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Non-discrimination

Portugal

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Country report

Non-discrimination

Portugal

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EXECUTIVE SUMMARY

1. Introduction

Portugal has a long tradition of contact with other cultures and peoples. Due to the 16th century maritime discoveries and the experience of Portuguese emigration to Brazil and Latin America in general, as well as to other countries in Europe, such as France and Germany, in the 1960s, the Portuguese are used to tolerating difference, at least in terms of ethnic origin, race and religion.

In Portugal, racist or fascist political parties are forbidden (Article 8 of Law 2/2008 of 14 May 2008).¹ Therefore, such parties do not exist.

No conflicts have been reported between religious groups in 2015. However, as the majority of the population is Catholic, other religions face greater problems in practice, for example in ministering to people in hospitals and prisons. In addition, meals in state schools are still not adapted to meet the needs of other religions, in particular to those of Islam. Notwithstanding those facts, religious diversity remains a fairly neutral topic in Portuguese society.

Portuguese society is not yet fully aware of the issues involved in the relatively new field of age discrimination and is only slowly becoming conscious of their implications. However, individuals are beginning to invoke age discrimination before the courts.² The Portuguese Government believes that the law already implements Directive 2000/78/EC in respect of age, but positive measures have not been completely successful so far. The Portuguese Insurance Institute is currently trying to abolish the age limit for insurance by creating non-term life insurance for older people and some insurance companies have already created health insurance policies with no age limit.

Finally, it must be emphasised that the Portuguese financial and economic crisis, which led to the austerity measures that have been in place for the last five years, has not helped the implementation of positive or support measures for the groups who need them. The programme of the current Government, which is supported by all left-wing parties in the Parliament, includes two items directly connected with equality and non-discrimination – the fight against poverty and the building of a more equal society.

2. Main legislation

The Portuguese Constitution³ includes many provisions dealing with non-discrimination. Article 13 is a specific general clause on the principle of equality. Article 13(1) reads 'all citizens possess the same social dignity and are equal before the law' and Article 13(2) states:

'no one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.'

The Constitution develops these principles in the chapters on workers' rights, freedoms and guarantees and on economic, social and cultural rights.

¹ Available at: <https://dre.pt/application/file/249115>.

² See Appeal No. 1013/12.5TTMTS.P1, decision of 3 November 2014, available at: <http://www.dgsi.pt/ittp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade>.

³ An English version of the Constitution can be consulted on the website: www.parlamento.pt.

Furthermore, Portugal has ratified several international human rights treaties, such as the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Racial Discrimination, the Revised European Social Charter, the Convention on the Elimination of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and ILO Convention 111 on Discrimination. In addition it has signed the Convention on the Rights of Persons with Disabilities. According to Article 8(2) of the Portuguese Constitution,

‘the norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state.’

In relation to domestic legislation, Law 18/2004 of 11 May 2004 transposes Directive 2000/43 (the Racial Equality Directive) of 29 June 2000 into the domestic legal order. The law establishes the principle of equality of treatment between persons irrespective of racial or ethnic origin, and follows the objective of setting up a legal framework to combat discrimination on the grounds of racial or ethnic origin.⁴

Law 38/2004 of 18 August 2004 defines the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities.⁵ Law 46/2006 of 28 August 2006⁶ prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*). Law 46/2006 entered into force on 29 August 2006, apart from the provisions that had budgetary implications and was regulated by Decree-law 34/2007 of 15 February 2007. Sanctions are set out in Articles 9 and 10 of Law 46/2006).

Decree-law 106/2013 of 30 July 2013 defines the statute for NGOs of people with disabilities (*organizações não governamentais das pessoas com deficiência* – ONGPD) as well as the state support to those organisations. Article 5(2) of this decree-law provides that in case of crime against people with disabilities, perpetrated on grounds of disability, the ONGPD are entitled to assist and support victims in criminal procedures.

As regards employment, Law 7/2009 of 12 February 2009 approves the Labour Code⁷ (hereafter ‘the Labour Code’), transposing, among many others, Directive 2000/43 (the Racial Equality Directive) and Directive 2000/78 (the Employment Equality Directive).

Article 24 of the Labour Code prohibits discrimination on the grounds of ancestry, disability or chronic disease, age, race, sex, ethnic origin, sexual orientation, religion, civil status, political or ideological convictions, family situation, trade union affiliation, genetic heritage or reduced capacity for work.

In the field of the labour law there are specific rules against discrimination on the grounds of age, sexual orientation, disability, religion and political convictions in addition to rules against discrimination on the grounds of race or ethnic origin.

Law 3/2011, which forbids any discrimination in access to and exercise of self-employment and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, entered in force on 20 February 2011. It has correctly clarified aspects of anti-discrimination legislation concerning self-employment and the rights of associations to intervene in labour, administrative and judicial procedures and changes the legal standing of NGOs and organisations that defend people against discrimination. It now guarantees

⁴ Available at: <http://dre.pt/pdf1sdip/2004/05/110A00/29712974.pdf>. Entered into force on 12 May 2004. Amended by decree-law 86/2005 of 2 May 2005.

⁵ Available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

⁶ Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

⁷ Available at: http://www.dgaep.gov.pt/upload/Legis/2009_1_07_12_02.pdf.

the right of associations to intervene in cases that fall under their scope, if the victim gives their consent.⁸

Article 240 of the Criminal Code⁹ covers discrimination based on race, colour, ethnic origin or nationality, religion, gender or sexual orientation. This article does not cover disability.

Finally, Law 134/99 of 28 August 1999 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin, and entered into force on 1 January 2000,¹⁰ regulated by Decree-law 111/2000 of 4 July 2000.

To sum up, the directives on anti-discrimination are transposed not only by national law, but also by several legal statutes, including codes, such as the Labour Code.

3. Main principles and definitions

The principle of equality and non-discrimination is a main principle of every state that respects the democratic principle and the rule of law; thus it is the case in Portugal.

National law defines several operational concepts of anti-discrimination law in order to facilitate the application of them by judicial and administrative bodies.

Direct discrimination is prohibited in national law and is defined. The definitions in Portuguese law of direct discrimination comply with those in the directives.

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

‘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 3(a) of Law 46/2006 states that

‘direct discrimination occurs when people with disabilities is subject to less favourable treatment than another is, has been or would be in a similar situation.’

Article 4 of the above-mentioned law, gives some examples of direct discrimination: the refusal to provide or the impeding of the taking up of goods or services; an impediment to or limitation of access to and normal exercise of an economic activity; an impediment to or limitation of access to buildings and public spaces; or the adoption of measures which may limit access to new technologies.

Article 23(1)(a) of the Labour Code 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 5(2)(a) of Law 3/2011 defines direct discrimination as

‘...when a person, due to one of the grounds of discrimination, is subject to less favourable treatment than another is, has been or would be in a similar situation.’

Indirect discrimination is also prohibited in national law and is defined. The definition of indirect discrimination in Portuguese law complies with those in the directives.

⁸ Available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

⁹ Criminal Code was approved by the Decree-Law 48/95, lasted amended by the Law 30/2015 of 22 April 2015. Available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

¹⁰ Available at: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

Law 18/2004 of 11 May 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 3(b) of Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, follows the same wording.

Article 23(1)(b) of the Labour Code uses similar wording.

Article 5(2)(b) of Law 3/2011 defines indirect discrimination as

‘...when an apparently neutral provision, criterion or practice would put a person with one of the grounds of discrimination in a less advantageous situation compared with other persons.’

Portuguese law defines racial discrimination and disability with particular care.

Racial discrimination is defined 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 also covers discrimination by association or perception.

A disabled person is defined as a person who, due to loss or abnormality of a psychological, intellectual, anatomical structure or function, likely to limit capacity, may be considered at a disadvantage for the exercise of normal activities, taking into account age, sex and prevailing socio-cultural factors. The definition of disability in Portugal goes beyond the simple disability concept as it includes those with a pre-existing aggravated risk to their health (*risco agravado para a saúde*).

Besides the general constitutional clause of anti-discrimination mentioned above, specific law forbid discrimination on certain grounds.

Thus Law 18/2004 forbids discrimination on grounds of racial or ethnic origin, nationality and colour.

The Labour Code prohibits

‘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 concerning the actual situation of the worker and in such a broad way that discrimination by association or perception is covered.

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 to a complaint against working conditions or to the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee.

Instructions to discriminate are dealt with as discrimination.

4. Material scope

Anti-discrimination provisions cover all the fields listed in the directives, namely employment, social protection, education, goods and services, and housing. Discrimination on the grounds of racial or ethnic origin, nationality, religion or belief, age, disability and sexual orientation are prohibited in employment and vocational training, including in prisons. Discrimination on the grounds of race or ethnic origin, colour, ancestry and nationality is also prohibited in relation to the exercise of any civil rights, liberties or social or cultural rights. With regard to employment, anti-discrimination provisions apply to both the public and private sectors.

5. Enforcing the law

The most important Government agencies that enforce anti-discrimination law are:

- High Commissioner for Migrations (ACM). The mission of this body is to collaborate in the creation, implementation and evaluation of sector, crosscutting and public policies concerned with the integration of immigrants and ethnic minorities, as well as to promote dialogue between the various cultures, ethnic groups and religions.
- Authority for Working Conditions (ACT) is responsible for promoting improved working conditions by ensuring compliance with labour regulations, in the context of private labour relations, and for promoting occupational risk prevention policies. Its work in the enforcement of anti-discrimination law is very important.

Associations are entitled to act on behalf of victims of discrimination. According to Article 5 of Law 18/2004,

‘associations with the objective of combating discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval.’

Trade unions and associations are entitled under national law (Labour Procedure Code) to act on behalf or in support of victims of discrimination.

NGOs of people with disabilities (ONGPD) are entitled to act on behalf of victims of discrimination according to Article 5(2) of Decree-law 106/2013 of 30 July 2013 defining the statute of ONGPD.

Law 46/2006 also provides in Article 15(1) that ONGPD and all organisations defending and promoting the interests of people with disabilities have the right to intervene in support of the interested party.

It is also worth mentioning that Article 23 of Law 107/2009 approving the procedural rules for administrative offences at labour and social security level also grants legal standing for trade unions to intervene in administrative proceedings in support of a worker.

Concerning the proof of discrimination, once some elements of proof of the existence of discrimination have been established, the burden of proof will shift, since the respondent has the duty to prove that the facts alleged are not discriminatory. This principle does not apply to criminal procedure or to actions where, according to the law, it is the responsibility

of a court or other jurisdiction to carry out the investigation. In practice, in courts, this principle has raised some difficulties.

Statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts appointed by the parties or by the court. It is the responsibility of the court to evaluate the evidence resulting from the statistics.

Situation testing could eventually be acceptable as evidence, under the same rules as evidence given by witnesses, but the law is silent on the use of situational testing and so far there has been no precedent for its use in Portugal.

