



REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2011

PORTUGAL

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

The bodies with supreme authority in Portugal are the Presidency of the Republic, the Assembly of the Republic (Parliament), the Government and the courts. The Assembly of the Republic has the following legislative powers, among others:

- to amend the Constitution (Article 161(a));
- to enact legislation on any subject other than those in the exclusive mandate of the Government under the Constitution (Article 161(c));
- to delegate to the Government the power to legislate (Article 161(d));
- to approve international conventions (Article 161(i)); and
- to propose to the President of the Republic that referenda be held in cases where they are warranted by national interest (Article 161(j)).

The Assembly of the Republic also has exclusive legislative powers on some matters, and partially exclusive legislative powers on others. For instance, the Assembly has exclusive legislative powers with regard to rights, freedoms and guarantees, except where legislative power is delegated to the Government.

The Government decides general national policies and is the supreme public administration body. It also enjoys legislative powers on matters that are not within the exclusive mandate of the Assembly of the Republic, and on matters that are within the exclusive power of the Assembly but which the Assembly delegates to it.

The Portuguese legal framework on discrimination is, according to the hierarchy of laws, based mainly on:

- a) The Constitution of the Portuguese Republic of 2 April 1976,¹ (hereafter ‘the Constitution’): Article 1 – dignity of all persons; Article 8 – international law as an integral part of Portuguese law; Article 13 – the principle of equal treatment, prohibition of discrimination on a non-exhaustive list of grounds: ancestry, sex, race, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition and sexual orientation; Article 15 – equal treatment of aliens and stateless persons; Article 18 – fundamental rights binding on both public and private bodies; Articles 58 and 59 – equal

¹ *Constituição da República Portuguesa de 2 de Abril de 1976*. The text of the 1976 Constitution can be read at <http://www.cidadevirtual.pt/cpr/legis2.html>.

- treatment of all workers without discrimination; Article 69 – child protection; Article 70 – protection of young people; Article 71 – rights of persons with disabilities, and Article 72 – rights of older people.
- b) Law 59/2007 of 04 September 2007, the Criminal Code² (hereafter ‘the Criminal Code’): Article 132 – homicide motivated by hatred based on race; religious or political beliefs; colour, ethnic origin or nationality; religion; or gender or sexual orientation; Article 145 (1) and (2) – physical injuries; Article 239 – genocide, abrogated by Law 31/2004 of 22 July 2004 and now covered by Article 8; Article 240 – discrimination on grounds of race, religion or sexual orientation; Articles 251 and 252 – insults on grounds of religion; Article 253 – violence or threats against funeral processions or ceremonies, and Article 254 – profanation of a corpse or a cemetery.
 - c) Law 134/99 of 28 August 1999, which forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin³ [...] refusal of or making conditional economic, social or cultural rights.
 - d) Law 18/2004 of 11 May 2004 (hereafter ‘Law 18/2004’), transposing Council Directive 2000/43 (hereafter ‘the Racial Equality Directive’) of 29 June 2000 into Portuguese law, and establishing the principle of equality of treatment between persons irrespective of racial or ethnic origin, and a legal framework to combat discrimination on the grounds of racial or ethnic origin.⁴ This law goes far beyond the Racial Equality Directive, as it prohibits discrimination based on nationality or skin colour. Article 3(1) provides that ‘for the purpose of this law the principle of equality of treatment means the absence of any discrimination, direct or indirect, based on racial or ethnic origin’. Article 3(2) states that ‘all actions or omissions affecting persons on the grounds of race, skin colour, nationality or ethnic origin which violate the principle of equality are considered as discriminatory practices’.
(Law 134/99 remains in force, and can be applied in a subsidiary manner under Articles 15 (2) and (4) of Law 18/2004 whenever it is of greater benefit to those discriminated against.)
 - e) Law 7/2009 of 12 February 2009 adopting the Labour Code (Law 99/2003 of 27 August 2003) (hereafter ‘the Labour Code’) implements the Racial Equality Directive and Directive 2000/78 (hereafter the Employment Equality Directive) in

² Código Penal, Lei 59/2007 de 4 de Setembro available at:

<http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

³ Lei n.º 134/99 de 28 de Agosto de 1999, proíbe as discriminações no exercício de direitos por motivos baseados na raça, cor, nacionalidade ou origem étnica e Decreto-lei n.º 111/2000 de 4 de Julho de 2000 regulamenta a lei que proíbe as discriminações no exercício de direitos por motivos baseados na raça, cor, nacionalidade ou origem étnica. See text of Law 134/99 at

http://www.acidi.gov.pt/_cfn/4d025013db115/live/Lei+n.%C2%BA+134%2F99+de+28+de+Agosto See text of Decree-law 111/2000 at http://apav.pt/apav_v2/images/pdf/discriminacao_racial.pdf.

⁴ Lei n.º 18/2004 de 11 de Maio de 2004, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE do Conselho, de 29 de Junho, que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica.

Article 2(i) and (j).⁵ This law addresses discrimination. The Labour Code implements the Framework Employment Directive, but it also prohibits discrimination on grounds not specified in this Directive. Article 24 of the Code deals with anti-discrimination and forbids the practice of any direct or indirect discrimination, based on ancestry, age, sex, sexual orientation, civil status, family situation, genetic heritage, impaired work capacity, disability or chronic disease, nationality, ethnic origin, religion, political or ideological belief or membership of a trade union.

- f) Law 38/2004 of 18 August 2004 (hereafter 'Law 38/2004'), defining the general legal basis for prevention of the causes of disability, and the training, rehabilitation and participation of persons with disabilities.⁶
- g) Law 16/2001 of 22 June 2001 (hereafter 'Law 16/2001'), the Law on Religious Freedom.⁷
- h) The prohibition of discrimination on the grounds of sexual orientation was added by Constitutional Law 1/2004 of 24 July 2004 (Sixth Constitutional Revision)⁸ (hereafter 'Law 1/2004') to Article 13, *in fine*, reflecting the principles stated in the Employment Equality Directive. The reference to sexual orientation in the Constitution has made it easier to implement this Directive.
- i) Decree-law 251/2002 of 22 November 2002⁹ establishing the High Commissioner for Immigration and Ethnic Minorities was amended by Decree-law 27/2005 of 04 February 2005.¹⁰ The amendments have not altered its organisation and structure, which will be referred to throughout the report.
- j) Law 18/2004 of 11 May 2004¹¹ was amended by Decree-law 86/2005 of 02 May 2005,¹² transposing into national law the Racial Equality Directive of 29 June

⁵ Lei n.º 7/2009, de 12 de Fevereiro de 2009, que aprova o Código de Trabalho. The text of Law 7/2009 is available at:

http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=1047&tabela=leis&ficha=1&pagina=1

⁶ Lei n.º 38/2004 de 18 de Agosto de 2004 define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência. The text of Law 38/2004 is available at: http://www.adm.ua.pt/legua/LegAdmPublica/Lei_38_2004.htm.

⁷ Lei n.º 16/2001 de 22 de Junho de 2001, Lei da liberdade religiosa. The text of Law 16/2001 is available at: http://www.adm.ua.pt/legua/pessoal/Lei_16_2001.htm.

⁸ Lei Constitucional nº 1/2004 de 24 de Julho de 2004 (Sexta Revisão Constitucional) adita ao artigo 13º *in fine*. The text is available at: http://www.estig.ipbeja.pt/~ac_direito/introdlegis.html.

⁹ Decreto-Lei 251/2002, de 22 de Novembro alterado pelo Decreto-lei 27/2005 de 4 de Fevereiro, diploma que institui o Alto-Comissariado para a Imigração e Minorias Étnicas available at: <http://acidi.gov.pt.s3.amazonaws.com/docs/decret2512002.pdf> (Decree-law 251/2002 was revoked by Decree-law 167/2007 of 3 May 2007).

¹⁰ Decreto-Lei 27/2005, de 4 de Fevereiro, diploma que institui o Alto-Comissário para a Imigração e Minorias Étnicas e que altera o Decreto-Lei 251/2002, de 22 de Novembro. (Also Decree-law 27/2005 was revoked by Decree-law 167/2007)

¹¹ Lei n.º 18/2004 de 11 de Maio alterada pelo Decreto-lei 86/2005 de 2 de Maio, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica.

¹² Decreto-Lei 86/2005, de 2 de Maio, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE, do Conselho que aplica o princípio da igualdade de tratamento entre as pessoas, sem



- 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and establishing a legal framework to combat discrimination on the grounds of racial or ethnic origin.
- k) Decree-law 163/2006 of 8 August 2006¹³ approves the standards and rules governing physical access to buildings and public spaces.
 - l) Law 46/2006 of 28 August 2006¹⁴ prohibits and punishes discrimination based on disability and on the grounds that a person has a pre-existing aggravated health risk (*risco agravado para a saúde*). This law was made the subject of detailed regulations by Decree-law 34/2007 of 15 February 2007. According to Article 3(c) of this law, 'persons with an aggravated risk to health' means any person or persons suffering from an illness or disease causing long-term organic, functional, progressive and potentially disabling health changes with no prospect of complete remission and resulting in changes in the physical, mental, emotional, social or economic quality of life of such persons, and that may be a cause of early-years disability or of significant reduction in life expectancy'. This covers situations in which the person has no disability as of yet, but has a health problem that could develop in a way that might result in a disability in future.

This law complements the existing Law 38/2004 of 18 August 2004, which is the cornerstone of the legal system for prevention of disability and the rehabilitation and participation of disabled people.

The objectives of this law are (i) to prevent and forbid direct or indirect discrimination on grounds of all types of disability and on the grounds that a person has a pre-existing aggravated risk to their health and (ii) to penalise acts which may constitute a violation of any fundamental rights or a refusal or restriction of the exercise of any economic, social, cultural or other rights by any persons on the basis of any type of disability.

This law is applicable to the actions of all natural and legal persons, whether public or private, covers all direct or indirect discrimination, and does not pose any obstacle to positive action.

The fields it covers include access to employment, health services, economic activities, goods and services, the rental or selling of real property, and physical

distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica, altera a Lei n.º 18/2004, de 11 de Maio.

¹³ Decreto-Lei 163/2006, de 8 de Agosto. Text at http://www.escadafacil.pt/catalogos/DL_163_2006.pdf.

¹⁴ Lei n.º 46/2006 de 28 de Agosto de 2006 que proíbe e pune a discriminação em razão da deficiência e da existência de risco agravado para a saúde. Text of Law 46/2006 at <http://dre.pt/pdf1s/2006/08/16500/62106213.pdf>.

- access to buildings and spaces, public transport and educational facilities, among others.
- m) Law 2/2006 of 17 April 2006 on nationality entered into force on 15 December 2006, together with Decree-law 237/A/2006 of 14 December 2006. This legislation on nationality facilitates the integration of immigrants living in Portugal through naturalisation.
 - n) Law 21/2007 of 12 June 2007¹⁵ on the new system of mediation and compensation for victims in criminal cases has been enacted by the national Parliament.
 - o) Decree-law 352/2007 of 23 October 2007¹⁶ of the Ministry of Labour and Social Solidarity, which approves the National Table of Disabilities caused by Work Accidents or Occupational Diseases, repealed Decree-law 341/93 of 30 September 2003 and approved the Indicator Table for the Evaluation of Disability in Civil Law.
 - p) Decree-law 3/2008 of 7 January 2008¹⁷ sets out the specialised support required in pre-school, primary and secondary level education in the public, private and co-operative sectors, with the purpose of adapting teaching methods to the special learning needs of pupils with significant limitations in their activity and participation levels in one or more domains of life.
 - q) Decree-law 3/2008 of 7 January¹⁸ addresses the special educational needs of children with disabilities. This decree defines the support to be given to pre-school, primary and secondary schools (public, private or co-operative) to adapt the learning process to the special educational needs of these children.
 - r) Decree-law 72/2008 of 16 April 2008¹⁹ approves the legal framework for insurance policies.
 - s) Law 33/2008 of 22 July 2008 establishes measures to promote access to information about specific goods for persons with visual impairments.²⁰

¹⁵ Lei 21/2007, 12 Junho 2007, cria um regime de mediação penal, em execução do artigo 10.º da Decisão Quadro n.º 2001/220/JAI, do Conselho, de 15 de Março, relativa ao estatuto da vítima em processo penal, available at: www.presidenciaue.parlamento.pt/CJustica/leis/212007.pdf.

¹⁶ Decreto-Lei 352/2007, D.R. n.º 204, Série I de 2007-10-23 Ministério do Trabalho e da Solidariedade Social Aprova a nova Tabela Nacional de Incapacidades por Acidentes de Trabalho e Doenças Profissionais, revogando o Decreto-Lei n.º 341/93, de 30 de Setembro, e aprova a Tabela Indicativa para a Avaliação da Incapacidade em Direito Civil. Text of law at <http://vlex.pt/vid/33045935>.

¹⁷ Decreto-lei 3/2008, de 7 de Janeiro que define os apoios especializados a prestar na educação pré-escolar e nos ensinos básico e secundário dos sectores público, particular e cooperativo visando a criação de condições para a adequação do processo educativo às necessidades educativas especiais dos alunos com limitações significativas ao nível da actividade e da participação em um ou vários domínios da vida available at:

<http://www.educare.pt/educare/Detail.aspx?contentid=434D15100AD16B07E04400144F16FAAE&opsel=5&channelid=0>.

¹⁸ Decreto-lei 3/2008 available at: http://sitio.dgidc.min-edu.pt/especial/Documents/dl_n_3_2008.pdf.

¹⁹ Decreto-Lei n.º 72/2008 de 16/04/2008 estabelece o regime jurídico do contrato de seguro, available at: <http://dre.pt/pdf1s/2008/04/07500/0222802261.pdf>

²⁰ Lei n.º 33/2008 de 22 de Julho que estabelece medidas de promoção da acessibilidade à informação sobre determinados bens de venda ao público para pessoas com deficiências e incapacidades visuais available at: http://www.inr.pt/bibliopac/diplomas/lei_33_2008.htm.



- t) Law 58/2008 of 09 September 2008 establishes the regime for employment relations in public services.²¹
- u) Law 39/2009 of 30 July 2009 tackles violence, racial discrimination, xenophobia and intolerance at sports events.²²
- v) Law 60/2009 of 6 August 2009 establishes a framework for sex education in schools (entered into force on 7 August 2009).²³
- w) Law 9/2010 of 31 May 2010 allows civil marriage for same-sex partners.²⁴
- x) Law 3/2011 forbids any discrimination in access to and exercise of self-employment and transposes into national law Directives 2000/43/EC, 2000/78/EC and Directive 2006/54/EC.²⁵
- y) Law 7/2011 of 15 March 2011 on gender identity creates procedures for gender and name changes in the civil registry. This law gives transsexuals the right to be legally registered in their preferred gender. This law entered into force on 16 March.²⁶

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.

This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

²¹ Lei n.º 59/2008 de 11 de Setembro que aprova o regime do contrato de trabalho em funções públicas available at: http://www.dgap.gov.pt/upload/Legis/2008_I_59_11_09.pdf.

²² Lei 39/2009 de 30 de Julho que estabelece o regime jurídico do combate à violência, ao racismo, à xenofobia e à intolerância nos espectáculos desportivos, de forma a possibilitar a realização dos mesmos com segurança available at: <http://dre.pt/pdf1sdip/2009/07/14600/0487604886.pdf>.

²³ Lei 60/2009 educação sexual at: http://www.plataforma-rn.org/site/index.php?option=com_content&view=article&id=114:lei-602009-sobre-educacao-sexual&catid=36:anatomia-de-um-crime&Itemid=60.

²⁴ Lei 9/2010 permite o casamento civil entre pessoas do mesmo sexo available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

²⁵ Lei 3/2011 de 15 de Fevereiro de 2011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho available at: <http://www.iapmei.pt/iapmei-leg-03.php?lei=7952>.

²⁶ Lei 7/2011 igualdade de género available at: http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=1308&tabela=leis&nversao.



Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

- a. The authors consider that national law breaches the Directives on the following points:
 - The provision of reasonable accommodation for persons with disabilities is seen as a form of positive action. Individuals are only entitled to reasonable accommodation if the state provides funding to meet the costs of the accommodation.
 - There is a right to reasonable accommodation when this does not involve expense to the employer, e.g. if the only issue is a change to procedures or work patterns.

Until recently, associations had no legal standing in administrative or legal proceedings to impose fines concerning minor offences of discrimination at work where fines can be imposed. However, Law 3/2011 changes the legal standing of NGOs and organisations that defend people against discrimination.

This new legislation gives associations the opportunity to intervene in procedures under certain conditions, and clarifies the legal standing of Portuguese associations.

- As far as labour legislation is concerned, Article 443(d) of the Labour Code stipulates that trade unions have the right to 'initiate and intervene in legal cases and administrative proceedings in matters relating to the interests of their members as provided for by law'. However, employers' organisations cannot intervene to support their members when they are being prosecuted for discrimination in employment matters.
- The Labour Code Procedure (approved by Decree-law 480/99 of 09 November 1999, as amended by Decree-law 323/2001 of 17 December 2001, Decree-law 38/2003 of 8 March 2003, and Decree-law 295/2009 of 13 October 2009) stipulates in Article 5(5) that 'in cases where the question relates to workers' personal interest, their associations may intervene to assist their members, as long as they declare that intention in writing'.
- However, labour law covers discrimination on the grounds of age, sexual orientation, disability, nationality, religion and political belief, in addition to rules against discrimination on the grounds of race or ethnic origin. Discrimination based on any type of belief is also prohibited.
- Previously there was no general protection in the field of self-employment; Article 10 of the Labour Code only granted limited protection. With the adoption



of Law 3/2011, general protection in the field of self-employment has been clearly implemented.

- The authors consider that the Directive has been implemented but that positive measures, for instance those aiming to facilitate the recruitment of older workers through training and development of vocational skills, have not so far been completely successful.
- There is insufficient dissemination of information about legal protection against discrimination at work (Article 12 of the Employment Equality Directive).
- Article 4 of the Racial Equality Directive and Article 4 of the Employment Equality Directive refer only to occupational requirements; however, Article 3 (3)(c) of Law 18/2004 uses wording not limited to occupational requirements and consequently enlarges the exception in a way not foreseen in the Directive (see 2.3 b below).
- Protection against victimisation in the field of employment is too limited.

b. General considerations on implementation and enforcement of the Directives

The biggest problem in Portugal is the gap between legislation and its practical implementation. It is necessary to ensure that existing legislation is applied effectively and to improve the work of administrative and law enforcement bodies, such as the *Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI) [High Commission for Immigration and Intercultural Dialogue] and the *Autoridade para as Condições no Trabalho* (ACT) [Authority for Working Conditions], which deal with anti-discrimination matters. The manner in which the Directives have been transposed is very problematic, causing difficulties concerning procedures and raising many doubts regarding interpretation.

The main practical difficulties in enforcing legislation relate to coordination between the Commission for Equality and Against Racial Discrimination, the High Commissioner, the General Inspectorates (the bodies within ministries responsible for investigations in the areas covered by the ministry concerned) and the Prosecution Service. It is very difficult to obtain evidence of discriminatory acts and procedures tend to be very protracted.

As can be seen in the appended table, there is a multitude of laws and decree-laws transposing the Racial Equality Directive and the Employment Equality Directive. This makes it hard for people affected by discrimination, and even for lawyers and judges, to understand which provision actually applies to the case in hand.

So far there have been no precedents concerning the extension of the rights of associations to intervene in labour, administrative and judicial procedures under Law 3/2011.

Roma, immigrants and ethnic minorities are vulnerable to racial and ethnic discrimination even when they have Portuguese nationality.



There is a lack of information and data on the ethnic origin of victims of crime, racist violence and discrimination, making it difficult to assess the frequency of acts of racist violence or discrimination. There is no data available on discrimination on other grounds.

Amnesty International has made allegations of ill treatment, violence and excessive use of force by police officers against ethnic minorities and Roma.

According to the 2011 Amnesty International Annual Report, around 50 Roma families continued to live in the Quinta das Pedreiras neighbourhood of the town of Beja, where they were resettled in 2006 following their eviction from the neighbourhood of Bairro da Esperança. There were continued concerns that the houses in Quinta das Pedreiras did not meet minimum standards of health, sanitation and security. On 23 April 2011, the European Roma Rights Centre filed a complaint (Complaint no. 61/2010) with the European Committee of Social Rights,²⁷ claiming that Portugal had violated the right to housing of the Roma living in Quinta das Pedreiras. The complaint challenged the precarious living conditions of an informal Roma settlement on this site (Vidigueira) as well as the alleged interruption of access to water by this community, through the destruction, by the municipal authorities, of 12 taps in the area, which constituted the only water source for the settlement. Following media reports, and although he had not received any complaints on the matter, the Ombudsman decided on his own initiative to carry out an informal preliminary assessment of the situation. However, he concluded that the available information did not seem to support the need for an *ex officio* intervention.

In 2011, through his toll-free Children's Hotline, the Ombudsman received a complaint concerning the situation of three Roma children living with their mother in a tent under a bridge, without the basic conditions of hygiene, safety and comfort.

The Roma complain that they face discrimination in access to housing and public services as well as from the police and courts. If proved, this behaviour would be dealt with under Law 18/2004 of 11 May 2004 and Law 134/99 of 28 August 1999. There is no new data on Portugal for 2010 or 2011.

According to the *Relatório Anual de Execução Maio 2007-Maio 2008* [Report on the Implementation of the Plan for the Integration of Immigrants May 2007-May 2008],²⁸ the new law on nationality ended discrimination on grounds of country of origin by establishing a standard qualifying period of residence of five years. A contest entitled

²⁷ *ERRC v Portugal*, Collective Complaint available at

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC61CaseDoc1_en.pdf.

²⁸ The PNI Implementation Report is available at:

http://www.acidi.gov.pt/docs/PII/RAE0708_PII_compl.pdf. The updated version of this report is the 'Segundo Relatório Anual de Execução do Plano para a Integração dos Imigrantes Maio 2008-Maio 2009' (Second Annual Report on the Implementation of the Plan for the Integration of Immigrants May 2008-May 2009) and is available at: <http://www.acidi.gov.pt/docs/PII/Relatorio-PII-segundo-ano.pdf>.



'*A minha escola contra a discriminação*' ['My school against discrimination'] was held with the support of the ACIDI, the structure coordinating the European Year of Equal Opportunities for All in Portugal, the Ministry of Education and the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)]. A total of 110 schools were involved in this project. With regard to religion, the report states that Portuguese society has little knowledge of different confessions and sometimes feels insecure because of stereotypes that associate some religions with terrorism.

In 2010, the *Comissão da Liberdade Religiosa* (CLR)²⁹ [Commission for Religious Freedom] created an Annual Prize for scientific research in the area of religious freedom. It is worth mentioning that this Commission's temporary president belongs to the Evangelical Church.

The *Conselho Municipal das Comunidades Imigrantes e das Minorias Étnicas*³⁰ [Municipal Council of Immigrant Communities and Ethnic Minorities], a consultative body created through Deliberation 455/AM/93 of 22 March 1993 of the Lisbon City Hall, has been operating since 2009. It has been inactive for some time because of a lack of interest from the Lisbon City Hall executive. Several anti-racism NGOs, including *SOS Racismo*, *Olho Vivo* and *Solidariedade Imigrante* belong to this council, as does the High Commissioner for Immigration and Intercultural Dialogue. The roles of the council are to evaluate the situation of ethnic minorities in Lisbon and the problems they face in relation to racism and xenophobia, and to promote intercultural dialogue and active participation of immigrant communities and minority ethnic groups in political decisions that seek to promote their integration into society.

A masters thesis from the Economics Faculty at Coimbra University, *Jovens Muçulmanos, Identidades e Escola Pública: um estudo de caso* [Young Muslims, identities and state school – a case-study] published in 2009 states that these pupils still face difficulties accessing meals that meet their religious requirements. As a matter of fact, Articles 12 (Principles of equality), 13 (Pastoral care in special situations) and 14 (Exemption from work, classes and exams for religious reasons) of the Law on Religious Freedom (Law 16/2001 of 22 June 2001) do not specifically mention 'reasonable accommodation'. The authors have no knowledge of any case where this matter had been raised in practice, beyond the modified meals already mentioned and the appeal against *Ordem dos Advogados* [Bar Association] (mentioned below) regarding a request to take a Bar exam on a date other than that fixed by the Association for religious reasons.

In general, persons with disabilities are not the subject of unfavourable stereotypes. On the contrary society accepts and understands both intellectual and physical disabilities. The sources and grounds for this conclusion are articles published in

²⁹ Comissão da Liberdade Religiosa website: <http://www.clr.mj.pt/sections/home>.

³⁰ Conselho Municipal das Comunidades Imigrantes e das Minorias Étnicas website: http://www.cm-lisboa.pt/archive/doc/Reg04_008.html.



journals on social issues, reports on the social situation in Portugal, and content from newspapers and other media.

There are no legal statistics available to indicate if individuals with disabilities have complained of discrimination, and this topic is rarely referred to in the media.

Amnesty and the Eurobarometer survey both specifically refer to the lack of positive measures concerning persons with disabilities. The authors do not think that there is general prejudice against persons with disabilities in Portuguese society.

Discrimination in employment is particularly reflected in an inability to find suitable jobs for people with disabilities or adapt existing ones. Low levels of employment among persons with disabilities are currently also a consequence of the prevailing labour market and difficulty in financing accessibility and adaptations for disabled workers.

c) Discrimination as a problem:

The authors feel that Portuguese society does not publicly express discriminatory feelings about persons with disabilities. Nor is there, in general, prejudice against persons with disabilities in Portugal (as can be found, for instance, in relation to the Roma community). On the contrary, society's attitude is of understanding and support for persons with disabilities. Some insensitive attitudes are sometimes expressed, but they are not generally badly intentioned. Society is becoming aware that positive measures should be taken towards integration of persons with disabilities.

Non-respect for rules on buildings and facilities is widespread. Even court buildings still do not have adequate facilities for persons with disabilities. The failure to make equipment available for persons with disabilities, insufficient adaptation of buildings and non-implementation of measures concerning vocational education and training may be considered types of discrimination. Violations of these rules are rarely prosecuted (Article 5 of the Employment Equality Directive). NGOs representing persons with disabilities have no right to intervene in judicial procedures, and are seldom consulted on the development of government policy. When they are consulted, their opinions are rarely taken into consideration.

The authors must stress that with Decree-law 163/2006 of 8 August 2006 approving the framework for the accessibility of buildings and public spaces, Law 46/2006 of 28 August 2006 prohibiting and punishing discrimination based on disability or an aggravated risk to health, the *Action Plan for the Integration of Persons with Disabilities*, and the *National Plan for the Promotion of Accessibility*, the Government has taken important steps towards protecting the disabled.

In a survey conducted by the *Centro de Reabilitação Profissional de Gaia* [Centre for Vocational Rehabilitation] and the *Instituto Superior de Ciências do Trabalho e da*



Empresa (ISCTE) [Higher Institute of Business and Labour Studies] based on a sample of 15,000 people, most of the 8.2 per cent of people referred to as having disabilities were older women or poor.

The INR published *Estudo sobre o Impacto da Discriminação com base na Deficiência nas Mulheres* [Study of the Impact of Disability Discrimination on Women] in 2010.³¹

The *Código da Estrada* [Traffic Code] lays down specific rules on the transportation of children under 12 years of age but does not contain specific rules for children with disabilities, who frequently travel in vehicles without any safety measures to meet their requirements.

The law prohibits disability and age discrimination in promotion, but the criteria defining promotion of employees (increased salary, better conditions and so on) are too vague and there is a great deal of room for discretion. Under current legislation it is therefore in practice very easy to discriminate against older persons and persons with disabilities in access to promotion in both the private and public sectors (Articles 1 and 9 of the Employment Equality Directive). However, it is not lawful to discriminate against older persons or workers with disabilities when it comes to dismissal and redundancy.

No significant positive action has been taken regarding age discrimination. The *Conselho Nacional para a Política da Terceira Idade* [National Council for Third Age Policy (policy for elderly people)] has been abolished. No effective lobbying takes place in matters relating to age discrimination as there are no NGOs dealing with this issue at national level. However, the Government did improve its support to the elderly through the creation in 2006 of the *Complemento Solidário para Idosos* [Solidarity Supplement for the Elderly] for those who are facing poverty. The Government is now making access to this benefit easier, and has disseminated information about it in municipalities, hospitals, day care centres and the media. Discrimination in self-employment is illegal under Law 3/2011.

With regard to sexual orientation, according to the ILGA³² Portugal Report (16 May 2008), Portugal was the first European country, and the third country in the world, to explicitly forbid in its Constitution discrimination on the grounds of sexual orientation, with the unanimous support of all the parties represented in the Assembly of the Republic.

