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## REVIEW

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'Better Regulation' with 'Make it Work': An assessment of the Make it Work's Drafting Principles on Compliance Assurance

*Lorenzo Squintani*

Environmental modernization and administrative simplification in Portugal

*Alexandra Aragão*

The Non-Regression Principle under EU and German Water Law 'on the Ground'

*Eckard Rehbinder*

Evidence based legislation? Adequate protection of EU citizens against aircraft noise

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Statement on the Circular Economy concept

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## Editorial

The aim of simplifying environmental law persists; it rekindled with the European Commission 2015 update of the Better Regulation Strategy and the related ‘Regulatory Fitness and Performance programme’ (REFIT) striving for “making EU law lighter, simpler and less costly”. At the same time, the ‘Make it Work’ initiative launched by several EU Member States adds some dynamics to the debate by providing first implementation experiences.

Against this background, *elni Review 1/2016* throws a spotlight on the simplification of environmental law. *Lorenzo Squintani* analyses the first ‘Make it Work’ Drafting Principles on compliance assurance with particular attention given to simplification matters, but also taking into account regulatory burdens and the EU’s objective of a high level of environmental protection. Subsequently, *Alexandra Aragão* reports on environmental modernization and administrative simplification experiences in Portugal and gives critical analysis of recent legal changes that took place in 2015.

Besides, *Eckard Reh binder* assesses the landmark 1<sup>st</sup> July 2015 decision of the European Court of Justice on the Non-Regression Principle and specifically addresses remaining open questions not answered by the court. *Franziska Heß* and *Martin Führ* discuss the current body of scientific knowledge on aircraft and based on this evidence derive legal implications with respect to EU legislation aiming at adequate protection of EU citizens against aircraft noise.

Furthermore, in a *Statement* contribution *Franz Fiala* and *Michela Vuerich* articulate *ANEC*’s perspective on the circular economy concept presented by the European Commission in December 2015. Finally, in the recent developments section *Miriam Dross* sums up highlights from a recent statement by the *German Advisory Council on the Environment* as regards the impacts that the planned TTIP agreement could have on German and European environmental protection standards.

We hope you enjoy reading of *elni Review 1/2016*.

Contributions for the next issue, in particular with respect to CETA’s impact on environmental law (see the ELNI Forum announcement), are very welcome. Please send contributions to the editors by mid-September 2016.

*Julian Schenten/ Martin Führ*

June 2016

### ELNI Forum:

**8 September 2016**

**Brussels, Belgium**

### **“Assessing CETA’s Impact on Environmental Law”**

ELNI in cooperation with the Centre d’Etude du Droit de l’Environnement (CEDRE) is organising the 2016 ELNI Forum on “Assessing CETA’s impact on Environmental Law”. The Forum will take place at the **Saint-Louis University** in Brussels, Belgium between 2pm and 5.30pm.

The following topics, among others, will be discussed between law scholars and practitioners as well as representatives from the NGO and political/administrative scenes:

- The nature (a mixed agreement?) and validity of CETA
- The impact of CETA on existing environmental legislation and application
- The impact of CETA on future environmental legislation

Further details will soon be available on [www.elni.org](http://www.elni.org) and on <http://www.usaintlouis.be> (CEDRE)

## Environmental modernization and administrative simplification in Portugal

Alexandra Aragão

### 1 Introduction

The fight against bureaucracy has been a constitutional goal in Portugal since 1982, when the first constitutional amendments were made. In Article 267(1), the following was included on the organization and goals of the Public Administration: *“the Public Administration shall be structured in such a way as to avoid bureaucratisation, bring departments and services closer to local people and ensure that interested parties take part in its effective management, particularly via public associations, residents’ organisations and other forms of democratic representation”*.

Unfortunately, the mere fact of having a constitutional article dedicated to bureaucracy does not automatically fulfil the intended goal unless there is also the political will, governmental commitment and institutional capacity to achieve the objective.

Since 2005 the conditions for serious and systematic simplification have finally been met. In this article, the legal and political context in which the first modernization initiatives occurred will, firstly, be briefly explained. Then, the article will move on to a more detailed presentation and critical analysis of the recent legal changes that took place in 2015 and transformed the environmental bureaucracy landscape in Portugal.

### 2 The three simplification waves

In order to understand the different ideologies influencing better regulation and administrative simplification in Portugal, it is necessary to see them in context.

Considering that simplification requires fighting administrative inertia by means of strong political commitment, the simplification initiatives need to be placed in the political context in which they were approved. There have been three different ‘waves’ of simplification in Portugal. The first period dates back to 2005 (with the XVII democratic government<sup>1</sup>) and continued through two consecutive socialist governments to 2011. The second period started in 2011 and lasted until 2015, overlapping with a right wing coalition government of the social democrats and the liberals. The third period started at the end of 2015 with a new socialist government whose political agenda is based on a formal written agreement with two other left-wing parties.