Victims of discrimination may address their complaints to any police authority, the ACM or the ACT. In the case of a crime, the Public Prosecution Service will conduct the case in the criminal courts.

The Labour Code considers that the practice of any discriminatory action is a summary offence punishable with fines that are doubled in the case of legal persons.

6. Equality bodies

The High Commission for Migrations – ACM – (formerly the High Commissioner for Immigration and Intercultural Dialogue, *Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI)),¹¹ was created by Decree-law 31/2014 of 27 February 2014¹² and has the responsibility to promote equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin, and also to promote dialogue with and the integration of immigrants, ethnic minorities and religions existing in the country.

The High Commission is assisted by the Commission for Equality and Against Racial Discrimination (CEARD) (*Comissão para a Igualdade e Contra a Discriminação Racial*), which is part of the High Commission, but is a distinct body that only has the power to issue advisory opinions. It does not have the power to bring any cases before the courts or to assist complainants in doing so.

The CEARD consists of two members of the Portuguese Parliament, two Government representatives and two representatives each from immigrants' groups, anti-racist organisations, trade unions, employers' associations and human rights organisations, as well as three prominent public figures appointed by the other members.

The ACIDI, which was the predecessor of the ACM (see above), has developed the use of cultural mediators to achieve greater integration of the Roma ethnic group.

7. Key issues

The most important point to highlight is that Portuguese legislation and practice is in accordance with the directives. There have not been reports of there being many cases of discrimination on grounds of race, ethnic origin, religion, sexual orientation and gender.

However, this does not mean that such cases do not exist.

In Portugal it is common to approve legislation that would be completely appropriate to achieve the required goals, yet which, due to several factors – such as the current weakness of the economy and the financial situation, and the weight of the public

¹¹ It was governed by Decree-law 167/2007 of 3 May 2007.

¹² This decree-law repealed Decree-law 167/2007 of 3 May 2007, and creates the High Commission for Migrations, which replaces the High Commission for Immigration and Intercultural Dialogue. It entered into force on 27 February 2014. Available at: <https://dre.pt/application/file/572214>.

administration – does not function effectively and efficiently. To some extent this applies to the implementation of anti-discrimination law.

Furthermore, in Portugal the culture of taking judicial action against discriminatory practices is almost non-existent. Therefore, there are very few judicial decisions on such issues. There are two main reasons for this: first, for all judicial procedures, the victims have to instruct a lawyer and advance some funds and secondly, the length, complexity and difficulty in obtaining evidence may act as disincentives to victims seeking redress.

However, there were some important judicial decisions in 2015.

The Constitutional Court declared the unconstitutionality of two rules, one of which imposed the requirement of a three-year legal residence in Portugal for the recognition of the right to the Social Integration Income (RSI) if the applicant was not a national of a European Union (EU) Member State, a European Economic Area (EEA) country, or another state with an agreement with the EU permitting the free movement of persons and a second rule that denied the RSI in cases in which the remaining members of the applicant's household (except for children below the age of three) had not also lived in Portugal for at least the last three years. The court considered that the legislative solution was clearly disproportionate.¹³

The Oporto Court of Appeal delivered a ruling on a case in which, following a case, despite being fully aware of the content of and grounds for a sentence, the lawyer (in this new case now the defendant) had disseminated extracts from the magistrate's sentencing speech, which did not refer to the convicted person, but to the Roma community in general. The court ruled that the lawyer's behavior had caused damage to the author of the speech – the judge who read the criminal sentencing decision – and, consequently, he was required to compensate the author. The damages resulted from the fact that the lawyer made comments on decontextualized extracts of the judgment, creating a negative image of the judge, knowing that such excerpts were not based on the judge's own ideas, but on witness statements. The defendant was ordered to pay the judge compensation of EUR 10 000 (and interest).¹⁴

The Court of Appeal of Guimarães delivered a ruling on a case where a man and his disabled wife claimed discrimination in the conclusion of an insurance contract. The insurance company set the premium of the insurance contract higher than usual due to the medical situation of the woman applicant. The claimants alleged a breach of the equality principle enshrined in Law 46/2006. After extensive consideration, the court decided that the discrimination had not been proved because the applicants had been given prior knowledge of the insurance contract rules by the insurer and they had accepted them.¹⁵

Administrative complaints are more frequent and as they usually achieve the victims' objective of ending the discrimination and/or of being compensated for damages, they are often considered to be a sufficient remedy.

In this context, the main problematic point in the transposition of the directives concerns the lack of independence of the equality bodies. They are either departments or services of the Government or depend on it.

There are no other potential breaches of the directives.

¹³ Constitutional Court, Ruling No. 296/15 of 25 May 2015, <http://www.tribunalconstitucional.pt/tc/en/acordaos/20150296s.html>.

¹⁴ Oporto Court of Appeal, Ruling No. 589/11.9TVPRT.P1 – 3.ª, 26 March 2015. Available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4cc5b7c0cecf4b6880257e2800347076?OpenDocument>.

¹⁵ Guimarães Court of Appeal, Ruling No. 31/11.5TBCHV.G1, 29 April 2015. Available at: <http://www.dgsi.pt/jtrq.nsf/86c25a698e4e7cb7802579ec004d3832/1f69b7eeedaee9380257eec0052652b?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,raz%C3%A3o,da,defici%C3%Aancia>.

RÉSUMÉ

1. Introduction

Le Portugal a une longue tradition de contact avec d'autres peuples et cultures. Les découvertes maritimes du 16^e siècle et l'expérience de l'émigration portugaise vers le Brésil et l'ensemble de l'Amérique latine, de même que vers d'autres pays d'Europe tels que la France et l'Allemagne au cours des années 1960, font que la tolérance de la différence y est usuelle, du moins en ce qui concerne l'origine ethnique, la race et la religion.

Il n'y a pas de partis politiques racistes ou fascistes au Portugal car ils y sont interdits (article 8 de la loi 2/2008 du 14 mai 2008).¹⁶

Aucun conflit entre groupes religieux n'a été signalé en 2015. Ceci dit, étant donné que la majorité de la population est catholique, les autres confessions tendent à rencontrer davantage de problèmes pratiques – pour exercer leur ministère dans les hôpitaux et les prisons, par exemple. Les repas servis dans les écoles ne sont toujours pas adaptés aux besoins d'autres religions, et de l'islam en particulier. En dépit de ces constats, la diversité religieuse demeure un sujet assez neutre au sein de la société portugaise.

Les questions relatives au domaine relativement récent de la discrimination fondée sur l'âge constituent une problématique dont la société portugaise n'a pas encore entièrement pris conscience et dont elle ne saisit que lentement toutes les implications. Des particuliers commencent néanmoins à invoquer cette forme de discrimination devant les tribunaux.¹⁷ Le gouvernement portugais considère que la législation met déjà en œuvre la directive 2000/78/CE pour ce qui concerne l'âge, mais les mesures positives n'ont à ce jour pas totalement atteint leur but. L'Institut portugais des assurances s'efforce actuellement de faire supprimer la limite d'âge en matière d'assurabilité par la création d'une assurance-vie sans échéance pour les personnes âgées, et plusieurs compagnies ont déjà institué des contrats d'assurance-maladie sans limite d'âge.

Il convient de rappeler enfin que la crise économique et financière, à l'origine des mesures d'austérité en vigueur depuis cinq ans, n'a pas favorisé la mise en œuvre de mesures positives ou de soutien à l'intention des groupes qui en ont besoin. Le programme du gouvernement en place, qui bénéficie du soutien de tous les partis de gauche siégeant au Parlement, comporte deux points touchant directement l'égalité et la non-discrimination: la lutte contre la pauvreté et l'édification d'une société plus égalitaire.

2. Législation principale

La Constitution portugaise¹⁸ contient plusieurs dispositions portant sur la non-discrimination. Son article 13 en particulier constitue une clause générale relative au principe de l'égalité, dont le premier paragraphe dispose que «tous les citoyens ont la même dignité sociale et sont égaux devant la loi» et dont le second paragraphe est libellé comme suit:

«Nul ne peut être avantagé, favorisé, défavorisé, privé d'un droit ou dispensé d'un devoir quelconque en raison de son ascendance, de son sexe, de sa race, de sa langue, de son territoire d'origine, de sa religion, de ses convictions politiques ou idéologiques, de son instruction, de sa situation économique, de sa condition sociale ou de son orientation sexuelle».

¹⁶ Disponible sur: <https://dre.pt/application/file/249115>.

¹⁷ Voir appel n° 1013/12.5TTMTS.P1, arrêt du 3 novembre 2014, disponible sur: <http://www.dgsi.pt/itpr.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade>.

¹⁸ Une version française de la Constitution peut être consultée sur www.parlamento.pt (rubrique Législation)

La Constitution développe ces principes dans les chapitres consacrés aux droits des travailleurs, aux libertés et garanties fondamentales, et aux droits économiques, sociaux et culturels.

Le Portugal a ratifié par ailleurs plusieurs traités internationaux relatifs aux droits de l'homme tels que la Convention européenne de sauvegarde des droits de l'homme (CEDH), la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, la Charte sociale européenne révisée, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, le Pacte international relatif aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels, et la Convention n° 111 de l'OIT sur la discrimination. Il a signé en outre la Convention relative aux droits des personnes handicapées. En vertu de l'article 8, paragraphe 2, de la Constitution portugaise:

«Les dispositions des conventions internationales régulièrement ratifiées et adoptées sont applicables dans l'ordre interne après leur publication officielle, dans la mesure où elles engagent l'État portugais au plan international.»

En ce qui concerne la législation nationale, la loi 18/2004 du 11 mai 2004 transpose en droit interne la directive 2000/43 (directive sur l'égalité raciale) du 29 juin 2000. Elle consacre le principe de l'égalité de traitement entre personnes indépendamment de leur origine raciale ou ethnique, et a pour objectif d'instituer un cadre juridique pour lutter contre la discrimination fondée sur l'origine raciale ou ethnique.¹⁹

La loi 38/2004 du 18 août 2004 définit la base juridique générale pour la prévention du handicap, et la formation, la réadaptation et la participation des personnes handicapées.²⁰ La loi 46/2006 du 28 août 2006²¹ interdit et punit la discrimination fondée sur le handicap et sur la préexistence d'un risque aggravé de santé (risco agravado para a saúde). Elle est entrée en vigueur le 29 août 2006, hormis les dispositions ayant des implications budgétaires, et elle a été réglementée par le décret-loi 34/2007 du 15 février 2007. Les sanctions sont fixées aux articles 9 et 10 de la loi 46/2006.

