Contributions towards Maritime Spatial Planning (MSP) in Portugal – Conference report

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Abstract:

This contribution summarizes the main concerns presented by experts at a conference held in Lisbon in January 2015 to discuss the developing Portuguese legal framework for MSP and lists the suggestions that were correspondingly offered on how to improve the proposed framework.

Keywords: marine spatial planning; legal framework; stakeholder engagement; sustainable development

Highlights:

- An expert conference was held in January 2015 to discuss Portugal's MSPM framework
- Concerns with architecture of proposed framework and its development were expressed
- Issues of concern were paired with suggestions for their resolution
- Detailed conference report sent to Portuguese authorities prior to diploma approval

1. Introduction

On 16 January 2015, an expert conference took place at FCSH/UNL to discuss the current Portuguese MSP legal framework: the Law establishing the Basis of the Policy for Marine Spatial Planning and Management (MSPM) of the National Maritime Space (NMS) (henceforth MSPM Law) [1] (Table 1), and a Decree-Law Proposal (henceforth Proposal) developing the implementation of the MSPM Law and transposing EU's MSP Directive [2] (cf. Supplementary Material, Table S1, with highlights of the Proposal).

The conference had a double objective: i) to discuss the Portuguese MSP legal framework, particularly the Proposal; ii) to produce a document to be sent to the government with suggestions for improvement. The conference was organized in three sessions (Spatial planning, Law, and Environment) with specialists in themes related to MSPM from academia and civil society as invited speakers.

2. Conference report

Table 2 summarizes the main concerns raised by experts during the conference, focusing on the following themes: i) option for national development model; ii) articulation with the terrestrial planning and management system; iii) management principles in the relation between the central government and the Autonomous Regions; iv) approach to international best practices for environmental sustainability

(including ecosystem-based management, stakeholder engagement, strategic environmental assessment, monitoring and evaluation, and international commitments); v) equity in treatment of uses and activities; vi) clarity of decision criteria for conflict resolution; and vii) general aspects related to the Proposal and to its development process.

To every critique or concern raised at the conference, concrete suggestions for its resolution or clarification were proposed. Table 2 is organized to highlight the clear connection between concerns raised and the corresponding suggestions, showing that no concern was left unaddressed.

3. Conference conclusions

The Portuguese government's merit and effort to regulate such an important and complex matter as MSP of its Maritime Space was generally acknowledged. However, the main message from the conference discussion is that both the Proposal and its development process have been unnecessarily opaque and may promote, rather than avoid, conflict, suspicion, legal uncertainty and waste of time. These lack a solid legal framework and the necessary societal consensus. It is vital to improve the current legal framework, namely in terms of the proposed system's actual capacity to promote the public interest, and to improve its clarity and its capacity to ensure the sustainability of future planning and management actions. This is why, for every concern, suggestions were offered on how to improve the proposed framework. A conference report detailing all of the aspects summarized herein was sent to the Portuguese authorities on 30 January 2015 [3].

The Proposal was officially published, virtually unchanged, on 12 March 2015 (Decree-Law 38/2015) [4]. Voices in the National Parliament have already demanded its further discussion. The organizers of the conference remain fully available to collaborate with the law-making authorities to improve the current legal framework for the spatial planning and management of the Portuguese National Maritime Space.

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References

[1] Law 17/2014, of 10 April. Lei 17/2014, de 10 de Abril. Diário da República, 1ª série, no. 71, p. 2358-62.

[2] Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning.

[3] Ferreira MA, Calado H, Pereira da Silva C, Abreu AD, Andrade F, Ribeiro MC, Fonseca C, Gonçalves E, Guerreiro J, Noronha F, Pereira M, Pinto Lopes C, Stratoudakis Y, Vasconcelos L. Final report of the debate (in Portuguese). In http://www.fcsh.unl.pt/e-geo/sites/default/files/dl/site2014/Relatorio_Debate_Mar_Portugues.pdf, in 20 Abril 2015.

[4] Decree-Law 38/2015, of 12 March. Decreto-Lei 38/2015, de 12 de Março. Diário da República, 1ª série, no. 50, p. 1523-49.