1 The list of constitutional governments in Portugal started in 1976, when the first free and democratic constitution entered into force, two years after the carnation revolution (the bloodless military coup that, on the 25th of April 1974, overthrew the dictatorship in Portugal).

The first step was, in 2005, to create a Coordination Unit for Administrative Modernization (CUAM)<sup>2</sup>, which was connected to the Minister of State and Internal Affairs. In 2007 the CUAM was promoted to a Secretary of State<sup>3</sup>. The post of Secretary of State for Administrative Modernization continued over the following government and was, during this time, connected to the Minister for Regional Development. In 2015 the cabinet post was upgraded to a Ministry for Administrative Modernization<sup>4</sup>.

Curiously, during the last eleven years, only two people, both skilled Professors, have assumed this role at the heart of administrative reform in Portugal<sup>5</sup>.

Since 2007, the National Agency for Administrative Modernization<sup>6</sup> has been responsible for implementing the simplification measures adopted by the Governments under the supervision of the Secretary of State until 2015, and of the Minister from 2015 onwards.

The striking nickname commonly used to refer to the simplification initiatives during the first period was ‘Simplex. The administrative simplification program’. In the intermediate period they were given the plain name ‘Simplify’. And in the current period since 2015 they are referred to as ‘Simplex+. Even simpler’.

#### 2.1 Overview of simplification dynamics in the first and second wave

The more visible and impactful measures were adopted in the first simplification period by Maria Manuel Leitão Marques. Some examples of these are: the ‘citizen card’<sup>7</sup>, which combines different identification profiles in a single smart card for electronic reading (social security, public health service, taxpayer and voter id); the ‘citizen spots’<sup>8</sup> or one-stop-shops as integrated multi-channel models for delivering public services (providing different services in the same place: taxes, social security; registries; health care;

2 Resolution by the Council of Ministers in 90/2005 of 13 May.

3 The Decree 49-C/2007 of the President of the Republic of the 17 May appoints a new Secretary of State.

4 The Decree-Law 251-A/2015, of 17 December approves the Organic Law of the XXI Constitutional Government.

5 Maria Manuel Leitão Marques, between 2005 and 2011 and from 2015 onwards. Miguel Poiars Maduro, in the period of 2011-2015.

6 The first organizational structure of the Agency was approved by the Decree-Law 116/2007 of 27 April.

7 Law 7/2007 of 5 February.

8 Since 2007 these spots were managed by the Agency for Administrative Modernization (Decree-Law 116/2007 of 27 April).

labour; immigration; licenses and permits from several departments); ‘integrated counters’ offering multiple services associated with life events (such as the ‘I lost my wallet’ counter or the ‘company in one hour’ counter, one of the most relevant achievements of the simplification movement in this period) and ‘zero licensing’<sup>9</sup> (reduction of administrative burdens through the elimination of licenses, permits, inspections and prior conditioning for specific activities, replacing them with ex post inspections, auditing and accountability mechanisms).

In 2008 the OECD performed an independent study on the measures adopted up to this point<sup>10</sup>. The study was quite favourable to the hundreds of simplification initiatives in Portugal although it highlighted the “*vast number of initiatives that were not clearly bound together by overall strategic goals or lines of action*”.

The strategy of having an overall approach and a systematic methodology for state reform was indeed more present in the simplification measures adopted in the second wave, by Poiães Maduro. Urged by the Parliament<sup>11</sup> to proceed with the administrative modernization measures, the governmental initiatives were based on three steering principles:

1. ‘Only once’: The purpose of this principle is to avoid duplicate requests by sharing administrative information among the different administrative services. The strategies designed to ensure that no one is asked twice for the same information as long as another public entity holds the required information are: a permanent observatory to identify repeated and unnecessary iterations, a shared online platform and a procedure manual for sharing information and an inter-ministerial network having a focal point in each ministry.
2. ‘One-in-one-out’: The objective is to prevent bureaucracy and increased “context costs” for citizens and economic activities. Applying regulatory impact assessment procedures, namely the ‘SME test’<sup>12</sup>, whenever a new normative act is found to create new context costs for businesses or citizens, there shall be a parallel equivalent re-

duction of context costs in other normative acts that have a similar impact<sup>13</sup>. The most relevant cost reduction measures are aimed at shortening decision deadlines through conferences, agreements and joint decision making between various services involved in complex procedures. Other measures are decision maker liability whenever the timings are not respected, appointment of a procedure “manager” and creation of an online interoperability platform.

3. ‘Digital by default’: As part of the governmental strategy called ‘Approach’<sup>14</sup>, aimed at bringing people and the Administration closer together<sup>15</sup>, the use of electronic means as a rule of communication<sup>16</sup> with the Administration was laid down<sup>17</sup>. In fact, a large number of public services are already available online. Since July 2015 there has been a new portal for public participation<sup>18</sup> on which all the current public participation procedures are available and searchable using a search engine. For concerns relating to environmental licensing, the ‘SILiAmb’ platform is available for communication between the users and the Portuguese Environmental Agency<sup>19</sup>.