Le décret-loi 106/2013 du 30 juillet 2013 définit le statut des ONG exerçant leur activité en faveur des personnes handicapées (*organizações não governamentais das pessoas com deficiência* – ONGPD) ainsi que l'aide dont ces organisations bénéficient de la part de l'État. L'article 5, paragraphe 2, du dit décret-loi prévoit qu'en cas de délit à l'encontre de personnes handicapées, commis avec une motivation liée au handicap, les ONGPD sont habilitées à soutenir et à aider les victimes dans le cadre de procédures pénales.

En ce qui concerne l'emploi, la loi 7/2009 du 12 février 2009 porte approbation du code du travail²² (ci-après «le code du travail») et transpose, entre autres, la directive 2000/43 (directive sur l'égalité raciale) et la directive 2000/78 (directive sur l'égalité en matière d'emploi).

L'article 24 du code du travail interdit la discrimination fondée sur l'ascendance, un handicap ou une maladie chronique, l'âge, la race, le sexe, l'origine ethnique, l'orientation sexuelle, la religion, l'état matrimonial, les convictions politiques ou idéologiques, la situation familiale, l'affiliation syndicale, le patrimoine génétique ou une aptitude réduite au travail.

¹⁹ Disponible sur: <http://dre.pt/pdf1sdip/2004/05/110A00/29712974.pdf>. Loi entrée en vigueur le 12 mai 2004 et modifiée par le décret-loi 86/2005 du 2 mai 2005.

²⁰ Disponible sur: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

²¹ Disponible sur: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

²² Disponible sur: http://www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf.

Le droit du travail comporte des règles spécifiques à l'encontre de la discrimination fondée sur l'âge, l'orientation sexuelle, un handicap, la religion et les convictions politiques en sus des règles contre la discrimination fondée sur la race ou l'origine ethnique.

La loi 3/2011, qui interdit toute discrimination dans l'accès et l'exercice d'une activité indépendante et transpose en droit interne les directives 2000/43/CE, 2000/78/CE et 2006/54/CE, est entrée en vigueur le 20 février 2011. Elle clarifie correctement certains aspects de la législation antidiscrimination en matière d'emploi indépendant et de droits des associations d'intervenir dans des procédures du travail, administratives et judiciaires; et elle modifie la capacité d'ester en justice des ONG et des organisations de défense contre la discrimination. Cette loi consacre désormais le droit des associations d'intervenir dans les cas relevant de leur champ d'action pour autant que les victimes y consentent.²³

L'article 240 du code pénal²⁴ vise la discrimination fondée sur la race, la couleur de peau, l'origine ethnique ou la nationalité, la religion, le genre ou l'orientation sexuelle. Cet article ne couvre pas le handicap.

Enfin, la loi 134/99 du 28 août 1999 interdit la discrimination dans l'exercice des droits en raison de la race, de la couleur de peau, de la nationalité ou de l'origine ethnique; entrée en vigueur le 1^{er} janvier 2000,²⁵ elle est réglementée par le décret-loi 111/2000 du 4 juillet 2000.

En résumé, les directives antidiscrimination sont transposées non seulement par le droit national, mais également par plusieurs lois, en ce compris des codes tels que le code du travail.

3. Principes généraux et définitions

Le principe de l'égalité et de la non-discrimination est essentiel pour tout État qui respecte le principe démocratique et la primauté du droit; tel est donc le cas au Portugal.

Le droit national définit plusieurs concepts opérationnels en matière de législation antidiscrimination afin d'en faciliter l'application par les instances judiciaires et administratives.

La législation nationale définit et interdit la discrimination directe. Les définitions qu'elle contient sont conformes à celles figurant dans les directives.

L'article 3, paragraphe 3 sous a), de la loi 18/2004 dispose que

«une discrimination directe est réputée survenir lorsque, en raison de son origine raciale ou ethnique, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable».

L'article 3 sous a) de la loi 46/2006 dispose pour sa part que

«une discrimination directe survient lorsqu'une personne handicapée est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable».

L'article 4 de la loi susmentionnée propose quelques exemples de discrimination directe: le refus de fournir ou l'empêchement d'accéder à des biens ou des services; l'empêchement ou la restriction de l'accès à une activité économique ou de l'exercice normal de celle-ci;

²³ Disponible sur: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

²⁴ Le code pénal a été approuvé par le décret-loi 48/95, modifié en dernier lieu par la loi 30/2015 du 22 avril 2015. Disponible sur: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

²⁵ Disponible sur: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

l'empêchement ou la restriction de l'accès à des bâtiments et des espaces publics; ou l'adoption de mesures susceptibles de limiter l'accès aux nouvelles technologies.

L'article 23, paragraphe 1 sous a), du code du travail définit la discrimination directe comme

«une situation dans laquelle une personne, en raison de l'un des facteurs visés plus haut, est traitée de façon moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable».

L'article 5, paragraphe 2 sous a), de la loi 3/2011 définit la discrimination directe comme

«une situation dans laquelle une personne, en raison de l'un des motifs de discrimination, est traitée de façon moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable».

La législation nationale définit et interdit également la discrimination indirecte. Les définitions qu'elle contient sont conformes à celles figurant dans les directives.

La loi 18/2004 du 11 mai 2004 dispose en son article 3, paragraphe 3 sous b) que

«une discrimination indirecte survient chaque fois qu'une disposition, un critère ou une pratique apparemment neutre désavantage les personnes d'une certaine race ou origine ethnique par rapport aux autres».

L'article 3 sous b) de la loi 46/2006 du 28 août 2006, qui interdit et punit la discrimination fondée sur un handicap et la préexistence d'un risque de santé, suit le même libellé.

L'article 23, paragraphe 1 sous b), du code du travail utilise un libellé analogue.

L'article 5, paragraphe 2 sous b), de la loi 3/2011 définit la discrimination indirecte comme

«une situation dans laquelle une disposition, un critère ou une pratique apparemment neutre désavantagerait une personne par rapport à d'autres parce qu'elle présente l'un des motifs de discrimination».

Le droit portugais définit avec un soin particulier la discrimination raciale et le handicap.

La discrimination raciale est définie comme

«toute distinction, exclusion, restriction ou préférence fondée sur la race, la couleur de peau, l'ascendance, l'origine nationale ou ethnique, qui a pour objet ou pour effet l'invalidation ou la restriction de la reconnaissance, de la jouissance ou de l'exercice, dans des conditions équivalentes, de droits, de libertés ou garanties ou de droits économiques, sociaux ou culturels».

Cette définition est large au point d'englober également la discrimination par association ou par perception.

Une personne handicapée est définie comme étant une personne qui, à la suite d'une perte ou d'une anomalie de la fonction ou de la structure psychologique, intellectuelle ou anatomique, susceptible de limiter ses capacités, peut être considérée comme défavorisée dans l'exercice d'activités normales, compte tenu de son âge, de son sexe et des principaux facteurs socioculturels. La définition du handicap en droit portugais va au-delà du simple concept de handicap dans la mesure où elle inclut les personnes présentant un risque aggravé de santé (*risco agravado para a saúde*).

Outre la clause constitutionnelle générale mentionnée plus haut, des dispositions législatives spécifiques interdisent la discrimination fondée sur des motifs particuliers.

Ainsi la loi 18/2004 interdit la discrimination fondée sur l'origine raciale ou ethnique, la nationalité et la couleur de peau.

Le code du travail interdit

«toute discrimination par les employeurs à l'égard de travailleurs ou de candidats qui serait fondée sur l'ascendance, l'âge, le sexe, l'orientation sexuelle, l'état civil, le patrimoine génétique, la capacité de travail, un handicap, une maladie chronique, la nationalité, l'origine ethnique, la religion, les convictions politiques ou idéologiques ou l'affiliation syndicale»

et énonce donc les motifs de discrimination interdits sans aucune limitation quant à la situation réelle du travailleur et de façon tellement large que la discrimination par association ou perception y est incluse.

L'article 129, paragraphe 1 sous a), du code du travail interdit à un employeur

«de s'opposer de quelque manière que ce soit à l'exercice par un travailleur de ses droits, ainsi que de licencier un travailleur ou de lui imposer des sanctions ou de le soumettre à un traitement défavorable en raison de l'exercice des droits en question».

L'article 331, paragraphe 1 sous a) à d), dispose que toute mesure disciplinaire à l'encontre un travailleur doit être considérée comme abusive (et donc illégale) si elle est prise en représailles d'une plainte déposée pour cause de conditions de travail ou en représailles du fait que le travailleur exerce, a exercé ou a l'intention d'exercer des droits ou des garanties, ou de les invoquer.

L'injonction de discriminer est assimilée à une discrimination.

4. Champ d'application matériel

Les dispositions antidiscrimination couvrent tous les domaines visés par les directives, à savoir l'emploi, la protection sociale, l'éducation, les biens et les services, et le logement. La discrimination fondée sur l'origine raciale ou ethnique, la nationalité, la religion ou les convictions, l'âge, un handicap et l'orientation sexuelle sont interdites dans le domaine de l'emploi et de la formation professionnelle, y compris dans les prisons. La discrimination fondée sur l'origine raciale ou ethnique, la couleur de la peau, l'ascendance et la nationalité est également interdite pour ce qui concerne l'exercice de l'ensemble des droits civils, des libertés et des droits sociaux ou culturels. En ce qui concerne l'emploi, les dispositions antidiscrimination s'appliquent au secteur public comme au secteur privé.

5. Mise en application de la loi

Les principaux organismes officiels chargés de faire respecter le droit antidiscrimination sont:

- la Haute Commission des migrations (ACM), qui a pour mission de collaborer à l'élaboration, à la mise en œuvre et à l'évaluation des politiques sectorielles, transversales et publiques en rapport avec l'intégration des immigrants et des minorités ethniques, et de promouvoir le dialogue entre les diverses cultures, groupes ethniques et religions;
- l'Autorité en charge des conditions de travail (ACT), qui a pour mission de promouvoir, d'une part, l'amélioration des conditions de travail en veillant au respect

de la législation en la matière dans le cadre des relations de travail privées et, d'autre part, des mesures de prévention des risques professionnels. L'Autorité joue un rôle très important dans la mise en application de la législation antidiscrimination.

Les associations sont habilitées à agir au nom des victimes de discrimination. En vertu de l'article 5 de la loi 18/2004,

«les associations ayant pour objet de combattre la discrimination fondée sur l'origine raciale ou ethnique ont le droit d'engager des procédures judiciaires au nom ou en soutien des personnes concernées moyennant leur consentement».

Les syndicats et associations sont autorisés par le droit national (code de procédure du travail) à agir au nom ou en soutien de victimes de discrimination.

Les ONG exerçant leur activité en faveur des personnes handicapées (*organizações não governamentais das pessoas com deficiência* – ONGPD) sont habilitées à agir au nom de victimes de discrimination en vertu de l'article 5, paragraphe 2, du décret-loi 106/2013 du 30 juillet 2013 définissant le statut des ONGPD.

