

PORTUGAL

1. SUBSTANTIVE ASPECTS

1.1. Distinction

1.1.1. Does your national legislation differentiate between different categories of treaties? If it does, how are they categorised?

The Constitution of the Portuguese Republic (hereinafter “the CRP”) uses the words “international convention” to refer to international legally binding instruments in general (*i.e.* to treaties in the sense of the VCLT) – Cf. Article 8(2); see also, Article 4, Article 33(3) and (4), Article 115(3) and (5), Article 119(1)(b), Article 134(g), Article 197(1)(b), Article 273, and Article 280(3) of the CRP.

Depending on the criteria explained in the answer to Question 1.1.2, the CRP will designate that international legally binding instrument as a “treaty” or as an “international agreement”. To avoid confusion with the treaties in the sense of the VCLT, all following answers will refer to the treaties in the sense of the CRP as “treaties *stricto sensu*”. See also the answer to Question 1.2.3.

1.1.2. What are the criteria for their classification into specific category (subject matter, scope, financial effects, etc.)? Does the form of the instrument lead to a different category of treaty?

The CRP will qualify an “international convention” either as a “treaty” (*stricto sensu*) or as an “international agreement”, depending on their subject matter and on the applicable internal procedure for the Portuguese Republic to express its consent to be bound by them – respectively, approval by the Assembly of the Republic and ratification by the President of the Republic, or just approval (either by the Assembly of the Republic or the Government, depending on the subject). For more details, see also the answer to Question 1.2.3.

1.1.3. What is the legal status of treaties not requiring parliamentary approval in the internal hierarchy of norms?

All treaties – *i.e.* treaties *stricto sensu* and international agreements alike – rank equally in the internal hierarchy of norms and are fully in force in the Portuguese Republic after the conclusion of the applicable internal procedure for the State to express its consent to be bound by them.

1.2. Competence

1.2.1. Which authority is responsible for drafting the text of each category of treaty?

One of the political functions of the Government concerns its competence to negotiate and conclude treaties [Cf. Article 197(1)(b) of the CRP]. The law governing the organisation of the Ministry of Foreign Affairs (MFA) – Decree-Law nr. 121/2011, of December 29 – establishes it as the line ministry competent for formulating, coordinating and implementing the external action of Portugal, which includes treaty making.

The initiative and the lead to negotiate, sign or accede to a treaty are therefore always a prerogative of the MFA, without prejudice to its articulation with the line ministry or ministries with technical competence corresponding to the subject matter of the treaty (*e.g.* Home Affairs, Justice, Finance ...). This is not only important for assessing the national interest on a certain treaty, but also extremely relevant during the negotiations pertaining to the drafting of the material aspects of the text of the treaty in question, which may require technical expertise. It also ensures consistency across the different international conventions concluded by Portugal

The formal aspects of the text that pertain to the Law of Treaties, particularly the accurate legal terms and the final clauses of the treaty, are drafted by the MFA. See also the answer to Question 1.2.2.

1.2.2. In the process of drafting a treaty, which authority is responsible for the assessment of the legal character and category of an agreement?

The legal character and category of treaties is determined by the CRP, as explained in the answers above.

As per the applicable regulations of the MFA (Cf. Reglementary-Decree nr. 10/2012, of January 19, and Ministerial Ordinance nr. 33/2012, of January 31), the International Law Department of the Department of Legal Affairs of the MFA is responsible for providing legal advice during treaty negotiations, including on its conformity with international law (namely with the Law of Treaties) and internal law (*maxime*, the CRP).

In the internal legal opinions issued during this process, the International Law Department assesses the legal character and category of the treaty and calls the attention of the competent negotiating services for the internal procedures needed for signing and approving/ratifying the treaty in question.

Since the International Law Department must be consulted throughout the negotiation process – *i.e.* issuing an internal legal opinion on the successive versions of the draft treaty – all those formal aspects are routinely verified prior to the closing of negotiations.

1.2.3. Which authority has the general responsibility for ratification/approval/confirmation procedures for treaties (is it generally the responsibility of the Parliament and only certain categories are confirmed by the government or vice versa)?

There are two types of internal procedures for the Portuguese Republic to express its consent to be bound by a treaty, depending on its form. The procedures involve at least two and up to three entities that exercise sovereignty under the CRP: the Assembly of the Republic, the Government and the President of the Republic.