Table 1 – MSPM Law (highlights).

Theme	Description
Principles, Art. 3.	Ecosystem approach, adaptive management, integrated management, valorization and promotion of economic activities, regional and cross-border cooperation and coordination
Objectives, Art. 4(1).	Promotion of economic exploitation, [one which is] sustainable, rational and efficient, of marine resources and ecosystem services, ensuring the compatibility and sustainability of the diverse uses and of the activities developed therein, considering the inter and intra-generational responsibility in the use of the national maritime space and aiming at job creation
MSPM system, Art. 6.	Strategic instrument of MSPM policy: National Ocean Strategy, NOS 2013-2020 MSP instruments for the national maritime space
MSP instruments, Art. 7(1)	Situation plan Allocation plans
Information and participation rights, Art. 12.	(1) All those interested have the right to be informed and to participate in the processes of elaboration, amendment, revision and suspension of the instruments for the spatial planning of the national maritime space, namely by electronic means. (2e) The participation of those interested through the process of public discussion

Table 2 – Synthesis of main concerns and corresponding suggestions for improving the proposed framework.

Theme	Concerns	Suggestions
Development model	<i>The current legal framework is inspired by EU's Blue Growth development model, ignoring sustainable development as a vision. It uses MSP solely as a licensing tool instead of a basis for social, environmental and economic development.</i>	- Clarify the MSP policy of the NMS, namely vision, goals and objectives in the context of sustainable development taking into account the ecosystem approach (instead of just as a licensing regime).
	<i>It is unclear how the economic revenue from private use of the sea including the private use fee (TUEM) will revert to public benefit.</i>	- Allocate part of TUEM's revenue to an Ocean fund to stimulate national-based entrepreneurship and innovation for marine industries, and to invest on science and the long-term protection and conservation of the marine environment.
"One country, two systems"	<p><i>The proposed MSPM system (Situation and Allocation Plans) is not an articulated system:</i></p> <ul style="list-style-type: none"> - <i>It is disconnected from the coastal and terrestrial planning systems, lacking clarification on their interlinkages, and hierarchical relationships, statutory effects, criteria for approval/refusal, scope, typology, and material and documental contents of such instruments;</i> - <i>The possibility of lower ranking allocation plans amending hierarchically superior plans reverses well-established best practices of planning instruments.</i> <p><i>The proposed MSPM instruments are unsuitable for planning:</i></p> <ul style="list-style-type: none"> - <i>The Situation plan is merely a representation of current and potential uses, proposing no programmes or strategies;</i> - <i>Allocation plans are pathways for the promotion of private interests, allocating ad-hoc patchworks of private pretensions of sea uses at the expense of integrated public planning.</i> 	<ul style="list-style-type: none"> - Restructure the architecture and conceptual framework of the Portuguese MSPM system namely in what concerns spatial planning instruments. - Modify terminology: "Situation Plan", should be changed to "Map of existing and potential situation"; "Allocation Plans", when resulting from private initiative, to "Licensing Process for uses and activities". - Public and private investment should be directed to the Situation Plan, to enhance knowledge on existing activities and resources and the impacts and pressures they are subjected to.
Shared management with the Autonomous Regions (ARs)	<i>Several norms in the Proposal are deemed unconstitutional and illegal because they overlook constitutional and statutory principles, such as cooperation and shared management between central government and the ARs, as well as specific competencies of the ARs in relation to sea affairs. The ARs can plan their maritime space, namely through the creation of MPAs and may license certain maritime uses and activities.</i>	- Clarify the concept of shared management and its domains of application in conformity with the Portuguese Constitution and the Political-Administrative statutes of the ARs.
International best practices for environmental sustainability	Ecosystem-based management (EBM) <i>is generically advocated in the legal framework but is not applied (no specific norms for achieving it).</i>	- Adopt provisions for an effective EBM, including fisheries (e.g. consider the spatialization of fishing opportunities).
	Stakeholder engagement in managing the commons: <i>An innovative model of active stakeholder engagement is advocated, in line with European and international law and principles. However, actual participation opportunities in the proposal follow traditional models of participation (e.g. public scrutiny only)</i>	- Introduce effective/meaningful participation mechanisms, from the earliest stages of the planning process, ensuring co-construction of a model of collaborative governance, articulating multiple institutional/societal layers and promoting shared responsibility.

