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ID 1610 | THE NEW "PLANNING AMNESTY" IN PORTUGAL: HOW FAR SHOULD PLANS ACCOMMODATE NONCOMPLIANT DEVELOPMENT?

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1 INTRODUCTION

In 2014, Portugal introduced legislation[1] imposing amendments on statutory plans to accommodate illegal structures "that are incompatible with land management instruments or land use restrictions" applied to productive units such as industrial, farming, waste management and quarries. The initial deadline for application was January 2016, but was extended until June 2017[2]. This amendment also introduced "subtle" changes, to include buildings in which construction had not been finished, and some types of warehouses. The pressure for a solution to illegal development arose from restrictions on real-estate transactions and conditions placed by the EU on eligibility for its funding mechanisms. Though not

[1] Decree-Law 165/2014, from November 5.
[2] Law 21/2016, from July 19.

intended as such, this new legislation has several similarities (but also important differences) to other planning amnesties implemented in other Mediterranean countries.

How far should plans accommodate noncompliant development? The object of the paper is to formulate a perspective on the new planning amnesty in Portugal and to elaborate on expected results, built on the experience of similar programs in other Mediterranean countries.

1.1 COMPARATIVE INSIGHT

In general, planning amnesties are "programs" or, in other words, "time-window" opportunities for private owners to formalize illegal building, installation, or uses that are not compatible with statutory plans. These amnesties have become "traditional" in some countries, e.g. in Turkey, where they have been granted 16

times since 1983 (Unsal, 2009), and in Italy, and repeatedly since 1985 (Zanfi, 2013). More recently, Greece implemented a similar program, but with temporary effects. In September 2009, a new law was adopted by the Greek Government to allow the legalization of "minor" alterations in buildings located in planned urban areas, provided they did not exceed the volume of the building, and the approved urban planning indexes in terms of height and construction area. It allowed, for example, the legalization of marquees and the closing of semi-open areas of buildings. With the same scope, Law no. 3843/2010 permitted the temporary legalization of such changes for a period of 40 years, upon presentation of a declaration. This was practically optional between 2010 and September 2011, and, since transactions and real estate mortgages with such changes were not prohibited, they had a reduced impact.

Law 4014/2011 made it compulsory to declare illegalities, major or minor, in planned or unplanned areas (excluding those located in protected areas such as public space, too close to roads or streets, forestry land, seashores, beaches, too close to coastlines or riverbeds, archeological or historic sites) (Lalenis, 2015). Small changes within the volume of buildings in planned areas continue to enjoy a period of immunity from enforcement actions for 40 years and the remainder for 30 years. Within this period, the local administration is supposed to implement the necessary regeneration and urban renewal plans. Simultaneously the law introduces a restriction on the transaction of illegal or semi-legal buildings requiring the presentation of an owner´s declaration and an up-to-date certificate from a private expert regarding the compatibility of the work with the approved project. The procedure has thus become more rigorous, but consequently, the transaction is based on more bureaucracy with higher costs (also for legal buildings). The Ministry of Environment has recently clarified this certificate is not required in the case of mortgages. By May 2013, 562,263 declarations had been submitted, despite that only 68.6% of these completed the process by paying the appropriate fees. For the period 2009-2013, the estimated revenue from the amnesty to the public asset is around € 1 billion. The total expected revenue resulting from the new Law no. 4178/2013 was about 5 billion euros. However, it is estimated that, by keeping these informal constructions out of the economic cycle, the annual GDP loss is about € 3 billion (Potsiou, 2015). Other South-eastern European countries have implemented similar policies: Montenegro, Albania, the former Yugoslavia Republic of Macedonia, Greece and Cyprus (Potsiou, 2014). All these provide some kind of "pardon" for illegal development.