“Treaties *stricto sensu*” are a form reserved for subject matters that the CRP considers as especially solemn and that have a particular impact in the State’s sovereignty, such as Portugal’s participation in international organisations, friendship, peace, defence, rectification of borders or military affairs. Treaties *stricto sensu* may only be approved by an act of the Assembly of the Republic (*i.e.* the national parliament) – which takes the form of a resolution [Cf. Article 166(5) of the CRP] – and they are always subject to ratification by the President of the Republic [Cf. Article 135(b) of the CRP].

“International agreements” cover all subject matters not reserved to “treaties *stricto sensu*”. They are approved by an act of the Assembly of the Republic or by an act of the Government, according to their subject matter – following the same logic of competence distribution as the approval of internal laws [Cf. Article 161(i) and Article 197(1)(c) of the CRP]. Therefore, the Government approves the “international agreements” whose approval is not within the competence of the Assembly of the Republic (and *vice versa*). (The Assembly of the Republic may also be called to approve an international agreement whose approval would be the competence of the Government, but which the latter has chosen to submit to the appreciation of parliamentarians for political reasons). Afterwards, the act of approval of the “international agreement” – a resolution of the Assembly of the Republic or a decree of the Government, as applicable – is signed by the President of the Republic [Cf. Article 134(b) of the CRP].

Finally, the document of ratification (“treaties *stricto sensu*”) or the signature of the President of the Republic (international agreements) is confirmed by a final signature by the Prime-Minister prior to its publication (see also Section 2.5).

It should be noted that, despite the need for internal approval and, if applicable, ratification by the President of the Republic, international conventions are immediate sources of law under the CRP, and do not need to be transformed or incorporated in national legislation.

1.2.4. What are the responsibilities of the line ministries and the Ministry of Foreign Affairs throughout the procedure of conclusion and ratification of each category of treaty?

The conclusion of treaties is the same regardless of their category (treaties *stricto sensu* or international agreements). For the responsibilities of the MFA and line ministries during the negotiation/conclusion of a treaty, see the answer to Question 1.2.1..

The competent service of the MFA who was responsible for conducting the negotiation of a treaty is also responsible for starting the process for internal approval or ratification of treaties once they have been signed, gathering and reviewing the necessary documents thereto. In the case of treaties to which Portugal accedes, line ministries may at this stage be requested to issue opinions (whenever required by law) on the accession; they may also be invited by the MFA to prepare an official translation of the treaty in Portuguese in case that is not an authentic language of that treaty.

The abovementioned competent service of the MFA sends all necessary documents to the the International Law Department of the Department of Legal Affairs of the MFA, which verifies the dossier and requests corrections or additional documents, if need be. The Cabinet of the Minister of Foreign Affairs receives the finalised dossier from the International Law Department and forwards it to the Presidency of the Council of Ministers (central government department that supports the Council of Ministers), for the next phases of approval or ratification, as applicable.

1.2.5. What is the competence of autonomous regions/territories for the conclusion of a treaty?

The Portuguese Republic is a unitary State with an autonomous island system of self-government comprising two autonomous regions: the Azores and Madeira archipelagos. The CRP determines that they both have their own political and administrative statutes and self-governing institutions [Cf. Article 6(2) of the CRP].

The Autonomous Regions are territorial legal persons, lacking the powers to represent the Portuguese Republic at the international level; therefore, they may not conclude treaties nor enter into treaties on behalf of the State. Respecting the unitary character of external action, the Autonomous Regions have the power to participate in the negotiation of treaties that directly concern them, and to share in the benefits derived therefrom [Cf. Article 227(1)(t) of the CRP].

1.2.6. Does the Ministry of Foreign Affairs have delegated competence to conclude less significant treaties on its own, by producing full powers signed by the Minister of Foreign Affairs? If it does, what typically characterises these agreements?

The competence to conclude treaties, regardless of their category, belongs to the MFA (see answer to Question 1.2.1). The Portuguese Republic does not conclude international non-legally binding instruments; the Government of the Portuguese Republic, the line ministries or other subjects of internal Public Law may conclude such instruments.

2. PROCEDURAL ASPECTS

2.1. Procedure before conclusion/signature

2.1.1. What are the procedures required for the conclusion of different categories of treaties? Can a treaty be concluded through a simplified procedure? If yes, please provide a

detailed presentation of the circumstances in which such procedures can be applied and describe the procedures.