On 17 May 2010, the President of the Republic approved Parliamentary Decree 9/XI on same-sex marriage and on 31 May 2010 it was promulgated by Parliamentary Law 9/2010, allowing civil marriage for same-sex partners. As a result, Article 1577 of

³¹ Study available at: <http://www.inr.pt/content/1/1058/apresentacao-do-estudo-sobre-impacto-da-discriminacao-com-base-na-deficiencia-nas-mulheres/>.

³² International Lesbian, Gay, Bisexual, Trans and Intersex Association.



the Civil Code, which defines marriage as ‘a contract celebrated between two persons of different sexes who wish to start a family through full communion of life under the provisions of this Code’, was amended and the reference to ‘different sexes’ was removed. However, Portuguese law forbids adoption by same-sex couples under the Law on *De Facto* Unions (Law 7/2001 of 11 May 2001) and the Law on Adoption (Law 31/2003 of 22 August 2003).

Around 350 same-sex marriages were celebrated in 2010 and the number rose to around 570 marriages in 2011.

Law 7/2011 was published in March 2011, creating the procedure for sex and name changes in the civil registry. This law allows transsexuals to finally have their identity legally recognised.

With regard to medical assistance for conception, the law currently in force discriminates against same-sex partners. Assisted methods of conception are only permitted for women under the ‘tutelage’ of their husbands or male partners, and single women and lesbian couples are explicitly not assisted.

According to ILGA Portugal, despite the rules laid down by the *Instituto Português do Sangue* (IPS) [Portuguese Blood Institute] which state that ‘nobody can be discriminated against on the grounds of her/his sexual orientation’, in practice male homosexuality is still considered a risk factor and an impediment to blood donation in Portugal.

The *IV Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2011-2013*³³ [Fourth National Plan for Equality – Gender, Citizenship and Non-discrimination 2011-2013] was approved in December 2010 and specifies the need to train and raise awareness among health professionals of discrimination on the grounds of sexual orientation and gender identity. However, there is still a lack of information and some discriminatory behaviour occurs in access to health centres. Moreover, ILGA Portugal has reported that the January 2011 edition of the journal of the *Ordem dos Médicos* [Portuguese Medical Association] contained an opinion article stating that lesbians and gays suffer from ‘sexual aberrations and perversions’ and that ‘homosexuality is forbidden in all civilizations but is tolerated in the more developed civilizations as humanity tends to respect patients, the lame, the abnormal, the disabled and the perverted’. The ILGA has challenged the Portuguese Medical Association about this article on the grounds that it constituted an insult, demonstrated lack of training on anti-discrimination issues among doctors, and that it was inadmissible to speak about homosexuality and disability like this.

³³ Plan available at:

<http://www.poatfse.qren.pt/upload/docs/legislacao/Nacional/Plano%20Nacional%20Igualdade%20IV%20plano%20RCM%20n%C2%BA%205-2011.pdf>.



The *Fourth National Plan for Equality* defines 14 strategic intervention areas: 1) the gender perspective in all policy domains as a requirement for good governance; 2) economic independence, job market and organisation of professional, family and personal life; 3) life-long education and higher education; 4) health; 5) environment and territorial organisation; 6) research and knowledge society; 7) sport and culture; 8) media, advertising and marketing; 9) gender violence; 10) social inclusion; 11) sexual orientation and gender identity; 12) young people; 13) civil society organisations; 14) international relations and cooperation.

ILGA Portugal is promoting training for security forces and services. It believes that promotion of universal access to health is essential and is willing to collaborate with the Ministry of Health to work against discrimination.

With regard to same-sex partners, ILGA is making efforts to guarantee equal legal protection to children brought up by same-sex partners and has already presented a case to the Ministry of the Presidency (this Ministry works directly with the Prime Minister in his capacity of President of the Council of Ministers).

Article 2 of Law 60/2009 of 6 August 2009, which establishes the rules for sex education in schools, is very important as it forbids any discriminatory behaviour on grounds of sexual orientation or any violence on grounds of gender or sexual orientation. This raises awareness among young people of non-discrimination on the basis of sexual orientation. This law was regulated by Ordinance (*Portaria*) 196-A/2010, which introduces sex education in primary and secondary schools and defines the curricula for different educational levels.

The *Comissão para a Cidadania e a Igualdade de Género* (CIG) [Commission for Citizenship and Gender Equality], formerly the CIDM [Commission for Equality and Women's Rights], has as its main objectives to contribute to equal opportunities and rights for men and women, to ensure their effective implementation in employment and social and cultural matters, and to promote citizenship and gender equality. The *Fourth National Plan for Equality* is being implemented by this commission.

Since the adoption of the Lisbon Treaty, the CIG has worked in the areas of sexual orientation and gender identity. Two organisations representing the LGBT community have also become members of the CIG's Advisory Board, and the CIG has sponsored the 'first study at the initiative of a public body'. The findings of this study were included in the *Fourth National Plan for Equality*. For the first time, the *National Plan for Equality* provides measures for the LGBT community. ILGA Portugal suggested measures to enhance gender equality and full citizenship, including by ensuring greater attention to the mainstreaming of discrimination based on sexual orientation and gender identity.

The Labour Code (Law 7/2009 of 12 February 2009) imposes a duty on employers to display information relating to workers' rights and duties in appropriate places in accordance with the principles of equality and non-discrimination (Article 24(4)).



Violation of this disposition is considered a *contra-ordenação leve* [minor offence] under Article 24(5) of this law.

Article 24(1) of the Labour Code grants protection against discrimination on grounds of race or ethnic origin. The same rules apply to employment in the public service (Law 59/2008 of 11 September 2008, which approves the regime for employment contracts in public services - Articles 13 to 27).

Council of Ministers Resolution 9/2007 of 17 January 2007 approved the *Plano Nacional de Promoção da Acessibilidade* [National Plan for the Promotion of Accessibility]. This plan will be in force until 2015, and the *Instituto Nacional para a Reabilitação* (INR) [National Rehabilitation Institute] is responsible for its implementation. At the end of each civil year, the INR has to deliver a report on implementation of the measures foreseen in this plan to the member of the Government responsible for disability.

Promotion of accessibility of buildings and public spaces, transport services and information and communications technologies are the main strands of this plan, which aims to increase competitiveness and employment, reinforce social cohesion and promote sustainable progress. The social aim of this plan is to integrate persons with disabilities into society to enable them to take an active part in society and lead a normal life. The environment created by the plan should be barrier-free and adapted to fulfil the needs of all people equally.

Decree-law 324/2007 of 28 September 2007, which amends the Civil Register Code, establishes that marriages celebrated by other religions or ministers of a church or community established in Portugal (*'radicada em Portugal'* – Article 37 of Law on Religious Freedom (LRF), Law 16/2001 of 22 June 2001) may be recognised and will have the same effects and status as a Catholic marriage.

Article 37 of Law 16/2001 of 22 June 2001 does not specify which religions are 'established', but states they may not be covered by this law until they have had a social and organised presence in Portugal for 30 years, unless they are religious communities that have already been in existence abroad for more than 60 years (see Article 37(2)). The churches and religions that have been 'established' in Portugal include Catholicism, Judaism, Islam and the Baha'i faith.

Non-Catholic confessions also still face problems ministering to people in hospitals and prisons. According to the General Education Inspectorate, meals in state schools are still not adapted to other confessions, and specifically to Islam. No complaints have been reported from Jewish pupils.

0.3 Case-law

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the



equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

Name of the court *Tribunal da Relação de Lisboa* – Appeal Court of Lisbon

Date of decision 01 February 2011

Name of the parties Nationalist Party (*Partido Nacionalista Renovador*)

Reference number (or place where the case is reported). Case 59862/08.7TDLSB.L1

Address of the webpage (if the decision is available electronically)

Brief summary of the key points of law and of the actual facts (no more than several sentences).

The poster which provoked this judgement belonged to the Nationalist Party (*Partido Nacionalista Renovador*) and was placed in a Lisbon square. It read as follows:

‘IMMIGRATION? We say NO!

Enough of abuse: open frontiers, dependence benefits, low wages, criminality and multiculturalism. Portugal for the Portuguese’.

The President of the Nationalist Party responsible for this poster argued in court that he had no intention of using any racist or xenophobic language in this poster and moreover that he had the right to freedom of expression.

The issue at stake was the alleged commission of a crime under Article 240(2) of the Criminal Code on discrimination on grounds of race, religion or sexual orientation, which states that:

(a) anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting or encouraging racial or religious discrimination shall be punished.

(b) anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender and sexual orientation shall be punished.



First instance decision

The accused was the President of the Nationalist Party (*Partido Nacionalista Renovador*), who had already been accused of and tried for racist and xenophobic behaviour in other cases but has never been found guilty.

At first instance, the Court (the 1st *Juízo do Tribunal de Instrução Criminal de Lisboa*) dismissed the accusation by the Prosecution Service that this poster represented a racist act against immigration on the grounds that the poster was only against immigration and not racist as it did not specify races or ethnic origins but immigration as a whole. Consequently, the judge refused to try the accused.

Appeal to the Lisbon Court of Appeal

The Prosecution Service lodged an appeal to the Lisbon Court of Appeal on the grounds that the action of Mr. José Coelho (the President of the *Partido Nacionalista Renovador*) fell within the scope of Article 240(2)(b) of the Criminal Code since the clear purpose of the poster was to disseminate an offensive message against a group of persons on the grounds of their national origin, in order to instigate racial discrimination.

In the poster, the white lamb (supposedly representing Portuguese nationals) expelled black lambs (immigrants) from the country. The association between the image of a hostile white lamb expelling the other lambs and the text itself might establish a cause/effect connection implicating immigrants as the cause of crime, low wages and unemployment, the current great concerns of the Portuguese community. This association affected the image of immigrants in general and their honour and might encourage discriminatory behaviour and violence against immigrants. In this sense, the action of the accused fell within the scope of Article 240(2)(b) through the dissemination and encouragement of discriminatory behaviour against the immigrants.

However, the accused stated that he only was attempting to raise attention to the need of a more restrictive immigration policy.

Decision of the Lisbon Court of Appeal

The Court of Appeal decided that, as the poster did not explicitly refer to racial or ethnic origin, encouragement to racial discrimination could not be inferred, and therefore it did not consider the accused guilty.

According to the Court, a conviction for racial discrimination is directly related to the International Convention on the Elimination of All Forms of Racial Discrimination in which the term 'racial discrimination' means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on



an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. (Article1).

As a State Party, Portugal should condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form and guarantee the immediate adoption of positive measures. However, the Court considered that in this case encouragement to racial discrimination was not proved hence this poster did not contain an explicit threat to immigrants nor include offensive statements about immigrants which incited or encouraged racial discrimination. The Court did not therefore consider that the accused had incited racial discrimination and had only used (within its limits) his freedom of expression. The first instance decision was upheld.

Name of the court: Supreme Administrative Court (STA)

Date of decision: 14 December 2011

Name of the parties: Prosecution Service

Reference number: Case 59862/08.7TDLSB.L1

Address of the webpage:

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/cf48be006a1539b28025797d005684f8?OpenDocument&ExpandSection=1#_Section1

Brief summary: This case related to Law 16/2001 of 22 June 2001 on Religious Freedom and a public prosecutor who requested that she might be allowed to observe the Sabbath on Saturdays.

A public prosecutor who is a Seventh-Day Adventist asked the *Conselho Superior de Magistratura* [Supreme Judicial Council] and the Prosecution Service [*Ministério Público*] if she could be exempted from work on Saturdays as the Sabbath should be observed on the seventh day of the week, specifically, from Friday sunset to Saturday sunset. Adventists avoid secular work and business, although medical, relief and humanitarian work is accepted, and they typically gather for their church services on Saturday morning.

The Board of the Prosecution Service refused her request, and the decision was confirmed by the Supreme Administrative Court. The Adventist public prosecutor invoked Law 16/2001 of 22 June 2001 on Religious Freedom, which enshrines the principle of freedom of conscience, religion and worship and the principle of equality, stating that the State must not discriminate against any church or religious community in relation to others.

Article 14 of this law on exemption from work, lessons and examinations for religious reasons provides that:

1. Employees and agents of the State and other public entities, as well as contract workers, have the right to, on request, suspend work on the day of the weekly



rest, on the days of festivals and during hourly periods that are prescribed for them by the religion or belief they profess, under the following conditions:

- a) They shall work according to a flexible schedule;
- b) They shall be members of a church or a registered community that has sent a list of the aforementioned days and hourly periods for the current year to the Minister of Justice during the previous year;
- c) There shall be full compensation for the respective work period.

In this case, the plaintiff requested an emergency procedure (the expert does not know her exact motivations but this proceeding is used when fundamental rights are in real and eminent danger. He supposes that she wanted a very quick decision). The Supreme Court did not rule on the merits of the case and merely stated that in this specific case there was not a very urgent need for a decision. The plaintiff had the option of initiating a legal action under the normal procedure where all substantial aspects of the case would be discussed, but this procedure required more time. The action must be filed with the Supreme Administrative Court and the facts and legal questions involved would be fully discussed there. The expert is unaware of a follow up to this case. There is no information on the submission of an ordinary action.

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

European Roma Rights Centre (ERRC) v Portugal, Collective Complaint no. 61/2010 of 23 April 2010 (discrimination, housing, social protection):

The ERRC's complaint against Portugal was based on its findings from field visits to several Roma settlements between 2005 and 2011. Its specific concerns related to (i) 'the precarious and difficult housing conditions for a large part of the Roma community'; (ii) 'the high number of Roma families that live in segregated settings, whether in unregulated encampments or as a result of re-housing by the authorities in the outskirts of cities'; and (iii) 'the inadequacy of re-housing programmes for the Roma community in terms of their family composition, cultural habits and ways of life'. It submitted that each of the situations identified through its visits represented a violation of the Government's non-discrimination obligations under the Revised Charter. The Portuguese Government argued that along with other members of Portugal's population, the Roma community has access to, and has benefited from, a set of social policies which are aimed at groups affected by poverty and social exclusion. It claimed that whilst there have been no specific housing programmes based on ethnicity, the Roma have benefited from housing programmes available to all.

The Committee found that the percentage of Roma living in poor housing conditions is 'far above the national average' and they are therefore in a different and disadvantaged situation. The conditions in which many Roma live in Portugal, and the failure of the Government to take sufficient measures to ensure the adequacy of these conditions, represented a violation of Article E of the Revised European Social



Charter in conjunction with Articles 31(1) and 16. Identical treatment of the Roma was not sufficient to discharge the Government's positive obligation to avoid indirect discrimination by taking into account the different position of the Roma community as compared with the rest of the population. Finally, the Committee found that the Government had failed to discharge its further obligation, under Article 30 of the Revised Charter, to adopt positive measures to ensure that excluded and disadvantaged groups, such as Roma, are able to access rights such as housing and achieve social inclusion.

A 2010 report by the EU Agency for Fundamental Rights – covering only European Union member states – found that residential segregation of Roma and Travellers is evident in Portugal. In countries such as Portugal, Roma often live in the same areas as other minorities, particularly immigrants, in socially deprived areas of low-quality housing.

In fact, the authors can confirm that in Portugal, many Roma live in extremely basic encampments on the outskirts of towns. The Commissioner for Human Rights of the Council of Europe conveyed his serious concern at this situation back in his 2009 letter addressed to the Portuguese Deputy Minister of Justice. In 2010, the Advisory Committee on the Framework Convention for the Protection of National Minorities reported that 'many Roma live in segregated areas' in Portugal. The Advisory Committee noted as a matter 'of particular concern that, in some municipalities, Roma settlements are surrounded by walls, often with only one entrance and exit route.'³⁴

³⁴ European Union Agency for Fundamental Rights – *Annual Report 2010* available at: http://fra.europa.eu/fraWebsite/attachments/AR_2010-conf-edition_en.pdf.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

Portuguese constitutional principles go beyond the Directives. They cover a greater number of grounds of discrimination than the Directives, including ancestry,³⁵ sex, race, language, territory of origin, religion, political or ideological belief, education, economic situation, social condition and sexual orientation (Articles 13 and 59).

Article 26(1) of the Constitution guarantees protection against any kind of discrimination. The list of grounds in Articles 13 and 59 of the Constitution is considered non-exhaustive. Consequently, all types of discrimination, including on grounds of disability and age, are forbidden.

In addition, disability is covered in Article 59 (rights of workers), Article 71 (persons with disabilities) and Article 74 (education) of the Constitution. Article 70 (young people) and Article 72 (elderly people) deal with age discrimination.

Portugal has ratified the main international conventions on non-discrimination, and they constitute an integral part of Portuguese law (see Article 8 of the Constitution). In the hierarchy of laws, international conventions are ranked higher than Portuguese law but below the Portuguese Constitution, in other words they are ranked between the Constitution and ordinary legislation. They can be invoked directly.

Article 15 of the Constitution establishes that aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and are subject to the same duties as Portuguese citizens. Exceptions to this general rule are political rights, the exercise of public functions which are not predominantly technical, and the rights and duties which according to the Constitution or the law are restricted to Portuguese citizens.

Article 13 establishes that all citizens have the same rights and duties. Some authors interpret 'citizens' in a very broad sense, as meaning all human beings and not only Portuguese citizens.

Article 59(1) forbids discrimination at work against any worker on grounds such as age, sex, race, citizenship, country of origin, religion, or political or ideological

³⁵ The Portuguese word is '*ascendência*', meaning ancestral lineage. It corresponds to 'birth' in Article 21(1) in the European Charter of Fundamental Rights.



convictions. Paragraph (2)(c) refers to special protection for persons with disabilities at work. Although it does not expressly refer to sexual orientation, it must be interpreted in connection with Article 13, which forbids discrimination on the ground of sexual orientation.

It should also be noted that Article 9(h) of the Constitution considers ‘the promotion of equality between men and women’ as one of the fundamental duties of the State. This confers on the State the duty to combat sexual discrimination and to assure effective equality of treatment between men and women.

Article 26(1) of the Constitution establishes, among other individual rights, the right to legal protection against any kind of discrimination: ‘... *protecção legal contra quaisquer formas de discriminação*’. The Constitution thereby guarantees legal remedies to violations of anti-discrimination provisions.

The prohibition of discrimination on the ground of disability is provided for in Article 71(1) of the Constitution, which establishes that ‘citizens who have physical or mental disabilities shall enjoy all the rights and be subject to all the duties contained in this Constitution, except to the extent that their disability renders them unfit to exercise or perform them’.

According to Article 71(2), the State is obliged to have a national policy to prevent the causes of disability and for the treatment, rehabilitation and integration of citizens with disabilities, to support their families and to develop educational methods to raise society’s awareness of the duty to respect and show solidarity towards disabled citizens. The State must assume responsibility for the effective exercise of their rights, without prejudice to the rights and duties of their parents and guardians. Paragraph 3 of the same Article adds that ‘the State shall provide assistance to organisations for citizens with disabilities’.

With regard to access to education, Article 74 of the Constitution states that ‘everyone has the right to education with a guarantee of the right to equal opportunities for access to and success in schooling’. In education policies, the State must promote and support the access of persons with disabilities to education and, where necessary, support special education (Article 74(2)(g)). This constitutional provision aims to compensate for inherent disadvantages that may be suffered by persons with disabilities in order to guarantee real equality of opportunity.

According to constitutional principles, differences in treatment are considered legal when they are based on an objective distinction of situations, have legitimate objectives in accordance with the principles of the Constitution and can be considered necessary, adequate and proportionate (Constitutional Court judgments: 14/84, 126/84, 76/85, 352/91, 400/91, 806/93, 231/94).

b) *Are constitutional anti-discrimination provisions directly applicable?*



Article 18(1) states that constitutional provisions concerning rights, freedoms and guarantees are directly applicable and are binding on public and private entities. Furthermore, Article 204 establishes that courts and tribunals cannot enforce rules that violate the Constitution.

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The wording of Article 18(1) referred to above is subject to various interpretations. All the main commentators accept that the constitutional clauses on equality can in some cases be enforced against private actors. They diverge about the extent to which and how the constitutional provisions are directly applicable in private law. The question is still open; there are no judicial precedents. The Constitutional Court has not yet taken a clear decision on the effect of the principles of non-discrimination and equality in private relationships (cf. Judgment 98/95). However, the provisions of the Labour Code (Articles 23 to 25) make it clear that the constitutional clause can be enforced against private parties in labour relationships.



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

Article 13 of the Constitution prohibits discrimination on the grounds of ancestry, sex, race, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation. Article 26(1) refers to the right to protection against any form of discrimination. Laws, case law and commentaries do not contain considerations such as whether an ethnic group is homogeneous. Under Portuguese law, 'race' can be understood to include ethnic origin. Furthermore, Article 26(1) forbids any form of discrimination.

Article 71(1) of the Constitution refers to equal treatment for persons with disabilities.

The prohibition of discrimination on the grounds of sexual orientation was introduced by Constitutional Law 1/2004 of 24 July 2004 (*Lei de Revisão Constitucional no 1/2004*). This addendum to Article 13 was a direct consequence of Community law.

Article 24(1) of the Labour Code prohibits discrimination on the grounds of ancestry, age, sex, sexual orientation, civil status, family situation, genetic heritage, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, religion, political or ideological convictions, or membership of a trade union.

Law 134/99 prohibits discrimination on the grounds of race, colour, nationality and ethnic origin, but does not cover sex discrimination.

Law 18/2004 protects against discrimination on the grounds of race and ethnic origin in general (Article 3(2)).

Law 46/2006 of 28 August 2006 prohibits and punishes discrimination based on disability and on an aggravated risk to health. Article 1(2) of this law states: 'The provisions of this law are also applicable not only to disability but also to discrimination against persons on the ground of existence of an aggravated risk to their health (*existência de risco agravado para a sua saúde*), for example paramyloidosis'.

Law 3/2011 forbids any discrimination in access to and exercise of self-employment (Articles 3(1) and 5).



2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in Case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

Racial discrimination is defined in Law 134/99 of 28 August 1999 as "any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of, or results in, invalidation or restriction of the recognition, enjoyment or exercise, in equal conditions, of rights, liberties or guarantees, or of economic, social or cultural rights". This definition is so broad that it covers discrimination based on association. However, there are no legal definitions for the notions of 'race' and 'ethnic origin'.

Law 38/2004 of 18 August 2004 expressly repeals Law 9/89 of 02 May 1989, and gives a slightly different definition of a disabled person in Article 51. Disability is defined in Article 2 of this law as follows: 'a disabled person is one who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others'. This definition is in accordance with the concept used in Case C-13/05 of the European Court of Justice.

Law 38/2004 is previous to the UN Convention on the Rights of Persons with Disabilities adopted in 30 March 2007. However, the Portuguese Parliament approved this Convention (Parliament Resolution 56/2009) and its Optional Protocol (Parliament Resolution 57/2009) on 7 May 2009. The Convention was ratified by Presidential Decree 71/2009 of 30 July 2009 and the Optional Protocol by the Presidential Decree 72/2009 of 30 July 2009.

According to Article 8(2) of the Portuguese Constitution 'rules laid down in international conventions approved or ratified under standard procedure will be in force within Portuguese law after publication in the Official Journal and for as long as they are internationally binding on the Portuguese State'. Therefore, the rules contained in the UN CRPD are in force in Portuguese legislation, including Law 38/2004, which has to be interpreted in conformity with the UN CRPD.

As since July 2009 no incompatibility has been found between Law 38/2004 and the UN CRPD, no legislative amendments have been made. If any incompatibility is found then this law will have to be amended.



Environmental factors in Portuguese law may be interpreted as incorporating elements of the social model of disability. However, as there is no case-law on this matter, the authors can only say that Portuguese law can be interpreted as going beyond the medical model.

The Portuguese definition is intended to cover all limitations or hindrances to activity and participation. It must be considered in parallel with Law 46/2006 prohibiting discrimination on grounds of disability and the existence of an aggravated risk to health.

Article 6 of Law 38/2004 refers to the principle of non-discrimination as follows: 'a person shall not be discriminated against either directly or indirectly, by act or omission, on the basis of his/her disability (...). A disabled person should benefit from all measures of positive action with the aim of ensuring the exercise of his/her rights and duties, correcting the present situation of inequality that persists within society.' This also applies to people discriminated against on the ground that they had a disability in the past or that they will acquire one in the future (discovered, for instance, through genetic testing).

The law recognises that persons with disabilities do not constitute a homogenous group and that specific measures must therefore be taken in order to meet their different needs.

It also defines rehabilitation as 'a comprehensive and continuous process designed to correct a disability and to maintain, develop or restore the person's skills and capacities so that normal activity may be performed' (Article 3).

The provisions of Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and aggravated risk to health, and complements existing Law 38/2004 of 18 August 2004, which defines the general principles of the legal system for prevention, rehabilitation and participation of persons with disabilities, are also applicable to discrimination against persons with an aggravated risk to their health (*risco agravado para a sua saúde*).

This law states that its provisions are binding on all individuals and legal entities, private or public, and goes beyond the Directive in the sense that it protects not only persons with disabilities but also persons with aggravated risk to their health (*risco agravado para a saúde*) (Article 3(b)).

- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*



Recital 17 of the Employment Equality Directive is not specifically referred to in national law. As far as religion is concerned, the *Procuradoria Geral da República* [Office of the Attorney-General] has used the following definitions (Proclamation no. 54/95, published in *D.R. II Série*, 222, 24/09/96): ‘Churches are large communities that are well-established in society, with a formal structure that is bureaucratic and hierarchical’; ‘Sects are in principle smaller and less organised’; ‘A religious confession can be defined as a community based on a doctrine, manifested in a creed, and established according to rules addressed to a human group of followers (believers)’; ‘Religious confessions are social aggregates unified by the communion of faith of their members; a religious confession has a doctrine, the fundamentals of faith are the religious principles accepted by the believers’.

These definitions were established in the context of religious and moral education in schools. They are regarded as an important element of interpretation of the law due to the Attorney-General’s broad formulation, even if it is not binding on the courts.

So far, the Committee for Religious Freedom has not given any definition of ‘religion’ (*religião*) or ‘belief’ (*crença*).

The definition of disability in Portugal goes beyond the common concept of disability as it includes those with a pre-existing aggravated risk to their health (*risco agravado para a saúde*). ‘Persons with an aggravated risk to health’ refers to ‘any person or persons suffering from an illness or disease causing long-term organic, functional, progressive and potentially disabling health changes, with no prospect of complete remission and causing changes to the physical, mental, emotional, social or economic quality of life of such persons, and that may be a cause of early-years disability or of significant reduction in life expectancy’. This covers situations in which the person has no disability as of yet, but has a health issue that could change in such a way that in future it results in a disability.

The expression ‘sexual orientation’ will probably be interpreted by the courts according to its common meaning as including only those people with a heterosexual, homosexual or bisexual orientation, but so far there are no judicial precedents.

Law 46/2006 of 28 August 2006,³⁶ prohibiting and punishing discrimination based on disability or a pre-existing aggravated risk to health (*risco agravado para a saúde*), goes beyond just disability.

- c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

³⁶ *Lei n.º 46/2006, de 28 de Agosto de 2006, que proíbe e pune a discriminação em razão da deficiência e da existência de risco agravado para a saúde*. Text of Law 46/2006 available at: <http://dre.pt/pdf1s/2006/08/16500/62106213.pdf>.



There are no restrictions to the scope of 'age' as a protected ground. There is no minimum age below which anti-discrimination law does not apply.

On the other hand, we should mention that age can be used as a defence:

- In criminal cases, criminal liability starts at 16 years of age. Special legislation applies to persons between 16 and 21 years of age.
- In civil cases, Article 488(2) of the Civil Code establishes a presumption of non-existence of civil liability for minors aged less than seven years of age.

Sixty-five years of age is the normal minimum age for old age benefits, retirement and pension applications; however, there have been changes in the law leading to an increase in the retirement age. (Please see 4.7.4.)

- d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

There are no specific rules dealing with situations of multiple discrimination. At present there is not much awareness of the problem of multiple discrimination. European legislation dealing with multiple discrimination would facilitate the adjudication of such cases.

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

No court cases regarding multiple discrimination have been reported. The discrimination cases reported so far have been treated under one single ground of discrimination.

2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Portuguese civil and administrative law prohibits discrimination based on perceived or assumed characteristics. The principles of interpretation generally used in Portuguese courts cover cases where discrimination is based on an incorrect



assumption or perception. An incorrect assumption or perception by the perpetrator of the offence (discrimination) cannot be considered as justification under the general principles of criminal law.

The principles of Article 16 of the Criminal Code relating to error (*error in persona*) are also applicable to the enforcement of administrative sanctions, and consequently they apply to both criminal and administrative sanctions.

b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?

Portuguese law on discrimination covers discrimination based on association with persons with particular characteristics.