In 2015 several online platforms including the ‘citizens spot’, the ‘citizens portal’ and the ‘Online Certification for SME’ were certified as best practice by the European Public Sector Awards<sup>20</sup>.

## 2.2 Public participation in the second and third simplification waves

Comparing public participation in the second and third simplification waves both Ministers were very dialogue-oriented and open to public contributions. However, they took different approaches to achieve public participation in the development of new simplification measures.

In the second period, public involvement was – as suggested by the Parliament – based on consultation of companies, of the Public Administration itself, and on the contribution of citizens. The aim was to estab-

9 Decree-Law 92/2010 of 26 July and Decree-Law 48/2011 of 1 April. In 2015 the regime was extended even further by the Decree-Law 10/2015 of 16 January.

10 Making Life Easy for Citizens and Businesses in Portugal Administrative Simplification and e-Government <http://www.oecd.org/mena/governance/42600869.pdf> (accessed on the 27<sup>th</sup> April 2016. All online resources referred to in this article have been last accessed on this date).

11 By Resolution 31/2014 of 11 April of the Assembly of the Republic.

12 Following the report of the Expert Group instituted by the Enterprise and Industry Directorate General of the European Commission: “Think Small First – Considering SME interests in policy-making including the application of an ‘SME Test’”, adopted in March 2009.

13 This idea is laid down in the Decree-Law 72/2014 of 13 May establishing the Administrative Modernization network.

14 Approved by the Resolution of the Council of Ministers 15/2013 of 19 March.

15 The Resolution of the Council of Ministers 55-A/2014 of 15 September identifies the distribution of the public services throughout the country taking into account the special need of vulnerable citizens such as the elderly and illiterate persons.

16 When using online public services, each user is granted one personal digital key for authentication. All electronic communications and notifications are now legally binding.

17 Decree-Law 74/2014 of 13 May.

18 See [participa.pt](http://participa.pt).

19 Available at <https://siliamb.apambiente.pt>.

20 Available at [http://www.epsa2015.eu/files/EPsa2015\\_Total\\_list\\_of\\_Best\\_Practices.pdf](http://www.epsa2015.eu/files/EPsa2015_Total_list_of_Best_Practices.pdf).

lish possible ways to reduce bureaucracy and improve their relationship with the Administration. For this purpose the government carried out an online survey (and received 155 valid answers), interviews (with 20 representatives from trade, services and industry) and roundtables (64 people were involved) and attended workshops (7 restricted workshops organized by 1 university)<sup>21</sup>.

Nevertheless, in February 2015, when the Government announced one of the most important simplification measures for reducing environmental bureaucracy, the Single Environmental Licensing, all four left-wing parties represented in the Parliament complained that the Assembly was not informed about the contents and political options before the legal regime was approved<sup>22</sup>.

In terms of public participation in the ongoing period of administrative simplification, the procedures developed during the first simplification wave are currently being repeated. The Secretary of State has spent three months touring the country to meet, listen and talk directly with citizens, businesses and associations (preferably represented by the key persons that have to deal with bureaucracy on a daily basis) as well as with local public institutions, services and departments. This initiative started in January 2016 and continued until April 2016.

### 3 Environmental modernization and simplification of authorization procedures

The two pillars of environmental modernization in the second phase are the Single Environmental Licensing (SEL<sup>23</sup>) and the Responsible Industry System (RIS<sup>24</sup>) –), the first one mainly concerns procedural simplification and the second one aims to introduce new rules for substantial improvement of industrial activities.

Both laws were adopted in May 2015, with only a few days in between. The Responsible Industry System corresponded to a legal regime that had existed since 2012 but undergone comprehensive revision in 2015. The Single Environmental Licensing was a brand new legal instrument. In view of the narrower scope of the Responsible Industry System, which is applicable only

to industrial activities, the analysis will start with the Single Environmental Licensing, the broader regime.

#### 3.1 Single Environmental Licensing

The Single Environmental Licensing condenses up to ten different legal regimes and several administrative decisions into one single title (called Single Environmental Title or SET):

- a) Environmental impact assessment;
- b) Assessment of the environmental effects of certain energy production units;
- c) Prevention and control of major-accident hazards involving dangerous substances<sup>25</sup>;
- d) Industrial emissions;
- e) Emissions trading scheme;
- f) Waste management;
- g) Landfilling of waste;
- h) Mineral deposit waste management;
- i) Integrated centres for recovery and disposal of dangerous wastes;
- j) Use of water resources.

Considering the different simplification techniques normally identified — elimination, reduction, rationalization and computerizing<sup>26</sup> — the SEL mostly relies on computer-based digital platforms intended to streamline procedural steps and shorten decision deadlines<sup>27</sup>.

