

Title: Common rules for legislative drafting in Portuguese-Speaking countries and regions

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1. Introduction

Legislative drafting aims to create criteria, standards, rules and methods to draft quality legislative instruments, since a legislative instrument must convey the intention of the political decision-maker and of its addressees in a simple, clear and certain way.

Legislative drafting can be approached in four different dimensions: i) the normative acts; (ii) “material” rules for legislative drafting; (iii) “formal” rules for legislative drafting and (iv) legislative impact assessment.

The Mandelkern Group (2001) triggered the development of Better Regulation within the European Union (EU), by approving a report which determined the need to pursue a legislative policy based on necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity of the legal rules.

Nowadays, not only the EU, but also the European Organization for Cooperation and Development (OECD), the World Bank and a relevant number of European Union Member-States have been implementing better and smart regulation programmes.

The research project “*Rules for Legislative Drafting in Portuguese-speaking Countries and regions*”¹ is developed by a research team from the Lisbon Research Centre for Public Law². The scope of the project is legislative drafting in its formal dimension and its goal is to promote and define common legislative drafting criteria, standards and rules within the legal orders of the Portuguese-speaking countries and regions: Angola, Brazil, Cape Verde, Timor-Leste, Guinea-Bissau, Macao Special Administrative Region, Mozambique, Portugal and São Tomé and Príncipe. It should be noted that the aim of the project is not to standardize laws within the Portuguese-speaking countries and regions but to find common formal rules to draft laws in those countries and regions.

The research project has been developed since 2016 and should finish in 2020. Currently it assembles Portuguese researchers, legal experts, researchers and consultants from the

¹ See more at: www.icjp.pt/cidp/investigacao/4462/projectos/11618?fbclid=IwAR3qqrNARgpogl5O9qH-nkdzYs1XfBUBkp_VuAxHRwZTNwSM0uVUqBSRUdg.

² See more: www.icjp.pt/cidp/?language=en.

Portuguese-speaking countries and regions and legislative drafting consultants from European universities.

Throughout this paper we will i) justify why we are developing this project of searching common criteria, standards and rules for Portuguese-speaking countries and regions, ii) go through the existing situation of legislative drafting rules in those countries and regions, iii) present the investigation phases of the research project, iv) refer the current investigation lines of research of the project, v) refer the outcomes of the project and vi) present our final remarks.

2. Why searching for common rules?

There are five main reasons which ground the need for this research project: i) since the nine legal orders already have a common legal culture, the adoption of criteria, standards and common rules for legislative drafting is easier; ii) more similar legal drafting rules in a common area allow for an easier understanding of laws and more legal certainty. If the law is easily understood and legal certainty exists, red tape costs³ for businesses in Portuguese-speaking countries and regions will be reduced and investment will be potentiated; iii) a common language shapes the possibility of a cultural setting which is ideal to foster common drafting rules for countries and regions where the law is drafted in Portuguese. This means to study common rules to draft legislation for legal orders where more than 250 million people speak Portuguese; iv) to contribute for a common development, cooperation and integration within a specific area which lacks this type of proximity, essential for the rule of law and society stability and evolution; and v) to enhance the quality of the democratic legislating procedures.

3. Existing situation of legislative drafting rules in Portuguese-speaking countries and regions

The legislative rules in Portuguese-speaking countries and regions are set forth in a collection of laws and guidelines which vary in its form, its legal value (hard or soft law) and scope in each legal order. In a relevant number of cases, the rules are very similar, seemingly

³ *Red tap costs* are excessive bureaucracy and regulation meaning a cost for business.

having evolved from the same shared roots or basis. However, there are exceptions, as we will see.

3.1. Portuguese legal order

Currently, the Portuguese legal order does not have formal legislative drafting rules. However, (a) the Government follows an internal handbook containing the drafting rules aimed at the governmental legislative acts and (b) the National Parliament follows a handbook containing drafting rules aimed at parliamentary legislative acts. There is also a legal instrument in force for ex ante impact assessment of governmental legislative acts.⁴

In the past, formal legislative drafting rules were in force in the Portuguese legal order. Firstly, those rules were included in the Resolution of the Council of Ministers n. 126-A/2004 of September 3. The successive Governments approved Council of Ministers Regiments which contained the same legislative drafting rules until 2015⁵. The last formal act containing these rules was Resolution of the Council of Ministers n. 90-B/2015 of November 9. Although these rules are no longer in force in the Portuguese legal order, they are currently followed. The reason why the current Government opted not to include them in their Council of Ministers' Regiment was the fact that these rules were considered already well implemented in the Portuguese legal drafting tradition and, therefore, it was no longer necessary to include them in a formal act.