Articles 24(1) and 25(1) of the Labour Code prohibit ‘discrimination by employers against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic heritage, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade union affiliation’, and so sets out the grounds of discrimination without any limitation as regards the actual situation of the worker and in such a broad way that discrimination based on association is covered.

Article 3(1) of Law 134/99 uses the wording ‘Racial discrimination is any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of, or results in, invalidation or restriction of the recognition, enjoyment or exercise, in equal conditions, of rights, liberties or guarantees, or of economic, social or cultural rights’. Similarly, this definition is so broad that it covers discrimination based on association.

Article 3(2) of Law 18/2004 covers any discriminatory practices that violate the principle of equality to be discrimination. Assumed and associated discrimination will be treated as discrimination.

The authors consider that Portuguese law is in line with the judgement in Case C-303/06; however there are no judicial precedents.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

Article 3(3)(a) of Law 18/2004 states:



Direct discrimination is considered to occur when, due to racial or ethnic origin, a person is subject to less favourable treatment than another is, has been or would be in a similar situation.

Article 23(1)(a) of Law 7/2009 defines direct discrimination as:

... when a person, due to one of the factors referred to above, is subject to less favourable treatment than another is, has been or would be in a similar situation.

Article 4 of Law 46/2006 states that:

Discriminatory practices against persons with disabilities occur through acts or omissions on grounds of disability, with intent or negligence, which violate the principle of equality. For instance: the refusal to provide or the impeding of the taking up of goods or services; impediment to or limitation of access to and normal exercise of an economic activity; impediment to or limitation of access to buildings and public spaces; or adoption of measures which may limit access to new technologies.

- b) *Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).*

Discriminatory statements and discriminatory job vacancy announcements are capable of constituting direct discrimination.

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The law permits direct discrimination to be justified in a very few cases covered by genuine occupational requirements.

Law 7/2009 (Labour Code) states in Article 23(1)(a) that 'direct discrimination occurs when, on one of the grounds referred to [in Article 24(1) of the Labour Code] a person is treated less favourably than another is, has been or would be treated in a comparable situation'.

The wording of Article 23(1) of the Labour Code corresponds to the wording of the Directive. However, the law does not give any indication as to what is to be considered justifiable, determining, legitimate and proportionate.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*



There is no specification in law as to how a comparison is to be made in relation to age discrimination. It is up to the court to decide whether age discrimination has occurred on the basis of the facts of the case. No judicial precedents have been found.

2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.*

The law is silent on the use of situation testing.

Under the general principles of the administration of evidence, 'situation testing' can be admitted as evidence, but is not defined by law. The procedural rules are those applicable to evidence given by witnesses: see Articles 619-645 of the Civil Procedure Code and Articles 340-349 of the Criminal Procedure Code.

There are no special rules governing situation testing. So far no court cases have been reported where situation testing has been used. The author believes that situation testing would be given the same standing as evidence given by witnesses and would be subject to the rules and procedures applicable to witnesses. Evaluation of the evidence will be treated by the judge as evidence given by witnesses and subject to its rules.

- b) *Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc).*

So far there is no precedent for the use of situation testing in Portugal.

- c) *Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There is no reluctance on the basis of ethical or methodology issues to use situation testing as evidence in court. The courts will evaluate the evidence resulting from any future situation tests based on their own evaluation of the credibility of the persons involved.

It is quite common in Portuguese courts to use legislation, court precedents and legal theory from other countries, mainly European countries, in arguments.

- d) *Outline important case law within the national legal system on this issue.*



There is no significant case-law on this issue. The authors do not know if situation testing has been used during a trial in a court of first instance because first instance cases are not normally reported on court websites.

2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

Law 18/2004 states in Article 3(3)(b) that 'indirect discrimination occurs whenever an apparently neutral provision, criterion or practice places persons of a certain race or ethnic origin in a less advantageous situation than other persons'. Article 23(1)(b) of Law 7/2009 uses similar wording.

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

According to the Labour Code (Law 7/2009), 'indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons with one of the characteristics referred to in Article 24(1) of the Labour Code in a less advantageous situation compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

According to Article 23(1)(b) of this law, indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The text of Article 2(2)(b)(i) of the Directives is thus reproduced.

There are no specific rules defining legitimate aims. Courts will decide based on general principles of law and on the circumstances, following the precedents of the Court of Justice and of the European Court of Human Rights. However, no court cases have taken place so far.

c) *Is this compatible with the Directives?*

This wording is compatible with the Directives.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*



There is no specification in law as to how a comparison is to be made in relation to age discrimination. It is up to the court to decide whether age discrimination exists on the basis of the facts of the case. No judicial precedents have been found.

- e) *Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?*

Differences in treatment based on language can be considered as indirect discrimination on the grounds of racial or ethnic origin if a connection between the two circumstances can be established. However, there have been no court cases on the subject. *SOS Racismo* has mentioned complaints on the use of language imitating immigrants (e.g. the African accent) in some media as a kind of racism.

2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?*

Statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts named by the parties or appointed by the court. It is up to the court to evaluate the evidence resulting from the statistics. They are admissible if they can be produced as documents (Articles 515 and 523-552 of the *Código de Processo Civil* [Code of Civil Procedure]). The national census contains no relevant data for the purposes of this report.

In civil, criminal and labour proceedings, plaintiffs have the right to require through the court that data in the possession of the respondents or third parties required to determine a *prima facie* case of discrimination be put at the court's disposal, and if necessary, be subject to an expert evaluation. This is provided for in the Civil Procedure Code, Articles 513 (object of the evidence), 519 (duty of cooperation with the discovery of truth), 519-A (the judge may, on deeming it appropriate, require the parties to produce confidential data), 528 (duty of the other parties to present to the court the documents deemed necessary), 531 (documents belonging to third parties must also be surrendered to the court if they are considered necessary as evidence).

The court may also appoint experts to determine certain facts on request of one of the parties or *ex officio* (Articles 582 and 583). These rules are applicable in all other types of procedures.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*



No. Use of statistical evidence is not widespread. There have been no cases in Portugal involving direct or indirect discrimination where statistics have played a major role.

There is no reluctance to use statistical evidence in court on the basis of ethical or methodology issues. The courts will evaluate the evidence resulting from statistics depending on their own evaluation of the credibility of the institutions that have provided them. It is quite common in Portuguese courts to use legislation, court precedents and legal theory from other countries, mainly European countries, in arguments.

c) *Please illustrate the most important case law in this area.*

There has been no significant case law involving statistics.

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

This point is covered by Law 67/98 of 26 October 1998, *Lei da Protecção de Dados Pessoais* [Law on the Protection of Personal Data]. This transposes into national law Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data. It is also covered by Law 32/2008 of 17 July 2008 which transposes into national law Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

Article 7(1) of this law forbids the processing of personal data concerning philosophical or political convictions, membership of political parties or trade unions, religion, private life and racial or ethnic origin, as well as data on health and sexual orientation. It does not apply to family status.

This procedure is not often used and the authors have no knowledge that this has been used in contexts other than employment. As far as we know, no victim of discrimination has made a complaint based on the prohibition of processing personal data. There are no other exceptions to Article 7(1) apart from paragraphs (2) and (3), which state:

The processing of data may be permitted in cases of important public interest; when the individuals have given their consent; to protect the vital interest of the individual when the individual is unable through incapacity to give his/her



consent; processing by a legal entity with no commercial interest [*sans but lucratif*] when it concerns only its members and provided that the data are not available to other persons without prior consent of the individuals; or when necessary for a judicial procedure and for this specific procedure.

Employers in general are only allowed to keep records of the characteristics (personal data) of their workers after obtaining permission from the *Comissão Nacional de Protecção de Dados* (CNPd) [Commission for the Protection of Personal Data] and with the consent of the worker. Personal data are defined in Article 3 of Law 67/98 of 26 October 1998, the Law on the Protection of Personal Data, as any information relating to a clearly identified natural person (individual). Employers must inform the CNPD in advance as to what type of data they intend to collect and the purpose of keeping personal records.

They must supply all the documentation related to the collection of data and indicate the procedure to be used, in particular how they intend to obtain the agreement of the person involved. The exceptions are mentioned above.

Statistical data are used to design positive action measures. These data are collected by the *Instituto Nacional de Estatística* (INE) [Statistics Portugal], the Ministry of Labour and Social Solidarity, and some publications on social issues.

2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Articles 163(2) and 164(2) of the Criminal Code regarding sexual coercion and sexual abuse, define 'harassment' as the 'abuse of authority resulting from a hierarchical, economic or employment relationship, by means of an order or threat'.

This definition is more restrictive than that contained in Article 29 of the Labour Code and in Article 3(4) of Law 18/2004, where harassment is defined as any form of unwanted behaviour that is related to racial or ethnic origin and has the purpose or effect of affecting a person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive³⁷ environment.

The concept of harassment embedded in the Labour Code differs from the notion of harassment that can be found in Article 2(3) of the Directives by accepting that the purpose and effect of the harasser's behaviour may be either to violate a person's dignity or to create an intimidating, hostile, degrading, humiliating or disturbing

³⁷ The Portuguese laws reproduce the exact wording of the Portuguese version of the Directive where 'offensive' corresponds to '*destabilizador*'. This Portuguese word corresponds, in our opinion, better to the English word 'disturbing'.



working environment. It grants employees wider protection against harassment than the Directives. According to Law 18/2004, Article 3(4) and Article 29(1) of the Labour Code, harassment is considered a form of discrimination.

b) Is harassment prohibited as a form of discrimination?

Article 29(1) of the Labour Code states that harassment of employees and job applicants is to be considered a form of discrimination. Article 29(1) defines harassment as: ‘... any kind of unwanted behaviour [...] occurring in the context of a job application or in the context of actual employment, occupation or vocational training, which has the purpose or the effect of affecting a person’s dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment’. Article 29(2) stresses that ‘any unwanted verbal, non-verbal, or physical behaviour of a sexual nature, with the purpose or the effect described in the previous section’, constitutes sexual harassment.

Article 25(1) of the Labour Code (which refers to Article 24) prohibits ‘discrimination by employers against workers or job applicants based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic heritage, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions, or trade union affiliation’ and so sets out the grounds of discrimination without any limitation concerning the actual situation of the worker, and in such a broad way that it covers discrimination based on association.

The general rules dealing with the behaviour of workers in the workplace (including Articles 127(1)(a) and 351(1)(2)(b)(c)(i) of the Labour Code, and the rules on the protection of workers and individual rights of employees outlined by Articles 14 to 22 of the Labour Code and Article 70 *et seq.* of the Civil Code) would apply in some cases, providing workers with some protection against unwelcome conduct based on their sexual orientation.

Under Article 129(1)(c) of the Labour Code an employer may not exert any pressure on an employee in order to adversely influence him/her or his/her own or his/her co-workers’ working conditions.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

There are no additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case law) prohibit instructions to discriminate?
If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*



National law prohibits instructions to discriminate. Article 23(2) of Labour Code (Law 7/2009) includes a provision specifically stating that 'an order or instruction with the purpose of disadvantaging any persons by reason of one of the grounds referred to in Article 24(1) shall be deemed to constitute discrimination'.

Article 3(5) of Law 18/2004 states that an instruction to discriminate on grounds of race or ethnic origin is a form of racial discrimination.

Article 5 of Law 46/2006 complements the articles laid down in the Labour Code. Under this article, the following constitute discriminatory practices against persons with disabilities: the adoption of procedures, measures or criteria directly by the employer or through instructions given to workers or job centres, which may make the recruitment of employees and the termination of work contracts conditional on factors of a physical, sensorial or mental nature.

Article 11 of the Criminal Code and Article 7 of the General Rules on Minor Offences (*Regime Geral das contra-ordenações*) adopted by Decree-law 433/82 (amended by Decree-law 356/89 of 17 October 1989, Decree-law 244/95 of 14 September 1995 and Law 109/2001 of 24 December 2001) and by Article 551 of the Labour Code set out the liability of legal persons for such actions.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for persons with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*
Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

The definition of disability contained in Article 2 of Law 38/2004 is applicable for the purpose of defining reasonable accommodation and also for protection against discrimination in general.

Articles 85 and 86 of the Labour Code establish that the employer has a duty to provide reasonable accommodation for persons with disabilities. The State has a duty to provide support to employers. The burden is not considered disproportionate when it is compensated for by the State (Article 86(3)).



Article 86 states that the employer shall adopt appropriate measures of positive action to enable a person with a disability or a chronic disease to have access to, participate in, or progress in his or her career, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The burden will not be considered disproportionate when it is sufficiently alleviated by legal measures that exist within the framework of national disability policy. The burden will not be considered disproportionate when it is compensated for by the State in terms still to be provided for in special legislation. In addition:

- the law does not specify when the duty applies;
- the law does not state the criteria for assessing the extent of the duty; and
- there is no definition of 'reasonable'.

The competent national authorities are to advocate the adoption of these specific measures by employers and create incentives for action in this field.

Article 85 and Article 86 consider provision of reasonable accommodation as a positive action. Article 85(1) refers to the principle of equal treatment and Article 85(2) and (3) refers to positive action by the State. In this sense they are in accordance with Article 86, and in particular Article 86(2). Article 86 refers to positive action in favour of persons with disabilities. Where the burden will be compensated for by financial aid from the State, an employer's refusal may be considered discrimination.

b) Does national law provide for a duty to provide a reasonable accommodation for persons with disabilities in areas outside employment? Does the definition of "disproportionate burden" in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?

Portuguese law in general does not provide for a duty to provide reasonable accommodation for persons with disabilities in areas outside employment. However, Article 6 of Law 38/2004 states that: 'a person shall not be discriminated against either directly or indirectly, by act or omission, on the basis of his/her disability (...) A disabled person shall benefit from all measures of positive action with the aim of ensuring the exercise of his/her rights and duties, and correcting the present situation of inequality that persists within society'.

According to Decree-law 3/2008, of 7 January 2008, children with disabilities should be integrated into normal classes (mainstream education) when possible and also some special classes (separate classes but not necessarily separate schools; with specifically adapted programmes) must be organised. Pupils are supported by services created for special education and receive books and material adapted to their disabilities free of charge. The assistance depends on the kind of disability and may include all the following: extra teaching assistance, reasonable accommodation (in addition to material in Braille), and physically accessible schools.



- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

Article 85(1) of the Labour Code guarantees equality of treatment for persons with disabilities. Violation of this principle constitutes a serious offence and is punished by the same fines as discrimination.

Employers will be punished either for violating Articles 23(1) and 24(1) (discrimination) or Article 85(1), but not for both (i.e. they will not be punished twice for the same violation). An individual to whom reasonable accommodation is denied can either complain to the ACT – *Autoridade para as Condições no Trabalho* [the Authority for Working Conditions], which must investigate the situation, or file a case to the labour courts.

Article 86 is headed ‘positive measures’. Paragraph (1) deals with the question of reasonable accommodation. It transcribes the wording of the Directive.

A refusal to provide reasonable accommodation will be considered to be a discriminatory act, but the law detailing financial assistance to be provided by the State has not yet been adopted and employers (particularly small and medium-sized enterprises with fewer than 50 employees) claim that they face a disproportionate burden. The provision of reasonable accommodation is considered a positive action, and it will only be possible to consider court actions based on Articles 85 and 86 after financial assistance is provided by the State. Benefits may be obtained from the IEFP – *Instituto de Emprego e Formação Profissional* [Institute for Employment and Vocational Training].³⁸ The State has to cover 100 per cent of the costs for an entitlement to accommodation to exist. Reasonable accommodation which does not cost any money at all is an intrinsic right and refusal to provide it is discriminatory. Articles 85 and 86 can be relied on directly before the courts.

The *Programa de Emprego e Apoio à Qualificação das Pessoas com Deficiências e Incapacidades* [Programme of Employment and Support for Persons with Disabilities and Incapacities] provides several measures to support persons with disabilities who have difficulties in beginning and making progress in their careers.³⁹

The adaptation of jobs and the elimination of architectural barriers are the responsibility of employers and may, exceptionally, be financed by the IEFP under certain conditions. The IEFP part finances enterprises to provide reasonable accommodation for employees with disabilities in their premises, in order to overcome functional difficulties and eliminate physical barriers that prevent or hinder

³⁸ *Instituto de Emprego e Formação Profissional* (IEFP): www.iefp.pt/.

³⁹ This Programme is available at:

<http://www.iefp.pt/apoios/PessoasDeficiencia/Paginas/PessoasDeficiencia.aspx>.



access to the workplace. According to the ACT, violation of this provision may lead to a fine. It is possible to bring cases either to the ACT or the labour courts.

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

National law has not implemented this duty in respect of any of the other grounds. Reasonable accommodation in Portugal is understood as mainly ‘facilities’ – equipment or premises adapted for persons with disabilities. Changes to procedures that do not involve costs are a right of the person and the employer cannot refuse them when these changes are necessary for the disabled employee to work.

In 2007, a candidate to the Bar Association [*Ordem dos Advogados*] filed an appeal with a court of first instance against a decision of the Bar Association that had denied her request to take the Bar exam on a date other than that fixed by the Association, because of her religion.

The Association had set the date for the exam on a Saturday, 8 July. Since the Association refused to grant the candidate’s request, she filed an appeal to a court of first instance, claiming that the Association’s refusal was in violation of the right of religious freedom enshrined in Articles 13 and 14 of the Portuguese Constitution. The court of first instance did not grant the candidate’s appeal, but the court of appeal⁴⁰ subsequently revoked this decision and ordered that the appellant be considered exempt from the exam on that day.

The court of appeal also decided that the Bar Association should fix a new date for the candidate’s exam, not later than 10 days after the court decision. The authors accept that in European law there is a wider concept of reasonable accommodation but in this instance the court dealt with the case as discrimination on the ground of religion and did not invoke the concept of ‘reasonable accommodation’. Although the court’s decision is in line with the Directive, it does not invoke the obligation to provide reasonable accommodation.

The court seems to have regarded the exam date requirement as a form of indirect discrimination, because, according to the court of appeal:⁴¹

- a) the failure of the Bar Association to set a new date for the examination violated the essential religious freedom of the appellant, infringing Articles 13 and 41 of the Portuguese Constitution.
- b) Article 41(2) of the Portuguese Constitution states that: ‘No one shall be persecuted, deprived of rights or exempted from civic obligations or duties

⁴⁰ Administrative Central Appeal Court (North), February 2007, *Bar Association versus Applicant*.

⁴¹ Judgement of the North Central Administrative Court of 8 February 2007.



because of his convictions or religious observance' and therefore any form of discrimination (direct or indirect) on religious grounds is forbidden.

- e) *Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

The rules governing the shift of the burden of proof concerning the right to reasonable accommodation are the same as for other grounds of discrimination (direct or indirect).

- f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Portuguese law requires that services must be available to the public and designed and built in an accessible manner so that persons with disabilities may use them (Articles 2 and 9 of Law 163/2006).

Decree-law 163/2006 of 8 August 2006, which lays out the accessibility regulations for buildings and public spaces, expands on the principles laid out in Law 38/2004 of 18 August 2004 defining the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of persons with disabilities. The legislation stipulates that these spaces should be barrier-free and adapted to fulfil the needs of all people equally.

The Decree sets out the technical rules and measures to be taken into account in the public planning process. These rules need to be adhered to in the design of open spaces and recreational areas, local roads and footpaths, the immediate vicinity of buildings, building entrances and the interiors of buildings. The Decree also sets out the design requirements for access to both new and existing structures (public and private), and minimum dimensions and measurements, materials, and so on. It also draws attention to the problems encountered in existing structures and recommends alternative solutions and modifications.

So far, there are very few public spaces which have already been adapted in accordance with this legislation on accessibility. Almost 60 per cent of Portuguese courts, for instance, still remain almost inaccessible to persons with disabilities.

- g) *Does national law contain a general duty to provide accessibility for persons with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*



National law does not contain a general duty to provide accessibility for persons with disabilities by anticipation. However, Decree-law 163/2006 of 8 August 2006 approves the standards and rules governing physical access to buildings and public spaces.

h) Please explain briefly the existing national legislation concerning persons with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for persons with disabilities?

Portuguese law makes provision for certain special rights for persons with disabilities, specifically with regard to work:

The *Instituto de Emprego e Formação Profissional* (IEFP) [the Institute for Employment and Vocational Training], the largest training operator in Portugal, has special programmes for and gives support to persons with disabilities, mainly in the field of employment, such as:

- sheltered work for persons with disabilities in order to use their abilities and knowledge during their work;
- career advice to support persons with disabilities in their choice of vocational area (for persons not less than 15 years of age);
- vocational training to give persons with disabilities the necessary skills and knowledge to obtain professional qualifications;
- re-adaptation to work for those who have become disabled during their working lives, providing special working conditions adapted to their disability;
- teleworking;
- support for integration into the labour market for persons with disabilities;
- technical support; and
- support for self-employment.

The *Centros de Novas Oportunidades* [New Opportunities Centres]⁴² created for the recognition, validation and certification of secondary schools which had specific programmes for students with disabilities, are now being reformed.

The project *Respons&ability – investidores da diversidade* [Respons&ability – Investors in Diversity] aims to raise awareness among Portuguese SMEs about employment of persons with disabilities. Among other activities, it has distributed an integration manual and a book on diversity management in European SMEs and social responsibility. This project is an initiative of the European Union EQUAL programme and has several partners such as the INR,⁴³ IAPMEI⁴⁴ and Delta Cafés.

⁴² *Novas Oportunidades* website: <http://www.novasoportunidades.gov.pt/>.

⁴³ INR – *Instituto Nacional de Reabilitação*.

⁴⁴ IAPMEI – *Instituto de Apoio às Pequenas e Médias Empresas e à Inovação* [Institute for Support to SMEs and Innovation].



Specific intervention programmes for employment that have been created and implemented in accordance with a variety of criteria, such as age group, level of qualifications, or conditions leading to increased exposure to the risk of exclusion (immigrants and persons with disabilities) have gradually been making an important contribution to keeping people who are unemployed and are covered by the methodologies INSERJOVEM (helping young people make the transition to working life) and REAGE (supporting the (re)integration of unemployed adults) methodologies connected to the labour market.

The Vocational Training and Employment for Persons with Disabilities Programme, the objective of which is to facilitate the social and professional integration of persons with disabilities who are experiencing difficulties in gaining access to or remaining in the labour market, or in securing career advancement, encompasses a broad range of responses designed to make it easier to gain access to a job. Among others, these particularly involve:

- (i) support for employment in the mainstream labour market;
- (ii) protected employment;
- (iii) vocational assessment /career guidance;
- (iv) pre-professional preparation;
- (v) vocational training;
- (vi) re-adaptation to work; and
- (vii) placement support and post-placement monitoring.

Persons with disabilities are also exempt from income tax under certain circumstances, and benefit from preferential tax arrangements. Under Article 28 of Law 58/2008 of 11 September 2008 which establishes the regime for employment relations in the public services, parents of minors with disabilities have the right to special working conditions, namely a reduction in working time.

With respect to social security, persons with disabilities receive special treatment under Portuguese law. There are several subsidies and allowances available, including disability pensions and family foster care subsidies for children and young people (up to the age of 24 years), supplementary benefits for dependency, and subsidies for special education, among others.

In the field of education, pupils with disabilities follow special programmes in basic and secondary-level schools. In higher-level education, faculties have an admissions quota of two per cent of total intake reserved for students with disabilities.

As far as health services are concerned, persons with disabilities are exempt from any fees within the *Serviço Nacional de Saúde* (SNS) [national public health service], as long as they can provide proof of their disability.

With regard to transport, persons with disabilities are entitled to buy certain special means of transport (cars, wheelchairs) at reduced rates of tax. The Institute for



Employment and Vocational Training may sponsor the adaptation of cars for persons with disabilities, if they can prove that they need a car to carry out their work.

The first and second 2008 and 2009 PAIPDI annual reports have been presented.⁴⁵ These reports mainly focused on three strands of action, which have already been partially or completely implemented:

- Strand 1 – Accessibility and information, communication, culture, sport, awareness-raising;
- Strand 2 – Education, qualifications and promotion of inclusion in the labour market, employment, information and training of professionals;
- Strand 3 – Provision, adaptation and maintenance of living conditions of a reasonable standard, social solidarity and protection, prevention (which means prevention of deterioration of living and social conditions), rehabilitation, and quality and innovation in services and institutions.

According to the *PAIPDI Relatório de Avaliação Anual 2008*⁴⁶ [*PAIPDI Annual Report 2008*] almost all the targets set by this plan had been successfully achieved and better results were expected for 2009.

According to the *PAIPDI Interim Evaluation Report* for the first semester of 2009,⁴⁷ out of a total of 99 measures, 48 had already been concluded, 32 were still in development and 19 were scheduled to be completed by the end of 2009 (pages 14 and 15). There is no new data on this Plan, which has already been completed. A new plan will be set out in 2011 – *Estratégia Nacional para a Deficiência* [*National Disability Strategy 2011-2013*] (ENDEF 2011-2013)⁴⁸ according to Council of Ministers Resolution 97/2010 which approves it. This will consist of 133 measures and will be overseen by the National Rehabilitation Institute (INR). This strategy will be a continuation of PAIPDI and will focus on five strands of action:

- Strand 1 – Disability and multiple discrimination;
- Strand 2 – Justice and exercise of rights;
- Strand 3 – Autonomy and quality of life;
- Strand 4 – Accessibility and design for all; and
- Strand 5 – Administrative modernisation and information systems.

So far, no developments on this Strategy have occurred.

⁴⁵ PAIPDI Report available at Rede Solidária website: <http://www.inr.pt/content/1/26/paipdi>.

⁴⁶ PAIPDI Annual Report on the Plan's Implementation 2008 available at: <http://www.inr.pt/content/1/26/paipdi>.

⁴⁷ PAIPDI Interim Evaluation Report of the first semester 2009 available at: <http://www.inr.pt/content/1/26/paipdi>.

⁴⁸ ENDEF 2001-2013 strategy available at: <http://www.inr.pt/content/1/1487/estrategia-nacional-para-deficiencia-edef>.



Increases in life expectancy and the need to overcome insufficient provision of health care and social support led to the development of the Integrated Continued Care Network (Decree-law 101/2006 of 6 June 2006), a partnership between the Ministry of Health and the Ministry of Labour and Social Solidarity. This network consists of a set of projects, solutions, social and health facilities and services, whose objective is to provide social and health support to meet the specific needs of individuals and families, paying special attention to situations of social exclusion. In most cases, its activities are implemented through a cooperation model between the State and civil society, and are essentially targeted at the following intervention areas: i) children and young people; ii) persons with disabilities; iii) the older population; iv) family and community; v) drug addiction; vi) persons with AIDS and their families; and vii) other intervention areas (mental health, and integrated social solutions).

According to the first report of the interdepartmental group for the National Disability Strategy 2011-2013 dated 17 May 2011:⁴⁹

Situation:

23 measures are being implemented by the Ministry of Solidarity and Social Security in coordination with the National Rehabilitation Institute, and the following have already been accomplished:

- Strand 1 – from a total of 6 measures - 6 have already been accomplished;
- Strand 2 – from a total of 5 measures - 4 have already been accomplished;
- Strand 3 – from a total of 3 measures - 2 have already been accomplished;
- Strand 4 – from a total of 4 measures - 3 have already been accomplished;
- Strand 5 – from a total of 5 measures - 4 have already been accomplished.

2.7 Sheltered or semi-sheltered accommodation/employment

a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Portuguese legislation makes provision for sheltered or semi-sheltered accommodation and employment for workers with disabilities under Decree-law 290/2009 of 12 October 2009.⁵⁰ Employers will receive state funds for setting up facilities, their running costs and the remuneration of workers.

⁴⁹ ENDEF May 2011 Report available at: <http://www.inr.pt/content/1/1487/estrategia-nacional-para-deficiencia-edef>.

⁵⁰ Decree-law 290/2009 available at: <http://dre.pt/pdf1sdip/2009/10/19700/0748207497.pdf>.



Work will be carried out in a *Centro de Emprego Protegido* [Sheltered Employment Centre] or in an 'enclave' for semi-sheltered work, which is an area where persons with disabilities can work within a normal workplace, but with adapted conditions.⁵¹

b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*

Yes, including for the purposes of application of the anti-discrimination law. These activities can be carried out:

- for a probationary (training) period of up to nine months which does not constitute an employment relationship; or
- as employment constituting a normal employment relationship.

⁵¹ For further information on sheltered accommodation or work please visit <http://www.iefp.pt/apoios/PessoasDeficiencia/ProgramaEmpregoApoioQualPessoasDefInc/EmpregoApoiado/Paginas/CentroEmpregoProtegido.aspx> .



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

Article 24(1) of the Labour Code prohibits ‘employers’ from discriminating. This applies to natural and legal persons (Article 551 of the Labour Code). Article 24(1) of the Labour Code refers only to employers, but under Article 614 and 621 of the Code, all persons are liable to administrative sanctions if they violate the provisions on equality and non-discrimination.