##### 3.1.1 SILiAmb platform

The Single Environmental Title is an electronic document, issued following the applicable administrative procedures depending on the type of project. It is requested using the online platform called ‘integrated system of environmental licensing’ or ‘SILiAmb’ in the Portuguese acronym. Using this platform, the operator can request all environmental authorizations, opinions, prior consents and so on needed to obtain the environmental permit. A Ministerial Ordinance adopted in 2015<sup>28</sup> lists in detail all the documents and information necessary for environmental licensing. The documents required can be uploaded all at once or at different times.

21 Data disclosed by the right wing government in July 2014 when answering 25 questions on administrative simplification measures raised by the socialist Members of Parliament in May 2014 (parliamentary questions n. 1658/XII/4. of 26 May).

22 See [http://www.rtp.pt/noticias/politica/oposicao-unida-nas-criticas-a-diplomado-ambiente-que-diz-desconhecer\\_n802634](http://www.rtp.pt/noticias/politica/oposicao-unida-nas-criticas-a-diplomado-ambiente-que-diz-desconhecer_n802634).

23 The UEL (or LUA in the Portuguese acronym) regime was adopted by the Decree-Law 75/2015 of 11 May.

24 The RIS (or SIR in the Portuguese acronym) regime by the Decree-Law 169/2012, of 1 August, and subsequently modified by Decree-Law 73/2015 of 11 May.

25 The Decree-Law 150/2015, transposing the Seveso III Directive entered into force in August 2015.

26 According to Alessandro Natalini, *Le semplificazioni amministrative*, Il Mulino, Studi e Ricerche, Bologna, 2002.

27 The deadlines for each administrative procedure are not changed but the different administrative procedures now start simultaneously right after the initial requirement and do not succeed to one another. As a consequence, deadlines are not added to each other and the final deadline applicable is simply the longest individual deadline. As a consequence, the overall time required for the Single Environmental Title is shorter.

28 Ordinance 279/2015 of 14 September.

The drawback is that sometimes the documents necessary to complete the process are not available in digital form and have to be scanned by the applicant. This is particularly the case with public documents issued by local entities. Undoubtedly, changing documents into digital form reduces environmental impacts but it increases administrative burdens if it has to be done by the applicant.

When a particular document is already held by the Administration, the corresponding field is automatically filled in.

After the initial push by the applicant, the SILiAmb platform automatically sends out notifications to all the public services that should actually be involved in the procedure, taking into account the nature of the activity and the types of authorizations requested. The same thing occurs whenever new elements are added to the process.

All the documents (be it those uploaded by the applicant or those produced by the public entities involved in the administrative procedure) are accessible online to all the public authorities involved. The SILiAmb platform alerts the users to the deadlines applicable to each administrative step and allows the applicant to follow all the procedural stages until an environmental permit is either issued or denied.

The fact that all the necessary administrative procedures are triggered simultaneously and all the deadlines for producing the intermediate formalities start concurrently and run in parallel is the greatest achievement of the SILiAmb system – it significantly reduces the overall timing for the final decision. In order to enhance the legal certainty and attract investment, the law includes an annex list of maximum deadlines applicable to each environmental regime covered by the Single Environmental Licensing scheme.

Furthermore, the SILiAmb platform offers an online simulation tool. Based on a few pieces of data (namely the classification code for the economic activity according to the national version of an international standard of classification for all economic activities and the type and quantity of dangerous substances), the system calculates the deadlines required for issuing the permit, the indispensable paperwork, the taxes applicable and the public authority that coordinates the authorization process. One of the strongest deterrents of investment — the psychological costs of uncertainty — are attenuated by this simulation tool.

In the end, the Single Environmental Title is available for the interested public authorities to check the contents, conditions, expiry date and other vicissitudes of

the authorizations. In fact, the permit is automatically updated when relevant decisions are taken, modifications are agreed on, or other relevant events happen to the operator, to the activity or to the installation. These facts are registered in the same platform so that the whole life-cycle becomes visible.

The following events must be automatically registered and visible in the platform:

- a) Administrative acts modifying, suspending or revoking the permit;
- b) Prior controls and inspections performed;
- c) Court rulings declaring the nullity, annulling or determining the suspension of the effectiveness of the permit or of any licenses or opinions issued during the procedure;
- d) Administrative decisions addressed to the operator on any environmental administrative offenses committed;
- e) Interim measures applied to the activity.

Another advantage of the integrated approach to permitting is the fact that the applicant pays only one single fee of a value below the aggregate previous sectoral taxes. Even more importantly, the amount to be paid is known from the beginning of the procedure, thereby increasing predictability and mitigating the psychologic costs.

In the previous licensing system, the licensing authority was the main public body with which the applicant had to engage in dialogue. Now other entities – both public and private – assume important roles.

Private entities can become certifiers after submission to an accreditation procedure before the Portuguese Environmental Agency<sup>29</sup>. These entities certify the compliance of the request with the legislation in force and issue a compliance report to be submitted along with the request. The presence of compliance certification has the beneficial effect of reducing (in some cases by half) the applicable deadlines<sup>30</sup>.