La loi 46/2006 prévoit elle aussi, en son article 15, paragraphe 1, que les ONGPD et l'ensemble des organisations de défense et de promotion des intérêts des personnes handicapées peuvent légitimement intervenir en soutien de la partie concernée.

Il convient de signaler également que l'article 23 de la loi 107/2009 portant approbation des règles de procédure en matière d'infractions administratives au niveau du travail et de la sécurité sociale habilite également les syndicats à intervenir en soutien d'un travailleur dans le cadre de procédures administratives.

En ce qui concerne la preuve de discrimination, dès que certains éléments établissent l'existence d'une discrimination, il y a renversement de la charge de la preuve puisqu'il incombe dès lors à la partie défenderesse de démontrer que les faits allégués ne sont pas discriminatoires. Ce principe ne s'applique pas aux procédures pénales ni aux actions pour lesquelles il appartient, en vertu de la loi, au tribunal ou à une autre juridiction de mener l'enquête – principe qui n'a pas manqué de susciter quelques difficultés dans la pratique judiciaire.

Les données statistiques éventuellement disponibles peuvent être utilisées à titre de preuves. Elles sont considérées comme des pièces documentaires et peuvent faire objet d'une analyse d'experts désignés par les parties ou par le tribunal. Il appartient au tribunal d'apprécier les éléments probants tirés de statistiques.

Le test de situation pourrait être recevable en tant que preuve selon les mêmes règles que celles appliquées aux preuves fournies par des témoins, mais la loi est muette sur l'utilisation de ce test – laquelle n'a encore fait l'objet d'aucun précédent au Portugal.

Les victimes de discrimination peuvent déposer plainte auprès de toute autorité de police, de l'ACM ou de l'ACT. En cas de délit, le ministère public porte l'affaire devant un tribunal pénal.

Le code du travail considère que tout acte discriminatoire est une infraction de simple police passible d'une amende, laquelle est doublée lorsqu'il s'agit de personnes morales.

6. Organismes de promotion de l'égalité de traitement

La Haute Commission des migrations ou ACM (ex-Haut-Commissariat à l'immigration et au dialogue interculturel – *Alto Comissariado para a Imigração e Diálogo Intercultural* ou

ACIDI)²⁶ a été instituée par le décret-loi 31/2014 du 27 février 2014²⁷ avec pour mandat de promouvoir, d'une part, l'égalité de traitement entre toutes les personnes sans aucune discrimination fondée sur l'origine raciale ou ethnique, et, d'autre part, le dialogue avec la population immigrée, les minorités ethniques et les religions présentes dans le pays, et leur intégration.

La Haute Commission est assistée de la Commission pour l'égalité et contre la discrimination raciale (*Comissão para a Igualdade e Contra a Discriminação Racial* ou CEARD), qui fait partie du Haut-Commissariat mais qui constitue un organe distinct ayant pour seule compétence d'émettre des avis consultatifs. La Commission n'est pas habilitée à intenter des actions en justice ni à aider des plaignants à le faire.

La CEARD comprend deux membres du Parlement portugais, deux représentants du gouvernement et deux représentants respectivement issus de groupes d'immigrants, d'organisations de lutte contre le racisme, de syndicats, d'associations d'employeurs et d'organisations de défense des droits de l'homme, ainsi que trois éminentes personnalités publiques désignées par les autres membres.

L'ACIDI, qui a précédé l'ACM (voir plus haut), a développé le recours à des médiateurs culturels pour mieux intégrer le groupe ethnique des Roms.

7. Points essentiels

Le point majeur à souligner est la conformité de la législation et de la pratique du Portugal avec les directives. Peu de cas de discrimination fondée sur la race, l'origine ethnique, la religion, l'orientation sexuelle et le genre sont signalés.

Il ne faudrait pas en conclure pour autant que de tels cas n'existent pas.

Il est fréquent au Portugal qu'une législation parfaitement conçue pour atteindre les objectifs fixés soit adoptée mais que son efficacité et son efficience soient entravées par divers facteurs tels que la mauvaise conjoncture économique et la situation financière que connaît actuellement le pays, et le poids de son administration publique. Il en est ainsi, dans une certaine mesure, de la législation antidiscrimination.

De surcroît, la culture du recours en justice à l'encontre de pratiques discriminatoires est pratiquement inexistante au Portugal, ce qui fait que les décisions judiciaires en la matière sont très peu nombreuses. Deux raisons principales expliquent cette situation: premièrement, dans toute procédure judiciaire, les victimes doivent faire appel à un avocat et avancer des fonds; et, deuxièmement, la durée, la complexité et la difficulté d'obtenir des preuves peuvent dissuader les victimes de demander réparation.

Quelques décisions judiciaires importantes n'en ont pas moins été rendues en 2015.

La Cour constitutionnelle a déclaré l'inconstitutionnalité de deux règles: l'une exigeait une durée de séjour légal de trois ans au Portugal pour l'obtention du droit au revenu d'intégration sociale (RIS) lorsque le demandeur n'était pas un ressortissant d'un État membre de l'Union européenne (UE), d'un pays de l'Espace économique européen (EEE) ou d'un autre État ayant conclu avec l'UE un accord autorisant la libre circulation des personnes; et l'autre refusait le bénéfice du RIS lorsque les autres membres du ménage du demandeur (hormis les enfants de moins de trois ans) n'avaient pas non plus vécu au

²⁶ Il était régi par le décret-loi 167/2007 du 3 mai 2007.

²⁷ Ce décret-loi abroge le décret-loi 167/2007 du 3 mai 2007 et institue la Haute commission des migrations, qui remplace le Haut-Commissariat à l'immigration et au dialogue interculturel. Il est entré en vigueur le 27 février 2014. Disponible sur: <https://dre.pt/application/file/572214>.

Portugal durant les trois dernières années au moins. La Cour a considéré que la solution législative était manifestement disproportionnée.²⁸

La Cour d'appel de Porto s'est prononcée dans une affaire qui faisait suite à une autre affaire et dans laquelle l'avocat (devenu la partie défenderesse dans cette nouvelle affaire), tout en étant pleinement conscient de la teneur et des motifs d'une condamnation, a diffusé des extraits de l'exposé de la sentence par le magistrat, lesquels ne concernaient pas la personne condamnée mais la communauté rom en général. La Cour a estimé que le comportement de l'avocat avait causé un préjudice à l'auteur de l'exposé – à savoir le juge ayant procédé à la lecture de l'arrêt – et qu'il était tenu, par conséquent, d'indemniser celui-ci. Le préjudice découlait du fait que l'avocat avait commenté des extraits décontextualisés de l'arrêt et avait, ce faisant, créé une image négative du juge – sachant que les extraits en question ne se fondaient pas sur les idées personnelles de ce magistrat mais sur les déclarations des témoins. La partie défenderesse a été sommée de verser au juge une indemnité de 10 000 euros (plus intérêts).²⁹

La Cour d'appel de Guimarães s'est prononcée dans une affaire dans laquelle un homme et son épouse handicapée alléguaient une discrimination dans le cadre de la conclusion d'un contrat d'assurance. La compagnie d'assurance avait fixé pour le contrat en question une prime supérieure au montant habituel en raison de la situation médicale de l'épouse. Les requérants ont invoqué une violation du principe de l'égalité consacré par la loi 46/2006. Après mûre réflexion, la Cour a estimé que la discrimination n'avait pas été prouvée, étant donné que les requérants avaient été préalablement informés par l'assureur des règles régissant le contrat et qu'ils les avaient acceptées.³⁰

Les plaintes administratives sont plus fréquentes et souvent considérées comme un recours suffisant du fait qu'elles permettent généralement aux victimes d'atteindre leur objectif, à savoir la cessation de la discrimination et/ou l'obtention d'une réparation du préjudice.

Dans ce contexte, l'aspect le plus problématique de la transposition des directives concerne l'indépendance des organismes de promotion de l'égalité, qui sont des départements ou des services du gouvernement, ou qui dépendent de celui-ci.

On ne constate aucune autre violation potentielle des directives.

²⁸ Cour constitutionnelle, arrêt n° 296/15 du 25 mai 2015, <http://www.tribunalconstitucional.pt/tc/en/acordaos/20150296s.html>.

²⁹ Cour d'appel de Porto, arrêt n° 589/11.9TVPR.T.P1 – 3.^a du 26 mars. Disponible sur: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4cc5b7c0cecf4b6880257e2800347076?OpenDocument>.

³⁰ Cour d'appel de Guimarães, arrêt n° 31/11.5TBCHV.G1 du 29 avril 2015. Disponible sur: <http://www.dgsi.pt/jtrq.nsf/86c25a698e4e7cb7802579ec004d3832/1f69b7eeedaae9380257eec0052652b?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,raz%C3%A3o,da,defici%C3%Aancia>.

ZUSAMMENFASSUNG

1. Einleitung

Portugal hat eine lange Tradition der Begegnung mit anderen Kulturen und Völkern. Seit den Entdeckungen der portugiesischen Seefahrer im 16. Jahrhundert ist das Land geprägt von der Emigration, vor allem nach Brasilien und ganz Lateinamerika, seit den 1960er Jahren aber auch in europäische Länder, wie Frankreich und Deutschland. Vor diesem Hintergrund haben die Portugiesen eine Toleranz gegenüber dem Fremden entwickelt, zumindest in Bezug auf ethnische Herkunft, Rasse und Religion.

Rassistische oder faschistische Parteien sind in Portugal verboten (Gesetz 2/2008 vom 14. Mai 2008, Art. 8).³¹ Entsprechende Parteien gibt es daher nicht.

Aus dem Jahr 2015 sind keine Konflikte zwischen religiösen Gruppen bekannt. Da die Mehrheit der Bevölkerung der katholischen Kirche angehört, erleben Angehörige anderer Glaubensgemeinschaften jedoch praktische Probleme, z. B. bei der Seelsorge in Krankenhäusern und Haftanstalten. Auch das Schulessen in staatlichen Schulen ist noch nicht an die Bedürfnisse anderer Religionen, insbesondere des Islam, angepasst. Dennoch ist religiöse Vielfalt in der portugiesischen Gesellschaft kaum umstritten.

Das relativ neue Phänomen der Altersdiskriminierung und seine Folgen dringen nur langsam ins öffentliche Bewusstsein der portugiesischen Gesellschaft. Die Menschen beginnen jedoch, Altersdiskriminierung vor Gericht geltend zu machen.³² Die portugiesische Regierung ist der Ansicht, dass das nationale Recht die Vorgaben der Richtlinie 2000/78/EG in Bezug auf Altersdiskriminierung bereits umsetzt, positive Maßnahmen waren jedoch bisher noch nicht uneingeschränkt erfolgreich. Das portugiesische Versicherungsinstitut versucht derzeit, durch die Einführung unbegrenzter Lebensversicherungen für ältere Menschen Altersgrenzen in Versicherungen abzuschaffen und einige Versicherungsgesellschaften bieten bereits Krankenversicherungen ohne Altersgrenzen an.