Article 351(2)(b)(c) and (i) specifically stipulate that a worker may be dismissed if she or he breaches co-workers’ rights, repeatedly enters into conflict with co-workers, or commits any crime in the workplace against co-workers.

An employer’s customers cannot be held liable under the scope of these equality and non-discrimination provisions; the employer can only be held liable if the employer has a special duty of care in relation to the behaviour of the customers.

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

There are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives. Everyone benefits from the protection of the anti-discrimination laws.⁵² Furthermore, discrimination based on nationality is specifically prohibited in labour law and, in general, in Article 3(2) of Law 18/2004 of 11 May 2004.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

Both natural and legal persons are protected against discrimination and have the rights and duties compatible with their nature (Article 12(2) of the Constitution). This includes personal rights. As regards liability, fines are higher for legal persons.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin)

⁵² See also Article 2(3) of Law 18/2004.



service providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

- a) Employers and service providers can be held liable for the actions of employees.
- b) They cannot be held liable for actions of third parties, except where (i) a special duty of care is imposed by law; or (ii) a special relationship can be established, for instance with sub-contractors (Article 551(3) of the Labour Code).
- c) The individual harasser or discriminator is also held liable. Prohibition of discrimination applies to all. Employers and workers may be held liable.
- d) (i) Trade unions or other trade/professional associations are liable for the actions of their directors, representatives and officers; (ii) they are liable for the actions of their members only if these are in a situation in which they represent these bodies, or they are acting in accordance with instructions given by a union or an association.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

Article 2(1) of Law 18/2004 prohibiting discrimination on grounds of race or ethnic origin is applicable to all sectors.

The equality and non-discrimination provisions of the Labour Code apply to all fields of private employment and, until other specific regulations are passed, to public sector employees (Article 1(2) of Law 35/2004). Self-employment is explicitly referred to in Article 10 of the Labour Code.

Anti-discrimination provisions on the grounds covered by the Directives are also applicable to statutory offices.

The Portuguese Government has opted to implement the Employment Equality Directive (together with a considerable number of other EC directives) through a new, comprehensive Labour Code, which came into force on 1 December 2003, and through the adoption of supplementary provisions (Law 35/2004).



Articles 30-40 of Law 35/2004 develop the material scope of the provisions on equality and non-discrimination contained in the Labour Code (Article 32). These rules are applicable to all employment relationships referred to in Article 10 of the Labour Code and in Article 1(2) of Law 35/2004.

According to Article 33 of Law 35/2004, 'the right to equal opportunities and treatment in access to employment, vocational training, promotion and working conditions' encompasses:

- selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy;
- access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience;
- pay and other pecuniary payments, promotions to all hierarchical levels and the criteria used in the selection of employees to be dismissed; and
- membership of, or involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by it.

Articles 85-88 of the Labour Code refer to workers who have a disability or suffer from a chronic disease. With the aim of applying the principle of equal treatment, Article 85(1) states that these workers shall enjoy all the same rights and be subject to all the same duties as other workers as regards access to employment, training, job promotion and working conditions, except to the extent that their disability renders them unable to exercise these. The law does not lay down criteria for determining when a person is unable to exercise such rights and duties. The decision is firstly that of the employer, but it can be verified by the Authority for Working Conditions and by the labour courts, which can ultimately decide whether the person is really incapable or not. As far as positive action is concerned, Article 85(2) states that the Portuguese State shall create incentives for hiring persons with disabilities or chronic diseases.

However, there is no legislation on discrimination on the grounds of religion, belief, age, or disability in the field of self-employment and occupation, with the exception of Article 10 of the Labour Code, which grants protection in cases similar to an employment relationship. However, taking into consideration the court decision mentioned in point 0.3 above, we can say that the Portuguese system in general grants protection against discrimination on the grounds referred to above in the fields of self-employment and occupation.

Law 46/2006, prohibiting and punishing discrimination based on disability and an aggravated risk to health, forbids all discriminatory practices that prevent, or limit access to, the exercise of an economic activity (Article 4(b)).

Article 5 of the same law complements the articles in the Labour Code. This article states that the following constitute discriminatory practices against persons with disabilities:



- the adoption, either directly by an employer or through instructions given to workers or job centres, of measures or criteria which may make the recruitment of employees and the termination of a work contract conditional upon factors of a physical, sensorial or mental nature; and
- the production or publication of job advertisements or any other kind of publicity connected to the pre-selection or recruitment of workers which may directly or indirectly contain any specification based on discriminatory factors on the basis of disability.

Law 3/2011 forbids any discrimination in access to and exercise of self-employment under the same terms as the Labour Code.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?

The public sector is not dealt with differently to the private sector.

The public sector has a quota of 5 per cent for employment of persons with disabilities, and the private sector has a quota of 2 per cent (Article 28 of Law 38/2004 of 18 August), but these quotas have never been enforced in practice, due to the rise in unemployment. The law specifies fines for non-respect of the quotas but in practice these have never been enforced.

Self-employment is protected against any type of discrimination by the principles set out in the Constitution, and specifically by the laws forbidding racial discrimination. Discrimination on other grounds is forbidden by the Labour Code, which also applies to independent work under the conditions set down in Article 10. This article states that employment contracts are subject to the principles of the Code as regards equality of treatment and non-discrimination. This rule does not cover professionals such as lawyers, doctors or accountants, nor discrimination occurring in the exercise of independent practice. However, the courts consider that discrimination in independent work is forbidden.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.



Articles 3 and 6 of Law 7/2001 of 11 May 2001, which adopts measures to protect *de facto* unions, have in some cases been narrowly interpreted with regard to same-sex couples. The authors believe that Case C-267/06 will help to clarify Portuguese practice with regard to non-discrimination against same-sex couples in respect of occupational pensions.

Non-discrimination related to working conditions is covered by Articles 23(1) and 24(1) of the Labour Code. Protection covers employment and working conditions, including pay and dismissal, and contractual conditions of employment, as well as the conditions in which work is, or is expected to be, carried out. An employee cannot be asked to fill in a questionnaire containing unnecessary data.

The principles of non-discrimination on all grounds covered by the Employment Equality Directive are applicable to occupational pensions. Occupational pensions are governed by Decree-law 72/2008 of 16 April 2008, Chapter VII. The rules governing occupational pensions do not contain specific exceptions. The Portuguese legal system, specifically the Constitution, forbids any form of discrimination. Rules on occupational pensions must be interpreted in accordance with this principle.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning courses?

Protection covers both ‘education’ and ‘vocational training’.

Article 85 of the Labour Code grants equal treatment to workers with disabilities in vocational training, but no specific measures are provided for.

Article 127(1)(d) of the Labour Code establishes that employers must provide vocational training to workers according to their qualifications. Article 6(2) states: ‘The State should guarantee, in particular, the access of citizens to vocational training and continual updating of knowledge and skills from when they start work, and should also support the operation of the training system through public funds’.

Article 130(d) establishes that one of the objectives of vocational training must be to promote vocational rehabilitation of persons with disabilities, especially those whose disability results from a work-related injury.



Article 26(1) of Law 38/2004 of 18 August 2004 on disability states that positive measures must be adopted by the State to guarantee the right of persons with disabilities to vocational guidance, vocational training, practical work experience and vocational rehabilitation. Furthermore, the State must encourage self-employment, teleworking, part-time work and work from home.

Article 24(2)(b) of the Labour Code (Law 7/2009) refers to 'guidance, training and vocational retraining at any level, including the acquisition of practical experience',⁵³ and Article 85 of the Labour Code guarantees vocational training to workers with disabilities. Article 86 of this Code refers to positive measures on vocational training to benefit workers with disabilities.

The principles of non-discrimination are applicable to education (Article 74 of the Constitution). Children with disabilities cannot be denied access to education on the grounds that they 'cannot learn'. Children or adults with disabilities are to be placed in mainstream education whenever possible.

Article 2 of Law 46/86 of 14 October 1986, as amended by Law 115/97 of 19 September 1997 (the Basic Law on the Education System),⁵⁴ grants all Portuguese citizens the right to education and culture in accordance with the Portuguese Constitution. Articles 16, 17 and 18 of this law refer to the right of persons with disabilities to special education.

For other grounds of discrimination, the principle of equal treatment applies, but the Labour Code does not provide for specific positive action.

There are no specific provisions concerning technical schools or universities, and no court decisions are available on this subject. It is the author's opinion that anti-discrimination law will be applicable to vocational training in technical schools and universities, and will cover life-long learning courses too.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

⁵³ 'acesso a todos os tipos de orientação, formação e reconversão profissionais de qualquer nível, incluindo a aquisição de experiência prática'.

⁵⁴ Lei n.º 46/86 de 14 de Outubro, Lei de Bases do Sistema Educativo. (The consolidated version of this law with the amendments introduced by Law 115/97 of 19 September 1997 was republished as Law 49/2005 of 30 August 2005.)



Article 24(1) of the Labour Code states that ‘the employer cannot practice any discrimination, direct or indirect, based on (...) religion, political or ideological convictions or trade union affiliation’. No discrimination is therefore allowed on the basis of membership of a trade union. Trade unions themselves cannot discriminate against their own members or with regard to applications for membership.

Article 24(2)(d) of the Labour Code (Law 7/2009) protects the right to equal opportunities and treatment and covers membership and involvement in an organisation of workers whose members carry out a particular profession, including the benefits provided for by such an organisation.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

No. The Labour Code and the law in general do not contain any exceptions to the provisions regarding social benefits. The principle is that discrimination is not allowed in these areas (Article 59 of the Constitution and Article 2(1) of Law 18/2004).

Law 4/2007 of 16 January 2007 (the Basic Law on the Social Security System) establishes in Article 7 the principle of equal treatment and forbids any kind of discrimination regarding beneficiaries.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

Discrimination is not permitted in these areas (Article 59 of the Constitution and Article 2(1) of Law 18/2004). Law 4/2007 of 16 January 2007 (the Basic Law on the Social Security System), establishes in Article 7 the principle of equal treatment and forbids any kind of discrimination in the access to social security on grounds of the gender or nationality of beneficiaries.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and persons with disabilities. If these cases



and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated 'special' education are favoured and supported.

Access to education

The school drop-out rate among Roma children is very high, as shown by the figures provided by the Portuguese authorities. There are very few Roma children who pursue their studies beyond the first four years of school. According to non-government sources, there are currently fewer than ten Roma students in higher education. Roma girls are particularly likely to leave school at a very early age because of cultural reasons and sexist traditions.

In Portugal, school abandonment among Roma is very high. Roma children sometimes face hostility from non-Roma parents, who have pressured school officials not to enrol Roma and have put up signs reading 'No to Gypsies' in the past.

All these trends have been analysed in the study sponsored by the former ACIME [High Commission for Immigration and Ethnic Minorities] and the *Fundação para a Ciência e Tecnologia* (FCT) [Foundation for Science and Technology], entitled '*Olhares I: Pontes para outras Viagens – Escola e Comunidade cigana: Representações*' [Regards I – Bridges to other Journeys – School and the Roma Community: Representations]. The housing difficulties faced by certain Roma impact on their ability to attend school under appropriate conditions.

The Labour Code is not relevant in the context of education. We must stress that the General Education Inspectorate is very careful to investigate all complaints of discrimination. For instance, in 2010, the First Criminal Court of Santarém sentenced a music teacher to a 100-day fine (a daily fee of ten euros in accordance with Article 181 of the Criminal Code), which amounted to one thousand euros. The Court charged the teacher with slander. Witness statements of students from a school in Santarém revealed that the teacher said 'Come in, black' to a 12 year-old pupil when he asked permission to enter the classroom. His mother complained to the local police. The case was considered as crime of slander and therefore was dealt with by a criminal court (Case 357/08.5.TASTR). The *Direcção Regional de Educação de Lisboa Vale e Tejo* [General Directorate of Education] also instigated disciplinary proceedings against the teacher.

Discrimination is unlawful in education. There have been several incidents of parents protesting against the presence of too many Roma children in schools (not on any legal basis, as far as the authors know, but just because of the fact that the pupils were Roma). 'Too many' is a very subjective idea frequently used in the context of populist arguments, and has nothing to do with the real proportion.



The present generation of Roma is clearly in a better situation than their parents' generation. For instance, the Mayor of the Municipality of Torres Vedras with almost 78,000 inhabitants is of Roma origin. However, the new generation still faces discrimination in education: they generally leave school earlier than other pupils, in the fourth grade (between the ages of 10 and 12 years), and do not complete the nine-year period of compulsory education (up to ninth grade). Most leave school because of academic failure and having to repeat school years, and the majority of those who drop out are girls.

The reasons for the high drop-out rate among Roma students are:

- absenteeism;
- lack of parental interest;
- failure of schools to adequately cope with Roma culture, and the social needs and values of Roma children; and
- difficulties experienced by teachers in understanding the children's situation.

Some problems have been encountered between teachers and Roma students in schools. Children leave school early as their parents expect them to work from a young age. The drop-out rate among girls is greater than among boys.

Language problems have not been reported.⁵⁵ The older generations are predominantly illiterate and among children total illiteracy is still around 25 per cent, predominantly affecting girls.

Some initiatives have been taken to encourage school attendance by Roma children. One example is the creation of posts for socio-cultural mediators (some of Roma origin), who act as liaison points between families and schools. The Portuguese authorities have said that the school attendance rate of Roma children has risen since the creation of these mediator posts.

The *Secretariado Entreculturas*⁵⁶ [Intercultural Secretariat] is designed to raise awareness of Roma culture among non-Roma teachers and pupils. The minority of Roma children whose parents have nomadic or semi-nomadic lifestyles continue to benefit from the school network set up some time ago, which enables them to attend school throughout the year, wherever they may be in Portugal. There is no evaluation available of the concrete results of this scheme.

A study published by the former ACIME [High Commission for Immigration and Ethnic Minorities]⁵⁷ does not establish a relationship between rehousing and

⁵⁵ Luiza Cortesão, Stephen Store, Maria José Casa-Nova, Rui Trindade in *Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas*, 2005.

⁵⁶ Entreculturas website: <http://www.acidi.gov.pt/pesquisa/Entreculturas?>

⁵⁷ Luiza Cortesão e o. in *Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas*, 2005.



segregation and absenteeism at school. However, the study confirms that absenteeism is greater among Roma children than among other children.

Another study⁵⁸ also published by the former ACIME concludes that absenteeism is due to a failure to perceive the important role of schools in self-development and vocational training. This study does not make any reference to a relationship between rehousing and absenteeism either.

Roma children occasionally face hostile reactions from parents of non-Roma children who do not wish Roma children to join their own children's classes. In addition, Roma culture is not yet sufficiently taught and promoted, especially in schools attended by Roma, because attention has only recently been drawn to these questions.

Special conditions for access to education and special learning methods are stipulated for students with disabilities. Provisions cover both 'education' and 'vocational training'.

Article 85 of the Labour Code grants equal treatment to workers with disabilities in vocational training, but no specific measures are provided for.

Article 26(1) of Law 38/2004 of 18 August 2004 on disability states that positive measures must be adopted by the State to guarantee the right to vocational guidance, vocational training, practical work experience and the professional rehabilitation of persons with disabilities. Furthermore, the State must promote self-employment, teleworking, part-time work and work from home.

A disabled person may work the hours which he or she wishes to work, if there is no danger to his or her health.

Article 24(2)(b) of the Labour Code (Law 7/2009) refers to 'guidance, training and vocational retraining at any level including the acquisition of practical experience', and Article 85 of the Labour Code guarantees vocational training to workers with disabilities. Article 86 of the same Code refers to positive measures on vocational training for workers with disabilities.

The principles of non-discrimination are applicable to education (Article 74 of the Constitution). Children or adults with disabilities are placed in mainstream education whenever possible. No data are available on the percentage of children with disabilities attending mainstream schools.

According to Decree-law 3/2008 of 7 January 2008,⁵⁹ children with disabilities should be integrated into normal classes (mainstream education) when possible, and some

⁵⁸ Maria Manuela F. Mendes in *Nós, os Ciganos e os outros*, 2005 (pp. 98-121).

⁵⁹ Decree-law 3/2008 available at: <http://dre.pt/pdf1s/2008/01/00400/0015400164.pdf>.



special classes (separate classes but not necessarily separate schools; with specifically adapted programmes) must be organised. Students enjoy support services created for special education and receive books and materials adapted to their disabilities free of charge. The assistance depends on the kind of disability and may include extra teaching assistance, reasonable accommodation (other than material in Braille), and physically accessible schools.

Practical difficulties have occurred due to the lack of specialised teachers and availability of rooms.

In the Ministry of Education's database, the authors found only statistical data on pupils' gender and not on pupils with disabilities.

This relates only to the right of persons with disabilities to special and adapted education within mainstream education. Persons with disabilities have the right to special education if necessary.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The rules against discrimination based on race or ethnic origin are applicable to access to and supply of goods and services.

Article 3 of Law 18/2004 applies to discrimination on the basis of race or ethnic origin. Anti-discrimination rules are applicable to the supply of goods and services. The law is applicable to all goods and services available to the public. Goods and services available through private associations are excluded under the principle of freedom of association. According to Decree-law 594/74 of 7 November 1974, as amended by Decree-law 71/77 of 25 February 1977,⁶⁰ private associations have the right to restrict supply of goods and services to their members. This means that distinctions can be made on the basis of membership. However, membership itself cannot be based on discriminatory criteria.

The rules against discrimination based on disability applicable to access to buildings, public spaces and the supply of goods and services are contained in Decree-law 163/2006 of 8 August 2006, which sets out access regulations for buildings and

⁶⁰ Decree-law 594/74 available at: <http://pt.legislacao.org/download/pdf/decreto-lei-n-o-594-74-associacoes-associacao-constituicao-estatutos-38660>; Decree-law 71/77 available at: <http://pt.legislacao.org/download/pdf/lei-n-o-71-77-autorizacao-ensino-duracao-assembleia-51022>.



public spaces, and in Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and an aggravated risk to health.

- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

The law has no provisions concerning treatment on the grounds of age and disability in the provision of financial services. In practice credit institutions, so far, have been free to assess the risk.

If actuarial or statistical data are used there is no public access to or knowledge of them. However, Law 46/2006 forbids any discrimination against persons with disabilities.

Complaints have been made that the premiums for insurance policies ancillary to loans granted by banks (e.g. mortgages) are too expensive for persons with disabilities. Life insurance policies expire when the person insured reaches 75 years of age; people who wish to remain covered after that age must negotiate and obtain a new insurance policy, which is much more costly than insurance for those under 75.

More than 100 complaints were filed in relation to discriminatory practices with regard to disability or an aggravated health risk in 2007, according to an official report on implementation of Law 46/2006 of 28 August 2006 banning discrimination on the grounds of disability or aggravated health risk after the law had been in force for one year. The complaints that were filed related mainly to property sales and insurance policies.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to persons with disabilities and older people.

With regard to housing for persons with disabilities, mortgages are provided on special terms, provided that the property concerned is to be their permanent residence. There are also special loans available to adapt houses for persons with disabilities.

Access to buildings and public spaces, local roads and pathways is regulated by Law 38/2004 of 18 August 2004, defining the general legal basis for the prevention of the



causes of disability, and the habilitation, rehabilitation and participation of persons with disabilities. The social aim of this law is to integrate persons with disabilities into society in order for them to be active in society and lead a normal life. As far as the built environment is concerned, it should be barrier-free and adapted to fulfil the needs of all people equally.

This law deals with the technical rules and design solutions or measures to be used when planning the built environment. This also includes the design of several complementary domains: open spaces and recreational areas, local roads and pathways, the immediate vicinity of buildings, building entrances and the interiors of buildings.

This law also specifies design requirements for vertical and horizontal access in both new and existing buildings (public and private), the technical and architectural aspects of implementing measures with regard to general and particular application characteristics, criteria, minimum dimensions and measurements, materials, and so on. It also defines problems encountered in existing constructions which hinder implementation of this law, and provides for alternative solutions and modifications.

Authorisations and licences to open any premises to the public are subject to the rules laid down in this law. Municipalities (Town Halls) are responsible for allocating these to private buildings.

Buildings constructed before 1997 have 10 years to be adapted to the new rules, while those constructed after 1997 have five years to be adapted. New houses and apartments have a gradual period of eight years for adaptation.

Article 3(2)(c) of Law 18/2004 applies to discrimination based on race, colour, nationality and ethnic origin, and considers as discrimination the refusal to sell, let or sub-let, or the placing of restrictions on the sale, lease or sub-lease of immovable property based on one of these grounds. Law 134/99 also covers these grounds and certain others (race, colour, nationality or ethnic origin).

The difficulties connected with social housing in general make it difficult to solve the specific problem of rehousing Roma,⁶¹ thus requiring the displacement of Roma communities from encampments and shanty towns to social housing. Existing inhabitants frequently complain about the rehousing of Roma in the same area.

There have been reports of discrimination in Porto and Montemor-o-Novo, and the ECRI *Third Report on Portugal* (2007), paragraph 104 refers to discrimination against Roma in access to housing.

⁶¹ Isabel Duarte *et al.*, *Coexistência Inter-Etnica, espaços e representações sociais*, 2005.



The president of the Town Council of Amadora, where the Cova da Moura shanty town is situated, has stated that the regeneration of this area is only possible through the demolition of a great number of these shanty houses. The *Moinho da Juventude* cultural association is against this demolition, and considers that rehabilitation should be achieved with the support of the inhabitants of the area.

Discrimination against Roma with regard to housing is prohibited. This applies to all aspects of housing. No exceptions are permitted.

It has been estimated that many Roma communities still live in shanty towns despite the PER - Programa Especial de Realojamento [Special Programme for Re-housing], set up by the national authorities, which has enabled many Roma families to leave the shanty towns where they lived in Lisbon and Porto and move to decent housing.

Some Roma communities still live in the most basic of encampments on the outskirts of towns, sometimes without any access to essential services such as water and electricity. There are allegations of evictions and demolition of Roma housing without any alternative accommodation being offered.

Cases of discrimination in access to housing have been reported and complaints have been made to the ACIDI.

Several projects have been implemented. The Municipality of Coimbra has set up the *Coimbra, Cidade de Todos* [Coimbra, City for All] project and established the *Parque Nómada* [Nomads' Park], which is used as a sort of transitional stage to prepare Roma families for rehousing. The *Instituto da Habitação e Reabilitação Urbana* [Institute of Housing and Urban Renewal] has funded the *Velhos Guetos, Novas Centralidades* [Old Ghettos, New Centralities] project, covering all of Northern Portugal.

The Integrated Model of Action with the Roma Population is the product of the housing methods and strategies for Roma families implemented on an experimental basis in the *Parque Nómada* [Nomads' Park], as part of the *Coimbra, Cidade de Todos* [Coimbra, City for All] project, funded by the EU EQUAL Initiative.

The model describes the housing experiment at the *Centro de Estágio Habitacional* [Housing Studies Centre] as a widely participative process and presents the *Acção de Formação para a População Cigana* [Training Initiative for the Roma Population] in an empowerment perspective, carried out in conjunction with the training of integration experts who recognise the need to develop personal and professional skills that are important for interaction and dialogue with Roma families.

This model stresses the importance of partnership whenever several bodies or institutions are supporting the social and professional integration of families as a 'common cause'. It includes a number of experience-based and other



recommendations of a general nature that may prove useful to those willing to 'experiment'.

Action 3 of the *Coimbra, Cidade de Todos* project requires that the Model of Action be brought to the attention of and be explained to all interested parties and people – particularly local government authorities, IPSSs (private social solidarity institutions) and organisations representing the Roma population – in order to ensure that other bodies or institutions and all social actors have access to the Integrated Model of Action with the Roma Population and to innovative practices to solve the problem of social integration of the Roma population.



4 EXCEPTIONS

New legislation on equality and non-discrimination in the workplace allows for some differences of treatment, and expressly states that indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (Article 23(1)(b) of Labour Code (Law 7/2009)).

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

National law provides an exception for genuine and determining occupational requirements. Article 3(3)(c) of Law 18/2004 states that conduct (behaviour) based on race and ethnic origin does not amount to discrimination when, due to the nature of the activities or the context of their execution, such a factor constitutes a justifiable requirement and is determining for its exercise, but the objective must be legitimate and the requirement proportionate. This wording complies with Article 4(1) of the Racial Equality Directive. Article 3(2)(c) of Law 18/2004 does not refer to disability.

Article 25(1) of the Labour Code prohibits in effect all practices of direct and indirect discrimination by the employer on the grounds listed. According to the Code, a difference in treatment which is based on a characteristic related to any of the grounds listed shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a justifiable and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Article 25(2) of the Labour Code).

The authors consider that national law complies with the Directives and that no discrepancies in interpretation will arise.

4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

Portuguese law has no specific rule dealing with issues arising from organisations with an ethos based on religion or belief. The refusal to hire a person on the ground of his/her religion comes under the scope of the prohibition of discrimination laid down by Article 24 of the Labour Code. Article 351 of the Labour Code considers just cause for dismissal in general, and provides for dismissal when the behaviour of the worker makes the continuation of the employment relationship impossible from a



practical point of view. In this respect, the situation of the employer, the character of the relationship between the parties or between the worker and his/her co-workers, and any other relevant circumstances must be taken into consideration. We can deduce by analogy that conflicts between organisations with an ethos based on religion and belief and their employees would be solved on the basis of the same principle. This article could also be applicable when there is an 'ideological' conflict between the worker and the organisation (for instance a trade union or a political party), but as it is an issue of just cause for dismissal this would have to be the subject of a court ruling.

It is necessary to balance the provisions of the Labour Code on equality and non-discrimination with the guarantee of freedom of religion in the Constitution, which is also directly applicable under Article 41 of the Constitution. Article 3 of the Law on Religious Freedom (Law 16/2001 of 22 June 2001) states that churches are free to organise themselves, exercise their functions and provide church services. There is no specific rule on religious and other organisations with an 'ethos', such as political parties and philosophical organisations: consequently decisions have to be taken on a case by case basis. A decision on the effect of a contradiction between the convictions of an individual and the ethos of an organisation on the loyalty of the individual has yet to be taken by the courts.

So far, religious entities have in practice benefited from discretion in hiring or dismissing any worker who does not conform to their professed religion, stated beliefs, or religious ethos in general. The same applies to political parties. This seems to have occurred in practice, but the authors have not found any court cases on this issue, probably because they have been resolved through conciliation. The author has no knowledge of any evidence or facts that lead to the conclusion that those practices are not in conformity with the Directive.

There is no rule allowing discrimination on ideological or religious grounds. This is specifically forbidden by Article 24 of the Labour Code (see also Article 338 of the Labour Code which prohibits dismissal for 'political or ideological reasons' and the reference to Article 381(a) linked to the unfairness of the dismissal when it 'is for political, ideological, ethnic or religious reasons, albeit with the invocation of a different reason'). Some years ago, a case was reported in which a journalist on a daily newspaper connected with a political party was forced to leave the newspaper after he had left the political party.

If factual proof were given that any worker was hired or dismissed because he or she professed to or did not conform to a religion, this would exceed the difference of treatment permitted by the Directive, and this practice would be a violation not only of the Directives but also of Portuguese law.

With regard to church ministers and their status and functions, in Case 04S276 of 16 June 2004 the *Supremo Tribunal de Justiça* [Supreme Court], considered that the relationship between a minister and the church is not governed by the Labour Code.



The legal basis for this is Article 121(1)(e) of the (previous) Labour Code (Law 99/2003 of 27 August 2003), which imposes a duty of loyalty towards the employer. The extent of this duty is not defined in law and the authors have not found any published judicial precedents. As there is no specific rule, it is up to the judge to decide in accordance with the circumstances of the case.

- b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).*

There are no specific provisions or case law regarding such disputes. No cases have been reported concerning discrimination in organisations with an ethos based on religion.

- c) *Are there cases where religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

The recruitment and the necessary qualifications for teachers of *educação moral e religiosa católica* (Catholic religious and moral education) are covered in Decree-law 407/89 of 16 November 1989⁶² (see also Articles 2(h) and 3(a) of Decree-law 27/2006 of 10 February 2006).⁶³ Under Article 20(2) of Decree-law 407/89, the teacher to be hired is proposed by the bishop of his diocese.. As for 'dismissal', Article 18(1) states that 'the teacher ceases to teach the discipline of Catholic religious and moral education as a result of a proposal submitted by the bishop of the diocese, properly grounded, which demonstrates that the teacher has ceased to possess the specific conditions necessary to teach that discipline.'