The procedure manager plays a key role in coordinating and speeding up the process: monitoring the permit applications to ensure compliance with deadlines and avoiding delays; providing information on the status of the procedure; gathering the information necessary for the proper instruction of the procedure;

29 The list of accredited bodies is available in the website of the Portuguese Institute of Accreditation, the IPAC (<http://www.ipac.pt/pesquisa/acredita.asp>).

30 For instance, the maximum deadline for an ordinary environmental impact assessment procedure is 100 days. With the intervention of an accredited body the deadline is reduced to 70 days. For the environmental impact assessment of industrial activities, the deadline varies between 80 and 60 days depending on the case. Lastly, obtaining an environmental permit for an IPPC installation takes 80 or 40 days, depending on whether there is certification or not by an accredited body.

and meeting with the applicant, the coordinating entity, the licensing authority and other stakeholders.

### 3.1.2 Assessment

The merits of the reform are not limited to the creation of a digital support. When analysing the overall advantages of the new UEP scheme, 3 main axes can be identified:

1. Transparency – From the point of view of the operator, he/she can know beforehand the total taxes to be paid, the procedures applicable, the administrative requirements and the deadlines for the issuance of the permits. From the point of view of the administration, all relevant events in the life of the installation are available online.
2. Cooperation – There is a horizontal dialogue and cooperation among public entities all contributing to the authorization of the same activity and taking into account each other's opinions to achieve the best environmental options. But the dialogue is also vertical, between the public entities and the applicant. This communication is based on trust and responsibility: the operator doesn't need to provide a priori evidence of certain facts or status but he/she must bear the consequences if he/she is found, as a result of inspections, to have neglected his/her obligations<sup>31</sup>. Finally, the dialogue is also diagonal when it is carried out between the private independent entities, the operator, and the public environmental authorities. All the parties contribute to the same goal, namely achieving the most sustainable result.
3. Speed – During the procedure to obtain an environmental permit, the timings run in parallel and the deadlines are shortened. After the permit is issued, all relevant events are immediately registered and automatic notifications are issued to the public authorities, so that all the entities concerned, namely those responsible for environmental supervision and inspections, are aware of the actual situation.

Although the legal reform operated by the SEL has mainly remained a formal organization of procedures<sup>32</sup> designed to integrate ten authorization regimes into one single platform, there are substantial obligations imposed on the operator that are compiled in an article, the objectives of which are mainly pedagogic.

31 As a consequence of the greater responsibility placed on the industrial operator, the sanctions are now more severe, ranging from € 250 to € 2500 in the case of individuals, or from € 2500 to € 44 000 in the case of legal persons.

32 The government's intention at the time was to carry out a substantial revision and harmonization of the material and technical requirements applicable to each of the various environmental frameworks in the future.

In fact, these obligations are already present in other legal regimes such as EIA, IPPC, Seveso, environmental liability, waste management, water protection, and so on. Their repetition in this law is emphatic but somehow redundant. Yet, two of the obligations are worth mentioning.

Firstly, the holder of an environmental permit has the duty to adopt an ethical, transparent and socially responsible behaviour that is in accordance with the environmental provisions of laws and regulations applicable<sup>33</sup>.

Secondly, the holder must use natural resources in an efficient and sustainable way<sup>34</sup>.

Despite the difficulties of implementation, these broad norms are quite inspiring in terms of their ambition, their comprehensiveness and their far-reaching effects.

### 3.2 Responsible Industry System

The Responsible Industry System provides a legal framework for the industrial activities listed in an annex to the law. It is a long and quite complex law, containing over 80 articles and 3 annexes. The legal act distinguishes three different systems applicable to three categories of industrial installations, depending on the risks associated with the activity<sup>35</sup>.

According to the legal act, the main purposes of the new Responsible Industry System are twofold:

- firstly, environmental sustainability and corporate social responsibility;
- secondly, simplification and debureaucratization to increase competition and boost economic dynamics.

To achieve these objectives, several actions are foreseen by the law. Some are merely formal while others are more substantial. The formal approaches are the use of plain language<sup>36</sup> in the dialogue between the administrative authorities and the industrial operator, and the use of flowcharts to show the sequence of tasks and administrative acts.

The more substantial approaches are the reduction of the applicable deadlines by all means possible, the use

33 Article 18 b) of the Decree-Law 75/2015 of 15 May.

34 Article 18 k) of the same Decree-Law.

35 Type 1 industries are those submitted at least to one of the following regimes: EIA, integrated prevention and pollution control, major accidents involving dangerous substances, some waste management activities, production of food and feed using raw materials of animal origin.

Type 2 industries are those not included in type 1 and submitted to the emissions trading scheme or to waste management controls.

Type 3 industries are those included in neither type 1 nor type 2. Type 3 industries receive an operating title automatically and immediately upon prior communication by the operator to the public authorities through the electronic platform and after payment of the applicable fee.

