

Portugal and European Integration - Negotiations and Legal Implications

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Portugal lodged a formal request for accession to the European Communities on 28 March 1977, in accordance with Article 237.^o of the EEC Treaty¹. The decision to apply for accession was made possible by the change in the Portuguese political regime brought about on 25 April 1974, and, above all, by the approval of a new Constitution in 1976, and was supported by the political forces representing the overwhelming majority of the population. This put an end to years of hesitation regarding the strategic insertion of Portugal in the European arena.

Certainly, contrary to Spain, Portugal had been present from the start in some of the international organisations created in the post-war period, under the shield of the USA (NATO, OEEC/OECD). However, the country's access to the democratic European organisations that were not purely commercial, was barred due to the authoritarian nature of the Salazar regime.

Therefore, when in the fifties, United Kingdom decided to stay out of the European Common Market and to create EFTA, Portugal followed this example, and was among the seven countries that signed the Stockholm Convention. Besides, EFTA, compared to the EEC, offered considerable advantages for Portugal, bearing in mind the country's state of development (which was at the origin of Annex G to the Stockholm Convention) and its special links with the Overseas Territories, safeguarded within the framework of that organisation.

Later, whenever Great Britain applied for membership of the Communities, twice boycotted by General de Gaulle, Portugal also asked for negotiations to begin, with a view to achieve a suitable arrangement. It was only in 1972 when United Kingdom succeeded in joining the Common Market, that the Portuguese Government managed to sign an agreement with the EEC. The Inter-Ministerial Committee set up to examine the problem was of the opinion that an Association Agreement was highly desirable. Nevertheless, only a mere Trade Agreement, applied to all industrial products originating in EEC territory and in Portugal (excluding Portuguese colonies), could be obtained.

After 1976, the political situation stabilised and Portugal succeeded, even before applying for membership, in obtaining improvements in the commercial clauses of the 1972 Agreement and widening their scope to include technical, social and financial cooperation. Such forms of cooperation, contributed to boost the conditions to face the difficult negotiations that were approaching. These were accompanied by the conclusion of an agreement with the Community granting Portugal important "pre-accession aid", aimed at the strengthening of infrastructures required for economic development, as well as the capacity of national SMEs.

The accession negotiations were long and complex, not the least because they were conducted in parallel to those with Spain, and followed the pre-established, proven model used in earlier enlargements. The starting point for these negotiations was acceptance by the applicants of the so-called *acquis communautaire*, without jeopardising, whenever necessary, the setting up of transition periods and, exceptionally, temporary derogations, allowing for a gradual approach to be made until Community rules were fully applied.

At the same time, adjustments to the composition and functioning of Community bodies, as well as to applicable budgetary mechanisms, had to be determined. The issues to be negotiated were divided into separate chapters (*dossiers*) according to their subject following, on the whole, the structure of the Treaty: customs union, free movement of workers and social policy, capital movement, right of establishment and freedom to provide services, agriculture and fisheries, transport, environment and consumer protection, regional policy, economic and financial matters, budgetary issues, the Community's foreign relations and institutional issues.

At the same time, triangular negotiations between Portugal-EEC-EFTA were taking place with a view to preparing Portugal's exit from the latter and to adapting the free trade agreements between the two blocs in order to maintain the level of liberalisation already achieved in trade between Portugal and its EFTA partners. One by one, the different *dossiers* were opened. But it was only in 1982, using the technique of grouping *dossiers* into "packages", that the first agreements negotiated were concluded, subject to the global result of the negotiations for accession. The negotiating teams, government and administrative bodies set up for the purpose in Portugal, some more effective than others, varied over time.

Responsibility for conducting the negotiations sometimes laid with the Deputy Prime Minister, who at the same time held the portfolio for Finance or for Foreign Affairs, assisted by a junior Minister for European Integration; in other cases it was the Minister of Finance who carried the political responsibility for the negotiations, assisted by a junior Minister or a Director-General; in one of the governments involved, a Minister for European Affairs had negotiations in charge, assisted by a junior Minister.

The structure of Government reflected to a large extent the priorities selected. Were the diplomatic aspect to be emphasised, the logical solution was to give Foreign Affairs the key role; when the urgency of domestic adaptations was considered more important, then the move was to the Ministry of Finance.