According to Article 24(1) of Law 16/2001 (Law on Religious Freedom), churches and other religious communities may demand from the competent government member the opportunity to provide religious teaching in state primary and secondary schools. At present there are only three churches or religious communities which may teach in Portuguese public schools:

- (a) The Catholic Church, under the terms laid down by the 2004 Concordat (signed between the Holy See and the Portuguese Government);

⁶² Decreto-Lei 407/89, de 16 de Novembro, available at: <http://emrc4ever.files.wordpress.com/2010/09/8-decreto-lei-407-89.pdf>.

⁶³ Decreto-lei 27/2006, de 10 de Fevereiro, available at: <http://www.dre.pt/util/getdiplomas.asp?iddip=20060657>.



- (b) Evangelical Churches – teaching is allowed following Constitutional Court Judgment 423/87 and subsequently Ordinance (*Portaria*) 344-A/88 of 31 May 1988 of the Ministry of Education. However, the teaching of ‘moral and religious Evangelical education’ started only in 1990.
- (c) The Baha’i community, with the agreement of the Ministry of Education, began to teach Catholic religious and moral education in state primary and secondary schools in 1996. At the moment this is still taught in the North of Portugal (Viana do Castelo).
- (d) The authors have no knowledge regarding any agreements with other churches or religious communities with regard to religious teaching in schools.

4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

National law does not provide a specific exception for the armed forces in relation to age or disability discrimination, but the conditions for access inevitably limit employment due to limitations of age and physical ability.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

There are no provisions or exceptions relating to employment in the police, prison or emergency services. However the physical ability required may limit access to such employment.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

- a) *How does national law treat nationality discrimination? Does this include stateless status?
What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?)*

Article 1 of Law 134/99 forbids discrimination on the grounds of nationality. Stateless persons benefit from the same protection as foreigners. Article 3(2) of Law 18/2004 refers to discrimination on grounds of nationality and colour in addition to racial and ethnic origin.



The Labour Code explicitly states that discrimination on the grounds of nationality is forbidden in access to employment and work (Article 24(1)). This includes stateless status (Articles 4 and 24(3)(a)). Articles 4 of the code grants foreign workers and stateless individuals equal rights with Portuguese citizens, provided they are legally permitted to work in the country. They must have a written contract of employment (Article 5(1) of the Labour Code) and produce documents proving they have a work permit or residence permit (Article 5(1)(b) of the Labour Code).

There is no case law, but in the author's opinion discrimination on grounds of nationality may also constitute discrimination on grounds of ethnic origin.

b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?

There are no exceptions in anti-discrimination law that seek to rely on Article 3(2) of the Directive.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

Civil status and family situation are among the prohibited grounds for discrimination referred to in Articles 24(1) and 25(1) of the Labour Code.

Law 7/2001 of 11 May 2001 adopting protective measures on 'de facto unions'⁶⁴ (hereafter Law 7/2001), does not explicitly impose on public and/or private entities a general duty to treat *de facto* unions as equal to marital status.

De facto unions have only the rights specifically referred to in law. This law is applicable to same-sex couples, and gives unmarried partners that live together as husband and wife for at least two years a certain number of rights and benefits.

⁶⁴ *Lei n. º 7/2001, de 11 de Maio de 2001, adopta medidas de protecção das uniões de facto.* The text of Law 7/2001 can be accessed at: <http://portugalgalay.com/politica/parlamento03.asp>.



With regard to the civil service and employment benefits, partners living in a *de facto* union have the same rights that married civil servants enjoy regarding holiday, absence, leave, and placements; the same applies to private sector workers with regard to holiday, absence and leave (Article 3(b) and (c)). In the present legal context, benefits not covered by Article 3(b) and (c) may be limited to employees who are married.

However, this can also be interpreted in some cases as a violation of Articles 24(1) and 25(1) of the Labour Code, and a violation of the principles laid down in the Constitution. The authors tend to consider that this will depend on the type and nature of benefits offered to married couples. If they are considered to be remuneration under the definition given by Article 258 of the Labour Code, it would appear that discrimination is not allowed, but the authors are not aware of any legal precedents on this issue.

- b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

Article 1577 of the Civil Code, which defines marriage as ‘a contract celebrated between two persons of different sex who wish to start a family through full communion of life under the provisions of this Code’, was amended and the reference to ‘different sex’ has been deleted. As a result, in principle it would constitute unlawful discrimination if an employer provides benefits that are limited to those employees with opposite-sex partners.

The answer given to a) above is also applicable here.

If the benefits referred to above can be considered a right granted to workers, it is also unlawful for the employer to treat an unmarried same-sex couple less favourably, provided that the couple’s relationship is considered a *de facto* union under the said law.

4.6 Health and safety (Art. 7(2) Directive 2000/78)

- a) Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

Individuals with disabilities cannot decide for themselves that they wish to accept health and safety risks. An employer can exclude a disabled person on the grounds that the work will pose a risk to that person’s health and safety.

The employer will not be excluded from liability if the disabled individual suffers any harm in such circumstances (Articles 126 and 127 of the Labour Code). It is the employer who assesses what measures are needed to protect the health and safety of employees with disabilities.



This can be reviewed by the Authority for Working Conditions, the General Health Inspectorate⁶⁵ and the labour courts (a disabled person can challenge an employer's decision before the labour courts).

Law 38/2004 of 18 August 2004 sets out the general legal basis for prevention of the causes of disability and the rehabilitation and participation of persons with disabilities.

Articles 85-88 of the Labour Code contain provisions that seek to ensure the health and safety of persons with disabilities at work and to secure better integration and adaptation to work.

The law provides for several positive action measures to be agreed between the employer and the State concerning reasonable accommodation, and between the employer and the employee, such as a flexible timetable and exemption from overtime and night work as and when necessary. Collective agreements can include other measures of protection. Persons with disabilities can opt to work such hours if no risk is posed to their health or the health of others.

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc)?

There are no exceptions relating to health and safety law in relation to other grounds. The law does not mention issues connected to dress or personal appearance.

4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold?

Article 25(2)(3) of Labour Code (Law 7/2009) states that '...differences of treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. This corresponds to the exact wording of the Directive.

⁶⁵ *Inspecção de Saúde da Direcção Geral de Saúde.*



Legal rules or collective agreements which fall within Article 25(3) must nevertheless be periodically evaluated and modified if they are no longer justifiable (Article 25(4)).

The courts will take the *Mangold* case into consideration when interpreting this; so far, the authors have no knowledge of any court case on this issue.

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

Portuguese law does not allow other differences of treatment based on age, with the exception of positive measures in favour of young people.

The Constitutional Court considered the exclusion of young people between 18 and 25 years of age from a social benefit unconstitutional (Judgment no. 509/2002 of the Constitutional Court on discrimination against young people in access to social integration benefits). The ground for the decision was Article 1 of the Constitution (respect for dignity). The Court did not consider it necessary to examine the implications of Article 13 (equality of treatment).

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2)?

In the case of occupational pension schemes, it is possible under Portuguese legislation to fix ages for admission to a scheme or entitlement to benefits under it. Pension schemes must respect the principle of non-discrimination, but they can fix ages for admission or entitlement if these can be justified under the conditions of the specific pension scheme.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

Articles 66-83 of the Labour Code contain a detailed set of rules protecting younger workers. Workers (whatever their age) who are still at high school or university benefit from credit of up to six hours paid-for study per week under Articles 69(3) and 90(3)(d) of the Labour Code. They are also exempt from overtime (Article 73). This means that employers cannot ask them to work more than the normal agreed hours.

The *Instituto de Emprego e Formação Profissional* (IEFP) [Institute for Employment and Vocational Training] has a duty to supervise the implementation of these measures through a *Comissão de Acompanhamento* [Monitoring Commission] on



which the social partner members of the *Comissão Permanente de Concertação Social* [Permanent Commission for Social Dialogue]⁶⁶ are represented.

There are no specific provisions for older workers.

Persons with caring responsibilities have certain rights:

- maternity leave of up to 120 days (Article 40(1) of the Labour Code);
- paternity leave of up to 120 days (Article 40(1) of the Labour Code);
- the parent or guardian of a minor with a disability or chronic disease is entitled to special working conditions, namely reduced working hours (Articles 53 and 54 of the Labour Code);
- in the case of adoption, the adoptive parent(s) is/are granted 120 days' leave (Articles 44(1) and 40(1) of the Labour Code);
- Articles 46 to 48 of the Labour Code grant the right to leave work for medical consultations and to feed a baby.

Articles 49 to 65 of the Labour Code set out special working conditions for persons with caring responsibilities, such as parental leave of three months, part-time work and flexible hours. Article 49 grants leave to assist minors, especially those with a disability or chronic disease. Article 50 grants grandparents the right to leave of absence to take care of their grandchildren in certain circumstances.

As already mentioned, under Article 28 of Law 58/2008 of 11 September 2008 which establishes the regime for employment relations in public services, parents of minors with disabilities have the right to special conditions of work, namely a reduction in working time.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

The normal minimum age for access to employment is 16 years (Article 68(2) of the Labour Code). According to Article 68(3) of the Labour Code, minors under 16 years of age are allowed to work provided they have already finished compulsory education and the tasks set are simple and will not damage their health and personal development. Compulsory education ends with completion of ninth grade, and children begin school at the age of six (Article 6(1) and (2) of Law 46/86 of 14 October 1986, the Basic Law on the Education System). Children normally end their basic education at 15 years of age. The Authority for Working Conditions must be informed of the employment of such persons (Articles 55 (4) and 56(3) of the Labour Code). Article 72(3) of the Labour Code prevents those of less than 18 years of age

⁶⁶ *Comissão Permanente de Concertação Social* website: <http://www.ces.pt/31#4A>.



from undertaking activities 'which, by their nature or the circumstances in which they are provided, are harmful to the physical, mental and moral development of minors.'

For some types of public service, such as the army or the police, there is an age limit for access to employment. This is covered by Article 6 of the Directive. The normal minimum age requirement for public servants is 18 years.

For legal professions, for instance, judges, prosecutors, lawyers, notaries, bailiffs and judicial mediators or judicial referees there is no minimum or maximum age requirement for the exercise of the profession. However, the length of the required academic training means that entrance into the exercise of the professions cannot occur below the age of 22/25.

The compulsory retirement age is 70 years in the public sector, which means the end of the employment relationship for public servants.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

For public sector workers, there is a mandatory retirement age of 70 years when they must start receiving their pensions. If workers ask to retire before pensionable age or before they have completed the compulsory number of years of work (36) they will incur penalties such as a reduction in the value of the retirement pension. This will depend on the number of years worked and the age when early retirement is requested. People are entitled to request this from the age of 55 years. It is envisaged that the retirement age will increase annually (Law 4/2007, which approves the general basis of the social security system⁶⁷ and Decree-law 187/2007, which establishes and regulates the legal protection system for invalidity and

⁶⁷ Lei 4/2007 aprova as bases gerais do sistema de segurança social available at: <http://www.dgap.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-4e8140f46f49&ID=318>



retirement in the general social security system).⁶⁸ If a worker continues working after the age of 65 (the normal pensionable age), the pension will be increased until they reach 70 years.

A public servant can receive a pension from the *Caixa Nacional de Pensões* (CNP) [National Pension Fund] and still work if she or he has authorisation from the Ministry, but in this case she or he will receive only one third of normal remuneration.

Lawyers may retire at the age of 65. However, they may be allowed by the Bar Association [*Ordem dos Advogados*] to continue practising after retirement.

Private employees have no mandatory retirement age. They can receive a pension and work at the same time, but in this case their contracts must be amended in accordance with Article 348 of the Labour Code; the duration of the contract is changed to six months on a renewable basis, subject to termination with 60 days' notice (Article 348 (2)(c)).

b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

There is no standard legal age to begin to receive payments from occupational pension schemes. In the private sector, payments can be deferred or a person can collect a pension and still work, subject to agreement between the parties. The normal age range to start receiving payments from occupational pension schemes is between 60 and 65 years of age. These payments can be deferred. In some cases the individual can collect a pension and continue to work if the employer so agrees.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

For public employees the mandatory retirement age is 70 years. For private employees there is no mandatory retirement age.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

⁶⁸ Decreto-Lei N.º 187/2007, que define e regulamenta o regime jurídico de protecção nas eventualidades invalidez e velhice do regime geral de segurança social available at: http://www.previsao-sgfp.pt/cont_legislacao.asp?legislacao=46.



Employers cannot set retirement ages. If an employer wishes a worker to retire at, for example, 65 years of age, this has to be justified as if it were a dismissal. See below, e)(ii)

- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?*
- (i) The law on protection against dismissal and other laws protecting employment rights apply to all workers, irrespective of age.
- (ii) Article 348 of the Labour Code states that if an employee is 70 years of age or over, the duration of his/her employment contract shall be six months on a renewable basis, subject to termination with 60 days' notice (Article 348 (2)(c)).

The retirement age is the same for women and men.

Article 42 of the Framework Social Security Law (Law 32/2002 of 20 December 2002) makes provision for a flexible legal retirement age through mechanisms to reduce or increase pensions according to whether the age of the beneficiary is under or over that established in general terms.

Due to the financial difficulties of the social security system, from November 2006 the contribution period was increased, leading to an increase in the retirement age.

4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

Age is not taken into account, but seniority is referred to in Article 368(2) of the Labour Code as one of the criteria for selection for redundancy and collective dismissal. Workers with less seniority are generally selected for collective dismissal.

- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

Compensation for redundancy is not affected by the age of the worker; what counts is seniority. Those with less seniority are usually the first to be considered for redundancy, and will be paid according to their seniority.

The provisions and arrangements of Portuguese law mentioned in 4.7 in our opinion comply with the age discrimination requirements of the Directive.



4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

The laws implementing the Directives do not include any specific exceptions concerning public security, public order or similar, but these exceptions would seem to be implicit.

In a case of conflicting rights, Article 335 of the Civil Code states that the right which is considered to be of higher value must prevail (this is for the courts to evaluate on the basis of the Constitution and general principles of law).

Limitations of fundamental rights are dealt with in Article 18(2) of the Constitution: the law can restrict rights in cases provided for in the Constitution, but the restrictions must be limited to what is necessary to safeguard other rights or interests that are protected by the Constitution. Limitations to the main fundamental rights on the basis of public security, public order or similar are accepted by constitutional law experts, but the latter differ with regard to the extent of the limitations. There have been no precedents in the Constitutional Court on this subject so far.

No exceptions under this heading are provided for in the Labour Code.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

There are no other exceptions. Article 27 of the Labour Code states that positive action measures are not discriminatory.



5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.*

With regard to the Roma community, positive action has been implemented by the ACIDI:

- regulations and permits for itinerant salespeople, which is the main livelihood source of this community; and
- support for Roma NGOs and NGOs involved in work with the Roma community for instance with the participation of the *Associação para o Desenvolvimento das Mulheres e Crianças Ciganas Portuguesas* (AMUCIP) [Association for the Development of Women and Children of Roma Origin], *Igreja Filadélfia Cigana de Portugal* [Philadelphia Roma Church] and *Obra Nacional da Pastoral dos Ciganos* [National Roma Pastoral Care].⁶⁹

The ACIDI has published several academic studies about social integration and the educational and health problems of the Roma community.

Ethnic minorities and Roma people often live in urban districts dominated by shanty or social housing. Many of the Roma are still living in '*bairros de barracas*' or '*acampamentos*' [shantytowns and illegal encampments]. They have been integrated with other groups such as immigrants, both legal and illegal, to Portugal. Some municipalities⁷⁰ have made an effort to eradicate shanty housing through a special rehousing programme, mainly after 1995. This has occurred, for example, in the Lisbon and Porto areas, as well as Beja, Braga, Coimbra, Elvas, Évora and Setúbal.

Newspapers sometimes publish reports of incidents related to the accommodation of Roma families. The question of social housing in general makes it difficult to solve the problem of rehousing Roma.

Cultural mediators recruited from among the Roma community have been introduced, with the aim of establishing bridges between children, families and schools (Law 105/2001 of 31 August 2001, which introduces social and cultural mediators).⁷¹ The functions of these cultural mediators (Article 2 of Law 105/2001) are to work to promote social dialogue, help the inclusion of ethnic minorities,

⁶⁹ *Obra Nacional da Pastoral dos Ciganos* website: <http://www.portal.ecclesia.pt/onpc/>.

⁷⁰ *Imigrantes e Mudanças Sócio-Urbanísticas nos Bairros das áreas Metropolitanas*, Gabinete do Parlamento Europeu, 2005.

⁷¹ *Lei n.º 105/2001 de 31 de Agosto, que estabelece o estatuto legal do mediador sócio-cultural*. Law 105/2001 is available at: http://www.acidi.gov.pt/docs/Legislacao/LPortuguesa/Minorias/L105_2001.pdf.



intervene when necessary in social and educational procedures, and assist individuals in their contacts with public or private services. They are bound to respect the privacy of their service users, and the confidentiality of all information they receive.

The ACIDI launched a pilot project for Town Halls which aims to appoint Roma mediators in ten Portuguese Town Halls. These ten Town Halls will be chosen after the finalisation of the selection procedure by the ACIDI. The mediators will be at the disposal of Town Halls whenever they are needed. Their task will be to offer their assistance in solving conflicts arising, for instance, between residents and the police. The project will last for one year and is targeted at every town with Roma inhabitants. It is expected to be implemented in the towns with significant Roma populations. It began on 8 April 2009: International Roma Day. The number of mediators is proportional to the number of residents as not every Town Hall has registers indicating the number of Roma residents. Mediators should preferentially be of Roma origin, have completed nine years of education and reside in the area. The selection will be made by the Town Halls.

The first evaluation of the Municipal Mediators⁷² project was published by ISCTE and IUL - *Centro de Estudos Territoriais* (public universities) on September 2010.

The ACIDI through the *Gabinete de Apoio às Comunidades Ciganas* (GACI) [Roma Communities Support Office] is going to coordinate training on Institutional Rules, Mediation and Communication for the mediation procedure. The existence of Roma mediators will improve the access of Roma communities to services such as Town Hall facilities, healthcare centres, hospitals and so on, and will facilitate communication between the Roma community and other inhabitants.

Associations working in the areas of migration and cultural diversity can apply to the ACIDI to subsidise intercultural mediator posts. If the required conditions are met, the ACIDI will subsidise the recruitment and employment of a cultural mediator. The ACIDI does not allocate a specific budget for cultural mediators (there are 71 mediators in Lisbon and 22 in Porto).

It is worth mentioning the project 'Intercultural Mediation in the Public Services' – a pilot project developed under the European Fund for the Integration of Third Country Nationals, coordinated by the ACIDI. This project placed 28 intercultural mediators, whose goal was to promote interculturalism, in 25 public services (mostly health and municipal services). Mediators were also placed in the following areas: public security police, social security, housing, employment, and education. An estimated 14,000 people benefited from this programme and a new phase will start in March 2012 with 20 mediators.

⁷² *Relatório Final de Avaliação do projecto de mediadores municipais 2010* available at website: <http://www.cm-amadora.pt/files/2/documentos/20110706090903479967.pdf>



According to a report by the Commissioner for Human Rights of the Council of Europe,⁷³ some projects have achieved positive results through the introduction of 'socio-cultural mediators' in Portugal to liaise between Roma families and schools. The Portuguese public authorities report that Roma attendance rates have risen since the mediators were introduced. However, such mediators should be given the necessary financial support to carry out their job. Their status should also be clearly defined. In Portugal, the role of sociocultural mediators has been frequently misunderstood by school administrators and local authorities, who often perceive the mediators as additional teachers who should take care of the Roma pupils instead of acting as a link between the Roma families, the majority population, the school and the authorities.

The Roma community is represented on the Commission for Equality and Against Racial Discrimination.

Roma benefit from broad social policy measures, including unemployment benefits, Minimum Income Revenue (RMI) subsidies (social integration income), and special education when needed. There are general schemes from which Roma may also receive benefits.

There are no special quotas for social housing for Roma, but municipalities take their situation into specific consideration.

The ACIDI and certain local bodies have taken initiatives relating specifically to Roma. For example, the ACIDI has set up a working group on equality and integration of Roma, and recently published a series of studies on Roma in Portugal. Within the framework of the European Union EQUAL programme, the Ministry of Labour and Social Solidarity is participating in the transnational project 'Promotion of More Active Policies for the Social Inclusion of Roma and Traveller Communities'. The *National Action Plan for Inclusion 2008-2010*⁷⁴ contained specific measures for the inclusion of ethnic minorities.

Roma also benefit from other more general measures to tackle unemployment and social exclusion when they fall into the category of potential recipients.

With the support of the ACIDI, projects targeting young people, educational programmes, and programmes promoting social inclusion of Roma families and students are taking place throughout the country. These programmes providing support and facilities for young people, education, social inclusion of Roma families and students include:

⁷³ Report by the Commissioner for Human Rights of the Council of Europe available at: http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

⁷⁴ *Plano Nacional para a Inclusão 2008/2010* website: http://www.cnrsi.pt/preview_documentos.asp?r=397&m=PDF.



- Northern Portugal – ‘*Asas para o Futuro*’ (Wings for the Future), ‘*Vivências Multiculturais*’ (Multicultural Living), ‘*Escolhas mais Jovem*’ (Choices for Young People).
- Central Portugal – ‘*Renovar as Origens*’ (Renewal of Origins).
- Lisbon area – ‘*Interligar*’ (Interconnecting), ‘*No Trilho do Desafio*’ (The Route of Challenge), ‘*Nómada 1*’, ‘*Nómada 2*’, ‘*Novos Desafios*’ (New Challenges).
- Alentejo – ‘*Inclusão pela Arte*’ (Inclusion by Art), ‘*Mus-E*’, ‘*Encontros*’ (Crossroads), ‘*Escola Intercool*’.
- *Melhorar a Coesão Social - Guia de Boas Práticas para a Cidadania e o Relacionamento de Pessoas, Instituições e Comunidades Ciganas e não Ciganas* (Improving Social Cohesion - Guide for Good Practices on Citizenship and Relationships between Roma and Non-Roma People, Institutions and Communities).
- Several projects to train socio-cultural mediators throughout the country.

The aims of all the above-mentioned projects, specially conceived for young Roma living in problematic areas, and operating throughout Portugal are:

- to promote the educational and social integration of Roma students into schools and society through measures of protection and promotion for the most vulnerable against discrimination;
- to honour Roma culture and build partnerships in civil society to encourage tolerant and positive intercultural attitudes and practices;
- to minimise the risks of dropping out of school among Roma pupils, through support for the special needs of children and young people, and
- to increase personal, social and vocational skills within the local community to enable better access to employment.

As regards Roma integration, the Portuguese Government made available for public consultation until 18 January 2012 the document *Estratégia Nacional para a Integração das Comunidades Ciganas* (ENICC)⁷⁵ [National Strategy for the Integration of Roma Communities] with a list of measures to be taken before 2020. The strategy was prepared by the High Commission for Immigration and Intercultural Dialogue (ACIDI) with the contribution of ministries, municipalities, NGOs and representatives of Roma communities. The strategy includes several strands: education, health and housing, citizenship, anti-discrimination, gender equality, justice and security. This consultation follows the guidance of Council Directive 2000/43/EC and the principles laid down in Articles 9(c), 12, 13, 64 and 65 of the Portuguese Constitution.

⁷⁵ National Strategy for the Integration of Roma Communities available at website: http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.



The ACIDI will coordinate the National Implementation Strategy. A national study on the socioeconomic situation of Roma communities will be conducted by 2014.

Given the important role of a consultative group in improving the quality of the monitoring and evaluation process for the National Strategy, and also in monitoring the socio-economic circumstances of Roma communities, an advisory group needs to be created comprising representatives of government departments or other public or private bodies, and representatives of the Roma communities. This will hold its first meeting in 2012 and be composed of:

- a) the High Commissioner for Immigration and Intercultural Dialogue who will chair and coordinate the group;
- b) two representatives of the member of Government with responsibility for Internal Administration, one from the *Polícia de Segurança Pública* [Public Security Police] and another from the *Guarda Nacional Republicana* [National Guard];
- c) one representative of the member of Government with responsibility for education;
- d) one representative of the member of Government with responsibility for housing;
- e) one representative of the member of Government with responsibility for solidarity and social security;
- f) one representative of the member of Government with responsibility for the economy and employment;
- g) one representative of the member of Government with responsibility for health;
- h) one representative of the *Associação Nacional de Municípios Portugueses* [National Association of Portuguese Municipalities];
- i) one representative of the *Associação Nacional de Freguesias* [National Association of Parishes];
- j) two representatives of the institutions working with Roma communities, appointed by the High Commissioner for Immigration and Intercultural Dialogue;
- k) two representatives of associations representing Roma communities, appointed by the High Commissioner for Immigration and Intercultural Dialogue;
- l) two citizens of acknowledged merit, appointed by the High Commissioner for Immigration and Intercultural Dialogue.

The National Strategy was designed with involvement of the ministries with responsibility for the areas needing most attention through their representatives, regional and local authorities, civil society institutions and wide ranging groups of diverse elements of Roma communities, as stakeholders in formulating the intervention measures aimed at them.

The security forces are essential in setting up a partnership and their participation in local networks therefore represents a strategic contribution to designing and implementing local intervention plans.



Given the very specific issues identified in each of the areas of intervention, between 20 September 2011 and 26 October 2011 various sector-specific meetings were arranged with representatives of Roma communities involving 11 various bodies with experience in housing, health, employment and vocational training, justice, gender issues and discrimination, moderated by each of the partners responsible, with the aim of exploring further the contributions from the various partners which will feed into the priorities and measures comprising the National Strategy.

The main priorities of this National Strategy are as follows:

- Publicising the National Strategy to local agents of the security forces and justice agencies.
- Promoting integration of the security forces and administration of justice agencies into local partnerships.
- Developing an integrated multisectoral approach with active participation by Roma individuals and families and representatives of Roma communities in the field of social support.
- Encouraging the participation of Roma mediators in social support and in the re-housing process.
- Enhancing the skills level of practitioners delivering social care and support to Roma individuals, families and communities.
- Monitoring and optimising social support for Roma individuals, families and communities.
- Recognising Roma family values in a framework of respect for and dialogue with the fundamental values of Portuguese society.
- Investing in mediation and women's associations, training 20 female mediators by 2020.
- Organising citizenship education among Roma communities.
- Rolling out the Municipal Mediators project.
- Organising training/awareness raising actions to foster non-discrimination.
- Highlighting the importance of Roma history and culture.
- Ensuring access to preschool education.
- Increasing rates of school attendance, encouraging Roma children to stay on at secondary school and preventing early school leaving.
- Combating illiteracy.
- Ensuring access to lifelong learning.
- Ensuring access to housing.
- Improving knowledge of the housing situation of Roma communities.
- Strengthening housing policies that foster integration.
- Updating housing provision and upgrading premises for rehousing.
- Promoting employment and vocational training.
- Disseminating good practices in employment.
- Organising training for educators in the diversity of Roma culture.
- Health education and dissemination of information focusing on prevention.
- Raising awareness among health professionals of cultural diversity.



- Deepening relationships between health services and the Roma communities.

The National Strategy for the Integration of Roma Communities lists 39 priorities from a national perspective with measures targeting the Portuguese Roma. The goals address the four main areas for improving social and economic integration for Roma, all of which are primarily national policy areas:

- **Education:** ensuring that all Roma children complete primary school;
- **Employment:** cutting the employment gap between Roma and other citizens;
- **Health:** reducing the gap in health status between the Roma and the general population;
- **Housing:** closing the gap in access to housing and public utilities such as water and electricity.

EDUCATION: Ensuring access to social support by Roma individuals, families and communities with complete equality before the law, thereby countering discrimination and segregation, must be an aim for everyone. Enhancing access to compulsory education, by mobilising schools, as organisations, to help Roma students succeed and to accept their cultural diversity. It will accordingly be necessary to promote to Roma families an image of schools that are worthy of their commitment and trust. Making schools conscious of the importance of having more flexible education and training pathways depending on the beneficiaries, increasing their awareness of the importance of combating the successive repetition of school years. Involving families in decisions about the school choices of their children and young adults, with a commitment to hands-on support tailored to their needs.

EMPLOYMENT:

This National Strategy aims to help Roma access the labour market by using existing resources or adapting other available resources, with an interventionist methodology based on personalised solutions, by creating Personal Employment Plans (*Planos Pessoais de Emprego* - PPT), through the active participation of labour market entrants in solving their own problems, with the support of mediators from their cultural group, and by means of courses leading to qualifications using the existing programmes and measures provided by the Institute for Employment and Vocational Training (IEFP).

Priority will be given to vocational guidance in the fields of adult education and training, apprenticeships, initial qualification and education and training for young adults in order to develop the skills of Roma communities with a view to their employability and socio-economic inclusion, and the acquisition of skills which will facilitate access to employment.



HEALTH:

Roma communities are not amongst the regular users of health services, and it is necessary to encourage tailored measures, in particular using mobile units and encouraging registration at health centres as outreach structures. An equally important strategy will be a focus on developing channels of communication and dissemination strategies tailored to these communities.