36 Plain Portuguese language is a linguistic variant that can be understood by the ordinary person, instead of a complex technical jargon.



of digital media as communication tools, the adoption of ‘standardized technical conditions’ and the creation of ‘responsible business zones’.

The next sections will address these substantial approaches in more detail.

### 3.2.1 Main simplification steps in RIS

Simplification measures are positive if they successfully reduce bureaucracy while ensuring the same or even a higher level of environmental protection. As will be shown, this is not the case of the actions taken to reduce deadlines, but it can be the case with digital platforms, standardized conditions and mainly responsible business zones.

#### (i) Reducing deadlines

The reduction of deadlines is central in the law establishing the Responsible Industry System: the deadlines are counted in working days, they cannot be interrupted by any cause whatsoever; when there are two deadlines they do not cumulate (the longest one applies) and, in the absence of special provisions, the deadline to practice any acts, by default is 5 days.

Much more controversial is the legal recognition of tacit deferrals. If the competent authorities do not upload to the electronic platform the documents substantiating the necessary authorization, it is considered that there is a tacit approval of the applicant’s request. Further, no subsequent administrative or judicial act is necessary. Only if there is a substantial cause for rejection (a missing EIA for instance) will the digital title not be issued.

It is needless to express the deep contradiction between tacit approvals and the essential avoidance approach adopted in environmental law. As declared by the Court of Justice of the EU, in environmental matters, tacit approvals are contrary to the precaution and prevention principles<sup>37</sup>.

In any case, this questionable streamlining solution is not exclusive of this legal regime. It has been present for years in the environmental impact assessment and several other environmental law regimes<sup>38</sup>.

#### (ii) Digital platforms

The Responsible Industry System is coherent with the Single Environmental Licensing system and uses the same electronic platform, SILiAmb, to obtain the digital authorizations after a fully dematerialized pro-

cedure. Likewise, there are automatic notifications of the public entities when the applicant submits a new document or of the applicant when an entity adopts an act regarding the procedure at stake<sup>39</sup>.

Additionally, the digital platform displays two features, which are mentioned in the Responsible Industry System but omitted in the Single Environmental Licensing, that are worth mentioning. Firstly, the platform SILiAmb provides information to users on the means of judicial or extrajudicial reaction against the decision of the competent administrative authorities, thus implementing the third pillar of the Aarhus Convention. Secondly, the platform provides a geo-referencing tool to visualize the most suitable areas for the installation and operation of industrial plants and of responsible business zones, in line with the Inspire Directive.

#### (iii) Standardized technical conditions

The standardized technical conditions are a set of predefined rules and specifications for a particular activity or operation<sup>40</sup>. This system of “ready-to-wear” conditions<sup>41</sup> replaces a case-by-case analysis strengthening transparency and legal certainty.

The standardized technical conditions shall be adopted “progressively and incrementally”<sup>42</sup> by the public entities intervening in the Responsible Industry System.

The standardized conditions can be implemented in the operation of an industrial plant provided that on one hand, there is a correspondence between the features and specifications of the industrial activity concerned and the standard, and on the other hand, the operator formally declares accepting and assuming to respect all the technical conditions imposed.

To stimulate the operator to do so, there are some incentives laid down in the law: appreciation of the request by all the public entities normally involved is waived; preliminary inspections are also waived (except for industrial establishments using raw materials of animal origin for producing food or feed or some waste management operations); the amount of the payable fee is reduced to one-third.

It is important to stress that the existence or not and the application or not of standardized technical condi-

37 See, for instance, the Judgment of the Court of Justice of the European Union of 14 June 2001 in Case C-230/00, and the commentary article by Aragão, Alexandra, «A avaliação europeia de impacto ambiental: a sina belga e a ventura lusa», in: Revista do CEDOUA, no.1, vol. 3/1999, page 87 to 113 (also available online: <https://impactum.uc.pt/content/revista?tid=13820%2C%2013820>)

38 Presently it is article 19 of the Decree-Law 151-B/2013 of 31 October.

39 There is a procedure manager and private certifying entities as well.

40 The standardized authorization system in force since 2012 was repealed in 2015 and only the standardized technical conditions subsisted.

41 The expression is used by Maria Manuel Leitão Marques, Fernanda Paula Oliveira, Ana Cláudia Guedes and Mariana Rafeiro in their book commenting the law: Sistema da Indústria Responsável, Comentário ao novo Regime de Acesso à Atividade Industrial, Almedina, Coimbra, 2014.

42 Article 8 no.1 of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

tions does not affect the duty of the operators to adopt the best available techniques.

Finally – in some cases, namely when environmental laws require public participation – the adoption of standardized technical conditions may not be appropriate. This reduces considerably the scope of the measure.

#### (iv) Responsible business zones

Responsible business zones are well-defined areas intended for the installation of industrial, commercial or service activities, administrated by a management entity. There are also multipolar business centres that are geographically separated but functionally linked together and administered by the same manager.