Furthermore, when a Deputy Prime Minister assumed responsibility for European Integration affairs, the political importance of whoever was responsible for the negotiations was reinforced, while improving inter-ministerial coordination. Whether the junior Minister responsible had a seat in the Council of Ministers or not also indicated the political importance attached to the accession process. At the same time, it also determined how efficient was the performance of the negotiators in handling the work assigned to them. Indeed, should the leader of the negotiating team and responsible for coordination on the ground meet regularly with different members of Government at the Cabinet meetings, he would be able to understand, discuss and influence their positions, rather than having only indirect contact with them through their lower level representatives.

Technically, coordination between the different State departments was ensured by an *Inter-Ministerial Commission for European Integration*, chaired by a junior minister and comprising representatives of the different ministries, as well as of the Autonomous Regions of Madeira and the Azores. These representatives expressed the negotiating positions of the respective departments and were responsible for preparing documents to be submitted to Brussels on sectoral matters.

A *Secretariat for European Integration*, including specialists from the different areas being negotiated, provided direct support to the junior minister. To complete the Portuguese negotiating machine, the *Mission to the European Communities* provided the interface with the services of the European Commission, as well as with the negotiating teams in the Commission and in the Council, and with the Permanent Representatives of the Community Member States.

There was also an *Advisory Committee*, where the representatives of the social partners had a seat – Confederations and Associations for Industry, Trade and Agriculture and the unions. This Council was consulted regularly on the more important aspects of the negotiations. The work of this Advisory Council was particularly useful, not only because it heard the opinions of the different social and economic players, but also because it could give the Portuguese negotiating positions the indispensable “rear guard” backing.

But, whereas one of the technical and political difficulties was the fact that certain ministries were not sufficiently sensitive to the requirements of the integration process, listening to the opinions of the social partners also fell short of expectations. Indeed some of them lacked the necessary preparation, and sometimes adopted purely ideological attitudes in dealing with the specific problems addressed in the negotiations.

Consequently, one of the major concerns expressed by those responsible for the accession negotiations was that the country should be prepared to meet this challenge. To this end, training and information campaigns were launched throughout the country in cooperation with trade unions and industry organisations. Besides, information programmes on EEC were broadcast on national television and university post-graduate courses on European Integration were set up in the Faculties of Law and Economics and raised considerable enthusiasm. At the same time, young Portuguese graduates were encouraged to attend doctorate or post-graduate courses on European Affairs in European universities (France, Great Britain, the Bruges College of Europe, the University Institute of Florence, etc.).

Supported by diplomatic initiatives at the highest level – the Prime Minister, accompanied by those members of government most involved in the negotiations, made several tours of the European capitals to get political backing from his future partners – the negotiations were concluded and the Accession Treaty was signed in June 1985. Portugal obtained several derogations or transitory periods – some justified, others of more than doubtful utility – in agriculture, right of establishment [travel and tourism agencies (!), dubbing and sub-titling films (!)], iron and steel, the banking sector, foreign investment and in the management of uranium reserves.

Conversely, Portugal had to agree to restrictions in “sensitive areas”. The severest restrictions Portugal had to accept were on exports of textiles, tomato paste, wines and canned food, as well as on the mobility of workers. The latter was imposed for periods of 5 to 7 years, as a rule, with a maximum of 10 years for

Portuguese immigrant workers in Luxembourg, or who intended to move there. In practice, these restrictions appeared to be excessive and not sufficiently justified, and therefore were lifted before their deadlines had elapsed.

At the same time, a survey was carried out in collaboration with the European Commission on “secondary legislation” in force and the changes it would bring about in Portuguese legislation in a wide range of fields. Accession to the European Communities did have serious implications for the Portuguese legal framework. This was inevitable, bearing in mind the two fundamental principles which, in accordance with the Treaties and the case law of the Court of Justice of the European Communities, prevail in relations between the Community legal system and national legal systems: *Direct effect and Primacy of Community law over national law*.