The need to train health professionals so that they are more aware of the specificities of these sectors of the population, thereby taking forms of behaviour into account and finding appropriate solutions. Closer contact between health service providers and Roma communities. Mediators are a factor in facilitating communication and a resource in the event of disputes, and health is an area where their intervention will be very significant.

HOUSING:

Increasing transparency and fostering equality in housing policies, mainstreaming access to housing by Roma families in local housing strategies, highlighting the fact that these families have a right to decent housing, on an equal footing with other sectors of the population, strengthening the inclusivity of State-supported housing projects and developing mediation mechanisms, thereby preventing tensions, disputes and processes of exclusion, specifically by training inclusion specialists.

Promoting access by marginalised communities to the rental or owner-occupier market requires long-term interventions with a high degree of involvement by public bodies, and entails awareness-raising and training processes and mechanisms to impose rules for correct use of the accommodation and communal areas.

Municipal mediation has emerged as an integrated response to the needs identified and, through appropriate training for municipal mediators, gives Roma communities improved access to services and institutions, while providing those organisations with a greater knowledge of the Roma communities. Furthermore, by developing the skills of the mediators in specific training areas, in particular in relation to their responsibility and autonomy to intervene, municipal mediation fosters better understanding in Roma communities of how the agencies, institutions and existing social welfare mechanisms operate.

[Source: High Commission for Immigration and Intercultural Dialogue (ACIDI) report on the *National Strategy for the Integration of Roma Communities*]⁷⁶

⁷⁶ Report on the *National Strategy for the Integration of Roma Communities*, February 2012 available at: http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.



The *Segundo Plano para a Integração dos Imigrantes 2010/2013*⁷⁷ [*Second Plan for the Integration of Migrants 2010-2013*] aims to obtain the highest levels of integration within employment, housing, health and levels of education (cross-cutting perspective) and with respect to racism and discrimination, gender equality and citizenship. Another change from the first Plan is reflected in the distribution of the areas, with media and religious freedom now included under a new heading, Promotion of Diversity and Intercultural Dialogue. One theme, sport, has a dual value which is reflected in its inclusion in not one but two areas: Promotion of Diversity and Intercultural Dialogue, and Racism and Discrimination.

Like its predecessor, the *Second Plan for the Integration of Immigrants (2010-2013)* was compiled on the basis of joint contributions from all ministries, as well as contributions and proposals from civil society, namely immigrant associations, COCAI Conselho Consultivo para os Assuntos da Imigração [Advisory Council for Immigration Affairs] members, the Commission for Equality and Against Racial Discrimination (CEARD), and researchers working with the Immigration Observatory. The High Commission for Immigration and Intercultural Dialogue (ACIDI) is coordinating its implementation.

The Plan defines a series of commitments, namely:

- 1) measures to combat school abandonment and failure of the descendents of migrants;
- 2) strengthening vocational training;
- 3) intensification of Portuguese language teaching;
- 4) tools to facilitate access to individual and social rights in the areas of health, housing and justice.

The Plan aims to:

Extend the skills of teachers working in increasingly multicultural contexts by strengthening continuous training in the form of short-term vocational training and training workshops organised by teacher training centres. Guarantee and monitor the constitution of balanced class compositions, based on the recommendations of the Ministry of Education, ensuring a balanced 'ethnic mix'.

Reinforce, as part of the 'Educational Areas for Priority Intervention' (TEIP) programme, the presence of intercultural mediators in schools, guaranteeing their recognition as members of the educational community and key partners in the integration and learning process.

⁷⁷ *Second Plan for Migrant Integration 2010-2013* available at: http://www.acidi.gov.pt/_cfn/4d346c9b80687/live/Consulte+a+vers%C3%A3o+da+Plano+2010-2013+em+Ing%C3%AAs.



Disseminate best practices on the level of education and the level of partnerships with other organisations, such as city councils and immigrant associations, with regard to the reception, assistance and integration of children who are descended from immigrants.

This Second Plan also highlights two new areas of intervention: the promotion of diversity and intercultural dialogue, and elderly immigrants. This latter issue is a challenge which has recently emerged with increasing immigration to Portugal and is designed to be a preliminary to the introduction of actions and measures as part the European Year for Active Ageing and Solidarity between Generations planned for 2012.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of persons with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

According to Article 27 of the Labour Code, 'legislative measures of a specifically defined temporary nature, benefiting certain disadvantaged groups, including groups defined by reference to sex, reduced working capability, disability or chronic illness, nationality or ethnic origin, enacted with the aim of guaranteeing the exercise, in conditions of equality, of the rights provided for in this code and of correcting a situation of factual inequality persisting in social life, shall not be considered discriminatory'. So far this article has not been implemented.

- (i) Specific provisions of the Labour Code against discrimination on grounds of disability.

Articles 85-88 of the Labour Code refer to workers who have a disability or suffer from a chronic disease. As regards promoting employment opportunities for disabled people, Article 85(2) states that the Portuguese State shall create incentives for hiring persons with disabilities or chronic diseases.

According to the same article and Article 86(2), the State shall also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies shall give incentives to employers to include measures to help such people retain their employment when developing a strategy for managing disability in the workplace.

Several rights are guaranteed to workers with disabilities. These include the right to be exempted from a specific number of working hours (Article 87), if medically proven that this would constitute a danger to their health or safety at work; the right not to perform overtime (Article 88); and the right not to work at night, if that would



constitute a risk to their health or to the safety of the workplace (Article 87(1)(b)). The risk must be objectively evaluated and not solely by the employer (Article 87(2)).

The Labour Code also states in Article 86(4) that laws or collective agreements may introduce provisions that are more favourable to the protection of workers with disabilities or chronic diseases than to the employer, whilst bearing in mind the interests of both.

We should also highlight the Labour Code rules on teleworking (Articles 165-171), which is considered positive action in Portugal (Article 26(2) of Law 38/2004). This new method of working may benefit persons with disabilities, since many of the tasks that were previously carried out in factories or offices can now be done at home, or from any place where the worker has access to the necessary tools. According to Article 169 of the Labour Code, teleworkers have the same rights and the same duties as other workers in relation to training, job promotion and conditions of work.

Article 87(1)(a) of the Labour Code exempts workers with disabilities from working more than eight hours per day. Article 88 exempts them from working overtime and Article 87(1)(b) exempts them from night work.

Article 28 of Law 38/2004 establishes quotas for the employment of persons with disabilities of up to 2 per cent for private enterprises and up to 5 per cent for the public sector, but these have never been enforced. There are no statistics on the number of persons with disabilities employed under the quota. In a media interview, both the Secretary of State for Rehabilitation and the President of the Portuguese Association of Persons with disabilities stated that they had no doubt that these quotas were not being enforced.

(ii) The authors would also like to mention the following successful positive action:

- allocation of spaces in public transport for persons with disabilities (spaces in buses and trains are reserved for persons with disabilities),
- reservation of parking places (parking places are reserved by municipalities for persons with disabilities as close as possible to their home and workplace),
- support in acquiring houses or apartments of their own (mortgages with reduced interest rates are granted to persons with disabilities), and
- support for setting up their own small businesses.

The necessary logistical conditions were met to enable the achievement of one of the essential goals of the N-CID (Department for Children, Elderly and Disabled Persons): the creation of the Disabled People's Hotline (a direct and immediate telephone linkup) which started to operate experimentally in the first trimester of 2011. This hotline provides support to persons with disabilities and their families in regard to their rights, duties and benefits.



In addition, Decree-law 163/2006 of 8 August 2006 approves regulations on access to buildings and public spaces, Law 46/2006 of 28 August 2006 prohibits and punishes discrimination based on disability and an aggravated risk to health, and the *Action Plan for the Integration of Persons with Disabilities* and the *National Plan for the Promotion of Accessibility* stipulate positive action for persons with disabilities.

Other recently implemented actions which deserve mention are detailed below.

According to the *Associação Portuguesa de Deficientes* [Portuguese Association of Persons with Disabilities], accessibility provisions should include not only buildings, but also footpaths and obstacles that block the flow of pedestrian traffic.

Transport is also a vital component of independent living. Like others in society, persons with disabilities also rely on transport facilities, but in many instances, means of transport are inaccessible to them, sometimes because they cannot use them in the first place (e.g. inaccessible buses, train stations).

Immediate steps should be taken to ensure that persons with disabilities using public transport are not at a disadvantage compared to others. Measures could include ensuring that bus and train drivers make regular announcements at stops to inform individuals where they are, allowing the transportation of service animals, and providing signage in Braille.

Certain buses which provide transport links between hospitals and institutions for the support of persons with disabilities are now equipped with access ramps for wheelchairs.

The Ministry of Labour and Social Solidarity has recently announced that 23 subway stations will be equipped with lifts and toilet facilities for persons with disabilities.

Law 33/2008 of 22 July 2008,⁷⁸ establishing measures to promote access to information about specific goods for blind and visually impaired people, required large retailers to put in place, by 22 January 2009, equipment that would provide blind and visually impaired people with the necessary Braille information about the product they planned to buy.

Under Articles 2-6, this law is applicable to retailers who own at least five establishments larger than 300m² where food and non-food goods are sold. In one at least one of their establishments, the retailers should provide individual supervision for persons with visual impairments so that they can buy the products more easily. Braille labels should be attached to products so that these can be identified by

⁷⁸ *Lei n.º 33/2008, de 22 de Julho (Estabelece medidas de promoção da acessibilidade à informação sobre determinados bens de venda ao público para pessoas com deficiências e incapacidades visuais)*. Law 33/2008 of 22 July 2008 available at: <http://dre.pt/pdf1sdip/2008/07/14000/0453904540.PDF>.



visually impaired people. The labels should include the description of the product, its principal characteristics (such as ingredients) and expiry date. It was foreseen that associations representing persons with disabilities would give their agreement to this new system, which they did. Some large retailers are already implementing this measure but there are still a large number which are not.

The integration of new technologies in large retail facilities can improve the buying experience of persons with disabilities. This new application of Braille labelling in the retail sector will meet the needs of persons with serious visual impairments and also is a visible face of socially responsible retail.

Sofia Antunes, director of the *Associação dos Cegos e Amblíopes de Portugal* (ACAPO) [Portuguese Association of Blind and Visually Impaired People] stated that 'citizens with visual impairments face countless challenges and barriers daily, including the whole process of retail buying. Without suitable labelling it is very difficult to distinguish between a tube of toothpaste and a tube of glue, or between a tin of pickles and a tin of floor wax. Solutions like this will render the retail buying experience easier for the more than 160,000 persons with severe visual impairments estimated to live in Portugal.' Labelling all goods in Braille is now becoming a common practice in Portugal.

The ACAPO organised a '*jantar às escuras*' (dinner in the dark), where invited guests (politicians and employers) had to eat dinner over a two-hour period without any light, just as if they were blind. This action took place in a shopping centre and sought to raise awareness of the difficulties blind people face in daily life.

As far as minority ethnic groups are concerned, immigrants, especially newcomers, face competitive disadvantages or specific vulnerabilities which require positive action to enable effective equality.

To achieve such objectives, programmes and actions that allow immigrants to be properly received are being developed, such as the National Immigrant Support System, with initiatives such as the National Immigrant Support Centres. These support centres combine the presence of the public bodies with which immigrants have to deal with a diversified set of support offices (dealing with family reunification, employment, legal support, and so on), which speeds up access to fundamental rights.

Furthermore, the National Network of Information for Immigrants provides useful and practical information to facilitate immigrant integration, available in a variety of languages and in different formats from a number of sources (leaflets, websites, media, telephone help lines and information centres).

In this area, the teaching of Portuguese provided by the *Portugal Acolhe* [Portugal Welcomes] programme is also extremely important. The majority of these



programmes are funded by the ACIDI and the *Serviço de Estrangeiros e Fronteiras* [Aliens and Borders Service].



6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

Racial discrimination in general

The ACIDI acts in many cases as a (*de facto*) mediator to try to solve conflicts and avoid formal legal procedures.

The ACIDI is going to sign a Protocol of Collaboration with the Attorney General's Office [*Procuradoria-Geral da República*] aiming to develop better linkage between these bodies in the scope of racial discrimination claims covered by Law 18/2004 of 11 May 2004 and Decree-law of 28 August 1999, which are dealt by the CEARD (Commission for Equality and Racial Discrimination).

For offences committed under Law 134/99 and Law 18/2004, the High Commissioner has the authority to impose penalties. The High Commissioner initiates an administrative procedure, and after having heard representations from the parties and the Permanent Commission of the Commission for Equality, decides whether a fine should be imposed and how much that fine should be. The respondent has the right to appeal to the courts against the fines imposed by the ACIDI. Neither the victim nor associations have the right to appeal or intervene in the appeal procedure. Victims have the right to sue for damages in court.

Civil damages can be awarded for all types of discrimination under the general principles of Articles 483, 484 and 496 of the Civil Code. In labour law, it should be noted that Article 28 of the Labour Code expressly states that the occurrence of any discriminatory act gives the worker or job applicant concerned the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of civil law (i.e. Articles 483, 496, 799 and 800(1) of the Civil Code).



There are no statutory limits for pecuniary or non-pecuniary (moral) damages. However, the authors have not found any precedents in which damages have been awarded only on the basis of a case of simple discrimination.

In the case of multiple discrimination, damages could be higher, taking into account the aggravated conduct of the perpetrator.

Non-pecuniary damages do not include interest. Pecuniary damages may, in some cases, include interest or take into consideration the devaluation of money, in particular where the passage of time is a consideration.

Under Portuguese law there is no right to punitive damages. However, the courts have great discretionary powers in relation to the amount of non-pecuniary damages they can award.

The victims have to instruct a lawyer and advance some funds. They are, however, entitled to *apoio judiciário* (legal assistance) if they do not have sufficient financial means to cover a lawyer's fees and litigation costs. This is also valid for foreigners. We should point out that the length and complexity of civil procedure may act as deterrents to those seeking redress.

As far as administrative procedure is concerned, the law does not grant the victim the right to pursue the case, but he or she has the right to ask for information on the case and if necessary to complain to the *Provedor de Justiça* [Ombudsman].

Discrimination in employment

For legal cases in the sphere of employment, there are specialised *Tribunais do Trabalho* [labour courts]. They are part of the general legal system but deal only with labour law cases concerning employment relationships, work-related accidents and illness, appeals against fines, and disputes concerning social security rights. They deal with all questions arising from the drafting, execution and termination of employment contracts. The jurisdiction of the labour courts is set out in Article 85 of the Courts Act of 1999. These courts are staffed by professional judges. Issues arising between employees working for the same employer are also dealt with by the labour courts (Article 85(h) of the Courts Act). These courts also deal with appeals regarding sanctions imposed by administrative agencies for non-compliance with employment laws.

No specific procedures for mediation in relation to discrimination are provided for in the Labour Code. However, the rules for the labour courts make it mandatory for the judge presiding over a case to hold at least one conciliation conference between the parties before trial, and require him/her to try to mediate in any labour dispute coming under his/her jurisdiction (Articles 32(2), 36(2), 51(1)(2), 55(2) and 70(1) of the Labour Procedure Code – the code containing rules of procedure for labour actions in accordance with Decree-law 480/99 of 9 November 1999, as amended by Decree-



law 323/2001 of 17 December 2001 and Decree-law 38/2003 of 8 March 2003.⁷⁹ Article 492(2)(f) of the Labour Code also states that collective agreements should include mechanisms for conciliation (Articles 523, *et seq.*), mediation (Articles 526, *et seq.*) and arbitration (Articles 529 and 506 to 511) in labour disputes.

The Authority for Working Conditions (ACT) is responsible for monitoring enforcement of Labour Code provisions on equality and non-discrimination, investigating any complaints arising from infringement of these provisions, and imposing administrative sanctions as set out in the code for such violations.

It should be stressed that the ACT has played a useful role in combating discrimination on the grounds of nationality and, in some cases, disability. In 2008, it investigated nearly 2000 actions for possible discrimination. In 2008, the number of complaints it registered rose from 207 to 446. Complaints are received from immigrants and concern salary discrimination on grounds of nationality. Very few cases have been presented to the ACT by persons with disabilities. Meanwhile, the Ombudsman has also paid special attention to discrimination cases.

For public employees the law provides, in general, a system of internal (hierarchical) administrative appeals that, once exhausted, allows civil servants to challenge final decisions taken by public bodies before the administrative courts.

Racial discrimination is subject to disciplinary measures and the sanctions may go as far as dismissal. However, victims have no right to intervene in the disciplinary procedure. They have the right to file a complaint to the labour courts and to give evidence or to present witnesses.

According to Article 548 of the Labour Code, any violation of its provisions amounts to a *contra-ordenação* [administrative offence], for which a *coima* [administrative fine] can be imposed. The Labour Code classifies these administrative offences according to their degree of gravity as *leves* [minor], *graves* [serious] or *muito graves* [very serious] offences. A violation of the provisions on equality and non-discrimination is classified as a very serious offence. Other offences related to the application of the Employment Equality Directive may be classified as minor or serious offences.

Violations may affect persons with disabilities in general or specific individuals. So far, no fines have been imposed. In addition, the disabled person is entitled to compensation for the damage (losses) he or she has directly suffered. The authors have been unable to trace any cases of this.

⁷⁹ Labour Procedure Code available at:
<http://www.verbojuridico.com/download/codigoprocessotrabalho.pdf>.



If the discrimination is considered a crime under the Criminal Code, the victim may lodge a complaint with the police or the *Ministério Público* [Prosecution Service], or bring a civil case.

Many court buildings have not been adapted to facilitate access for persons with disabilities, and in most cases old buildings are very hard to access. Decree-law 163/2006 provides for the removal of architectural barriers, but establishes a period of up to eight years (Article 23) for their removal.

The Portuguese Disability Association⁸⁰ has repeatedly stated that Decree-law 123/97⁸¹ of 22 May 1997, abrogated by Decree-law 163/2006, on the removal of architectural barriers to public buildings and services to secure access, has hardly been enforced. While buildings housing public services must by law facilitate access by persons with disabilities, in practice many of the buildings, including the labour courts themselves, have not yet been adapted.

During court proceedings, information in Braille should be provided, as well as sign language interpreting if necessary. There are no specific rules for the courts and the Authority for Working Conditions about dealing with individuals with learning disabilities.

Mediation is not foreseen for dispute resolution for *funcionários públicos* [public servants]. They are required to file an action in the administrative courts.

b) *Are these binding or non-binding?*

- a. Mediation by the High Commissioner is not binding.
- b. Mediation by labour courts is binding.

Procedures for mediation in criminal law are currently implemented by the Ministry of Justice. *Julgados de Paz* [Justices of the Peace] who can also work in mediation exist in the biggest Portuguese towns.

c) *What is the time limit within which a procedure must be initiated?*

According to Article 526(2) and (3) of the Labour Code 'in the absence of conventional regulation, mediation may take place: a) by agreement of all parties, at any time during the conciliation; or b) at the initiative of one of the parties, one month after the beginning of conciliation, through communication in writing to the other party'.

⁸⁰ Associação Portuguesa de Deficientes.

⁸¹ Decreto-lei n.º 163/2006, *acessibilidade de espaços públicos, equipamentos colectivos e edifícios públicos e habitacionais*. Decree-Law 163/2006 available at: <http://www.euroacessibilidade.com/legis01.htm>.



If it is a criminal case there is no temporal limit as penal mediation may start at any time (there is only the stipulation that the case must be concluded within three months – Article 5 (1) of Law 21/2007 of 12 June 2007).

d) *Can a person bring a case after the employment relationship has ended?*

Cases can be brought within a period of one year after the employment relationship has ended (Article 337(1) of the Labour Code).

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) *What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

NGOs (such as *SOS Racismo* and *Associação Portuguesa de Apoio à Vítima* (APAV) [the Portuguese Association for Victim Support]), trade unions and the Prosecution Service are entitled under national law to act on behalf or in support of victims of discrimination. NGOs and trade unions take up complaints of discrimination and they pass them to the bodies that are involved in dealing with them, for example the ACIDI, the Authority for Working Conditions or the *Comissão para a Igualdade no Trabalho e no Emprego* (CITE) [Commission for Equality in Labour and Employment]. The new Law 3/2011, adopted by the Council of Ministers in 2010, has made it easier for NGOs to intervene.

NGOs working in the anti-discrimination field focus on the area or areas of discrimination in which they have expertise at national, regional or local level, for example, race, religion, sexual orientation or age. Some immigrants' NGOs focus on their own communities. Trade unions represent the interests of their members irrespective of the 'community' which they come from. Some NGOs – for example *SOS Racismo* and *Olho Vivo* – work with victims of harassment and race discrimination, providing support, advice and occasionally referral for legal assistance. The extent of these services, however, is dependent upon the resources and expertise available.

It is also possible for trade unions to engage in some cases on behalf or in support of victims of discrimination in judicial or administrative procedures under the Labour Code and the *Código do Processo do Trabalho* [Labour Procedure Code]. The situation is more complicated with regard to NGOs. We can say in general that they can engage in support of the victims in criminal judicial procedures and under Law 3/2011 they can engage on behalf of or in support of victims in administrative procedures. Legal entities (NGOs and associations) representing the interests of



persons with disabilities have legal standing in court to bring cases on behalf of disabled individuals.

Within companies, trade unions represent only their members but in practice they are often accepted to represent any worker.

Some trade union representatives do take up cases on behalf of individual members and some NGOs have casework functions. Where neither can assist they will endeavour to make appropriate referrals for individuals. It is worth noting that resources to support casework and organisations, such as law centres, that deliver it, are diminishing and it is not clear how or to what extent individuals will be able to access remedies for unlawful discrimination in the future.

Members of trade unions are entitled to free access to legal representation. The *Ministério Público* [Prosecution Service] represents all workers in cases before the *Tribunais do Trabalho* [labour courts].

- b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove “legitimate interest”, what types of proof are needed? Are there legal presumptions of “legitimate interest”?*

Under national law, associations have to be incorporated with specific aims listed in their by-laws. They need to aim to protect people against discrimination or protect fundamental rights in general. There are no membership or permanency requirements. ‘Legitimate interest’ is proved by the aims of the associations contained in their by-laws.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

Authorisation of the victim must be given in writing. In the case of minors or persons under guardianship the authorisation of parents or of guardianship is required. Article 5(2)(c) of the Labour Procedure Code states that trade unions may file actions to represent members who authorise them to do so in cases related to a general violation of individual rights of identical nature. Article 5(3) states that authorisation is presumed if the member does not manifest any opposition after being informed by the trade union of its intention to file the action.



- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

Action by all associations is discretionary. They decide what to do and in which cases to intervene.

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*
- (i) Article 7(2) of the Racial Equality Directive is covered by Article 5 of Law 18/2004, which stipulates that associations may engage in judicial or other procedures in support of a complainant. This gives to them the right to legal standing in civil and criminal cases concerning race discrimination, and in some administrative proceedings.

Article 5 of Law 18/2004 states:

Those associations that, according to their by-laws, have as their objective protection against discrimination based on racial or ethnic origin have the right to intervene in support or on behalf of one or more complainants, and with their approval in the respective legal procedures.

In addition, Article 15(1) of Law 46/2006 stipulates that associations for persons with disabilities and other similar organisations defending the rights and interests of persons with disabilities have the right to intervene in support or on behalf of a complainant in his/her respective legal proceedings. These entities have the right to monitor administrative procedures that may culminate in a fine for any discriminatory act referred to in this law. In cases of a crime committed against a disabled person, these entities have the right to assist in subsequent criminal proceedings. The application of this law will be monitored by the *Instituto Nacional para a Reabilitação* [National Institute for Rehabilitation].

Decree-law 163/2006 on accessibility for persons with disabilities also provides that legal entities (NGOs and associations) representing persons with disabilities have legal standing in court to assist or act on behalf of individuals with disabilities in court cases in which they are involved.

- (ii) In cases of *contra-ordenações* [minor offences], these entities have the right to denounce and file a complaint with the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination] and the *Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI)⁸² [High Commission for Immigration and Intercultural

⁸² ACIDI website: <http://www.acidi.gov.pt/>.



Dialogue]. Individual complainants need be identified only if this is necessary to substantiate the complaint.

Article 8 of Law 3/2011 states the following:

Legal standing:

Organisations whose purpose is the defence or promotion of the rights and interests of individuals against discrimination regarding access to employment, training or to the conditions for the provision of self-employment or employment, *have legal standing to intervene on behalf of the person concerned, provided that:*

- a) the associations explicitly include protection of the specific interests in their assignments or by-law objectives; and*
- b) there is express authorisation from the person represented.*

Article 53(1) of *Código de Procedimento Administrativo* [Administrative Procedure Code] grants NGOs whose aim is to protect a certain general interest the option of intervening in administrative procedures and subsequently the right to appeal to the administrative courts if they consider it necessary. However, there would not appear to be many opportunities to use this article in cases related to discrimination as it is intended to cover interventions in matters related to environmental problems.

- (iii) Article 9(2) of the Employment Equality Directive is covered by Article 477(d) of the Labour Code, but only trade unions have the right to intervene in defence and protection of their members.

Furthermore, Article 443(1)(d) of the Labour Code grants legal standing to trade unions in administrative proceedings, imposing fines in cases of violation of the anti-discrimination rules of this Code, with the right to file an appeal or to answer an appeal by the person found guilty. Article 5 of the *Código de Processo do Trabalho* [Labour Procedure Code] allows the intervention of trade unions in employment cases.

- f) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

Associations may seek and obtain the same types of remedies when they act on behalf of the actual victims.

- g) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

There are no special rules on the shifting burden of proof.



- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

National law allows associations to act in the public interest. Under Article 26A of the *Código de Processo Civil* [Civil Procedure Code] they can act in *acciones populares* when their aim is to protect unspecified persons or interests against discrimination or to protect fundamental rights. According to this article, all citizens, associations and foundations, as well as the Prosecution Service, have standing to intervene and initiate actions in order to protect general interests.

In civil procedure, an action requires legitimacy and self-interest from the person who presents the action.

In labour law, under Article 5 of the Labour Procedure Code (Law 488/99), trade unions can intervene to protect, in general, individual rights. They may use all types of proceedings available in the Code and the types of remedies specified by the Labour Procedure Code. There are no rules concerning the shifting burden of proof.

- i) *Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Class actions are possible in civil, criminal and labour procedures. The prosecution of hate crimes by several NGOs is considered a class action.

In labour law, under Article 5 of the Labour Procedure Code (Law 488/99) only trade unions can intervene to protect individual rights in general (class actions). Trade unions may use all types of proceedings available and the types of remedies provided by the Labour Code. Trade unions may under Article 5 of the Labour Procedure Code bring class actions and intervene in cases before a labour court.

There are no specific rules concerning the shifting of the burden of proof for class actions or *acciones populares*.

Trade unions and NGOs have the right to act on behalf of one or more complainants. Class actions, in the sense of collective actions, i.e. actions with several complainants, are possible in civil, criminal and labour procedures under:



- Law 33/95 of 31 August 1995 (*Acção Popular Civil* [People's Civil Action]) which covers some kinds of class action.
- Article 53(1) of the *Código do Procedimento Administrativo* [Administrative Procedure Code] grants to NGOs some rights to legal standing that can be used in some administrative procedures.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

According to Article 25(5) of the Labour Code, it is for the person who considers him or herself discriminated against to substantiate the occurrence of the alleged discrimination, by naming the worker or workers he or she feels are, have been or would be treated more favourably. It is for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination. Article 25(6) states that this is 'particularly applicable in the case of invocation of any discriminatory practice in access to employment or vocational training or working conditions, in particular by reason of leave for prenatal care, protection of the worker's health and safety in pregnancy, postpartum or when breastfeeding, maternity or paternity leave or absence for childcare.'

A presumption of discrimination is made once the employee can demonstrate the existence of facts that allow for such a presumption to be established. It is then up to the employer to prove that his or her actions are not to be considered discriminatory.

It should be noted that Article 25(5) of the Labour Code applies to all the grounds of discrimination mentioned in Article 24(1).

The complainant must establish the facts from which discrimination may be presumed. Once these have been established, the burden of proof will shift, since the employer has the duty to prove that the facts alleged in court are not true or justified. If the employer fails to prove that there has been no discrimination the employee will win.

Article 6(1) of Law 18/2004 states that the victim of discrimination has to present facts from which the occurrence of such discrimination may be inferred. It is up to the respondent to prove that the differences of treatment are not the result of any of the factors mentioned in Article 3, which refers to discrimination on the grounds of race, colour, nationality or ethnic origin and indicates, as examples, some typical discriminatory practices.



The victim must demonstrate the act of discrimination and present facts to substantiate it. The defendant must show in turn that the differential treatment had no basis in racial or ethnic origin.