But amnesties should not be viewed as the only option in dealing with non-compliant development. Other public policies have been designed to respond to non-compliant development in private property in South European countries, with different options in content and form. In Spain, the status of "similar to out-of-order" (assimilado a fuera de ordenación) provides a second type of permit for non-compliant buildings. It has a long background, coming from the 1965 Law of the Soil and was adopted by jurisprudence from the end of the 1980s, undergoing a gradual process of adjustment (Cortés Moreno, 2011; López Pérez, 2010) with significant changes in 2016. In more discretionary planning systems, as in the UK and Israel, there is no special legal framework to answer non-compliant development, but neither there is any restriction on selling illegal or semi-legal real estate. A reliable registry system and buyers' demand on "legality" (more in the UK than Israel) seem to be enough to avoid major growth of an illegal development market. Portugal is included in the list of countries where real estate restrictions were implemented.

The Portuguese government has opted, until very recently, to ignore the existence of illegal development, except for the particular case of semi-informal settlements (called "loteamentos clandestinos"), for which a

special legal framework was designed since the 1970's[1]. However, the ongoing process for semi-informal settlements relates mostly to the provision and payment of urban infrastructures and not to buildings – after tenure regularization it still requires a second step of building legalization to the same standards as required in formal land. Despite the mature level of the planning system, national planning literature is short in addressing the issue of non-compliant development in private property. For political, social and economic reasons, planning enforcement is seen as a burden on public administration.

But illegal and noncompliant development is not an inconsiderable problem, especially regarding illegal housing in the district of Lisbon (Rolo, 2006; Silva & Farrall, 2016). Estimates point out to 158,000 illegal dwellings built between 1970-1981 and a total of 314,400 in the sum of 12 districts (Cardoso, 1983, p. 350). A more recent study shows that the phenomenon is not only from the past, and about 285.000 dwellings were built without a building permit between 1991-2011 (Calor, 2017). This number is similar to Andalusia Autonomic Community in Spain (about 300.000 dwellings) but lower than the Greek estimate (1 million buildings with different uses). The reason why the discussion was been absent from planning agenda in Portugal is probably related to the social inconsideration of building illegalities, the absence of government recognition of the problem and the lack of legal framework.

In amnesties, design "details" do make a difference. There are two major differences to other planning amnesties (i.e. Greece, Italy and Turkey): (i) the Portuguese amnesty applies only to a selective use of buildings and (ii) it allows/promotes the formalization of buildings and extensions in areas where development restrictions were before more strict: natural parks, coastal areas, environmental and agriculture reserves. It is worth mentioning that it only applies to private property, not to squatting settlements or semi-informal ones.

2 THE PORTUGUESE PLANNING AMENSTY

2.1 LEGALIZATION BACKGROUND

Ad hoc legalization has been the main way of dealing with illegal development in Portugal and has gained increasing relevance due to the restrictions on selling implemented in 1999[2]. The number of legalization submissions has continuously increased since then, becoming a "burden" in land development (Calor & Pereira, 2015). In regular mode, legalization (or retrospective permits, as they are called in Britain) is theoretically very strict and depends on compliance with plans at the time of approval. In municipalities, bending planning rules to allow legalization is a common and accepted way to avoid the personal and political costs of demolition or imposing changes to buildings. Despite its significance, Portuguese legislation only incorporated "legalization" in 2014 (article 102-A of the Decree-Law no. 555/99, of December 16). In the same year, the new "selective" planning amnesty for economic activities was implemented (Decree-Law no. 165/2014, de November - RERAE[3]). Oliveira & Lopes (2016) call the sum of these pieces of legislation (together with the old law for regularization of semi-formal settlements) the new "legalization policy".

Exceptions for non-compliant development of economic activity were previously set in Portuguese law before 2014, but because they were in separate pieces of law (one for each of the economic activities[4]) they had less visibility. Their impact was reduced because plan amendments were optional, and in fact hardly any occurred. The reason why the amnesty program was selective to economic activities (and not general to other buildings use, as in other countries) is not entirely clear and it poses some obvious questions of proportionality, social-fairness and the point of having a binding planning system. For one, housing illegalities (especially extensions) are far more frequent and, second, no exception is made in law for those built out of necessity or even for those illegally built before plans implementation (Calor, 2013). National economic growth, inherent in economic activity, may be of public interest, but non-compliant buildings for other uses do not have a compatible solution.