Although not expressly mentioned, by creating responsible business zones, the plan is to promote associations between industries which prove to be beneficial for the environment. In fact, industrial symbiosis have a large potential to minimize waste production, to maximize energy efficiency, to save fuel and generate economies of scale in the transport of raw materials, products or even workers or to implement redundant and stronger risk prevention measures.

To boost the creation of RBZ and encourage companies to settle in, several exemptions to the normal iterations of environmental licencing are foreseen. For instance, no EIA is required, no environmental authorization is necessary, no water resource use permit is prescribed, no prior inspection is imposed, as long as the RBZ itself has submitted to EIA and obtained all the authorizations, permits and inspections indispensable for certain types of activities. It is up to the manager of the respective zone to check compliance with all the legal requirements.

#### 3.2.2 Compensating administrative simplification

However, there are some trade-offs in this extreme simplification of installations operating in a RBZ.

In fact, to compensate the risks emerging from downgrading public controls there are some redundancies and some precisions. Liability insurance is mandatory for the operator, for the manager of the responsible zone, as well as for the accredited bodies<sup>43</sup>. In addition, activities of type 1 and 2 are subject to review every 7 years; every 5 years the responsible zone is submitted to supervision and, if necessary, revision of operating conditions.

Moreover, the substantial obligations of the industrial operators are developed in detail.

43 In September 2015 the Ministerial Ordinance 307/2015 regulated the regime, establishing the general conditions for the insurances: minimum capital, insurance coverage, temporal and territorial scope, exclusions, possibility of establishing an excess and conditions for a refund.

As in the Single Environmental Licencing system, the general obligations are, first of all, to adopt an “*ethical, transparent, socially responsible behaviour, and in accordance with the applicable legal and regulatory provisions*”<sup>44</sup>. Then, to adopt “*prevention and control measures to eliminate or reduce the likely risk of affecting people and property, ensuring safety and health conditions at work, fire safety in buildings, as well as respect for environmental rules, minimizing the consequences of any accidents*”<sup>45</sup>. Surprisingly, in this case natural resources are not mentioned.

In terms of specific duties, the list is a little longer. Specific duties can be analyzed according to their intensity, ranging from quite basic requirements to very far-reaching burdens.

In this sense, the very basic requirements are the duties to:

- respect the rules under the Labour Code, particularly the norms on the promotion of safety and health at work;
- implement fire safety systems and security and health systems appropriate to the type of activity, including an emergency plan and self-protection measures, where applicable;
- adopt food safety management systems appropriate to the type of activity, when applicable;
- promote prophylaxis and adopt health surveillance measures legally established for the type of activity in order to protect public health as well as that of the workers.

More ambitious requirements are the duties to:

- adopt the best available techniques;
- implement environmental management systems;
- adopt risk prevention measures and to limit the effects of accidents;
- apply the necessary measures to avoid risks and pollution, so that the industrial location is in a satisfactory condition at the time of the final shutdown of the industrial establishment.

Finally, a completely innovative demand is the requirement for the operator to “*adopt principles and practices of eco-efficiency of materials and energy as well as eco-innovation practices*”<sup>46</sup>.

In the words of the law, eco-efficiency is “*the operating strategy conducive to the provision of competitive goods and services that satisfy human needs and,*

44 Article 3 no.1 a) of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

45 Article 3 no.1 b) of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

46 Article 3 no.2 a) of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

*simultaneously and progressively reduce the negative environmental impacts and the resource intensity throughout the life cycle of products*<sup>47</sup>.

Eco-innovation is, on the other hand, “*any form of innovation enabling or intending to reach demonstrable and significant progresses towards the goal of sustainable development, through reduced impacts on the environment, enhanced resilience to environmental pressures, or through a more efficient and responsible use of natural resources*”<sup>48</sup>.

These two concepts, unprecedented in national legislation, do not appear anywhere else in this law, besides the specific obligations of the operator. As a consequence, there is no other legal support for interpretation. The relation between the two concepts and the best available technologies remains unclear. No consequences of non-fulfilment of the eco-efficiency and eco-innovation duties are foreseen.

It would be desirable for these two promising concepts to benefit from further legislative developments in the future.

#### 4 The future: the third simplification wave

While the latest legislative measures adopted in 2015 are still being tested in real life conditions, the proposals by the current government suggest that the simplification movement in Portugal is here to stay. The expectations of more steps towards a more simplified future are strong. The most ambitious promise that goes beyond the environment field is to allow citizens to handle all the administrative proceedings relative to a person’s life event in a single point and with a unique iteration. In terms of better legislation, the commitment is to ensure that all the regulation necessary to implement new legal acts is adopted simultaneously with the law concerned. Finally, there is a commitment to concentrate in only two periods per year on all the legal framework reforms affecting the companies and entrepreneurs.

#### 5 Conclusion

The recent legislative reforms carried out in Portugal represent a great effort to streamline the environmental licensing system.