This principle does not apply to criminal procedure, or to actions where according to the law it is up to the court or other jurisdiction to carry out the investigation.

The burden of proof of non discrimination lies with the employer if the victim indicates facts that *prima facie* allow a presumption of discrimination. Breach of discrimination provisions constitutes a very serious misdemeanour and entitles the victim to compensation for pecuniary and non-pecuniary damages. Convictions can be published. Victims of discrimination, including harassment, are entitled to compensation.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Article 129(1)(a) of the Labour Code prohibits an employer from ‘opposing, in any way whatsoever, the exercise by a worker of his or her rights, as well as from dismissing an employee, or imposing any sanctions on him or her, or subjecting him or her to any adverse treatment because of that same exercise’.

Article 331(1)(a)(d) states that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation for a complaint against working conditions or for the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee.

Based on these provisions (and also on the provisions set out in Articles 351(1)(3) and 381(b) of the Labour Code), any kind of victimisation is considered illegal under labour law. Victimisation is clearly prohibited outside of employment and is covered in Article 7 of Law 18/2004.

There is no specific mention of protection of witnesses and of people who help a victim of retaliation, but if retaliation is proven the above rules should be applicable, taking into account the comprehensive wording of the law.

Article 7 of Law 18/2004 states that acts of retaliation are null and void. It does not mention witnesses, but they must be considered to be protected. However, no other sanctions are provided for retaliation. The wording of Article 23 of Law 18/2004 does not cover specifically victimisation, and so in this case general rules of burden of proof are applicable.



6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

Racial discrimination in general is a *contra-ordenação* [summary administrative offence]. Law 134/99 and Decree-law 111/2000 state that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions. Article 15 of Law 18/2004 makes reference to the above regulations.

Decree-law 111/2000 was repealed by Law 38/2004. However, Article 15 of Law 18/2004 states that for infringements related to discriminatory practices Articles 9 and 10 of Decree-law 111/2000 are still applicable, and consequently these articles must be considered still in force.

Fines may vary from €485 to €2,425 for individuals and are doubled for legal persons.

If the offence results from the omission of a duty, the application of the sanction does not prevent the offender from carrying out this duty if it is still possible. The ACIDI may apply the following ancillary sanctions:

- publication of the decision;
- public censure (admonition) of the perpetrators of discriminatory practices;
- confiscation of property;
- prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities;
- removal of the right to benefits granted by public bodies or services;
- removal of the right to participate in trade fairs;
- removal of the right to participate in public markets;
- compulsory closing of premises owned by the perpetrators; or
- suspension of licences and other permits.

Very serious offences are punishable as follows (see Article 554(4) of the Labour Code):

- i) when committed by an employer whose turnover is less than €500,000, fines can vary from €2,040 to €4,080 in the case of negligence, and from €4,590 to €9,690 in the case of intent (*dolus*);
- ii) when committed by an employer whose turnover is equal to or higher than €500,000 but less than €2,500,000, fines can vary from €3,264 to €8,160 in the case of negligence, and from €8,670 to €19,380 in the case of intent (*dolus*);



- iii) when committed by an employer whose turnover is equal to or higher than €2,500,000 but less than €5,000,000, fines can vary from €4,284 to €12,240 in the case of negligence, and from €12,240 to €28,560 in the case of intent (*dolus*);
- iv) when committed by an employer whose turnover is equal to or higher than €5,000,000 but less than €10,000,000, fines can vary from €5,610 to €14,280 in the case of negligence, and from €14,790 to €40,800 in the case of intent (*dolus*);
- v) when committed by an employer whose turnover is equal to or higher than €10,000,000, fines can vary from €9,180 to €30,600 in the case of negligence, and from €30,600 to €61,200 in the case of intent (*dolus*).

If the employer responsible for the violation of the rules is not a registered company, fines can vary from €1,020 to €2,550 in the case of negligence, and €2,550 to €5,100 in the case of intent (*dolus*). See Article 555(4) of the Labour Code.

If discriminatory treatment occurs during recruitment, the victim cannot request the court to order the employer to hire him or her. He or she is only entitled to damages.

However, if discrimination takes place in the context of actual employment, the victim of discrimination can ask the court to order the employer to put an end to any discriminatory treatment, and to be reinstated if he or she was unfairly dismissed.

Article 24(1) of the Labour Code refers only to employers, but it is fair to assume that under Article 548 of the same code everyone (and not only employers) is liable to administrative sanctions if they violate the provisions of the Labour Code on equality and non-discrimination, as Article 548 refers to '*qualquer sujeito*' which means 'any person' that violates the rules.

The Labour Code specifically states that legal persons are liable to administrative sanctions. Employers are also responsible for the payment of administrative sanctions imposed on their subcontractors if they cannot show that they acted with proper care (Article 551(4)). A decision imposing an administrative fine for a violation of the provisions of the Labour Code on equality and non-discrimination can also be published (Article 562(3)(4)).

With regard to sanctions for violation of disability anti-discrimination provisions, the Labour Code specifies in Articles 548-555 which offences are considered very serious or serious in cases related to discrimination. It should be noted that the criteria which distinguish very serious, serious and minor offences are not clear or necessarily logical.

For instance, the Labour Code states in Article 85(3) that the violation of Article 85(1), which forbids discrimination against persons with disabilities, is a 'very serious offence'. However, in Articles 224(7) and 225(7), a violation of Articles 224(2)(4) and 225, which exempts workers with disabilities from night work, is a 'serious offence'.



If a person is found guilty of discriminatory acts more than once (recidivism), he or she may be liable to ancillary penalties in addition to a fine, which may include the temporary withdrawal of public authorisation to carry out activities in an enterprise, a ban on competing for public contracts and/or the publication of the decision.

Any discriminatory provisions included in an employment contract are, under Articles 294 of the Civil Code and 121(1) of the Labour Code, considered null and void and can be declared so by the labour courts.

The payment of compensation for pecuniary and non-pecuniary (moral) damages suffered by victims of discrimination is covered by Article 26 of the Labour Code. There is no ceiling on the amount of compensation that can be awarded. The authors have not found any court cases on this issue.

The sanctions provided by law are effective, proportionate and dissuasive. According to the information available, sanctions have only been imposed in a few cases.

According to Law 46/2006 forbidding discrimination on the ground of disability, the perpetration of discriminatory acts give a disabled person the right to compensation for moral damages. In addition, the law foresees a pecuniary sanction of approximately €2,000-€4,000.

Penal sanctions

The Criminal Code has been amended and Article 240 now covers discrimination based on almost every ground. Article 240(1) makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Article 240(2) imposes penal sanctions on anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting to or encouraging racial or religious discrimination.

Article 240(2) also imposes penal sanctions on anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender and sexual orientation.

Those who incite or encourage racial, religious or sexual discrimination will be subject to a term of imprisonment from six months to up to five years.

Under Article 132(2)(4) of the Criminal Code on homicide, motives based on hatred on grounds of race, religious or political convictions, colour, ethnic origin or



nationality, religion, gender or sexual orientation are regarded as aggravating circumstances, resulting in a more severe penalty. Such aggravating circumstances may also apply in cases of assault causing bodily harm under Article 146 of the Criminal Code. There is no general rule stipulating that such motives constitute aggravating circumstances for all offences. This means that, for other offences, it is for the courts to decide, on a case by case basis, whether racial motives constitute an aggravating circumstance.

The fact that victims are especially vulnerable due to age and disability is also considered to be an aggravating circumstance in such crimes.

Articles 251 and 252 state that outrage (affronts and insults) and trouble and disorder affecting the normal provision of religious services are crimes punishable with imprisonment of up to one year, or with a daily fine up to 120 days. 'Daily fines' mean fines calculated on the basis of the income of a guilty party of between €1 and €49.80, as laid down in Article 47(2) of the Criminal Code, with a minimum of 10 days and a maximum of 120 days. If not paid, these fines will be converted into prison sentences.

Article 253 criminalises violence or threats against funeral processions or ceremonies (*cortejo ou cerimónia fúnebre*), punishable with imprisonment of up to one year. This article protects the religious ceremonies involved. Article 254 criminalises the profanation of any cemetery, which is punishable by up to two years' imprisonment or a daily fine of up to 240 days.

Genocide is covered by Article 8 of Law 31/2004 of 22 July 2004.

Civil sanctions

According to Article 28 of the Labour Code, regardless of the administrative sanctions that can be imposed, the victim of discrimination can always sue the perpetrator for pecuniary and non-pecuniary damages in accordance with the general rules on (civil) liability (Articles 483 *et seq.* of the Civil Code). Under Article 500 of the Civil Code (joint and several liability), in some cases the employer (if the perpetrator is not the employer him/herself) may also be sued for damages, together with the person who is held legally responsible for the discrimination complained of.

Under Article 70 of the Civil Code, individuals may institute legal proceedings to protect themselves against any unlawful interference with their physical or psychological integrity. Furthermore, victims are entitled to ask the courts to put a stop to such interference or, where there is a threat of such interference, to prevent it. Thus far, Articles 70 and 483 of the Civil Code have not been applied in cases of discrimination.



In the context of education, victims can also apply for such injunctive relief but it is more practical to apply to the *Inspecção Geral da Educação* [General Education Inspectorate of the Ministry of Education].

b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

There is no ceiling on the amount of compensation that can be awarded as civil damages.

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims?*
- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

There is no information available on the amount of compensation available to victims. No court cases on this issue have been reported.



7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The specialised body for the promotion of equal treatment with regard to racial and ethnic discrimination is the governmental *Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI)⁸³ [High Commission for Immigration and Intercultural Dialogue], formerly the ACIME [High Commission for Immigration and Ethnic Minorities]. The ACIDI is governed by Decree-law 167/2007 of 03 May 2007,⁸⁴ which approves the establishment and organisational structure of the ACIDI, which is now a public institution or legal person. It is the designated body according to the transposition process.

According to Article 8(1) of Law 18/2004 of 11 May 2004, as amended by Decree-law 86/2005 of 2 May 2005, it is now the responsibility of the ACIDI to promote equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin, and to promote dialogue with and integration of immigrants, minority ethnic groups and religions.

In particular, it is also part of the mandate of the High Commission to coordinate the '*Programa Escolhas*' ['Choices Programme'] and the *Estrutura de Missão para o Diálogo com as Religiões* [Structure for the Promotion of Religious Dialogue], as well as the *Secretariado Entreculturas* [Intercultural Secretariat].

The Choices Programme has entered its fourth cycle. It aims to reinforce social inclusion of children and young descendants of immigrants and minority ethnic groups living in more vulnerable socioeconomic conditions through the promotion of social cohesion and equality. The results of the Programme's activities in 2010 are available.⁸⁵ At the beginning of 2010, 130 new projects were implemented and the

⁸³ ACIDI website: <http://www.acidi.gov.pt/>.

⁸⁴ Decree-law 167/2007 available at: http://www.acidi.gov.pt/docs/ACIDI/Lei_organica_ACIDI.pdf.

⁸⁵ *Choices Programme Activity Report 2010* available at: <http://www.programaescolhas.pt/conteudos/noticias/ver-noticia/4d6d5b88c881d/divulgacao-publica-das-atividades-e-dos-resultados-do-programa-escolhas-em-2010>.



number of persons working in these projects increased greatly and more districts have been covered.

According to the *2011 Activity Report*,⁸⁶ the Choices Programme reached 71,000 children between the ages of 6 and 18 from disadvantaged social backgrounds, many of whom were the descendants of immigrants and members of ethnic minorities living in vulnerable places, in order to promote their social integration. From January 2010 until 31 December 2011, through this programme, over 4,000 children were reintegrated into school. In 2010/2011 the rate of academic success for all participants was 82%. This programme involved 1004 different partnerships, both with local authorities and civil society organisations, with the participation of 850 individuals, in 134 places of intervention.

According to Article 8(2) of Law 18/2004, the ACIDI has the power:

- to propose, through the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)], statutory measures aiming to abrogate any norms or rules contrary to the principle of equality of treatment; and
- 'to provide the assistance necessary to victims of discrimination to enable them to defend their rights.'

For the purposes of the Racial Equality Directive the relevant bodies which are included in the structure of the ACIDI [the High Commission] are:

1) *Alto Comissário [High Commissioner]:*

The main functions of the High Commissioner are:

- a) to represent the High Commission;
- b) to supervise all ACIDI departments [the High Commission];
- c) to chair the Commission for Equality (CEARD) and its Permanent Commission;
- d) to issue binding decisions concerning fines.

The High Commissioner is also Portugal's CERD representative (Notice 95/2001 of the Foreign Office of 24 August 2001).⁸⁷ According to Article 5(2) of Decree-law 167/2007, the High Commissioner is appointed for a three-year period and can be removed from office by the Prime Minister.

2) *Comissão para a Igualdade e Contra a Discriminação Racial – [Commission for Equality and Against Racial Discrimination] (CEARD)*

⁸⁶ *Choices Programme Activity Report 2011* available at: http://www.programaescolhas.pt/_cf/301828

⁸⁷ *Aviso n.º 95/2001 do Ministério dos Negócios Estrangeiros, 24 de Agosto de 2001.*



The competences referred to by Article 13(2) of the Racial Equality Directive are exercised together by the CEARD and the High Commissioner. The CEARD is chaired by the High Commissioner and is composed of the following members:

- two members elected by the Portuguese Parliament;
- one member appointed by the Ministry of Labour and Social Solidarity;
- one member appointed by the Ministry of Education;
- two members from immigrant associations;
- two members from anti-racist associations;
- two members from trade unions;
- two members from employers' associations;
- two members from associations for the defence of human rights; and
- three persons to be designated by the other members.

Members of the CEARD are appointed for three years. Members appointed by Ministers can be dismissed by them. Other members cease their functions when they no longer represent the associations which delegated them.

A Permanent Commission of three persons exists within the CEARD. The Permanent Commission is chaired by the High Commissioner, and its two further members are chosen from among the members of the Commission. The Permanent Commission gives advice on fines to be imposed. This advice is not binding.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.

According to Article 8 of Law 18/2004, these bodies cover all the areas that fall under the scope of the Racial Equality Directive (Article 3) and work at national level. Both entities (the High Commissioner and CEARD) deal with discrimination not only on the grounds of race and ethnic origin but also on the grounds of nationality.

The CEARD and the High Commissioner have no specific budgets. Their expenses are paid from the ACIDI's budget and totalled €8.47 million for 2010, according to the ACIDI report.⁸⁸ In 2011 the ACIDI's planned budget was €12.4 million, but only €8.7 million have been actually used.

The ACIDI also runs some projects under the scope of *Programa de Investimentos e Despesas de Desenvolvimento da Administração Central* (PIDDAC) [Central

⁸⁸ ACIDI Activity Report available at: [http://www.acidi.gov.pt/_cfn/4d346bd641db7/live/Relat%C3%B3rio+de+Actividades+do+ACIDI+\(2010\)](http://www.acidi.gov.pt/_cfn/4d346bd641db7/live/Relat%C3%B3rio+de+Actividades+do+ACIDI+(2010).).



Administration Programme of Investment and Expenditure on Development], for example the *Programa Escolhas* [Choices Programme].

In 2010, the overall budget of the ACIDI came from three sources: (1) self-financing (i.e. income generated by payment for its services), which made up 57 per cent of its total budget (about €4.79 million); (2) European Union financing, which came to 33 per cent of the total budget (about €2.78 million); and (3) the remaining 11 per cent came from state budgetary resources (€0.89 million).

The High Commission (which includes both the High Commissioner and the CEARD) is accountable to the *Tribunal de Contas* [Court of Auditors] for the way in which it spends its budget and for expenses incurred.

The amount above includes an annual transfer of around €6 million from the budget of the Institute for Employment and Vocational Training, which is part of the Ministry for Labour and Social Solidarity.

In addition, some resources are allocated by the *Programa de Investimentos e Despesas de Desenvolvimento da Administração Central* [Central Administration Programme of Investments and Expenses for Development] to finance ACIDI activities. In 2008 this amounted to €600,000. Decree-law 167/2007 refers to finance in Article 11, but the rules remain the same as before.

ACIDI [High Commission] budget has no allocation for assistance to victims. However, lawyers employed by the High Commission give legal assistance to victims and there is an agreement with the APAV (the Association for Victim Support) (see d) below). In practice no concerns have ever been raised.

There are no specific human resources allocated to each body. Employees work for the High Commission and exercise their functions, when necessary, according to the competences listed in Article 13 of the Directive. In 2005, the High Commission had around 33 full-time staff covering all its areas of competence.

Only a few members of the High Commission are civil servants. All the other members have better employment conditions than civil servants, but they can be dismissed more easily.

The ECRI report notes that the ACIME (now the ACIDI) is under the direct authority of the Prime Minister. It therefore has the advantage of being in direct contact with government authorities and is in a position to monitor their activities closely and to influence them. However, the ACIDI is not an independent body: this can create problems with some of the functions assigned to it, in particular when imposing penalties in racial discrimination cases. So far no conflicts have occurred and the ACIDI has always acted independently.



The independence of the equality body is stipulated in law. The ACIDI's powers are laid out in Decree-law 167/2007 of 03 May 2007, which also states and guarantees its independence.

Legal rules grant independence to the ACIDI and the CIG (Commission for Citizenship and Gender Equality) as administrative autonomous bodies which carry out their functions and powers by establishing their own policies and independence of action according to the rules stipulated in law. The CIG's powers are set out in Decree-Law 164/2007 of 3rd May 2007. The CIG now also deals with issues related to sexual orientation discrimination. Both organisations manage their resources independently, but they must respect the rules of public accountancy and are controlled by the Court of Auditors.

The authors do not perceive any discrepancies between the *de iure* and the *de facto* independence of the ACIDI and CIG.

The Commission for Equality and Against Racial Discrimination (CEARD) and the High Commissioner work independently in all their functions. As already mentioned, the High Commissioner is appointed and dismissed by the Prime Minister. He/she is independent in his/her functions, but the appointment involves a political decision.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The competences of the ACIDI [High Commission], as represented by the High Commissioner, are laid down in Decree-law 167/2007 of 03 May 2007. Under Article 3 (Purpose and powers of the High Commission) its competences are as follows:

- to fight any forms of discrimination on the grounds of race, skin colour, nationality, ethnic origin or religion, through positive awareness, education and training activities, and also via the applicable sanctions specified in law;
- to raise public awareness and to sponsor studies on immigration, ethnic minorities, intercultural dialogue and inter-religious dialogue; and
- to promote dialogue between religions through increased knowledge of other cultures and religions and the promotion of an attitude of mutual respect and regard for diversity both within the national borders and in Portugal's relations with the rest of the world.

In addition, the ACIDI [High Commission] carries out surveys and publishes reports and recommendations, although there is no specific budget for these tasks. It has commissioned academic experts to conduct surveys on discrimination and related problems and set up the *Observatório da Imigração* [Observatory for

Immigration],⁸⁹ which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

The CEARD is regulated by Article 5(2) of Law 134/99 of 28 August 1999, which establishes the competences of this commission:

- to gather all information related to discriminatory acts and to apply the relevant sanctions;
 - to recommend the adoption of legislative, regulatory or administrative measures that it deems adequate to prevent discrimination on the grounds of race, skin colour, nationality or ethnic origin;
 - to promote and conduct surveys and research on racial discrimination;
 - to write and publish an annual report on the situation in Portugal concerning equality of treatment and racial discrimination.
- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

On 17 November 2004 the ACIDI [High Commission] and the *Associação Portuguesa de Apoio à Vítima* (APAV) [Portuguese Association for Victim Support – an NGO] signed a protocol to create the *Unidade de Apoio à Vítima Imigrante e de Discriminação Racial ou Étnica* (UAVIDRE) [Unit for the Support of Immigrant Victims and Victims of Racial and Ethnic Discrimination] established by the APAV with the financial support of the ACIDI. This unit gives assistance to immigrants facing discrimination and to victims of racial or ethnic discrimination.

This protocol was effective for a period of one year, but has been renewed. The protocol gives financial support of €38,000 to the unit, and became effective in May 2005.

In the UAVIDRE's first year of existence (2005), it supported 131 clients. Over the following years, the number of clients has increased remarkably:

Year	Number of Clients
2005	131
2006	249
2007	300
2008	372
2009	377
2010	404
2011	470
Total	2,303

⁸⁹ Observatório da Imigração – website: <http://www.oi.acidi.gov.pt/>.



The number of victims of racial discrimination that sought the UVIDRE's support has also increased from only 13 victims in 2005 to 26 in 2009, 45 in 2010 and 61 in 2011.

The CEARD and the High Commission have at least five specially qualified and trained members to assist victims of discrimination; these include two lawyers, one psychologist, one social worker and one generalist.

The High Commission also has staff trained to assist victims. The assistance consists of:

- providing information on anti-discrimination legislation and possible legal action against discrimination;
- helping victims file official complaints when necessary or initiate court proceedings; and
- providing opportunities to reach amicable settlements (mediation) between the victim and the (alleged) perpetrator.

According to the Office of the High Commissioner, most cases are solved by mediation, the results of which are satisfactory to the victims to some extent.

- e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

Yes. The tasks are undertaken by the body independently.

The authors must stress that from the legal point of view the situation in Portugal with regard to equality bodies is too complex. The result is that there are several practical limitations in fulfilling responsibilities relating to the implementation of the Directive.

For example, the procedure for hearing and investigating cases is too complex, as detailed below:

- A complaint is filed either with the CEARD or the High Commissioner.
- After a preliminary examination the complaint is sent to the General Inspectorate deemed to be competent. Sometimes conflicts of competence arise between two General Inspectorates and have to be resolved by the Minister for the Presidency. The Inspectorates take too long to conduct investigations.
- The file returns to the Commission for Equality for the opinion of its Permanent Commission, and only then is a binding decision issued by the High Commissioner, imposing a fine if that is considered appropriate.



- f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

With regard to the legal standing of both bodies, Article 12 of Law 18/2004 states:

Competence

Any person or institution with knowledge of a situation which may be considered to infringe the law should bring the case to the attention of one of the following entities:

- a member of the Government whose responsibilities include the area of equality;
- the *Alto-Comissário para a Imigração e Diálogo Intercultural* [High Commissioner for Immigration and Intercultural Dialogue];
- the *Comissão para a Igualdade e contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination]; or
- the General Inspectorate with competence relevant to the matter (Decree-law 276/2007 of 31 July 2007 on the legal regime of inspection, audit and control of direct and indirect state administration services).

After receiving notice of any infringement, the entities referred to in (a), (b) and (c) above shall then forward the case to the relevant General Inspectorate, which will expedite the matter.

According to Article 13(2) of Law 18/2004, a binding decision (imposing a penalty) is within the competence and responsibility of the High Commissioner after having heard the opinion of the *Comissão Permanente* [Permanent Commission] of the CEARD, as provided for in Article 7(2) of Law 134/99 of 28 August 1999.

The members of staff of the High Commission have the power to mediate, and they frequently act as mediators between complainants and those accused. They do not have the power to refer a case to a court of law if mediation is unsuccessful. Claimants have to seek judicial redress themselves, for instance in employment cases.

Where a case of discrimination may be considered a crime under the relevant provisions of the Criminal Code, the file is sent to the Prosecution Service, which is the competent authority to bring criminal proceedings in a court of law.

When a case of discrimination involves a crime, both bodies are in formal and regular contact with the judicial system through the Office of the Public Prosecutor.

Neither the CEARD nor the High Commissioner has powers of investigation. According to Article 12(2) of Law 18/2004, they are only authorised to receive



complaints and must send files for investigation to the General Inspectorate responsible for the area in question.

Cases are frequently referred to the *Autoridade para as Condições do Trabalho* (ACT)⁹⁰ [Authority for Working Conditions], formerly the *Inspecção do Trabalho* [Labour Inspectorate], the *Inspecção Geral da Administração do Território* (IGAT) [General Inspectorate for Territorial Administration] and the *Inspecção Geral da Administração Local* [Local Administration Inspectorate].

The General Inspectorates are bodies within Ministries that have powers to hear witnesses and to conduct all investigations necessary in cases involving the areas covered by the Ministry concerned.

Both the CEARD and the High Commissioner are in formal and regular contact with these General Inspectorates – the Authority for Working Conditions, the Inspectorate General for Territorial Administration, and in a few cases the *Direcção-Geral da Saúde* [the Health Inspectorate], the *Autoridade de Segurança Alimentar e Económica* (ASAE) [the Economic Activities Inspectorate] and the Local Administration Inspectorate. They also have regular formal and informal contact with the NGOs and employees' organisations which are represented on the Commission for Equality and Against Racial Discrimination, as well as formal and informal contacts with the APAV (see above) and the *Ordem dos Advogados* [Bar Association].

The equality bodies cannot be considered as tribunals but are rather promotional bodies providing legal advice and support to victims of discrimination, building awareness and promoting good practices.

Provedor de Justiça [Ombudsman]

The authors consider it of interest to refer briefly here to the activities of the Ombudsman. The existence for many years of an Ombudsman who also acts in cases of discrimination on any grounds contributes to the effectiveness and independence of the system.

The Ombudsman is an independent official appointed by Parliament. This independent state body is established in the Constitution and its main function is to defend and promote the rights, freedoms, safeguards and lawful interests of citizens, by ensuring through informal means (that is without any judicial procedure) that public authorities act fairly and exercise their powers fairly and in compliance with the law. The Ombudsman's broad mandate includes the protection and promotion of all fundamental rights, in relation to all citizens, without distinctions of any sort, *inter alia* as regards their nationality, race, ethnic origin or place of residence.

⁹⁰ *Autoridade para as Condições do Trabalho* (ACT) – website: www.act.gov.pt.



Without prejudice to this, the Ombudsman seeks to dedicate particular attention to the most vulnerable groups, as they are not only more exposed to human rights violations, but also often less aware of their rights and less able to make use of available means to uphold them.

The issue of racial discrimination is accorded specific attention in the Ombudsman's inspections, such as those carried out in prisons, police stations and detention centres for non-admitted foreigners. To date, no particular causes of concern have been identified.

The Ombudsman has addressed a number of cases of racism, in particular against non-nationals and the Roma community, and has made recommendations to public authorities. The Ombudsman has taken due note of the concerns raised by various international human rights bodies, particularly the recent decision of the European Committee of Social Rights regarding the violation by Portugal of provisions of the European Social Charter. Following that decision, the Ombudsman carried out an internal assessment of cases handled in his Office concerning the rights of the Roma community. On the basis of that assessment, it was concluded that, after some more serious cases in the last decade of the 20th century, this has remained a minor area of activity in the overall context of the Ombudsman's work, mainly due to the low number of complaints. The Ombudsman has also been called to act on instances of discrimination specifically based on race and ethnic origin, in which, for the most part, he has been able to ensure a satisfactory resolution of situations in which discrimination was indeed found to exist.

Complaints can be filed with the CEARD or the High Commissioner by individual citizens, NGOs, and employees' organisations among others. Complainants benefit from the support of the staff of the ACIDI [High Commission], who receive their complaints and pass the files on to either the CEARD or the High Commissioner. They provide assistance to the victims. Practical assistance is provided by the UVAIDRE.

Complaints procedure:

- 1) A complaint arriving at the ACIDI is presented to the CEARD, which decides if the complaint will be followed up.
- 2) If so, the case is sent to the competent general inspectorate.
- 3) After investigation, the general inspectorate concerned sends the case back to the High Commission.
- 4) The High Commissioner renders a decision after taking advice from the Permanent Commission.
- 5) Violations of the Employment Equality Directive are directly decided by the Authority for Working Conditions.

In 2011 111 complaints were received by the CEARD, which resulted in the following developments:



Status of complaints received in 2011	Numbers
Administrative complaints procedure	35
Complaints sent to the Authority for Working Conditions (ACT)	15
Complaints reported to the Safe Internet Line	3
Complaints submitted to the Regulatory Authority for Social Communication (ERC)	4
Complaints forwarded to the Unit for the Support of Immigrant Victims and Victims of Racial and Ethnic Discrimination (UAVIDRE)	9
Complaints incomplete / incorrect	25
False complaints	4
Information requests	16
TOTAL	111

Matters outside the jurisdiction of CEARD:

Complaints were also filed to the Ombudsman but there is still no information on the number of cases of discrimination presented in 2011.

Complaints of discrimination based on disability:

According to an official report by the *Instituto Nacional para a Reabilitação* (INR) [National Institute for Rehabilitation] on the implementation of Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and the grounds of a pre-existing aggravated risk to health, during its first year in force (2007) more than one hundred complaints based on discriminatory practices on grounds of disability or an aggravated risk to health were filed. These complaints were mainly related to sales of real estate and insurance policies.