Another significant guidebook followed in the Portuguese legal order is “*Legística – Perspectivas Sobre a Concepção e Redação de Actos Normativos*/Legal drafting – Perspectives on the conception and drafting of normative acts”(2002)⁶. This handbook was an important basis for the first Resolution of the Council of Ministers issued in 2004. This handbook was also a precursor of the legislative drafting rules approved in other Portuguese speaking countries and regions.

We must also stress out that Portugal's EU integration imposes the need for different legislative drafting solutions, namely due to the implementation of European regulations and the transposition of European directives through national legislative acts⁷.

⁴ Council of Ministers Resolution n. 44/2017 of March 24.

⁵ Resolutions of the Council of Ministers n. 82/2005 of April 15 (Annex II), n. 77/2010 of October 11 (Annex II) and n. 29/2011 of June 11.

⁶ David Duarte et al., Almedina, Coimbra, 2002.

⁷ See the “Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation”, Luxembourg: Publications Office of the European Union, 2015.

3.2. Angola

The Angolan legal order has formal legislative drafting rules, one regarding the executive power legislative acts⁸ and another regarding impact assessment⁹.

3.4 Cape Verde

The Cape Verde legal order has formal legislative drafting rules aimed at guiding the drafting of governmental legislative acts¹⁰.

3.5. Guinea - Bissau

The Guinea-Bissau legal order does not have a law dedicated to formal legislative drafting rules. But one can find some of these rules in the Regiment of the National Popular Assembly, as in other Portuguese speaking countries and regions.

3.6. Macao Special Administrative Region (People's Republic of China)

The Macao legal order does not have formal legislative drafting rules. However, it does have a handbook which guides the legislative acts of the Legislative Assembly. There is also a handbook for legislative drafting: “Manual de Legística Formal”¹¹.

3.7. Mozambique

Mozambique's legal order does not have a law dedicated to formal legislative drafting rules yet one can find some of these rules in the Regiment of the National Assembly and in an internal resolution of the Council of Ministers.

3.8. São Tomé and Príncipe

The São Tomé and Príncipe legal order has formal legislative drafting rules aimed at guiding the drafting of all legislative acts¹².

3.9. Timor - Leste

⁸ Presidential Decree n. 251/12 of December 27.

⁹ Presidential Decree n. 357/17 of December 28.

¹⁰ Decree law n. 6/2005 of January 24.

¹¹ José Miguel Figueiredo & António Manuel Abrantes, CREDDM, 2015.

¹² Law n. 9/2008 of September 24.

The Timor-Leste legal order has formal legislative drafting rules aimed at guiding the drafting of governmental¹³ and one can also find some rules regarding parliamentary legislative acts¹⁴.

3.10. Brazil

The Brazilian legal order has two formal legislative drafting rules¹⁵ and two handbooks¹⁶.

The Brazilian legislative drafting rules are the ones which differ the most from the other eight Portuguese-speaking legal orders yet the differences do not prejudice the effort of finding common criteria, standards and rules among all of them.

Here are some examples of some striking differences of the Brazilian legal order when compared to the others: example 1) there is no “summary”/”*summary*” of a piece of legislation but an “ementa”, which has the purpose of briefly identifying the object of the legislation; example 2) articles are also divided but in “*parágrafos, incisos, alíneas e itens*” (not in “*números, alíneas e subalíneas*”); and example 3) Brazilian regulation accepts the use of the future tense.

3.7. Conclusions

Within the Portuguese-speaking countries and regions legal orders, Angola, Brazil, Cape Verde, São-Tomé and Príncipe and Timor-Leste have published hard law on legislative drafting.

Brazil and São-Tomé e Príncipe have defined rules aimed at acts of their Parliaments, Presidents and Governments. Angola, Cabo-Verde and Timor-Leste have rules aimed at legislative acts approved by Governments.

The legal orders of Angola, Cape Verde, Guinea-Bissau, Macao, Mozambique, Portugal, São Tomé and Príncipe and Timor-Leste follow, in general, the legislative drafting criteria, standards and rules set by the handbook “*Legística – Perspectivas Sobre a Conceção e Redação de*

¹³ Order n. 1/SECM/2007 of September 14.

¹⁴ Regiment of the National Parliament.

¹⁵ Complementary Law n. 95, of February 26 1998, as amended by Decree n. 9.191 of November 1 2017.

¹⁶ Handbook for drafting of the Republic’s Presidency and handbook for parliamentary drafting.

Actos Normativos/Legal drafting – Perspectives on the conception and drafting of normative acts”.