In several important cases, the Court of Justice had occasion to point out that the above-mentioned principles apply equally in relations between Community law and the Constitutional Law of Member States. Initially, such an approach gave rise to reluctance on the part of some constitutional courts or other legal authorities with jurisdiction over the control of the constitutionality of laws. Such was the case with the constitutional courts in Germany and Italy, and with the French *Conseil d'État*. But, with time, they all came to recognise the special features of the Community legal system, which could gradually affirm and consolidate its autonomy.

In Portugal, the question of compatibility between the 1976 Constitution and the Community legal order was widely discussed in doctrine already at the time when the original version of the Constitution was in force. It was discussed mainly in terms of compatibility between “models”, thus comparing the model implicit in the Portuguese “economic constitution” and the so-called “EEC economic model”.² Basically, there were two extreme positions: one³ considered the Portuguese constitution to be fully compatible with the economic constitution of the EEC, due to the “anaesthetising effect” of a certain number of the more ambiguous provisions in the text of the constitution; the other⁴ considered that the Portuguese Constitution enshrined a political-economic model incompatible with that of the EEC and, therefore, with the requirements arising from our integration. Several intermediary positions laid between these two extremes.⁵

To eliminate the main formal obstacles to accession, a constitutional amendment in 1982 added a § 3 to Article 8 in which: “*Rules made by the competent organs of international organisations to which Portugal belongs, apply directly in national law to the extent that the constitutive treaty expressly provides*”. This addition was, however, far from resolving the whole problem. Without going into the questions of the utility or need of the provision, as well as of the cumbersome terminology used in it, mention should be made to the fact that the paragraph in question included the adverb “expressly”. This raised doubts as to the importance attached by the Constitution to the case law of the Court of Justice which recognises direct effect for Community provisions (such as the *directives*) without this being *expressly* laid down in the constituting treaties.

Consequently, the 1989 amendment deleted the adverb. But this did not help clarify the understanding of the constitutional text on another problem, i.e. the hierarchical relations between Community law and national law and, therefore, the question of primacy of the former over the latter.

Nevertheless, although it had smoothed out some of the more obvious ideological aspects of the text of the Constitution, the 1982 amendment did leave behind many signs of the anti-liberal, bureaucratic and State control approach typical of the revolutionary period, opposed to the market and geared to Marxist inspired socialism. It was the later amendments that finally aligned the Portuguese Constitutional system with the political-economic model established by the treaties.

The Portuguese Constitutional Court analysed the question of “primacy” in the first judgement it was requested to give a ruling on the relations between the two legal systems (Case nº 154/89, judgement nº 163/90 in Section II, of 23 May 1990, – *Campo da Fonte do Piolho*). In this judgement, the Constitutional Court made an in-depth analysis of the preliminary ruling procedure (art. 177 of the EC Treaty⁶), as instrumental to the primacy and the uniform application of Community law. It also analysed the nature and limits of the obligation to refer a question for preliminary ruling and expressly considered itself bound by this obligation.⁷

With the prospect of the Treaty of Maastricht coming into force, several Constitutional provisions were amended or added in 1992:

- Article 7: a § 6 was added authorising the Portuguese Republic, under condition of reciprocity, to “*enter into agreements for the joint exercise of the powers necessary to establish the European Union*” having due regard for the *principle of subsidiarity* and the objective of *economic and social cohesion*;
- Article 105 (which became Article 102 after the 1997 amendment): the alteration aimed at adapting the powers and independence status of the Bank of Portugal to the new context of EMU;
- Article 166 (currently Article 163), subparagraph f), and Article 200 (currently Article 197), § 1, subparagraph i): on the parliamentary powers (of the *Assembleia da República*) to monitor acts of Government within the framework of the process for implementing the European Union.

Finally, during the 1996-97 IGC, that led to the Treaty of Amsterdam, amendments were made to:

- Article 102: “*The Bank of Portugal, in its capacity as a central bank, shall carry out its functions in accordance with the law and with the international rules to which the Portuguese State is bound*”;
- Article 112, § 9: new paragraph added, on the transposition of Community directives into the internal legal order, by law or decree-law, depending on the case;
- Article 115, §§ 4 and 5: on the possibility of submitting to referendum issues of relevant interest which must be the subject of international agreement, in principle within the jurisdiction of the *Assembleia da República*;
- Article 161, sub-paragraph n): power of the *Assembleia da República* to give its opinion on matters that are pending decision within the organs of the EU;
- Article 164, sub-paragraph p): exclusive jurisdiction of the *Assembleia da República* to legislate on rules concerning the appointment of members of EU organs, except for the Commission;
- Article 227, § 1, sub-paragraph x): participation of the autonomous regions in the process of implementing the European Union.