The final conclusions of the first INR annual report on discriminatory acts on grounds of disability and a pre-existing aggravated health risk falling under Law 46/2006 of 28 August 2006 (*Relatório Anual sobre a Prática de Actos Discriminatórios em Razão da Deficiência e do Risco Agravado para a Saúde - Aplicabilidade da Lei n.º 46/2006, de 28 de Agosto*), stated that the large number of complaints submitted in 2010 indicated that the most serious difficulties persons with disabilities face are found in accessibility to premises (public or private), social insurance, access to services and goods, education, employment and transport. There is still no new data for 2011.

According to this annual report, the following complaints were presented to several entities, e.g. General Inspectorates and Public Institutes in 2010: 26 complaints on



insurance, 27 on accessibility, 3 on access to goods and services, 2 on education, 1 on transport and 1 on employment out of a total of 60.

Sixty-eight complaints were submitted to the INR in 2010. No statistics have been found for 2011. Most of the complaints lodged with the INR related to a refusal or restriction of the sale or rental of property, bank loans and insurance policies. According to this report, the number of complaints indicates a lack of awareness among public and private entities as well as among persons with disabilities or an aggravated health risk, who still do not initiate appropriate actions against discriminatory practices.

The Portuguese Ombudsman issued a recommendation to the Institute for Mobility and Land Transport (IMTT) concerning the lack of mechanisms to allow the electronic submission of an application for renewal of the EU model parking card by persons with disabilities who have limited mobility.

After the IMTT heard the recommendation, it concluded that, notwithstanding the implementation under the SIMPLEX programme of various functionalities providing electronic assistance to users, the necessary mechanism for submitting these applications was not available. Therefore, it recommended that mechanisms enabling the electronic submission of applications for renewal of this document be implemented as soon as possible, which was achieved through the publication of Decree-Law 17/2011 of 27th January on the issuing and renewal of EU model parking cards for persons with disabilities.

Matters concerning the rights of children, elderly persons and persons with disabilities are currently handled by a specialised structure – the Department for Children, Elderly Persons and Persons with Disabilities (N-CID) – which has been in operation since late 2009.

According to the Portuguese Ombudsman *Relatório à Assembleia da República 2008*⁹¹ [2008 Report to the Parliament], 10 complaints were lodged on equality and non-discrimination regarding employment in public administration. The Ombudsman states the importance of following the rules relating to non-discrimination (direct or indirect) in job advertisements and also in access to the labour market (Articles 22 and 23 of the Labour Code (Law 99/2003)).

According to its 2010 and 2011 reports, discrimination complaints were made on the following grounds:

⁹¹ The 2008 Ombudsman's Report is available at: <http://www.provedor-jus.pt/relatoriosan.php>.



2010:

Age	Religion	Disability	Race	Sexual ori.	TOTAL
3	2	11	6	1	23

2011:

Age	Religion	Disability	Race	Sexual ori.	TOTAL
2	0	14	5	2	23

Complaints against educational establishments have also been presented on grounds of racial discrimination, especially in access to computers provided to pupils by schools (the *e.escola* programme).

The Ombudsman also dealt with the issue of pedestrian access to a Roma community in an area of social housing. In this case he recognised the importance of accessibility to this area and stated that in similar situations implementation of measures to promote accessibility should be taken into consideration from the outset.

With regard to disability, the greatest number of complaints in 2008 related to persons with disabilities, namely special educational needs, benefits for special education and proof of pupils' degree of incapacity. Recommendation 1/A/2008 of 1 February was addressed to the Secretaries of State for Education and Social Security on this matter. Complaints relating to insurance policies were also received.

g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).

ACIDI is not a quasi-judicial institution. It is an administrative body and has powers to impose fines but in Portugal it is not considered a quasi-judicial institution. Its decisions are binding and it has the power to impose sanctions and to appeal to courts. In the author's opinion, ACIDI decisions are well accepted.

With regard to complaints, one must consider not only the ACIDI but also the Authority for Working Conditions (ACT) and the Ombudsman, who also accept them.

With regard to labour law, the ACT investigated 1,089 cases in 2008 where there were suspicions of discrimination on grounds of nationality. Sixty-one of these were based on complaints.

With regard to race discrimination, 105 inspections were carried out in 2008. Three of these were based on complaints. The ACT organised eight formal infringement procedures on grounds of discrimination.



h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

The specialised body in Portugal, the *Alto-Comissariado para a Imigração e Diálogo Intercultural* (ACIDI) [High Commission for Immigration and Intercultural Dialogue] considers the Roma as a priority issue.

It has set up a new website on Roma interests, '*Ciga-nos*' (a play on the Portuguese word for Roma, '*ciganos*', which also sounds like the words for 'follow us' in Portuguese), where useful information about this community is available.

The ACIDI tries to stimulate the interest and participation of Roma citizens in legislation related to street trading, the experience of other countries in this matter, the sizes of fines, the training needs of the Roma, the creation of specific places for street trading, the need for support from the social services for the integration of Roma families into society, measures for positive discrimination, the awareness of town councils of street trading issues, and the difficulties members of the Roma community experience with integration into the Portuguese labour market, amongst other matters.

The ACIDI also intends to rely on the use of intercultural mediators to achieve greater integration of this ethnic group. Moreover, the ACIDI has set up a working group to look at the issue of itinerant trading as the most widespread means of subsistence among Roma communities.

A Roma community support office, *Gabinete de Apoio às Comunidades Ciganas* (GACI) has also been established within the ACIDI. The GACI published *Guia para o associativismo nas Comunidades Ciganas* [Guide to Roma community associations] as part of the ROMA EDEM project.



8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

- a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The former ACIME (now the ACIDI) made considerable efforts to disseminate information about discrimination in general. The book *Combate ao Racismo – Sistema Jurídico* [Fighting Against Racism – the Legal System], published by the High Commissioner, contains not only the main legislation but also a form for submitting a complaint about discrimination. It also informs readers that all public services have a *Livro Amarelo* [Yellow Book], in which any complainant may register a complaint against any discrimination by the public services. The ACIDI publishes a monthly bulletin, makes radio and television programmes and has financed the publication of books on anti-discrimination.

In labour matters, Article 24(4) of the Labour Code imposes on employers the duty to display in their premises information on the rights and duties of workers in relation to equality and non-discrimination. However, dissemination of information against discrimination in workplaces has not so far been very visible. The law does not specifically require employers to provide information in a form which is accessible to all persons with disabilities. Trade unions have done some work on this issue.

The *Direcção Geral do Emprego e das Relações de Trabalho* [Directorate General of Employment and Labour Relations] provides on its website (www.dgert.msst.gov.pt) information on national policy measures in this field as well as on the European Community action programme to combat discrimination. It also makes the relevant documents available.

- b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

Several Government agencies and the ACIDI are engaged in dialogue with NGOs in order to promote the principle of equal treatment. Some NGOs, for instance, *SOS Racismo*, *Solidariedade Imigrante*, and *Associação Portuguesa de Deficientes* receive funds in order to develop actions in this area. NGOs are represented in several Commissions.

- c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)



Dialogue between social partners takes place within several commissions and bodies, ensuring the participation of associations representing immigrants, human rights activists, trade unions, employers' associations and social solidarity institutions in the elaboration of policies promoting social integration and combating exclusion. These are listed below.

- The *Comissão para a Igualdade no Trabalho e no Emprego* (CITE)⁹² [Commission for Equality in Labour and Employment] is a tripartite entity created in 1979. It is composed of representatives of government and social partners (the Portuguese Retail and Services Confederation (CCP), the General Confederation of Portuguese Workers – National Trades Union (CGTP-IN), the Confederation of Portuguese Industry (CIP), and the General Workers' Union (UGT)).

The CITE is competent in the areas of equality and non-discrimination between women and men in labour, employment and vocational training and also to receive complaints and issue legal opinions on equality and non-discrimination in labour and employment. It cooperates with the Authority for Working Conditions in the application of legislation on equality and non-discrimination in labour, employment and vocational training, registers all legal decisions delivered by the courts concerning equality and non-discrimination between men and women, sponsors studies and research and disseminates legislation and legal opinions concerning equality and non-discrimination in labour, employment and vocational training. Women may request the support of the CITE if they feel discriminated against on any grounds in employment. In such cases, if the complaint is considered reasonable, the CITE may ask for intervention by the ACT and also has powers to make referrals to the Prosecution Service. Access to European and national law is provided through its website.

- *Comissão para a Cidadania e Igualdade de Género* (CIG) [Commission for Citizenship and Gender Equality], formerly *Comissão para a Igualdade e para os Direitos das Mulheres* (CIDM) [Commission for Equality and Women's Rights]. (Decree-law 164/2007 of 3 May 2007).
- *Comissão para a Igualdade e contra Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)] – mentioned above.
- *Comissão da Liberdade Religiosa* (CLR) [Commission for Religious Freedom]. (Article 52 ff. of Law 16/2001 of 22 June 2001, amended by Law 91/2009 of 31 August 2009).
- *Instituto Nacional para a Reabilitação* (INR)⁹³ [National Institute for Rehabilitation] formerly *Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência* (SNRIPD) [National Secretariat for the

⁹² *Comissão para a Igualdade no Trabalho e no Emprego* (CITE) website: www.cite.gov.pt/.

⁹³ *Instituto Nacional para a Reabilitação* (INR) website: <http://www.inr.pt/>.



Rehabilitation and Integration of Persons with Disabilities] (Decree-law 217/2007 of 29 May 2007).

- *Conselho Nacional para a Reabilitação e Integração das Pessoas com Deficiências* (CNRIPD) [National Council for the Rehabilitation and Integration of Persons with Disabilities] (Article 1 of Decree-law 225/97 of 27 August 1997)
- *Conselho Permanente de Concertação Social* (CPCS). [Permanent Council for Social Dialogue] (Decree-law 74/84 of 2 March 1984).
- *Conselho Económico e Social* (CES) [Economic and Social Council] (Article 92 of the Constitution).

Social dialogue:

The *Comissões de Trabalhadores* [Workers' Commissions], their *Comissões Coordenadoras* [Coordinating Commissions], trade unions and employers' organisations may advise on proposed legislation which affects the rights and duties of employers and employees before it is approved (Article 470 of the Labour Code).

According to Article 471 of the Labour Code, the *Comissão Permanente de Concertação Social* [Permanent Commission for Social Dialogue], which is composed of representatives of trade unions, employers' organisations and the State, and is part of the Economic and Social Council, may also give advice on proposed legislation. These procedures are in accordance with Article 11 of the Directive, which covers social dialogue.

Under the terms of Article 15 of Decree-law 164/2007 of 3 May 2007, the Commission for Citizenship and Gender Equality (CIG) is mandated to promote equality between men and women. It takes over this role from the former *Comissão para a Igualdade e para os Direitos das Mulheres* [Commission for Equality and Rights of Women] and also the functions of the *Comissão para Igualdade no Trabalho e Emprego* (Commission for Equality in Employment and Labour) in the promotion of equality.

d) *to specifically address the situation of Roma and Travellers.*

The ACIDI promotes and engages in dialogue with several Roma associations, namely the *Associação Cristã de Apoio à Juventude Cigana* (ACAJUCI) [Christian Association for the support of the Roma youth], *Associação das Mulheres e Crianças Ciganas Portuguesas* (AMUCIP) [Roma Portuguese women and children Association], *Associação para o Desenvolvimento da Etnia Cigana* (APODEC) [Association for the development of the Roma], *Associação Social Recreativa e Cultural Cigana de Coimbra* [Recreational and Cultural Roma Association in Coimbra], *Associação Cigana de Leiria* (CIGLEI) [Roma Association in Leiria], *Federação Calhim Portuguesa* (FECALP), and *Associação União Romani Portuguesa* (*União Romani*). This means it is acquainted with the major problems that the Roma community still faces in Portugal.



The Roma community is represented on the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)] by the mayor of Torres Vedras, who is of Roma origin. This Commission has a new website on racism, where several pieces of relevant legislation can be accessed.⁹⁴ The CEARD has also created a new website – *LinhaAlerta.internetsegura.pt* – to submit complaints against internet sites with racist or xenophobic content.⁹⁵ This is a member of the International Association of Internet Hotlines (INHOPE).

The ACIDI has been trying to forge closer links with Roma associations. Some of these are long-established, but for the most part they greatly lack organisational, technical and human resources.

Above all, the ACIDI's activities take the form of encouragement, in the sense of promoting the work of association leaders and making them responsible for the work carried out, increasing the level of dynamism of associations and their membership levels, and promoting adherence to what their communities require of associations, as well as acknowledging the difficulties experienced by the community in general.

There are a number of Roma and non-Roma associations which are attempting to build bridges between the majority in society and Roma communities, and which are actively looking for solutions to the main problems encountered by their communities all over the country. A Roma Monitoring Group, sponsored by the ACIDI, was created with the objective of running a cooperation and coordination platform to protect and support the Roma population as a whole, and information programmes to prevent children working as beggars.

The ACIDI through GACI – *Gabinete de Apoio às Comunidades Ciganas* [Roma Communities Support Office] is also going to coordinate training on institutional rules, mediation and communication for the mediation procedure among Roma communities.

The 2009 Plano Nacional de Acção para a Inclusão (PNAI) [National Plan of Action for Inclusion] evaluation report indicates that the targets of the Roma Monitoring Group were almost all accomplished but there were still some measures to be implemented in future years. Progress was being made on social inclusion and integration of under-privileged groups) through the elaboration of plans (in the fields of education and employment).

Certain local authorities are attempting to improve relations between Roma and the majority population. For example, the Portuguese authorities have indicated that the municipality of Lisbon has opened the *Casa de Cultura da Ameixoeira* [Cultural

⁹⁴ CEARD website: http://www.cicdr.pt/component/option,com_frontpage/Itemid,1/

⁹⁵ <http://linhaalerta.internetsegura.pt/>.



Centre of Ameixoeira] which is available for Roma to use for cultural activities. The centre is also open to non-Roma, thus giving others an opportunity to learn about Roma culture.

Several studies have been carried out on the special situation of Roma women. These studies have been sponsored by the ACIDI.

Initiatives have been taken by NGOs and the Institute for Employment and Vocational Training (IEFP) to train Roma, particularly younger members of the community, for employment. Racist prejudices still persist among certain employers, which mean that Roma suffer racial discrimination in recruitment. This often ends up discouraging young Roma job-seekers.

An international seminar entitled *Ciganos: territórios e habitat* [Roma: territories and habitat] took place in Lisbon in April 2008. At this seminar issues concerning the integration of the Roma community in Portugal were raised, including housing, education, employment and discrimination. It was estimated during this seminar that there are 40,000 Portuguese Roma, of whom 6,500 to 7,000 are still living in shanty houses.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

All contracts, collective agreements and other rules that conflict with the principle of equal treatment can be declared null and void by the courts. Any discriminatory clause in such contracts that contravenes the provisions of the Labour Code is to be considered invalid.

Moreover, Article 7(2) of Law 7/2009 of 12 February 2009, in the introduction to the Labour Code, states that provisions contained in collective agreements that are already in force and contrary to the provisions set forth in the Labour Code have to be replaced within one year of the enactment of the statute or be considered null and void.

Other provisions that may be included in future contracts, collective agreements, internal rules of undertakings, rules governing independent occupations and professions (if applicable), and rules governing workers' and employers' organisations, to the extent to which they may breach the equality and non-discrimination provisions of the Labour Code, will, of course, also be invalid and are



to be so deemed by those that are bound by them and can be so declared by any court, as provided either by the general rules of contract law (e.g. Articles 285 *et seq.* of the Civil Code) or by the provisions of the Labour Code itself (under Article 478(1)(a) of the Code, collective agreements cannot go against 'imperative legal provisions').

According to Article 204 of the Constitution, all courts and tribunals must refuse to enforce any rules deemed to be unconstitutional.

The principles of *lex specialis derogat legi generali* and *lex posteriori derogat legi priori* are applicable in the Portuguese legal system. Furthermore, as regards the hierarchy of rules, the anti-discrimination rules in the Constitution and the rules contained in the Labour Code prevail over the other rules mentioned in a) above.

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

No.



9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

The office of the ACIDI has responsibility for issues relating to immigration and ethnic minorities, and is under a duty to combat racism, but it has no responsibility for coordinating other bodies working in this area. The ACT (Authority for Working Conditions, formerly the General Labour Inspectorate) deals with some anti-discrimination issues, but it does not have responsibility for coordination either.

Within the Ministry of Justice, the *Gabinete de Política Legislativa e Planeamento* (GPLP) [Legislative Policy and Planning Office] is responsible for planning implementation of directives and other community instruments.

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

The *IV Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2011-2013* [Fourth National Plan for Equality – Gender, Citizenship and Non-discrimination 2011-2013] was approved in December 2010. During the next three years the government aims to fight against inequality and foresees greater participation by municipalities and NGOs as strategic partners in this fight through implementing public policies on equality and non-discrimination. This National Plan also aims to strengthen the relationship between the Presidency of the Council of Ministers and the Ministries of Internal Affairs, Justice, Labour and Social Solidarity, Health and Education at central government level.

The Plan contains 50 main measures to be implemented in five strategic areas:

- inform, sensitise and educate;
- protect victims and promote social integration;
- prevent recidivism through interventions with offenders;
- ensure that professionals are qualified; and
- investigate and monitor.

The Commission for Citizenship and Gender Equality (CIG) will be the coordinating body for this Plan and will among other measures elaborate an annual report on activities, monitor its implementation, guarantee collaboration between the entities and organisations involved, and issue statements when required on subjects relating to gender equality, citizenship and non-discrimination as well as on legislative measures related to these issues. As the authors have already mentioned, discrimination on grounds of sexual orientation will be one of the new main strands of this Plan.



ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country Portugal

Date: 01 January 2012

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.		Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Constitution Articles 1,8,13,15,17,58,59,69,70,71,72 http://www.parlamento.pt/Legislacao/Paginas/	02/04/ 1976	25/04/ 1976	All forms of discrimination	Constitutional	Principle of equality and social rights	Constitution Articles 1,8,13,15,17, 58,59,69,70,71,72

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
ConstituicaoRepublicaPortuguesa.aspx						
Law 134/99 of 28 August 1999 http://www.acidi.gov.pt/_cfn/4d025013db115/live/Lei+n.%C2%BA+134%2F99+de+28+de+Ago+sto	28/08/ 1999	02/09/ 1999	Race, colour, nationality, ethnic origin	Administrative	All areas, both public and private sectors. Defines discriminatory practices.	Law on discrimination
Decree-law 111/2000, repealed by the entry into force of Law 35/2004 of 29 July 2004 (This law was revoked by Law 7/2009)	04/07/ 2000 29/07 /2004	04/08/2000 29/08/2004	Regulates Law 134/99	Administrative	All areas, both public and private sectors	Labour issues
Decree-law 251/2002 http://acidi.gov.pt.s3.amazonaws.com/docs/decret2512002.pdf (This law was revoked by Decree-law 167/2007)	22/11/ 2002	23/11/2002	Creates the ACIME	Administrative	All areas, both public and private sectors	Creation of equality body

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
Law 18/2004 of 11 May 2004 http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_estrutura.php?tabela=leis&artigo_id=&nid=231&nversao=&tabela=leis	11/05/2004	12/05/2004	Race, colour, nationality, ethnic origin	Administrative	All areas, both public and private sectors	Creation of a new legal regime to fight discrimination based on race, colour, nationality and ethnic origin.
Labour Code (Law 7/2009 of 12 February 2009) http://dre.pt/pdf1sdip/2009/02/03000/0092601029.pdf Latest amendments: Law 105/2009 of 14/9/2009 http://www.dgap.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-	12/02/2009 14/09/2009	17/02/2009 15/09/2009	Ancestry, age, sex, sexual orientation, civil status, family situation, genetic heritage, reduced capacity to work, disability or chronic disease, nationality,	Private and administrative law	Public/private sectors. Covers all grounds of discrimination	Labour Code

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
4e8140f46f49&ID=961			ethnic origin, religion, political or ideological convictions and membership of a trade union.			
Law 35/2004 http://dre.pt/pdf1s/2004/07/177A00/48104885.pdf (This law was revoked by Law 7/2009)	29/07 /2004	29/08/2004	This law goes beyond the discriminatory factors set out in Article 23(1) of the Labour Code and also lists country of origin, language, race, education, economic status or	Private and administrative law	Public/private sectors. Covers all grounds for discrimination.	Labour Code

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
			social condition as factors leading to discrimination .			
Law 127/99 of 20 August 1999 http://www.idesporto.pt/DATA/DOCS/LEGISLA CAO/doc05_066.pdf	20/08/ 1999	20/08/1999	Disability rights associations	Administrative	Disability	Associations of persons with disabilities
Law 38/2004 of 18 August 2004 http://dre.pt/pdf1s/2004/08/194A00/52325236.p df	18/08/ 2004	23/08/2004	Disability	Administrative	Not yet regulated	Legal regime on the prevention, training, rehabilitation and participation of persons with disabilities
Law 16/2001 of 22 June 2001 http://www.unicef.pt/18/	22/06/ 2001	27/06/2001	Religious freedom	Administrative	Creation of Commission for Religious Freedom	Religious freedom

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
iberdade_religiosa_lei_16_de_2001.pdf						
Decree-law 27/2005 http://www.acidi.gov.pt/docs/Legislacao/LPortuguesa/ACIME/DL27-2005.pdf (This Decree-law was amended by Decree-law 167/2007)	04/02/2005	05/02/2005	High Commission for Immigration and Ethnic Minorities	Administrative	Establishes the High Commission for Immigration and Ethnic Minorities	Some amendments concerning the equality body
Decree-law 86/2005 of 2 May 2005 http://www.dre.pt/cgi/dr1s.exe?t=dr&cap=1-1200&doc=20051321%20&v02=&v01=2&v03=1900-01-01&v04=3000-12-21&v05=&v06=&v07=&v08=&v09=&v10=&v11='Decreto-Lei'&v12=&v13=&v14=	02/05/2005	03/05/2005	Racial and ethnic origin. Provides legal framework for combating discrimination	Administrative	Anti-discrimination	Assigning the resolution of conflicts in several areas such as labour to specific entities

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
&v15=&sort=0&submit=Pesquisar						
Decree-law 167/2007 of 3 May 2007 http://www.acidi.gov.pt/docs/ACIDI/Lei_organica_ACIDI.pdf	03/05/ 2007	01/06/2007	High Commission for Immigration and Intercultural Dialogue	Administrative	Establishes the High Commission for Immigration and Intercultural Dialogue	Replacement for the former ACIME
Decree-law 217/2007 of 29 May 2007 http://www.dre.pt/cgi/dr1s.exe?t=dr&cap=1-1200&doc=20071931%20&v02=&v01=2&v03=1900-01-01&v04=3000-12-21&v05=&v06=&v07=&v08=&v09=&v10=&v11='Decreto-Lei'&v12=&v13=&v14=&v15=&sort=0&submit=	29/05/ 2007	01/06/2007	INR – National Institute for Rehabilitation	Administrative	Establishes the INR – National Institute for Rehabilitation	Replacement for the former SNRIPD

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
Pesquisar						
Decree-law 276/2007 of 31 July 2007 http://dre.pt/pdf1s/2007/ 07/14600/0488904893. pdf	31/07/ 2007	01/08/2007	All grounds	Administrative	All areas of public service	Legal regime for inspection, audit and control of direct and indirect State administration services
Criminal Code (Law 59/2007 of 4 September 2007) – articles 132, 145 (1) and (2), 240, 251, 252, 253 and 254 see also on genocide Law 31/2004 of 22 July 2004 article 8 http://dre.pt/pdf1s/2007/ 09/17000/0618106258. pdf	04/09/ 2007 22/07/ 2004	15/09/2007 22/08/2004	Discriminatio n on the basis of race, religious or political convictions, colour, ethnic origin or nationality, religion, gender, sexual orientation,	Criminal	Sanctions for crimes of discrimination on grounds of racial, religious or sexual orientation	Discrimination on grounds of race, religion, and sexual orientation.

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
			age and disability.			
Decree-law 324/2007 of 28 September 2007 which amends the Code of Civil Register http://www.dgpj.mj.pt/sections/leis-da-justica/pdf-ult/sections/leis-da-justica/pdf-ult/dl-324-2007-de-28-de9863/downloadFile/file/DL%20324.2007.pdf?nocache=1190966734.16	28/09/2007	29/09/2007	Marriages performed in accordance with confessions or religions other than the Catholic Church	Administrative	Religious marriages	Religious anti-discrimination measure
Decree-law 352/2007 of 23 October 2007 http://www.dre.pt/cgi/dr1s.exe?t=dr&cap=1-1200&doc=20073559&v	23/10/2007	23/01/2008	Abrogates Decree-law 341/93 of 30 September 2003	Administrative	Approves the new National Table on Incapacities due to Accidents at Work or	Disability – positive measures

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
02=&v01=2&v03=1900-01-01&v04=3000-12-21&v05=&v06=&v07=&v08=&v09=&v10=&v11='Decreto-Lei'&v12=&v13=&v14=&v15=&sort=0&submit=Pesquisar					Occupational Diseases, and approves the Indicator Table for the Evaluation of Disability in Civil Law	
Decree-law 3/2008 of 7 January 2008 http://dre.pt/pdf1s/2008/01/00400/0015400164.pdf	7/01/2008	12/01/2008	Disability	Administrative	Education for students with disabilities	Disability-positive measures
Law 33/2008 of 22 July 2008 establishing measures to promote the accessibility to information about specific goods for visually impaired people http://www.redesolidaria.org.pt/legislacao/l33_0	22/07/2008	27/07/2008	Access to information by visually impaired people	Administrative	Requires large retailers to introduce, by 22 January 2009, equipment that provide blind and visually impaired people with the necessary Braille information about	Disability-positive measures

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
8.pdf					the product they plan to buy	
Law 58/2008 of 09 September 2008 which establishes the regime for employment relations in public services http://dre.pt/pdf1sdip/2008/09/17400/0626006274.pdf	09/09/ 2008	09/09/2008	All	Administrative	Public service employment	Employment
Law 39/2009 of 30 July 2009 against violence, racial discrimination, xenophobia and intolerance at sports events http://www.dgpj.mj.pt/sections/informacao-e-eventos/2009/lei-n-39-2009-de-30-de/	30/07 /2009	30/08/2009	Race, ethnic origin, nationality	Administrative	Prohibiting and punishing violence and discrimination based on race, ethnic origin and nationality at sports events.	Sports

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
Law 60/2009 of 6 August 2009 which establishes the regulations for sex education in schools http://dre.pt/pdf1s/2009/08/15100/0509705098.pdf	06/08/2009	07/08/2009	All grounds	Administrative	Establishes the regulations for sex education in schools.	Education.
Law 9/2010 of 31 May 2010 allowing civil marriage to same-sex partners http://dre.pt/pdf1sdip/2010/05/10500/0185301853.pdf	31/05/2010	05/06/2010	Sexual orientation	Administrative	Allows civil marriage to same-sex partners and changes the Civil Code.	Approval of same-sex marriage.
Law 3/2011 which forbids any discrimination on the access and exercise of independent work and which transposes into national law Directives 2000/43/EC,	22/12/2010	20/02/2011	All grounds and also nationality	Administrative	Access to employment, training, and working conditions	Legal standing of NGO and other entities which deal with discrimination issues

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrativ e/ Criminal Law	Material Scope	Principal content
2000/78/EC and Directive 2006/54/EC http://dre.pt/cgi/dr1s.exe?t=dr&cap=1-1200&doc=20110282&v02=&v01=2&v03=1900-01-01&v04=3000-12-21&v05=&v06=&v07=&v08=&v09=&v10=&v11=Lei&v12=3/2011&v13=&v14=&v15=&sort=0&submit=Pesquisar						
Law 7/2011 of 15 March 2011 law on gender identity – which creates procedures for gender and name changes in the civil registry http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf	15/03/2011	20/03/2011	Sexual orientation and gender	Administrative	This law enables transsexuals to enjoy the right of their own identity.	Sexual orientation and gender positive measures.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Portugal

Date: 1 January 2012

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	22 September 1976	9 November 1978	No	Yes	Yes
Protocol 12, ECHR	4 November 2000	---	No	No	No
Revised European Social Charter	3 May 1996	30 May 2002	No	Ratified collective complaints protocol?	Yes
International Covenant on Civil and Political Rights	7 October 1976	15 June 1978	No	No	Yes
Framework Convention for the Protection of National Minorities	1 February 1995	07 May 2002			Yes

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
International Convention on Economic, Social and Cultural Rights	7 October 1976	31 July 1978	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	29 April 1982	23 September 1982		No	Yes
Convention on the Elimination of Discrimination Against Women	24 April 1980	3 September 1981	No	Yes	Yes
ILO Convention No. 111 on Discrimination	25 June 1958	19 November 1959	No	No	Yes
Convention on the Rights of the Child	26 January 1990	21 September 1990			Yes
Convention on the Rights of Persons with Disabilities	30 March 2007	23 September 2009	No	No	Yes