Guinea-Bissau and Mozambique do not have legal acts assembling legislative drafting rules nor handbooks. Nevertheless each of these legal orders has a set of legislative drafting rules which can be extracted from various laws.

The Special Administrative Region of Macao and Portugal have handbooks with legislative drafting rules aimed at the legislative acts of the Legislative Assembly and the Parliament, respectively (soft law).

For more than ten years – from 2004 to 2015 -, Portugal had formal legislation about legislative drafting.

The differences among the legislative drafting rules of all the nine legal orders are not significant enough to endanger the efforts to achieve common criteria, standards and rules.

4. Research investigation phases

The research project contemplates the following research investigation phases: 1) gathering, systematization and dissemination of relevant data for the research project - already achieved; 2) improving methodologies and working procedures of the research project - already achieved; 3) disseminating obtained data during the development of the project - ongoing; 4) defining criteria, standards and common rules regarding the legislative drafting of laws and regulations within the Portuguese-speaking countries and regions - ongoing; 5) dissemination of the research project’s main outcomes.

These phases comprehend the following steps: phase 1) gathering, systematization and dissemination of relevant data for the research project: systematization, collection and publicity of relevant data for the research project: 1st step: identification and collection of laws, guidelines and doctrine on better legislation drafting in all legal orders of the countries and regions within the scope of the study - already achieved; 2nd step: drafting and publishing of an academic article on the evolution of how legislation drafting has been addressed in Portuguese-speaking countries and regions and brief comparison of the different solutions – in course; 3rd step: identification of the issues on legislation drafting where there is a higher potential for defining criteria, standards and rules, considering each legal order - already achieved.

Phase 2) improving methodologies and working procedures of the research project: further development of the methodology and procedures of the research project: 4th step: first meeting with the research consultants, in order to collect suggestions on methodology and procedures regarding the next steps of the research project - already achieved; 5th step: identification and division on three main blocks of questions on better legislation drafting, to be studied in three different moments/phases, which will be addressed in each of the three plenary meetings of the research team - already achieved.

This phase is being carried out through the drafting of common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions, dividing it into three main blocks: i) a general approach where simplicity and clarity of legislation, the construction of legal provisions or the use of our common language is the focus; ii) architecture and systematics of legal acts; iii) legal reforms, legislative consolidation, simplification programs and other strategies available.

The first block of criteria, standards and legislative drafting rules concerns to: i) simplicity and clarity; ii) titles of legislation itself and of articles; iii) articles; iv) marks, including the use of bold, italic, “quotation marks”, capital and regular letters; v) punctuation, including the use of parenthesis (), upright parenthesis ([]) and dashes (-); vi) uniform use of language and concepts, the use of foreign languages and verbal forms; vii) technical and scientific concepts and formulas; viii) acronyms and abbreviations; ix) numerals; x) changes to legal texts and the inclusion of new articles; and xi) repealing legislation and the cases of special legislation; xii) preambles, explanatory memoranda and equivalent texts.

The second block of criteria, standards and legislative drafting rules concerns to: i) organization and systematic organization of a legal act; ii) articles, numbering, paragraphing and sub-paragraphing; iii) remissive solutions; iv) formulary mentions; v) subject, scope and definitions; vi) specificities of punitive, tax and procedural norms; vii) complementary, transitional and final provisions; viii) attachments.

The third block of criteria, standards and legislative drafting rules concerns to: i) formulary laws and formulas; ii) model laws and framework laws; iii) consolidation and compilation; iv) simplification; v) republishing amended legislation; vi) legislative planning; vii) universal and free access to legal and regulatory texts and accessible communication about them.

Phase 3) disseminating data obtained during the development of the project: dissemination of the data obtained up to this stage of the research project: 6th step: writing of a book on the national and regional rules on legislation drafting in force in the Portuguese-speaking countries and regions.

Phase 4) defining common rules regarding the drafting of laws and regulations within the Portuguese-speaking countries and regions: definition of criteria, standards and common rules on better legislation drafting; 7th step: drafting of proposals regarding the definition of criteria, standards and common rules on legislation drafting for the first block of issues to be addressed and adopted in the first plenary meeting of the research team - already achieved; 8th step: definition of the criteria, standards and common rules on legislation drafting for the first block – already achieved; 9th step: drafting of proposals regarding the definition of criteria, standards and common rules on legislation drafting for the second block of issues to be addressed and adopted in the second plenary meeting of the research team - ongoing; 10th step: definition of the criteria, standards and common rules on legislation drafting for the second block of issues analysed, on the second plenary meeting of the research team - ongoing; 11th step: second meeting with the research consultants, in order to discuss suggestions regarding possible changes or elements to take into consideration at the last plenary meeting of the research team - ongoing; 12nd step: drafting of proposals regarding the definition of criteria, standards and common rules on legislation drafting for the third block of issues to be addressed and adopted in the third plenary meeting of the research team; 13th step: definition of the criteria, standards and common rules on legislation drafting for the third block of issues to be addressed at the third plenary meeting of the research team.