[1] Decree-Law no. 804/76 of November 6 and Law no. 91/95, of September 2.
[2] Decree-Law no. 281/99, of July 26.

[3] RERAE is the abbreviation to "Regime Extraordinário de Regularização das Atividades Económicas".
[4] For example, Article 69 of Decree-Law no. 209/2008 (Legal framework of the Exercise of Industrial Activity)

From a social perspective, amnesties give advantages to developers who, at first glance, did not care to follow the rules. In an opinion article, Schmidt (2014) wonders “what message this piece of law transmits to the many compliant entrepreneurs who put significant effort in fulfilling environmental and public health law? That crime pays? As is evident, it is also a problem of disloyalty provoked by the state.” The economic boost can be seen as public interest (job creation or maintenance of the existing ones and seizing the opportunity of economy growth to access European Funds) but may be regarded as too “selective”. Regularization of development driven by a developer’s profit (not necessity) may aggravate the already high mistrust of the Portuguese legal and planning system.

2.2 AMNESTY TIMMING AND PROCESS

The time-window of RERAE was originally scheduled to finish by January 2, 2016. However, Law no. 21/2016, of July 19 (extemporaneously) extends its deadline between that date and July 24 of 2017. Although not mentioned in the preamble, this law also extends the scope of situations and activities that can be regularized. Since July 19, RERAE can also be applied to the “regularization” of buildings which have not been started, have started and then ceased, or have been suspended for more than one year, provided there were some kind of building or physical structures (whether started or finished). Besides industrial, farming, waste management and quarries, it now also allows the regularization of “establishments and farms intended to support agricultural activity, agriculture, horticulture, fruit growing, forestry and beekeeping, such as warehouses, outbuildings and cold-storage plants”.

The process of application foresees the need to obtain, in advance, a declaration of municipal interest issued by the municipality and a study of economic viability of the company. The owner should submit the application to the responsible body (different, according to the activity[1]) and pay a fee (variable accordingly to administration body and municipalities). After acceptance of initial documents, it is subject to evaluation by a multilevel Government Commission, and a decision is made during a “council meeting” with representatives of all bodies with jurisdiction over the land or activity. Accordingly to CCDR representatives, very few submissions have been denied. If operating conditions are considered adequate, a two-year permit is issued. Municipalities are then required to promote an “automatic” amendment to general master plans within that period. Regular plan amendments are usually long, highly bureaucratic and expensive. It is still uncertain and unclear how the “automatic” amendment process will be undertaken and the costs involved. Nothing being said, it is likely that they will be mostly, if not entirely, supported by municipalities.

2.3 AMNESTY IMPACT

The reach of the amnesty can, somehow, be measured by the number of submissions. As there was no previous published data, we asked the coordinating body (CCDR[2]) for quantitative data that would allow a general perspective. In this paper, we provide data from 2 out of the 5 regions in Portugal: (i) North and (ii) Lisbon & Tejo Valley Region. These are expected to be the regions with more applications (having more dynamic economic activity). A total of 687 applications were submitted in both regions until March and April 2007.

[1] IAPMEI for industries Type 1 and 2 (“heavy” industry); Municipalities for industry Type 3 (“light” industry); DRAP for farming; CCDR for waste management and; DGEG for quarries. It is unclear which body is responsible for agriculture structures.

[2] CCCR is the abbreviation for Comissão de Coordenação e Desenvolvimento Regional.