The procedure for the Portuguese Republic to conclude treaties does not vary according to the category of treaty (treaty *stricto sensu* and international agreement). The conclusion of a treaty will always entail a first phase, that of negotiations, led by the MFA in articulation with competent line ministries, as appropriate. Once the text of the treaty has been agreed, we enter a second phase – that of the signature of the treaty by a competent person –, followed by a third one – that of the internal procedure of approval or ratification, as applicable. The fourth and final phase concerns the publication of the treaty. For more details, see the answers to Questions 1.2.1, 2.1.4, 2.5.1., 2.5.2. and 2.5.4..

See also the answer to Question 2.1.4. .

2.1.2. Do you have a procedure to review the harmonization and compliance of treaties not requiring parliamentary approval with existing national laws? What authority does the review and when?

The harmonisation and compliance of treaties with existing national laws should be considered during treaty negotiations. The exercise of reviewing such harmonisation and compliance is a part of the procedure of internal approval or ratification. The line ministries competent for the subject matter of the treaty are responsible for diagnosing the existing national laws that may require alterations once the treaty comes into force.

2.1.3. Do these procedures have one or two phases (before and/or after signature)? Can a treaty enter into force upon signature?

See answer to Question 2.1.2. . A treaty may not enter into force upon signature, due to the applicable internal procedure for the Portuguese Republic to express its consent to be bound by a treaty (see also the answer to Question 1.2.3).

2.1.4. Are there any differences in the procedures when considering multilateral vs bilateral treaties?

As noted in the answer to Question 2.1.1, all treaties concluded by the Portuguese Republic entail four procedural phases. There are no substantial differences in those procedures when comparing bilateral and multilateral treaties.

Thus, any procedural differences between bilateral and multilateral treaties concluded by the Portuguese Republic will only be those resulting from the (international) Law of Treaties (namely in accordance with the VCLT), and not any internal laws or regulations.

2.1.5. Are there certain denominations of treaties, which, according to your domestic law, always imply a treaty in simplified form? (for example, “Memorandum of Understanding”, “Minutes” etc.)

See answers to Questions 1.1.1, 1.1.2, 1.1.3, and 1.2.6.

As provided for in the VCLT, it is the content of an international instrument that determines its international legally binding nature, whatever its particular designation (“treaty” or other). According to Portuguese practice, “memoranda of understanding” is a designation used for international non-legally binding instruments, although not the only one (e.g. Protocol of Cooperation, Declaration of Intent, among others).

2.1.6. Is the procedure for obtaining the mandate for negotiations differentiated according to different categories of treaties? If yes, how?

There is no procedural difference for obtaining a mandate for the negotiations of a treaty *stricto sensu* or an international agreement.

From a political point of view, as the Government holds the competence to conduct external action and this competence is primarily exercised by the MFA, the mandate for negotiations is decided by this ministry (see also answer to Question 1.2.1.). The mandate is usually carried out by civil servants, such as diplomats and, in the case of multilateral treaties, representatives accredited by the Portuguese Republic to an international conference or organisation. Depending on the opportunity and political importance or urgency of concluding a treaty, a member of Government (a minister or a secretary of State) may preside to negotiations.

2.1.7. Are the signatories of all categories of treaties required to produce full powers upon signature or just some of them?

The internal law of the Portuguese Republic strictly follows Article 7(2)(a) of the VCLT in what concerns the *troika* of persons who may sign a treaty (any category) without having to produce full powers: the President of the Republic (Head of State), the Prime Minister (Head of Government) and the Minister for Foreign Affairs. All other persons must produce a letter of full powers duly signed by the Minister of Foreign Affairs, stating that said person is confirmed as the representative of the Portuguese Republic for the signature of that treaty.

It should be noted that, under Portuguese law, an internal procedure for authorising the signature of a treaty is always required ("procedure of prior authorisation to signature"). This authorisation is granted by the Prime-Minister, on behalf of the Government, with respect to the final draft of the treaty, and containing the letter of full powers, if applicable.

2.1.8. Do you allow for electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?

There is no concrete internal regulation nor prohibition of an electronic signature of treaties. Nevertheless, Portugal has no national practice of such electronic signature.