Phase 5) dissemination of the research project's main outcomes: 14th step: writing and publishing of a book on common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions, which may be used for several purposes, namely within the Community of Portuguese Speaking Countries (CPSC); 15th step: writing and publishing of a text which will assist in the implementation of the common rules on legislation drafting, which may play the role of a “reference book regarding legislation drafting in the Lusophone space”.

5. Research investigation lines

The project is quite active and has the following investigation research lines: i) identifying the different legislative drafting rules in Portuguese-speaking countries and regions – already achieved; ii) defining and improving methodologies and working procedures to set common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions - ongoing; iii) publishing a paper comparing different legislative drafting rules in Portuguese-speaking countries and regions - ongoing; iv) drafting and discussing a project of common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions with international consultants via presential meetings, conference calls, e-mailing - ongoing; v) holding workshops on legislative drafting - ongoing; vi) managing the contents of the IAL website - ongoing; vii) holding a Legislative Drafting post-graduation – already achieved; viii) participating in the Institute of Advanced Legal Studies Law Reform Project, with a Literature Review and Commentary on law reform in the Portuguese legal order¹⁷ – already achieved; ix) setting common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions (binding or non-binding); and x) drawing up a handbook on common criteria, standards and rules for legislative drafting in Portuguese-speaking countries and regions.

6. Research project outcomes

The following outcomes will represent the full achievement of the research project's goals: i) issuing a report with the common criteria, standards and rules on legislative drafting for the Portuguese-speaking countries and regions, which may be used for several objectives, namely within the CPSC, taking advantage of the existing knowledge in the legal orders with a Lusophone basis; ii) writing and publishing an article/book, which will assist the implementation of the common rules on legislation drafting - academic approach; iii) writing and publishing of a preliminary scientific article on the evolution of legislation drafting rules in Portuguese-speaking countries and regions and a brief comparison of the legislation in force regarding that matter; iv) holding an annual post-graduate course on “better legislation drafting and science of legislation”, which will take place under the responsibility of the Institute of Legal and Political Sciences of the Lisbon School of Law, in connection with similar activities in other Portuguese-speaking countries and regions; v) possibility of creating a “Legislation Observatory of Portuguese-speaking countries and regions”; vi) possibility of creating a legal drafting manual officially adopted by the CPSC or other international

¹⁷ See more: <https://ials.sas.ac.uk/research/research-centres/sir-william-dale-centre-legislative-studies/ials-law-reform-project>.

organization – soft law approach; vii) possibility of creating a declaration/proclamation by the Portuguese-speaking Countries and Regions – soft law approach; viii) possibility of establishing an international convention or a legally binding act of the CPSC – hard law approach.

The hard law approach is the most effective way of achieving harmonization on legislative drafting rules in Portuguese-speaking countries and regions, but it is difficult to achieve and implement, namely due to the sovereignty issues that it raises.

On the other hand, the soft law approach is not only achievable but also effective. It is the preferred international approach, having been used to create i) the joint OECD/EU SIGMA (Support for Improvement in Governance and Management) program: Law Drafting and Regulatory Management in Central and Eastern Europe; and ii) the Commonwealth Legislative Drafting Manual, in 1976. In order to face a shortage of trained legislative drafters in the Commonwealth, the Commonwealth Secretariat published a legislative drafting manual aimed to inform practitioners with little or no experience in legislative drafting so to explain the particularities of legislative drafting.

Finally, the academic approach, it is easily achieved yet the less effective. The publishing of an article or book which gathers the legislative drafting rules in Portuguese-speaking countries and regions may represent a reference regarding the legislation drafting in the Lusophone space, assisting the implementation of those rules in nine legal orders.

7. Final remarks

The nine legal orders of Portuguese-speaking countries and regions have a common language - more than 250 million Portuguese-speaking citizens - and many legal culture similarities. Finding common rules for legislation drafting in this area will bring us all a simplification of access and understanding of the law, on a one hand, and a stronger legal certainty, development, cooperation and integration for citizens and companies within this wide area, along with better quality of the democratic legislating procedures and more stability of the rule of law and society, on the other hand.