Abschließend sei darauf hingewiesen, dass die Sparmaßnahmen, die in den vergangenen fünf Jahren als Reaktion auf die Finanz- und Wirtschaftskrise in Portugal durchgeführt wurden, bei der Umsetzung von positiven Maßnahmen oder Fördermaßnahmen für benachteiligte Gruppen nicht gerade hilfreich waren. Das Programm der derzeitigen Regierung, die von allen linken Parteien im Parlament unterstützt wird, beinhaltet zwei Punkte, die in einem direkten Zusammenhang mit Gleichheit und Nichtdiskriminierung stehen: die Bekämpfung von Armut und die Schaffung einer gleichberechtigteren Gesellschaft.

2. Wichtigste Gesetze

Die portugiesische Verfassung³³ enthält mehrere Bestimmungen, die ein Diskriminierungsverbot enthalten. Artikel 13 ist eine allgemeine Verpflichtung zum Grundsatz der Gleichbehandlung. Artikel 13(1) lautet: „Alle Bürger haben die gleiche gesellschaftliche Würde und sind vor dem Gesetz gleich“ und Artikel 13(2) besagt:

„Niemand darf wegen seiner Abstammung, seines Geschlechts, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner politischen Überzeugungen, seiner Weltanschauung, seiner Bildung, seiner wirtschaftlichen

³¹ Abrufbar unter: <https://dre.pt/application/file/249115>.

³² Siehe Berufungsverfahren Nr. 1013/12.5TTMTS.P1, Entscheidung vom 3. November 2014, abrufbar unter: <http://www.dgsi.pt/itpr.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade>.

³³ Eine englische Übersetzung der Verfassung findet sich auf der folgenden Website: www.parlamento.pt.

Situation, seiner gesellschaftlichen Stellung oder sexueller Ausrichtung bevorzugt, begünstigt, benachteiligt, eines Rechts beraubt oder von einer Pflicht befreit werden.“

Die Verfassung führt diese Grundsätze in den Kapiteln über die Rechte, Freiheiten und Garantien von Arbeitnehmern und über wirtschaftliche, soziale und kulturelle Rechte weiter aus.

Außerdem hat Portugal mehrere internationale Menschenrechtsabkommen ratifiziert, z. B. die Europäische Menschenrechtskonvention (EMRK), das Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung, die revidierte Europäische Sozialcharta, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, den Internationalen Pakt über bürgerliche und politische Rechte, den Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte und die Konvention Nr. 111 über Diskriminierung der ILO. Ferner hat Portugal das Übereinkommen über die Rechte von Menschen mit Behinderungen unterzeichnet. Nach Artikel 8(2) der portugiesischen Verfassung gilt:

„Die in international und regulär ratifizierten oder verabschiedeten Konventionen enthaltenen Normen haben nach ihrer offiziellen Verkündung auch in der innerstaatlichen Rechtsordnung Geltung, solange sie den portugiesischen Staat völkerrechtlich verpflichten.“

Das Gesetz 18/2004 vom 11. Mai 2004 setzt die Richtlinie 2000/43 (Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse) in nationales Recht um. Das Gesetz garantiert den Grundsatz der Gleichbehandlung aller Menschen ungeachtet von Rasse oder ethnischer Herkunft und schafft einen Rechtsrahmen für die Beseitigung von Diskriminierung aufgrund der Rasse oder ethnischen Herkunft.³⁴

Gesetz 38/2004 vom 18. August 2004 definiert die allgemeine Rechtsgrundlage für die Vorbeugung der Ursachen von Behinderungen und für Bildung, Rehabilitation und Teilhabe von Menschen mit Behinderungen.³⁵ Das Gesetz 46/2006 vom 28. August 2006³⁶ verbietet Diskriminierung aufgrund einer Behinderung oder eines bestehenden Erkrankungsrisikos (*risco agravado para a saúde*) und enthält entsprechende Strafbestimmungen. Das Gesetz 46/2006 trat am 29. August 2006 in Kraft, mit Ausnahme von Bestimmungen mit Haushaltsauswirkungen, die durch die Gesetzesverordnung 34/2007 vom 15. Februar 2007 eingeführt wurden. Die Sanktionen sind in Artikel 9 und 10 des Gesetzes 46/2006 geregelt)

Die Gesetzesverordnung 106/2013 vom 30. Juli 2013 definiert das Gesetz für NROs von Menschen mit Behinderungen (*organizações não governamentais das pessoas com deficiência* – ONGPD) sowie die staatliche Förderung dieser Organisationen. Nach Artikel 5(2) dieser Gesetzesverordnung sind ONGPD im Fall von Verbrechen gegen Menschen mit Behinderungen, die aufgrund von Behinderung verübt werden, berechtigt, Opfer in Strafverfahren zu unterstützen.

Im Bereich Beschäftigung wurden durch das Gesetz 7/2009 vom 12. Februar 2009 Bestimmungen eingeführt, mit denen das Arbeitsgesetzbuch³⁷ (im Folgenden „Arbeitsgesetzbuch“) unter anderem die Richtlinie 2000/43 (Richtlinie zur Gleichbehandlung ohne Unterschied der Rasse) und die Richtlinie 2000/78 (Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung) in nationales Recht umsetzt.

Artikel 24 des Arbeitsgesetzbuchs verbietet Diskriminierung aufgrund von Abstammung, Behinderung oder chronischer Erkrankung, Alter, Rasse, Geschlecht, ethnischer Herkunft,

³⁴ Verfügbar unter: <http://dre.pt/pdf1sdip/2004/05/110A00/29712974.pdf>. In Kraft seit dem 12. Mai 2004. Geändert durch die Gesetzesverordnung 86/2005 vom 2. Mai 2005.

³⁵ Verfügbar unter: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

³⁶ Verfügbar unter: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

³⁷ Verfügbar unter: http://www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf.

sexueller Ausrichtung, Religion, Personenstand, politischen oder weltanschaulichen Überzeugungen, familiärer Situation, Mitgliedschaft in einer Gewerkschaft, genetischem Erbe oder geminderter Erwerbsfähigkeit.

Im Arbeitsrecht gibt es neben dem Verbot von Diskriminierung wegen der Rasse oder ethnischen Herkunft gesonderte Regeln gegen Diskriminierung aufgrund von Alter, sexueller Ausrichtung, Behinderung, Religion und politischen Überzeugungen.

Das Gesetz 3/2011, das Diskriminierung beim Zugang zu und bei der Ausübung von selbständiger Beschäftigung verbietet und die Richtlinien 2000/43/EG, 2000/78/EG und 2006/54/EG in nationales Recht umsetzt, trat am 20. Februar 2011 in Kraft. Es hat bestimmte Aspekte des Antidiskriminierungsrechts im Bereich der selbständigen Beschäftigung verdeutlicht und ermöglicht es NROs und Organisationen, die Opfer von Diskriminierung unterstützen, sich an Verfahren vor Arbeits-, Verwaltungs- und Zivilgerichten zu beteiligen. Das Gesetz garantiert diesen Vereinigungen das Recht, sich an Gerichtsverfahren zu beteiligen, die unter ihren Aufgabenbereich fallen, sofern das Opfer dem zustimmt.³⁸

Artikel 240 des Strafgesetzbuchs³⁹ behandelt Diskriminierung aufgrund von Rasse, Hautfarbe, ethnischer Herkunft oder Nationalität, Religion, Geschlecht und sexueller Ausrichtung. Der Artikel deckt nicht den Diskriminierungsgrund Behinderung ab.

Schließlich verbietet das Gesetz 134/99 vom 28. August 1999 Diskriminierung aufgrund von Rasse, Hautfarbe, Nationalität oder ethnischer Herkunft und trat am 1. Januar 2000 in Kraft,⁴⁰ verordnet durch die Gesetzesverordnung 111/2000 vom 4. Juli 2000.

Zusammenfassend lässt sich sagen, dass die Antidiskriminierungsrichtlinien nicht nur in nationales Recht umgesetzt wurden, sondern auch durch mehrere Rechtsvorschriften, einschließlich von Gesetzbüchern wie dem Arbeitsgesetzbuch.

3. Wichtigste Grundsätze und Begriffe

Der Grundsatz der Gleichbehandlung und Nichtdiskriminierung ist eine der wichtigsten Grundlagen für jeden Staat, der die Prinzipien der Demokratie und Rechtsstaatlichkeit respektiert; dies trifft auf Portugal zu.

Das portugiesische Recht enthält in mehreren Antidiskriminierungsvorschriften klare Definitionen von Diskriminierung, die die Umsetzung der Vorschriften durch Justiz und Verwaltungsbehörden erleichtern.

Unmittelbare Diskriminierung ist im portugiesischen Recht definiert und verboten. Die Definitionen im nationalen Recht entsprechen denen der Richtlinien.

Nach Artikel 3(3)(a) des Gesetzes 18/2004

„stellt es eine unmittelbare Diskriminierung dar, wenn eine Person wegen ihrer Rasse oder ethnischen Herkunft eine weniger günstige Behandlung erfährt, als eine andere Person in einer ähnlichen Situation erfährt, erfahren hat oder erfahren würde.“

Nach Artikel 3(a) des Gesetzes 46/2006

³⁸ Verfügbar unter: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

³⁹ Das Strafgesetzbuch wurde durch die Gesetzesverordnung 48/95 angenommen und zuletzt durch das Gesetz 30/2015 vom 22. April 2015 geändert. Verfügbar unter: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

⁴⁰ Verfügbar unter: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

„liegt eine unmittelbare Diskriminierung vor, wenn Menschen mit Behinderungen eine weniger günstige Behandlung erfahren, als eine andere Person in einer ähnlichen Situation erfährt, erfahren hat oder erfahren würde.“

Artikel 4 des oben genannten Gesetzes enthält auch einige Beispiele für unmittelbare Diskriminierung: Weigerung, Güter oder Dienstleistungen bereitzustellen, bzw. Erschwerung ihrer Inanspruchnahme, Erschwerung oder Beschränkung des Zugangs zu einer wirtschaftlichen Tätigkeit, Erschwerung oder Beschränkung des Zugangs zu Gebäuden und öffentlichen Räumen oder Maßnahmen, die den Zugang zu neuen Technologien beschränken.

Nach Artikel 23(1)(a) des Arbeitsgesetzbuchs liegt eine unmittelbare Diskriminierung vor,

„wenn eine Person wegen eines der oben genannten Faktoren eine weniger günstige Behandlung erfährt, als eine andere Person in einer ähnlichen Situation erfährt, erfahren hat oder erfahren würde.“

Nach Artikel 5(2)(a) des Gesetzes 3/2011 liegt eine unmittelbare Diskriminierung vor,

„wenn eine Personen wegen eines Diskriminierungsgrunds eine weniger günstige Behandlung erfährt, als eine andere Person in einer ähnlichen Situation erfährt, erfahren hat oder erfahren würde.“

Auch mittelbare Diskriminierung ist im portugiesischen Recht definiert und verboten. Die Definition von mittelbarer Diskriminierung im portugiesischen Recht erfüllt die Vorgaben der Richtlinien.

