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COM (83) 228

Vol. 1983/0095

Historical Archives of the European Commission

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COMMISSION  
OF THE  
EUROPEAN COMMUNITIES

General Secretariat

COM(83) 228 final.  
Brussels, 27 April 1983.

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NEGOTIATIONS ON PORTUGAL'S ACCESSION  
TO THE COMMUNITIES

Commission proposal on patents

(Communication from the Commission to the Council)

## EXPLANATORY MEMORANDUM

1. This communication concerns Portugal's implementation of the acquis communautaire regarding patents and is a response to the statement of 12 November 1982<sup>1</sup>, in which Portugal set out its position on the matter.
2. Part I sets out Portugal's request and Part II the grounds it advances in support of that request.
3. The Commission's assessment of Portugal's request is in Part III; Part IV contains the Commission's specific proposals.
4. The Commission is invited to adopt this proposal and decide that it be sent to the Council.

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<sup>1</sup>CONF-P/89/82.

## PART I: PORTUGAL'S REQUEST

1. In its statement on approximation of laws on 12 November 1982, at the 22nd meeting of the Conference at Deputy level<sup>1</sup>, the Portuguese delegation raised the question of the patentability of foodstuffs, chemicals and pharmaceuticals; Portuguese legislation does not provide for this, but accession to the Munich and Luxembourg Conventions (the European Patent Convention and the Convention for the European patent for the common market respectively) will make it necessary to introduce such a provision.

2. The Portuguese delegation "feels that the national industry needs a sufficiently long period of adjustment before being in a position to undergo the effects of the product patent". It is therefore asking for a derogation from its obligation to allow patenting of foodstuffs, chemicals and pharmaceuticals.

## PART II: PORTUGAL'S GROUNDS FOR THE REQUEST

3. It is the Commission's understanding, based on its examination of the abovementioned Portuguese statement and contacts between Portuguese and Commission officials, that Portugal's grounds for its request are essentially as follows.

Portugal's food, chemical and pharmaceutical industries are technically very backward, so that to make products of those industries patentable immediately would cause serious economic, social and structural problems. At the moment, the research capacity of the food, chemical and pharmaceutical industries is very limited and confined to manufacturing processes. Introducing patent protection for the actual products would make it extremely difficult for the industries to stay in business. There will have to be an adjustment period running to 1992 to allow them to prepare for the time when these products become patentable.

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<sup>1</sup>CONF-P/89/82 of 18 December 1982.

PART III: COMMISSION ASSESSMENT

4. In deciding whether a temporary derogation - on certain conditions - is needed, the Commission was guided by the following considerations:
- (a) In order to avoid thrusting a number of Portuguese firms into a critical situation by making foodstuffs, chemicals and pharmaceuticals patentable immediately, they should be allowed an adjustment period running beyond the date of accession.
  - (b) It is in the interests of both the Community and Portugal that the latter should accede to the European Patent (Munich) Convention of 5 October 1973 as soon as possible. Accession to that convention is a precondition for accession to the Luxembourg Convention. Accepting Portugal's request for a temporary derogation will enable it to accede to the Munich Convention as soon as it joins the Community, and at the latest by 7 October 1986. That would be a decisive step in the direction of the Luxembourg Convention. Industries could get patents valid in Portugal except for products covered by the reservation, which would include process patents for the manufacture of foodstuffs, chemicals and pharmaceuticals.
  - (c) The Commission does not feel that refusing Portugal a temporary derogation would necessarily ensure that foodstuffs, chemicals and pharmaceuticals become patentable by the desired date. Its view is that the only way to be sure that the industries can get a European patent (or a Community patent, if the Luxembourg Convention is in force by then) for these products in Portugal by a set date, i.e. from 7 October 1992, is for Portugal to accede to the Munich Convention by 7 October 1986.

The Commission would point out, in particular, that its aim as outlined above can only be achieved if the Member States promise Portugal to vote on the European Patent Office's Administrative Council to extend the reservation allowed under Article 167<sup>1</sup> until 7 October 1992. Unless it receives such an assurance Portugal will not be ready to accede to the Munich Convention.

5. Portuguese patent law contains none of the rules as exclusive compulsory licensing, compulsory exploitation of patents or patents of introduction which Spain has been asked to abolish or bring into line with the level of protection in the Community as from its accession. And since 30 June 1980 there has been a clause in Portuguese law<sup>2</sup> reversing the burden of proof on process patents which is in line with Article 75 of the Luxembourg Convention. This gives industry effective protection on new processes for manufacture of foodstuffs, chemicals and pharmaceuticals very similar to that conferred by a product patent, since it stipulates that the same product, when produced by any other party shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

6. In the light of the above<sup>3</sup>, there appear to be no grounds for a derogation from Article 30 et seq. of the EEC Treaty to protect Community industry against imports of the products in question marketed in Portugal for the first time by the holder of a product patent in one of the present Member States or with his

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<sup>1</sup> Article 167 of the Munich Convention stipulates that a contracting State may during a period of 10 years from the entry into force of the Convention reserve the right to refrain from providing patent protection for chemical, pharmaceutical or food products.

This transitional period expires on 7 October 1987. The Administrative Council of the European Patent Organization may however at the request of a contracting State which became a member no later than 7 October 1986 decide to extend the validity of this reservation by not more than five years, in other words until no later than 7.10.1992.

<sup>2</sup> Article 3 of Decree No 176/80 of 30 May 1980.

<sup>3</sup> The commission bases its position on the current state of Portuguese law. That position will of necessity be changed if the Portuguese legislature decides to abolish the rule reversing the burden of proof; the Commission is informed that such a possibility exists.

consent. The holder of the patent will naturally retain the right to forbid the import of products manufactured in Portugal by another party without his consent.

7. The Commission further considers the clause reversing the burden of proof should be applied from accession to all patents for processes lodged before the clause came into effect.

#### PART IV. COMMISSION PROPOSALS

In the light of the arguments put forward by Portugal and the above considerations, the Commission proposes the following.

1. Portugal should accede to the European Patent Convention (Munich Convention) in time to enable it to apply Article 167 in respect of foodstuffs, chemicals and pharmaceuticals.

In that connection the Member States of the Community in their capacity as contracting parties to the Munich Convention should undertake to do what is necessary, on the basis of a request from Portugal, to get the validity of the reservation provided for in Article 167 of the Convention extended beyond 7 October 1987, for the maximum period permitted by the Convention.

2. At the expiry of the derogation period Portugal should accede to the Luxembourg Convention for the European patent without recourse to the procedure provided for in Article 95(4) of that Convention.

3. Portugal should also see that its national law provides from accession that the clause reversing the burden of proof will apply to all patents lodged before the entry into force of Decree No 167/80 of 30 May 1980.