Penetration of Community law in Portuguese law was however not limited to constitutional level.

Secondary legislation and regulations on an endless number of activities were submitted to Community imperatives and adjusted to the demands of integration.

This has been the case, for example, with taxation (introduction of VAT), environment and consumer protection, intellectual property, public procurement and advertising, competition policy and State aid, transport, insurance and banking, telecommunications, energy and other utilities sectors.

In some branches of activity, covered by common policies, decision-making moved, in what was essential, to Brussels, the national authorities being limited to the execution of EC rules and to monitoring compliance with them and ascertaining that objectives defined by those rules are met. In this category are agriculture (submitted to the CAP), fisheries, foreign trade relations (common commercial policy) and, with gradual but rapid implementation of EMU, monetary, exchange and interest rate policies. At the same time, regional, social, vocational training, infrastructure and SME support policies, and after the Single Act and EU Treaty were approved, policies for culture, public health, research and technological development, benefited from Community support, as defined in the Treaty and in secondary legislation.

In addition, questions of common interest involving justice and home affairs (asylum, external border controls, immigration, combating drug dependence and drug trafficking, combating fraud, terrorism and other forms of international crime, police cooperation in civil and criminal matters and customs cooperation), subject to the mechanisms of intergovernmental cooperation as part of the so-called Third Pillar of the Treaty of Maastricht, were, at least partially, submitted to the Community rules by the Treaty of Amsterdam.

That is, these areas can no longer be viewed as though Portugal, or any other Member State, still had unrestricted legislative jurisdiction, and unlimited sovereignty not shared with its EU partners. All of this also means that in 15 years Portugal was forced to relinquish her introverted, protectionist attitude that for decades marked the life of the nation and to get used to life in an open European area. Open, meaning not only to trade in goods, services and capital, as envisaged from the beginning in the EEC Treaty, but also to the free movement of persons within the *Schengen Territory* (an area of freedom, security and justice), including citizenship rights that are not only economic and social, but also involve electoral participation, diplomatic protection, the right to petition and to appeal, as well as judicial protection.

At this respect, one last, important word must be added. It is impossible to speak of an effective judicial protection of individuals in the Community legal framework without first having created, within each

Member State national legal framework, the capacity to apply it and to uphold the rights that individuals (citizens and companies) draw from it.

The Portuguese experience in this field is elucidative – this time negatively. In fact, information is decidedly lacking as is the preparation of Portuguese magistrates in the different areas of Community law. And the same can be said for most lawyers, who should be questioning the application of such law in the national courts. Therefore, frequently, important interests and legitimate rights end up without protection because the courts systematically avoid the application of Community law and, when it arises, most of the time they refrain from referring a question for preliminary ruling to the EC Court of Justice.

It follows from the foregoing that the new candidates to accession should attach major priority, as early as possible, to preparing national jurists in matters of Community law, an area new to them, and one that requires much care in training to the highest level.

¹And corresponding articles of the two other Community Treaties.

² I summarised the controversy at the time in an article published in *Cadernos Europeus* by the Centre for European Studies of the *Instituto Amaro da Costa*, in which were included the Minutes of the First International Seminar on Portugal's Accession to the European Communities (1984).

³ The argument defended by the constitutionalist Jorge Miranda.

⁴ Shared by authors such as Paulo Pitta e Cunha, Fausto de Quadros, Manuel de Lucerna and Isabel Jalles.

⁵ Among these were the positions then taken by Marcelo Rebelo de Sousa and Jorge Braga de Macedo.

⁶ Currently Article 234.

⁷ On this decision, see my article "Droit constitutionnel et droit communautaire : le cas portugais", *Rivista di Diritto Europeo*, n° 2/1991.