Das Gesetz 18/2004 vom 11. Mai 2004 enthält in Artikel 3(3)(b) die folgende Bestimmung:

„Eine mittelbare Diskriminierung liegt vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen einer bestimmten Rasse oder ethnischen Herkunft in eine weniger günstige Lage versetzen als andere Personen.“

Artikel 3(b) des Gesetzes 46/2006 vom 28. August 2006, das Diskriminierung aufgrund einer Behinderung oder eines bestehenden Erkrankungsrisikos verbietet und mit Sanktionen belegt, folgt diesem Wortlaut.

Auch Artikel 23(1)(b) des Arbeitsgesetzbuchs verwendet eine ähnliche Formulierung.

Nach Artikel 5(2)(b) des Gesetzes 3/2011 liegt eine mittelbare Diskriminierung vor,

„ ... wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen, auf die ein Diskriminierungsgrund zutrifft, in eine weniger günstige Lage versetzen als andere Personen.“

Das portugiesische Recht definiert Rassendiskriminierung und Behindertendiskriminierung besonders sorgfältig.

Rassendiskriminierung wird wie folgt definiert:

„Jede Unterscheidung, Ausgrenzung, Beschränkung oder Bevorzugung aufgrund von Rasse, Hautfarbe, Abstammung oder nationaler oder ethnischer Herkunft, die eine Aufhebung oder Beschränkung bei der gleichberechtigten Anerkennung, Nutzung oder Ausübung von Rechten, Freiheiten oder Garantien oder wirtschaftlichen, sozialen oder kulturellen Rechten bezweckt oder bewirkt.“

Diese Definition ist so weit gefasst, dass sie auch Diskriminierung aufgrund von Assoziierung oder mutmaßlichen Gründen abdeckt.

Ein behinderter Mensch wird definiert als Person, die aufgrund des Fehlens oder der Anomalität von psychologischen, intellektuellen oder anatomischen Strukturen oder Funktionen vermutlich in der Leistungsfähigkeit beeinträchtigt und bei der Ausübung normaler Tätigkeiten unter Berücksichtigung des Alters, des Geschlechts und der herrschenden soziokulturellen Faktoren benachteiligt ist. Die Definition von Behinderung in Portugal geht über den bloßen Begriff der Behinderung hinaus, und umfasst auch bestehende verschärfte Erkrankungsrisiken (*risco agravado para a saúde*).

Zusätzlich zum allgemeinen Diskriminierungsverbot in der Verfassung verbieten Einzelgesetze Diskriminierung wegen bestimmter Diskriminierungsgründe.

So verbietet das Gesetz 18/2004 Diskriminierung aufgrund von Rasse oder ethnischer Herkunft, Nationalität oder Hautfarbe.

Das Arbeitsgesetzbuch verbietet

„Diskriminierung von Arbeitnehmern oder Stellenbewerbern durch Arbeitgeber aufgrund von Abstammung, Alter, Geschlecht, sexueller Ausrichtung, Personenstand, genetischem Erbe, Erwerbsfähigkeit, Behinderung, chronischer Erkrankung, Nationalität, ethnischer Herkunft, Religion, politischen oder weltanschaulichen Überzeugungen oder der Mitgliedschaft in einer Gewerkschaft“

und definiert damit die Diskriminierungsgründe ohne Einschränkung in Bezug auf die tatsächliche Situation des Arbeitnehmers und so weit gefasst, dass auch Diskriminierung aufgrund von Assoziierung oder mutmaßlicher Gründe abgedeckt ist.

Artikel 129(1)(a) des Arbeitsgesetzbuchs verbietet Arbeitgebern,

„einen Arbeitnehmer in irgendeiner Weise bei der Ausübung seiner Rechte zu behindern oder wegen der Ausübung dieser Rechte zu kündigen, zu sanktionieren oder in anderer Weise zu benachteiligen.“

Gemäß Artikel 331(1)(a)(d) gilt eine Disziplinarmaßnahme gegen Arbeitnehmer als missbräuchlich (und damit gesetzeswidrig), wenn sie eine Vergeltungsmaßnahme aufgrund von Beschwerden gegen Arbeitsbedingungen oder aufgrund der (gegenwärtigen) Ausübung, vergangenen Ausübung oder der Absicht zur Ausübung oder Geltendmachung von Rechten und Garantien durch den Arbeitnehmer darstellt.

Die Anweisung zur Diskriminierung wird wie Diskriminierung behandelt.

4. Sachlicher Anwendungsbereich

Ein Diskriminierungsverbot gilt in allen von den Richtlinien abgedeckten Bereichen, insbesondere in den Bereichen Beschäftigung, Sozialschutz, Bildung, Güter und Dienstleistungen sowie Wohnraum. Diskriminierung aufgrund von Rasse oder ethnischer Herkunft, Nationalität, Religion oder Weltanschauung, Alter, Behinderung und sexueller Ausrichtung sind im Arbeitsleben und in der beruflichen Bildung verboten; dies gilt auch für Haftanstalten. Diskriminierung aufgrund von Rasse oder ethnischer Herkunft, Hautfarbe, Abstammung und Nationalität ist außerdem bei der Ausübung von bürgerlichen Rechten und Freiheiten und von sozialen und kulturellen Rechten verboten. Das Diskriminierungsverbot im Arbeitsleben gilt sowohl für den öffentlichen als auch für den privaten Sektor.

5. Rechtsdurchsetzung

Für die Durchsetzung des Antidiskriminierungsrechts sind vor allem die folgenden Regierungsstellen zuständig:

- Der Hohe Kommissar für Zuwanderung (ACM). Diese Stelle hat die Aufgabe, die Ausarbeitung, Umsetzung und Auswertung von bereichs- und themenübergreifenden politischen Maßnahmen zur Integration von Einwanderern und ethnischen Minderheiten zu unterstützen und den Dialog zwischen den Kulturen, ethnischen Gruppen und Religionen zu fördern.
- Das Amt für Arbeitsbedingungen (ACT) ist dafür zuständig, in privatwirtschaftlichen Beschäftigungsverhältnissen die Einhaltung arbeitsrechtlicher Vorschriften zu überwachen und so die Arbeitsbedingungen zu verbessern und die Prävention von Risiken am Arbeitsplatz zu fördern. Die Arbeit des Amts ist sehr wichtig für die Durchsetzung des Antidiskriminierungsrechts.

Vereinigungen sind berechtigt, im Namen von Diskriminierungsopfern zu klagen. Nach Artikel 5 des Gesetzes 18/2004,

„sind Vereinigungen mit dem Ziel, Diskriminierung aufgrund von Rasse oder ethnischer Herkunft zu bekämpfen, berechtigt, sich im Namen oder zur Unterstützung der betroffenen Personen mit deren Einwilligung an gerichtlichen Verfahren zu beteiligen.“

Auch Gewerkschaften und Vereinigungen sind nach portugiesischem Recht (Verfahrensordnung für Arbeitsverfahren) berechtigt, im Namen oder zur Unterstützung von Diskriminierungsopfern zu handeln.

NROs von Menschen mit Behinderungen (ONGPD) sind nach Artikel 5(2) der Gesetzesverordnung 106/2013 vom 30. Juli 2013, die das Gesetz für ONGPD definiert, berechtigt, im Namen von Diskriminierungsopfern Klage einzureichen.

Auch das Gesetz 46/2006 legt in Artikel 15(1) fest, dass ONGPD und alle Organisationen, die die Interessen von Menschen mit Behinderungen verteidigen und fördern, berechtigt sind, sich zugunsten der betroffenen Partei an Verfahren zu beteiligen.

Erwähnenswert ist auch, dass Artikel 23 des Gesetzes 107/2009, das die Verfahrensordnung bei Ordnungswidrigkeiten im Bereich Arbeitsrecht und soziale Sicherheit festlegt, auch Gewerkschaften berechtigt, sich zur Unterstützung von Arbeitnehmern an Verwaltungsverfahren zu beteiligen.

Hinsichtlich der Beweislast gilt, dass die Beweislast auf den Beklagten übergeht und dieser beweisen muss, dass die vorgelegten Tatsachen keine Diskriminierung darstellen, sobald das Vorliegen einer Diskriminierung glaubhaft gemacht wurde. Dieser Grundsatz gilt jedoch nicht in Strafverfahren oder in Fällen, in denen ein Gericht oder ein anderes Organ der Rechtsprechung gesetzlich zur Strafverfolgung verpflichtet ist. In der Praxis hat dieser Grundsatz die Gerichte vor einige Probleme gestellt.

Statistiken sind gegebenenfalls als Beweise zulässig. Sie gelten als Dokumente und können von Sachverständigen begutachtet werden, die von den Parteien oder dem Gericht beauftragt werden. Das Gericht muss dann die Beweiskraft der statistischen Daten bewerten.

Situationstests könnten nach den üblichen Regeln für Zeugenaussagen als Beweis zugelassen werden, es gibt jedoch keine gesetzlichen Bestimmungen zu diesem Thema und bisher auch noch kein Fallrecht zu deren Verwendung in Portugal.

Opfer von Diskriminierung können bei jeder Polizeibehörde, beim ACM oder beim ACT Anzeige erstatten. Wenn eine Straftat vorliegt, klagt die Staatsanwaltschaft den Täter vor einem Strafgericht an.

Nach dem Arbeitsgesetzbuch sind diskriminierende Handlungen Ordnungswidrigkeiten, die mit Geldbußen geahndet werden können; sie fallen bei juristischen Personen doppelt so hoch aus wie bei natürlichen.

6. Gleichbehandlungsstellen

Das Hohe Kommissariat für Zuwanderung (ACM; vormals der Hohe Kommissar für Einwanderung und interkulturellen Dialog, *Alto Comissariado para a Imigração e Diálogo Intercultural* – ACIDI),⁴¹ wurde mit der Gesetzesverordnung 31/2014 vom 27. Februar 2014⁴² eingerichtet und ist für die Gleichbehandlung aller Menschen ohne Diskriminierung aufgrund der Rasse oder ethnischen Herkunft sowie für die Förderung des Dialogs mit und der Eingliederung von Zuwanderern, ethnischen Minderheiten und Religionen in Portugal zuständig.

Das Hohe Kommissariat wird durch die Kommission für Gleichstellung und gegen Rassendiskriminierung (*Comissão para a Igualdade e Contra a Discriminação Racial* – CICDR) unterstützt, die als eigenständige Stelle beim Hohen Kommissar angesiedelt ist, jedoch nur eine beratende Funktion hat. Die Kommission kann nicht selbst vor Gericht klagen oder Kläger bei ihren Klagen unterstützen.

