How) was the possibility of using international credits transposed into national legislation?

There are two laws transposing Directive n. 2003/87/CE (amended by Directive n.º 2008/101/CE for aviation activities): Decree-Law No. 38/2013 of March 15 (CELE) and Decree-Law no. 93/2010 of July 27 (aviation).

Both laws set out conditions for the use of international credits.

All operators of installations covered in the period 2008 to 2012 shall be allowed to use credits during the period 2008 to 2020, corresponding to a percentage of not less than 11% of their allocations during the above-mentioned period.

These operators may use credits up to an amount corresponding to a percentage higher than the 11% established so that the totality equals to a given percentage of their verified emissions in the period from 2005 to 2007.

All operators which did not receive free allowances for the period 2008 to 2012, including new entrants, may use credits up to an amount of not less than 4,5% of their verified emissions during the period from 2013 to 2020.

As from 1 January 2013, measures to limit the use of specific credits in relation to project types, to be defined by the European Commission, may be applied¹³.

As for qualitative limitations, the international credits that have been generated by projects concerning the use of nuclear energy, land use change and forestry cannot be used.

The approval of project activities relating to the production of hydroelectric power with a generating capacity of more than 20 MW should respect the best criteria and guidelines for environmental assessment, at national and international levels, including those contained in the report of the World Commission on Dams, in its final report of November 2000 entitled 'Dams and development. A new framework for decision-making'¹⁴.

2. Has your country used the possibility of using international credits to comply with EU-ETS requirements? If so, to what extent? Are you aware of the reasons for relying on this possibility?

¹¹ Decree-Law no. 42-A / 2016 of 12 August <http://www.fundoambiental.pt/>

¹² Resolution of the Council of Ministers no. 38/2016.

¹³ Annex III Decree-law 38/2013 of March 15.

¹⁴ Article 11 no.2 and 3 of Decree-law no. 93/2010 of July 27.

Since 2008 the Portuguese Carbon Fund is investing in international credits and investing in green investment schemes. The Fund has commitments to purchase 11 Mt of carbon credits. According to the performance risk analysis of the CDM projects, it is expected that the Fund will only receive about 6.5 Mt carbon credits pre-2012, of which the PCF already has 5.5 Mt in its account in the national register. The acquisition of credits in the secondary market (carbon stock exchanges) represents less weight in the FPC investment portfolio.

In October 2009, PCF signed the Assigned Amount Unit Purchase Agreement with Latvia for the acquisition of 4 million Assigned Amount Units.

After 2020, the emissions reduction target will be a domestic one, thus the use of international credits in the next trading period of the EU ETS is not foreseen.

3. How is the change to a domestic emissions reduction target received in your country? Is this change expected to affect your country's abilities to comply with EU-ETS requirements? Are you aware that other possibilities are discussed to compensate the loss of the flexibility through international credits?

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b) Effort Sharing (Non-ETS)

In the current framework for non-ETS sectors, targeted by the Effort Sharing Decision (ESD), MS are provided with a range of flexibilities in order to meet their (respective) reduction targets. MS are allowed to bank and borrow their (surplus) annual emission allocations (Art 3.3 ESD) as well as to transfer annual emission allocations to another MS (Art 3.4 ESD). In addition, MS can also use international project credits from emission reduction projects in developing countries (Clean Development Mechanism) or from greenhouse gas reduction projects among developed countries (Joint Implementation) to meet their commitments under the ESD (Art 5 ESD).

In a 2016 report, the Commission finds that so far, no MS has used any of the flexibility instruments provided in the ESD, yet a change is expected in the years to come ([SWD\(2016\) 251 final](#)).

1. (How) were the flexibility mechanisms of the ESD transposed into national law?

Portugal produced a national report¹⁵ in 2013 explaining how these mechanisms will be applied at the national level.

Portugal has signed memoranda of understanding for the implementation of clean development mechanism project based activities with the following countries: Angola, Argentina, Brazil, Cape Verde, China, Colombia, El Salvador, Guinea-Bissau, Morocco, Mexico, Mozambique, Tunisia, and Ukrain.

2. Has your country used any of the flexibility mechanisms yet in order to comply with ESD requirements? If so, to what extent?

According to the national report "Portugal intends to use all of the Kyoto Mechanisms. To that effect Government entrusted the Climate Change Commission to act as the DNA for the flexibility mechanisms, and created the PtCF to acquire credits from those mechanisms. All relevant legal provisions are already in place and the Fund is fully operational."

3. „Portugal hasn't yet invested directly in CDM or JI. So far, the Portuguese Carbon Fund invested in the following carbon funds: Luso Carbon Fund (a regulated private carbon fund in Portugal), Carbon Fund for Europe (a trust fund managed by the World Bank/International Bank for Reconstruction and Development and the European Investment Bank), Asia Pacific Carbon Fund

¹⁵ Portuguese Report under Article 3.2 of the Decision 280/2004 / EC on the Community Plant Variety Monitoring of Greenhouse Gas Emissions and Implementation of the Kyoto Protocol
https://www.apambiente.pt/_zdata/Alteracoes_Climaticas_Relatorios/ESD_3_2_report/Relatorio_3_2_PT_Final.pdf.