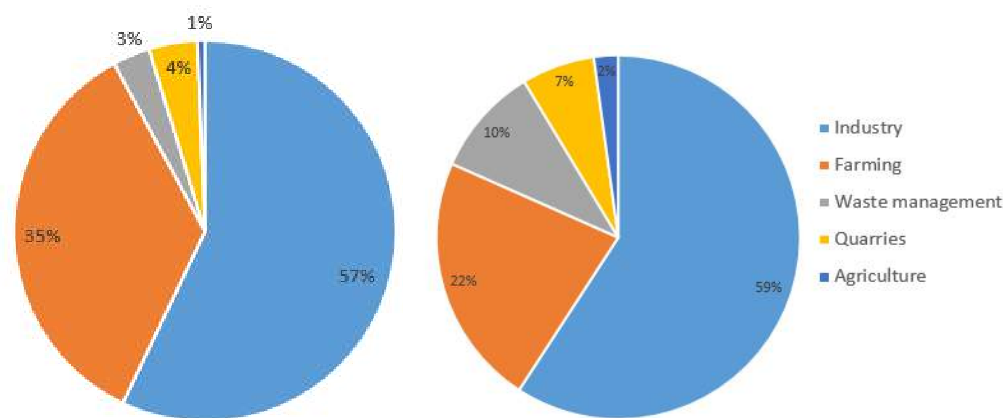

Figure 1 – Number of applications under RERAE in North region, by sector submitted before March 6, 2017. Source: CCDR-North

Figure 2 – Number of applications under RERAE in Lisbon & Tejo Valley Region, by sector submitted before April 18, 2017. Source: CCDR-LVT

Figures 1 and 2 show the activities with most impact, industry representing more than half the applications (184 in North Region and 219 in Lisbon & Tejo Valley Region) and animal farming is the second (111 in North region and 83 in Lisbon & Tejo Valley Region). Waste management and quarries are less representative. Agriculture warehouses have only ten submissions, which is explained by the uncertainty about which body is responsible for regularizing this type of building. Therefore, the extension of the "scope" of RERAE by Law No. 21/2016, of July 19 did not have major effect yet.

Figures 3 and 4 show results by sector and municipality. It indicates that in both regions there are significant differences among municipalities, and a few municipalities have a greater share of the total submissions. Vila Nova de Gaia (36) Sintra (72) and Ourém (60) have numbers much higher than other municipalities, which all set under 30. More than half of the municipalities have below five submissions and 54 municipalities (not represented in the chart) have no submissions. Difference in numbers does not seem related to municipality size, population or other geographic or social factor.

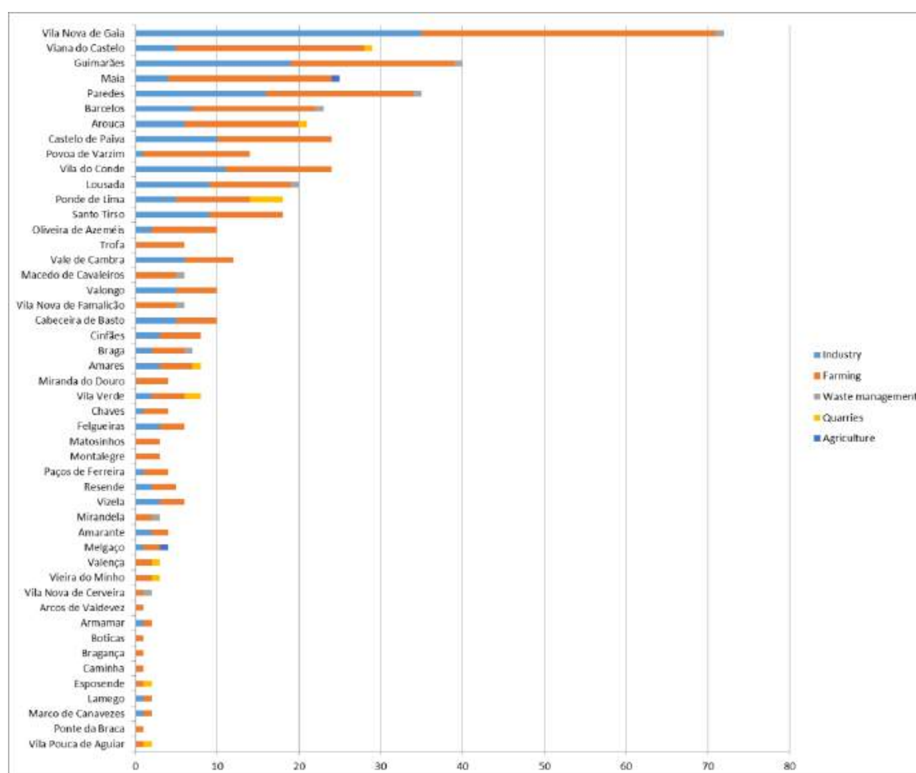

Figure 3 – Applications under RERAE in North region, by sector and municipality submitted before March 6, 2017. Source: CCDR-North

In a future investigation it would be interesting to understand if these numbers are a result of high numbers of illegalities or, as we believe might be more accurate, a consequence of a more active approach from municipalities (in creating expectations and incentivizing owners into submitting an application).