Theme	Concerns	Suggestions
	<p><i>at the final stages of the process) with low levels of engagement.</i></p> <p>Strategic Environmental Assessment (SEA): The proposal states that the Situation Plan may be exempted from SEA, required under EU and national law. Conversely, the proposal parallels Allocation Plans to projects, subject to Environmental Impact Assessments (EIA). However, the EIA legal framework in Portugal is not designed for the reality of the marine environment. It is unlikely that an Allocation Plan will include the elements necessary to identify and evaluate the corresponding environmental impacts, therefore increasing the risk of promoting unreliable evaluations.</p> <p>Monitoring and evaluation: Monitoring the implementation and development of licensed activities, increasing knowledge on the environment and their potential impacts is vital. The operational details of the monitoring obligations of private users and the process of institutional interaction during the evaluation stages are vague, laconic or inexistent, in particular in relation to the mechanisms for collection, transmission, validation and evaluation of data and information.</p> <p>International commitments: The possibility to automatically revoke instruments adopted <i>in the framework of national and international commitments</i> (e.g., MPAs), under <i>dubious concepts such as “national interest”</i>, <i>impairs the sustainable use and conservation goals which have been implemented during the last decades.</i></p>	<p>- Stipulate mandatory SEA of the Situation Plan and Allocation Plans to ensure sustainability of proposed options.</p> <p>- Promote monitoring and evaluation of environmental status: require the collaboration of private users in the provision of access, installation of platforms of opportunity and collection of data during exploitation; guarantee data availability to estimate all new sources of anthropogenic mortality to traditional fishery resources and extend the evaluation of acceptable exploitation level to new resources (e.g. marine <i>taxa</i> relevant for biotechnology); clarify the role of private users and public institutions in the evaluation stage.</p> <p>- Remove the provision that allows revoking protective measures of resources and the environment on grounds of “national interest”.</p>
Differential treatment of uses and activities	<p>Existing uses, namely fisheries (a traditional and socially important activity in Portugal), are not given equal treatment compared to potential emerging uses.</p> <p><i>Exemption of payment of TUEM by activities related to the “exploration and exploitation of geologic and energy resources” is environmentally incomprehensible and socially and economically unfair (TUEM is intended to compensate for the environmental costs of the activities).</i></p>	<p>- Integrate fisheries and other existing (including non-consumptive) uses in the planning process in an equitable way.</p> <p>- Introduce a framework for co-management and shared responsibility in resource management, including, but not limited to, fisheries.</p> <p>- Remove the exemption of certain activities from TUEM, which should be higher for the most profitable (and most environmentally hazardous) activities.</p>
Decision criteria for conflict resolution	<p><i>Geared to the evaluation of social and economic advantages, and based on vague, unreliable and undefined indicators. This may generate practical problems, hindering the implementation of the legal framework. Also, the mechanism (and associated public costs) of relocating existing uses and activities may harm public interests and goals.</i></p>	<p>- Identify and use coherent and clear criteria for conflict resolution among competing uses or activities.</p>

Theme	Concerns	Suggestions
	<i>Unrealistic response deadlines by the administration may lead to undesirable tacit approvals.</i>	- Allot realistic response deadlines to allow for responses in a timely and professional/responsible manner.
<i>Proposal's development process and general aspects</i>	It is unclear why the proposal's development process was not subjected to extensive public discussion, mandated by the transparency and participation principles, pillars of the Portuguese democracy.	- Subject the proposal to further meaningful discussion with a broad range of stakeholders prior to its implementation.
	Dubious/vague concepts and criteria.	- Clarify the wording of the proposal. - Make sure the current policy is coherent with the main responsibilities of a maritime country such as Portugal under national and international law and mechanisms.