(a trust fund established by the Asian Development Bank) and NatCAP (a private carbon fund managed by Natsource Group). Portugal also has AAU from Latvia and from Czech Republic.¹⁶

Support for flexibility mechanisms is still high. In fact, in the current post 2020 reform of the ESD, further flexibility mechanisms are discussed. Those flexibility mechanisms include the use of cancelled ETS certificates and the use of LULUCF credits to meet ESD targets (forestry offsets).

4. How is this proposal on further flexibility mechanisms received in your country? If the proposal becomes law, would you expect your country to rely on those flexibility mechanisms in the future?

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2. Exemptions from regulatory directives

a) *Water Framework Directive: Establishing less stringent environmental objectives*

The Water Framework Directive (WFD) establishes the overall objective of achieving "good status" for all waters, in view of which, environmental objectives are set for different types of waters.

Art 4.5 of the Directive provides for the possibility of deviating from these environmental objectives set by the Directive with regards to specific bodies of water which are affected by human activity or when their natural condition is such that it may be unfeasible or unreasonably expensive to achieve good status. Such less stringent environmental objectives may only be set after evaluating other options and measures are taken to ensure the highest quality status/the least deterioration possible, and all practicable steps are taken to prevent any further deterioration of the status of waters.

MS are required to include the establishment of such less stringent environmental objectives and the reasons for it in the river basin management plan for the respective river basin district (Art 13 WFD). The less stringent environmental objectives are to be reviewed every six years.

1. (How) was the possibility of establishing less stringent environmental objectives transposed into national law? Is the transposing legislation stricter than Art 4.5 by, e.g., adding further requirements for deviating from the environmental objectives?

Yes, it is article 51 no.1 of the law ¹⁷ which literally transcribes article 4.5 without changing a single word.

2. Have national authorities relied on the option of establishing less stringent environmental objectives in their river management plans? If so, to what extent and for what reasons? If not, why?

Yes. In the Douro River Basin Management plan¹⁸ of Douro river (in the north of Portugal) there are 30 natural water bodies (rivers) affected by the future hydroelectric plants (Alto Tâmega, Daivões, Fridão, Foz Tua and Gouvães), and existing hydroelectric plant of Baixo Sabor. In these water bodies, the maximum achievable objective is "good potential". It is clearly admitted that "the presence of projects of this nature will entail a reclassification of water bodies and a reduction in the requirement of environmental objectives". The justifications are scarce: "the derogation will apply only to 29% of the water bodies (226 km)". The reason is the "overriding public interest" of the large hydroelectric dams.

3. If national authorities have established less stringent environmental objectives in their river management plans, are these objectives regularly reviewed? Have such less stringent environmental objectives been adapted or even lifted?

¹⁶ Page 50-51 of the Portuguese Report.

¹⁷ Law no. 58/2005, of December 29, amended and republished by Decree-Law no. 130/2012, of June 22
<https://dre.pt/application/file/178471>

¹⁸

https://sniambgeoviewer.apambiente.pt/Geodocs/geoportaldocs/Planos/PGRH3/PGRH3_RNT%5CPGRH3_RT_CE-RNT.pdf

The river basin management plans are only submitted to ordinary revisions.

4. Are there possibilities for the public to challenge the establishment of less stringent environmental objectives in river management plans? If so, please describe those possibilities briefly.

Yes, members of the public can challenge the river basin management plans in the context of *actio popularis*¹⁹.

b) Industrial Emissions Directive: Setting less strict emission limit values

The Industrial Emissions Directive (IED) requires MS authorities, in permitting industrial installations covered by the Directive, to set emission limit values which ensure that emissions do not exceed the emission levels associated with the best available techniques (BATs; Art 15.3 IED). However, if due to the geographical location/the local environmental conditions or the technical characteristics of the installation concerned achieving those emissions limits would lead to disproportionately higher costs compared to the environmental benefits, MS authorities may set less strict emission limit values as part of the permit. As part of the permit conditions, the less strict emission limit values must be reviewed in accordance with Art 21 IED.

1. (How) was the option of setting less strict emission limit values as permit conditions transposed into national law? Is the transposing legislation stricter than Art 15.4 by, e.g., adding further requirements for deviating from the emission limit values?

Article 30/6 of the Law transposing the IED repeats article 15/5 of the Directive without changing the requirements.

2. Have national authorities relied on the option of setting less strict emission limit values in permitting industrial installations? If so, to what extent, for what reasons and for which types of industrial installations? If not, why?

(To my knowledge no. But knowing precisely if this has ever happened would require analysing one by one the individual permits of industrial installations²⁰).

3. If national authorities have set less strict emission limit values in permitting industrial installations, is there a requirement to review these permit conditions regularly?

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4. Are there possibilities for the public to challenge the setting of less strict emission limit values as part of permit conditions, the lack of review of such less strict emission limit values respectively? If so, please describe those possibilities briefly.

Yes, members of the public can challenge the environmental permit in the context of *actio popularis*²¹.

¹⁹ For more details see Aragão, Alexandra and Carvalho, Ana Celeste "Taking access to justice seriously: diffuse interests and actio popularis. Why not?" in: *ELNI Review, Environmental Law Network International*, nº.2/2017, pp. 42-48

²⁰ Available here <http://ladigital.apambiente.pt/>.

²¹ For more details see Aragão, Alexandra and Carvalho, Ana Celeste "Taking access to justice seriously: diffuse interests and actio popularis. Why not?" in: *ELNI Review, Environmental Law Network International*, nº.2/2017, pp. 42-48