Die CICDR besteht aus zwei Abgeordneten des portugiesischen Parlaments, zwei Vertretern der Regierung und jeweils zwei Vertretern von Einwandererverbänden, Antirassismusorganisationen, Gewerkschaften, Arbeitgeberverbänden und Menschenrechtsorganisationen sowie drei renommierten Persönlichkeiten des öffentlichen Lebens, die von den anderen Mitgliedern ernannt werden.

Der Vorgänger des ACM, der ACIDI (siehe oben) hat den Einsatz kultureller Mediatoren etabliert, um die Eingliederung der Roma zu verbessern.

7. Wichtige Punkte

Das wichtigste Ergebnis des Berichts ist, dass das portugiesische Recht und die Rechtspraxis des Landes den Richtlinien entsprechen. Es werden nur wenige Fälle von Diskriminierung aufgrund von Rasse, ethnischer Herkunft, Religion, sexueller Ausrichtung und Geschlecht gemeldet.

Dies bedeutet jedoch nicht, dass solche Fälle nicht existieren.

In Portugal ist es üblich, Vorschriften zu erlassen, die völlig angemessen wären, um die angestrebten Ziele zu erreichen, die aber aufgrund verschiedener Faktoren – derzeitige Schwäche der Wirtschaft und finanzielle Situation, Stellenwert der öffentlichen Verwaltung usw. – nicht wirksam und effizient funktionieren. Dies gilt bis zu einem gewissen Grad auch für die Umsetzung des Antidiskriminierungsrechts.

Außerdem ist die Kultur, gegen diskriminierende Praktiken gerichtlich vorzugehen, in Portugal fast inexistent. Gerichtliche Entscheidungen gibt es in diesem Bereich daher nur sehr wenige. Dies hat vor allem zwei Gründe: Erstens müssen Betroffene für alle gerichtlichen Verfahren einen Anwalt beauftragen und einen gewissen Betrag vorstrecken; zweitens können Länge, Komplexität und Schwierigkeiten des Zugangs zu Beweismitteln Betroffene davon abhalten, ihre Rechte geltend zu machen.

⁴¹ Sie unterlag der Gesetzesverordnung 167/2007 vom 3. Mai 2007.

⁴² Die neue Gesetzesverordnung hob die Gesetzesverordnung 167/2007 vom 3. Mai 2007 auf und ersetzte den Hohen Kommissar für Einwanderung und interkulturellen Dialog durch das Hohe Kommissariat für Zuwanderung. Sie trat am 27. Februar 2014 in Kraft. Verfügbar unter: <https://dre.pt/application/file/572214>.

Nichtsdestotrotz gab es 2015 einige wichtige Gerichtsentscheidungen.

Das Verfassungsgericht erklärte zwei Vorschriften für verfassungswidrig: Die eine sah vor, dass Personen, die nicht Staatsangehörige eines Mitgliedstaats der Europäischen Union (EU), eines Staates des Europäischen Wirtschaftsraums (EWR) oder eines anderen Staates sind, mit dem die EU ein Abkommen über freien Personenverkehr geschlossen hat, sich seit drei Jahren rechtmäßig in Portugal aufhalten müssen, um Anspruch auf das soziale Eingliederungseinkommen (RSI) zu haben; die zweite Vorschrift sah vor, dass kein Anspruch auf das RSI bestand, wenn die übrigen Mitglieder des Haushalts des Antragstellers bzw. der Antragstellerin (ausgenommen Kinder unter drei Jahren) mindestens in den letzten drei Jahren nicht ebenfalls in Portugal gelebt haben. Nach Ansicht des Gerichts war diese Regelung eindeutig unverhältnismäßig.⁴³

Das Berufungsgericht Oporto hatte über einen Fall zu entscheiden, in dem der Anwalt in einem früheren Verfahren (in dem neuen Verfahren nun der Beklagte) Auszüge aus dem vom Richter verlesenen Urteil veröffentlicht hatte, die sich nicht auf die verurteilte Person, sondern auf die Roma-Gemeinschaft im Allgemeinen bezogen, obwohl er sich des Inhalts und der Gründe des Urteils voll und ganz bewusst war. Nach Ansicht des Gerichts hatte das Verhalten des Anwalts dem Betroffenen – dem Richter, der das Strafurteil verlas – Schaden zugefügt, weshalb dieser den Richter entschädigen musste. Der Schaden resultierte daraus, dass der Anwalt aus dem Zusammenhang gerissene Teile des Urteils kommentierte und damit ein negatives Bild des Richters zeichnete – wohl wissend, dass diese Auszüge nicht auf den Vorstellungen des Richters, sondern auf Zeugenaussagen basierten. Der Angeklagte wurde dazu verurteilt, dem Richter eine Entschädigung in Höhe von 10 000 Euro (zzgl. Zinsen) zu zahlen.⁴⁴

Das Berufungsgericht Guimarães hatte über einen Fall zu entscheiden, in dem ein Mann und seine behinderte Frau Diskriminierung beim Abschluss eines Versicherungsvertrags geltend machten. Aufgrund des gesundheitlichen Zustands der Antragstellerin verlangte die Versicherungsgesellschaft eine höhere Versicherungsprämie als üblich. Die Kläger machten einen Verstoß gegen den im Gesetz 46/2006 festgeschriebenen Gleichheitsgrundsatz geltend. Nach eingehender Prüfung kam das Gericht zu dem Ergebnis, dass eine Diskriminierung nicht nachgewiesen worden sei, weil die Antragsteller im Vorfeld seitens des Versicherers über die Bestimmungen des Versicherungsvertrags in Kenntnis gesetzt worden seien und diese akzeptiert hätten.⁴⁵

Verwaltungsbeschwerden sind häufiger, und da mit ihnen in der Regel das Ziel der Betroffenen, die Diskriminierung zu beenden und/oder Schadensersatz zu erhalten, erreicht wird, werden sie oft als ausreichendes Mittel der Rechtsdurchsetzung angesehen.

Das größte Problem bei der Umsetzung der Richtlinien ist in diesem Zusammenhang die mangelnde Unabhängigkeit der Gleichbehandlungsstellen. Sie sind entweder Abteilungen oder Dienststellen der Regierung oder von dieser abhängig.

Ansonsten gibt es keine potenziellen Verstöße gegen die Richtlinien.

⁴³ Verfassungsgericht, Urteil Nr. 296/15 vom 25. Mai 2015, <http://www.tribunalconstitucional.pt/tc/en/acordao/20150296s.html>.

⁴⁴ Berufungsgericht Oporto, Urteil Nr. 589/11.9TVPR.T.P1 – 3.ª, 26. März 2015. Abrufbar unter: <http://www.dgsi.pt/jtrq.nsf/56a6e7121657f91e80257cda00381fdf/4cc5b7c0cecf4b6880257e2800347076?OpenDocument>.

⁴⁵ Berufungsgericht Guimarães, Urteil Nr. 31/11.5TBCHV.G1, 29. April 2015. Abrufbar unter: <http://www.dgsi.pt/jtrq.nsf/86c25a698e4e7cb7802579ec004d3832/1f69b7eeedaae9380257eec0052652b?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,raz%C3%A3o,da,defici%C3%Aancia>.

INTRODUCTION

The national legal system

According to Article 1 of the Constitution of the Portuguese Republic of 1976,⁴⁶ 'Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society.' That means that the human being is the first priority of the state, above the economic and the political power's organisation of the state.

According to Article 2 of the Constitution,

'The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy.'

The structure of the state is unitary with autonomous regions (Article 6(2)) and must respect the autonomous island system of self-government, the principles of subsidiarity, the autonomy of local authorities, and the democratic decentralisation of the Public Administration (Article 6(1) of the Constitution).

The political system is founded on the separation of effective powers (positive and negative) between the President, Parliament and Government, all of which possess identical democratic legitimacy.

The President of the Republic exercises effective positive and negative political powers, such as the appointment of the Prime Minister, the right of veto, the removal of the Government and the dissolution of the Assembly.

The Assembly of the Republic (Parliament) exercises legislative and political control powers (Article 149(1) of the Constitution). Among the legislative powers, the Assembly of the Republic has powers:

- to amend the Constitution (Article 161(a) of the Constitution);
- to enact legislation on any subject other than those in the exclusive mandate of the Government under the Constitution (Article 161(c) of the Constitution);
- to delegate to the Government the power to legislate (Article 161(d) of the Constitution);
- to approve international conventions (Article 161(i) of the Constitution); 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) of the Constitution).

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 conducts the country's general policy and is the supreme authority in Public Administration (Article 182 of the Constitution). 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.

⁴⁶ An English version of the Constitution can be consulted on the website: www.parlamento.pt.

Jurisdictional function is assured by courts, which exercise sovereignty with the competence to administer justice in the name of the people (Article 202 of the Constitution). The control of what is constitutional and legal is multi-faceted and any court (including the Constitutional Court) must not apply rules that contravene the provisions of the Constitution or the principles enshrined therein (Article 204 of the Constitution).

List of main legislation transposing and implementing the directives

- Law 18/2004 of 11 May 2004 (hereafter 'Law 18/2004'), transposes Directive 2000/43/EC (the Racial Equality Directive) of 29 June 2000 into the domestic legal order, which establishes the principle of equality of treatment between persons irrespective of racial or ethnic origin, and follows the objective of setting up a legal framework to combat discrimination on the grounds of racial or ethnic origin.⁴⁷ Entered into force on 12 May 2004. Amended by Decree-law 86/2005 of 02 May 2005.⁴⁸
- Law 38/2004 of 18 August 2004 (hereafter 'Law 38/2004'), defining the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities.⁴⁹
- Law 46/2006 of 28 August 2006,⁵⁰ which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*). This law entered into force on 29 August 2006, with the exception of the provisions that have budgetary implications, and was regulated by Decree-law 34/2007 of 15 February 2007.
- Law 7/2009 of 12 February 2009 approves the Labour Code⁵¹ (hereafter 'the Labour Code'), transposing, among many others, Directive 2000/43/EC (the Racial Equality Directive) and Directive 2000/78/EC (the Employment Equality Directive). It entered into force on 1 May 2009 and in 2015 it was amended by Law 28/2015 of 14 April, which enshrines gender identity within the scope of the right to equality in the access to employment and labour. This law entered into force on 15 April.⁵²
- Law 3/2011 of 15 February 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 2006/54/EC.⁵³
- The Criminal Code approved by Decree-Law 48/95, last amended by Law 110/2015⁵⁴ of 26 August 2015 (hereafter 'the Criminal Code'): Article 132 (2) (f) – homicide motivated by hatred based on race, religious or political beliefs, colour, ethnic origin or nationality, religion, 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.
- Law 134/99 of 28 August 1999 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin, entered into force on 1 January 2000,⁵⁵ regulated by Decree-law 111/2000 of 4 July 2000.
- Decree-law 163/2006 of 8 August 2006⁵⁶ approves the standards and rules governing physical access to buildings and public spaces. Entered into force on 9 February 2007.