Some simplification measures such as tacit deferrals may jeopardize the preventive character, the effective safeguard and the high level of protection required by environmental standards. Other measures like digital platforms seem quite effective in overcoming unnec-

essary formalities and making it easier to cope with the bureaucratic entropy of environmental permitting.

To balance the risks, ethical and environmental standards are imposed on those who develop activities having relevant environmental impacts. An ethical, transparent, socially responsible, eco-efficient and eco-innovative behaviour is now the rule.

In conclusion, the law in the books is not only simpler and faster but has the potential to be fairer and more sustainable. The law in action, however, may be a completely different thing. Are there the will to operationalize and the capacity to control the social and environmental sustainability beyond the mere compliance with formalities? Or are we just creating high-ways to a less sustainable future?

It is too early to deliver a final verdict. The environmental results of the simplification movement in Portugal remain to be seen.

47 Article 2 g) of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

48 Article 2 h) of the Decree-Law 169/2012 of 1 August, amended by the Decree-Law 73/2015 of 11 May.

## Imprint

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**Editors in charge of the current issue:**  
Martin Führ and Julian Schenten

**Editor in charge of the forthcoming issue:**  
Gerhard Roller (gerhroller@aol.com)

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*The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.*

## Authors of this issue

**Alexandra Aragão**, Professor at the Faculty of Law of the University of Coimbra, Portugal; aaragao@ci.uc.pt.

**Miriam Dross**, Ass. jur. Miriam Dross LL.M., member of the expert staff of the German Advisory Council on the Environment in Berlin. Her Main areas of work are environmental law, energy law, European and public international law; miriam.dross@umweltrat.de.

**Franz Fiala**, Head of Consumer Council at the Austrian Standards Institute, Chair of ANEC Sustainability Group; f.fiala@austrian-standards.at.

**Martin Führ**, Professor of public law, legal theory and comparative law, Society for Institutional Analysis (sofia), Darmstadt University of Applied Sciences, Germany, www.sofia-research.com; fuehr@sofia-darmstadt.de.

**Franziska Heß**, Specialist lawyer for administrative law, law firm Baumann Rechtsanwälte PartGmbH, Leipzig, Germany; hess@baumann-rechtsanwaelte.de

**Eckard Rehbinder**, Emeritus Professor of Law, Research Centre for Environmental Law, Goethe-University Frankfurt am Main, Germany; Rehbinder@jur-uni-frankfurt.de.

**Lorenzo Squintani**, Assistant professor of European Law at the University of Groningen, the Netherlands and member of the managing board of the European Environmental Law Forum; l.squintani@rug.nl.

**Michela Vuerich**, ANEC Sustainability Programme Manager; michela.vuerich@anec.eu.

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If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: [Roller@fh-bingen.de](mailto:Roller@fh-bingen.de).

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

#### Contact

##### Freiburg Head Office:

P.O. Box 17 71  
D-79017 Freiburg  
Phone +49 (0)761-4 52 95-0  
Fax +49 (0)761-4 52 95 88

##### Darmstadt Office:

Rheinstrasse 95  
D-64295 Darmstadt  
Phone +49 (0)6151-81 91-0  
Fax +49 (0)6151-81 91 33

##### Berlin Office:

Schicklerstraße 5-7  
D-10179 Berlin  
Phone +49(0)30-40 50 85-0  
Fax +49(0)30-40 50 85-388

[www.oeko.de](http://www.oeko.de)

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

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#### Contact

Prof. Dr. jur. Gerhard Roller  
University of Applied Sciences  
Berlinstrasse 109  
D-55411 Bingen/Germany  
Phone +49(0)6721-409-363  
Fax +49(0)6721-409-110  
[roller@fh-bingen.de](mailto:roller@fh-bingen.de)

[www.fh-bingen.de](http://www.fh-bingen.de)

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
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#### Contact

##### Darmstadt Office:

Prof. Dr. Martin Führ - sofia  
University of Applied Sciences  
Haardtring 100  
D-64295 Darmstadt/Germany  
Phone +49(0)6151-16-8734/35/31  
Fax +49(0)6151-16-8925  
[fuehr@sofia-darmstadt.de](mailto:fuehr@sofia-darmstadt.de)

[www.h-da.de](http://www.h-da.de)

##### Göttingen Office:

Prof. Dr. Kilian Bizer - sofia  
University of Göttingen  
Platz der Göttinger Sieben 3  
D-37073 Göttingen/Germany  
Phone +49(0)551-39-4602  
Fax +49(0)551-39-19558  
[bizer@sofia-darmstadt.de](mailto:bizer@sofia-darmstadt.de)

[www.sofia-research.com](http://www.sofia-research.com)



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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

### elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

### elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

### elni Website: elni.org

The elni website [www.elni.org](http://www.elni.org) contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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elni, c/o Institute for Environmental Studies and Applied Research  
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

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