In extremely exceptional circumstances, the Portuguese Republic has signed a bilateral treaty via electronic means/videoconference, but without electronic signature: while the treaty was being signed, by hand, in Lisbon by the Minister of Foreign Affairs, so it was being signed in the capital of the other party, by a competent authority, also by hand.

2.2. Procedure after conclusion

2.2.1. Does the internal procedure for expressing consent to be bound change based on different categories of treaties (i.e., ratification, approval, acceptance, etc.)? If so, please explain.

See answer to Question 1.2.3.

2.2.2. Is entry into force of a treaty possible on the date of the signature? If yes, what are the procedural requirements that enable such entry into force?

No, since the norms contained in any treaties signed by the Portuguese Republic only come into force in internal law after they have been duly ratified or approved, as applicable, and once they have been officially published – Cf. Article 8(2) of the CRP.

2.2.3. If entry into force is not possible on the date of the signature, is it possible to use provisional application for an earlier application of such treaty?

No. Although the VCLT admits the provisional application of a treaty, the Portuguese Republic is constitutionally prevented from accepting such a regime, for the same reason why a treaty cannot enter into force with regard to the Portuguese Republic on the date of its signature – Cf. Article 8(2) of the CRP (see answer to Question 2.2.2).

2.3. Form

2.3.1. Do different categories of treaties require specific form when the text is prepared for signature (i.e., printing on treaty paper, sealing, treaty folder)?

All treaties (in the sense of the VCLT) are printed single-sided in treaty paper (special A4 paper sheets bearing a red border) and presented for signature in a treaty folder bearing the coat of arms of the Portuguese Republic. Two narrow ribbons, a red and a green one, are used to bind the treaty paper; for easier access to the last page on the moment of signature, the binding of the treaty with said ribbons usually happens only after signature and in preparation for storage at the Diplomatic Archives at the MFA.

2.3.2. Who prepares the text of different categories of treaties for signature?

The political or technical service within the MFA that was competent for promoting the negotiation of the treaty on behalf of the Ministry is also responsible for preparing the text for signature.

2.4. Implementation

How are treaties not requiring parliamentary approval implemented in national legislation in order to ensure respect of the principle of *pacta sunt servanda* in accordance with Article 26 of the VCLT?

Even though under the CRP some treaties are approved by Government and not by the Assembly of the Republic (parliament), all treaties that are binding on the Portuguese Republic are implemented fully and in good faith, pursuant to the principle of *pacta sunt servanda*. See also the answers to Questions 1.1.1, 1.1.3, 1.2.3. and 2.1.2.

2.5. Publication, Registration and Depository

2.5.1. Do all categories of treaties have to be published?

Yes. Article 119(1)(b) of the CRP requires that all treaties (in the sense of the VCLT) and their respective notices (e.g. entry into force, termination, interpretative declarations, reservations, accession of new parties to a treaty) are published in the official gazette – the *Diário da República*.

2.5.2. If not, which categories do not need to be published and made available to the general public? Is there room for discretion?

There is no room for discretionary decisions, as all categories of treaties need to be published in the Official Gazette (cf. answer to Question 2.5.1).

2.5.3. Which authority decides whether a treaty should not be published?

Non-applicable (see answers to Questions 2.5.1 and 2.5.2.).

2.5.4. Where is each category of treaty published (Official Gazette, website, database, etc.)?

All treaties are published in the official gazette – the *Diário da República* – pursuant to Article 119(1)(b) of the CRP (see answer to Question 2.5.1). The *Diário da República Eletrónico*, a digital version of the official gazette, is available for viewing and download, free of charge, in the official webpage managed by *Imprensa Nacional*, the national publisher of the official gazette: < <https://dre.pt/dre/home> >.

2.5.5. Which categories of treaties are registered with the UN Secretariat?

All treaties to which the Portuguese Republic becomes a Party are subject to registration with the UN Secretariat, in accordance with Article 102, paragraph 1, of the Charter of the United

Nations, and Article 80, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties. See also the answer to Question 2.1.5. .

2.5.6. Where are the originals (or certified true copies) of different categories of treaties kept (e.g., MFA, authority responsible for their implementation, state archives)?

All originals or certified true copies of treaties signed by the Portuguese Republic are kept by the Division of Archives and Library of the Diplomatic Institute of the Ministry of Foreign Affairs.