



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



Vasco Becker-Weinberg<sup>\*,1</sup>

Campus de Campolide, Lisboa 1099-032, Portugal

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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.

\* Corresponding author.

<sup>1</sup> CEDIS – Research Centre on Law and Society, Faculty of Law at the NOVA (New) University of Lisbon.

<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>

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

<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/EU 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

(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.

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