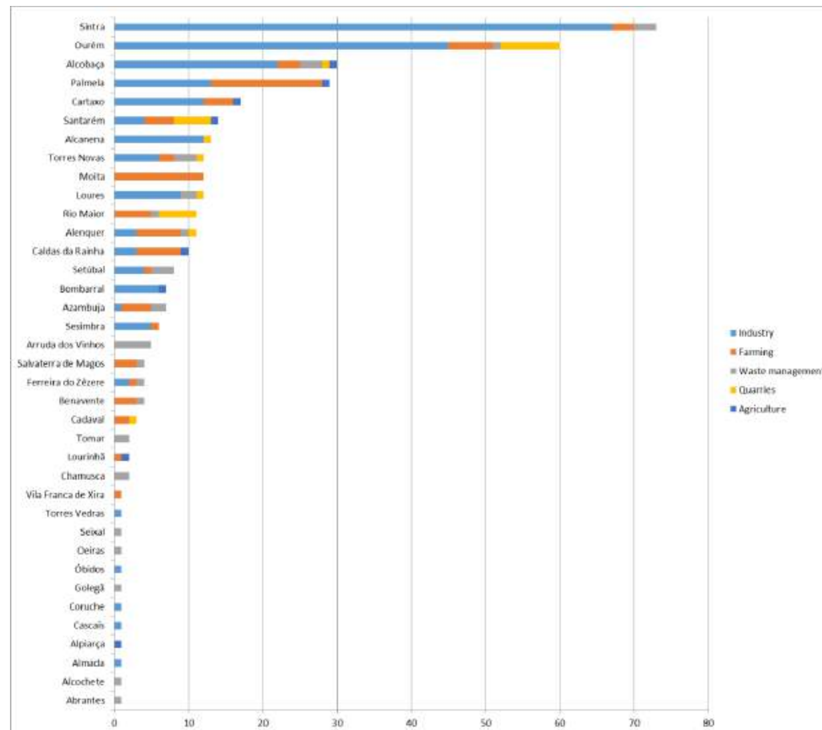

Figure 4 - Applications under RERAE in Lisbon & Tejo Valley Region,
by sector and municipality submitted before April 18, 2017. Source: CCDR-LVT

2.4 EXPECTED RESULTS

The newness of the diploma and the embryonic state of progress of the regularization process, have not allowed them to achieve their full potential; but, considering its expected length, we believe it will not reach owners' expectations. Affordability, and short term results are considered by Potsiou (2014) as key to achieving positive results, and these effects are not expected from the Portuguese amnesty.

The legislator's choice to impose the change on the planning instruments seems inconsistent with the proposed objectives. By demanding that final regularization be made through conventional legalization, and making it dependent on the change to plans, the process does not meet the interests of timing and costs for the entrepreneurs. On the other hand, the costs of plan amendments will be up to the municipalities.

3 CONCLUSIONS

Planning amnesties are not new in South European countries, having been implemented in different stages and forms. The Portuguese amnesty is a "selective" one because it relates only to certain types of economic activities; therefore, the number of submissions cannot be compared to broader planning amnesties in other countries. Quantitative data from the North Region and Lisbon & Tejo Valley Region show that the numbers are not very significant. Only in a few municipalities have "visible" numbers, being industry the activity with the biggest share.

Plan amendment costs are relevant but have not been given much consideration, which will very likely delay municipalities making the "punctual" amendments that are required to complete the process. Mandatory plan amendments require a long time and it is unlikely that municipalities (especially small

ones) will have the human and financial resources. Economic interests behind planning prevail over spatial planning principles and, as in all planning amnesties of this nature, there is a sense of injustice to compliant individuals.

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