⁴⁷ Available at: <http://dre.pt/pdf1sdip/2004/05/110A00/29712974.pdf>.

⁴⁸ Available at: <https://dre.pt/application/file/534485>.

⁴⁹ Available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

⁵⁰ Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

⁵¹ Available at: http://www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf.

⁵² Available at: http://www.cite.gov.pt/asstscite/downloads/legislacao/Lei_28_2015.pdf

⁵³ Available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

⁵⁴ Available at: <https://dre.pt/application/file/70114279>.

⁵⁵ Available at: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

⁵⁶ Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/15200/56705689.pdf>.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution includes many provisions dealing with non-discrimination.

As has been mentioned, the human being is the first priority of the Portuguese Republic.

Furthermore, the Constitution contains a specific general clause on the principle of equality. Article 13(1) enshrines the principle of equal treatment before the law and Article 13(2) prohibits discrimination founded on a large and non-exhaustive list of protected grounds ('ancestry, gender, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation').

Article 15 of the Constitution establishes a principle of equivalence of rights and duties between foreigners and stateless persons and Portuguese citizens. According to that provision, foreigners and stateless persons temporarily or habitually resident in Portugal 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.

The Constitution enshrines the right to legal protection against any form of discrimination in Article 26(1). The Constitution thereby guarantees legal remedies to violations of anti-discrimination provisions.

Article 18 of the Constitution establishes the legal force of the provisions on rights, freedoms and guarantees.

In addition, Article 8(1) of the Constitution establishes that 'The norms and principles of general or common international law form an integral part of Portuguese law', and Article 8(2) reads:

'the norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state.'

That means that as long as Portugal has ratified the main international (regional and universal) conventions on equality and non-discrimination, the latter provision plays an important role.

Apart from these general principles and provisions, the Constitution includes, in the chapter on workers' rights, freedoms and guarantees, the prohibition of dismissal without fair cause or for political or ideological reasons (see Article 53 on job security). In Title III on economic, social and cultural rights and duties, Article 59(1) of the Constitution forbids discrimination at work against any worker on grounds such as age, gender, race, citizenship, place of origin, religion, or political or ideological convictions and paragraph (2)(a) of the same article refers to the principle of equal pay for equal work. Article 59(2)(c) of the Constitution refers to the special protection of the work done by minors, the disabled and those whose occupations are particularly strenuous or are undertaken in unhealthy, toxic or dangerous conditions. Although it does not expressly refer to sexual orientation, it must be interpreted in connection with Article 13 of the Constitution, which forbids discrimination on the ground of sexual orientation.

In Title III concerning economic, social and cultural rights and duties, the Constitution includes the right to protection of health (Article 64(2)(a) and (b) of the Constitution). This

right is a universal right that is fulfilled by means of a universal and general national health service which, with particular regard to the economic and social conditions of the citizens who use it, will tend to be free of charge and by creating economic, social, cultural and environmental conditions that particularly guarantee the protection of childhood, youth and old age. The Constitution charges the state, as a priority, to guarantee every citizen, regardless of his economic situation, access to preventive, curative and rehabilitative medical care (Article 63(3)(a) of the Constitution).

Furthermore, Article 69(1) on childhood provides that with a view to their integral development, children have the right to protection by society and the state, especially from all forms of abandonment, discrimination and oppression. Article 70 on youth establishes that 'in order to ensure the effective fulfilment of their economic, social and cultural rights, young people shall enjoy special protection'.

The prohibition of discrimination on the ground of disability is provided for in Article 71(1) of the Constitution, which establishes that

'citizens with physical or mental disabilities fully enjoy the rights and are subject to the duties enshrined in the Constitution, save for the exercise or fulfilment of those for which their condition renders them incapable.'

According to Article 71(2) of the Constitution, 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'.

In addition, Article 72(1) and (2) of the Constitution, on the elderly, state that 'the elderly have the right to economic security and to conditions in terms of housing and family and community life that respect their personal autonomy and avoid and overcome isolation or social marginalisation' and 'the policy for the elderly shall include measures of an economic, social and cultural nature that tend to provide elderly persons with opportunities for personal fulfilment by means of an active participation in community life.'

Article 73(1) of the Constitution provides that 'everyone has the right to education and culture' and Article 73(2) states:

'the state shall promote the democratisation of education and the other conditions needed for an education conducted at school and via other means of training to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities.'

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 people with disabilities to education and, where necessary, support special education (Article 74(2)(g) of the Constitution). This constitutional provision aims to compensate for the inherent disadvantages that may be suffered by people with disabilities in order to guarantee real equality of opportunity.

All provisions on specific rights should be read together with Article 13 of the Constitution.

According to Portuguese constitutional case law, differences in treatment are considered acceptable 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 (see, among many others, Constitutional Court judgment No. 232/2003 of 13 May 2003).⁵⁷

Some of the constitutional anti-discrimination provisions are directly applicable, while others are not.

In order to clarify this question, one needs to draw attention to the fact that the Constitution draws a formal division between rights, freedoms and guarantees (civil and political rights) and economic, social and cultural rights. This distinction has some substantive consequences, given that the legal regime of both groups of fundamental rights is rather different.

Article 18(1) of the Constitution concerns the direct applicability of the provisions that enshrine rights, freedoms and guarantees and their binding effect on public and private persons and bodies. That means all political and civil rights have binding effect over all public and private entities.

In contrast, the real effects of the constitutional provisions on social rights have been disputed since the very beginning of the Constitution's entry into force. On the one hand, Article 18 of the Constitution does not directly apply to them and they usually depend on the adoption of ordinary laws that develop their constitutional contents. Therefore, some authors argue that these fundamental rights are only binding when special conditions are met (for instance, sufficient administrative and financial resources are provided by the Government). On the other hand, according to another doctrinal current, Article 18 of the Constitution does not apply to the binding effect of social rights, which is supposed to be similar to the rights, freedoms and guarantees. As a consequence, these fundamental rights are binding to the legislator, to the executive and to the courts. For people who make the latter argument, the main difference resides in the direct applicability and not in the effectiveness and binding effect of the social rights – in summary, all fundamental rights must be effective and must have a binding effect. In spite of these differences, there is a consensus in the case law and in academia that the Constitution establishes a duty to pursue the full implementation of social rights, with reasonable delays, depending on public choices and resources.

The constitutional equality clauses can, in some circumstances, be enforced against private actors (as opposed to the state). When provisions on rights, freedoms and guarantees (see the explanation above) are implied, they are surely binding on private actors. By contrast, where economic, social and cultural rights are concerned, their binding effect must be assessed case by case.

⁵⁷ The Portuguese version of this decision is available at: <http://www.tribunalconstitucional.pt/tc/acordaos/>.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

Ancestry, gender, race, language, place of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation (Article 13 of the Constitution). The Labour Code adds age, gender identity, civil status, family situation, genetic heritage, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, or membership of a trade union (Article 24(1)).

2.1.1 Definition of the grounds of unlawful discrimination within the directives

National law provides definitions for some grounds of discrimination.

a) Race and ethnic origin

Racial discrimination is not fully defined in national law. However, some elements of definition can be found in some legal provisions. Article 3(1) of the Law 134/99, of 28 August 1999,⁵⁸ defines racial discrimination 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, freedoms or guarantees, or of economic, social or cultural rights.'

Although there is no legal definition for the notion of 'race', Article 4 of the above-mentioned law exemplifies a large number of discriminatory practices that are forbidden.

Law 18/2004 provides for elements of the definition in Article 3. Discrimination on grounds of racial origin is also defined in Article 240 of the Criminal Code and Article 24(1) of the Labour Code.

The definition of 'ethnic origin' is not provided for the legislation. However, the same provisions that refer to 'race' or 'racial origin' also mention 'ethnic origin'.

In addition to ethnic origin or race, these provisions include nationality, territory of origin and language as suspect classifications.

In Portugal, the culture of taking judicial action against discriminatory practices is almost non-existent. Therefore, there are very few judicial decisions concerning racial discrimination.

In spite of the exhaustive research of the author of this report, in 2015 only one judicial decision was found in the official legal database (www.dgsi.pt) concerning discrimination on grounds of 'ethnic origin': appeal No. 589/11.9TVPRT.P1 – 3.^a from 26 March 2015 of the Oporto Court of Appeal.⁵⁹

In 2011, a magistrate introduced an ordinary declaratory action against a lawyer, calling for him to be sentenced to pay EUR 500 000 (and interest), due to the practice of unlawful and negligent acts causing damage and generating liability.

⁵⁸ Portugal, Law 134/99 of 28 August 1999 forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin, entered into force on 1 January 2000 regulated by Decree-law 111/2000 of 4 July 2000. Available at: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

⁵⁹ Available at <http://www.trp.pt/jurisptij.html>.

According to the magistrate, after reading a criminal sentencing decision, which she had prepared and delivered as Judge of the Court of Felgueiras, the lawyer (the defendant in the current case) who was representing two of the defendants, threatened the judge, with the purpose and attitude of offending her personality, saying that he would promote the dissemination in the media of excerpts of the sentencing decision. The day after, several media outlets published, as the lead or prominent news story, the headline 'Judge from Felgueiras says Roma are marginal and treacherous' and the content of those news stories referred to or included extracts from the sentencing speech, which did not refer to the convicted defendants but to the Roma community in general. The publication of that news story gave rise to many articles and comments in which the name, honor and image of the author, as a citizen and as a judge, were insulted and demeaned.

The defendant argued that he did not disclose the content of the judgment and merely exercised legal representation in accordance with the ethical rules of the profession.

According to the Court of Appeal of Oporto, the lawyer-defendant was aware of the content and grounds of the sentence that the magistrate delivered in the case in which he acted as a lawyer and so has the duty to compensate the judge for the damages that he caused to her. These damages resulted from the lawyer's comments on decontextualized extracts of the judgment, which created a negative image of the magistrate, although the excerpts were not based on the judge's own ideas, but on witness statements.

The defendant was sentenced to pay compensation to the judge, but the amount was only EUR 10 000 (and interest).

b) Religion

The term 'religion' is also not defined in national law. However, according to Law 16/2001, of 22 June 2001 (Law on Religious Freedom), 'religious purposes' are defined as the purposes of 'exercise of worship or rites, religious assistance, training of ministers of religion, missionary work and dissemination of the professed denomination and religious education' (Article 21(1)(a)).

c) Disability

By contrast, Law 38/2004, of 18 August 2004, which is not an anti-discrimination law, expressly defines a disabled person, in Article 2, as

'someone 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.'

According to an interpretation within the legal system, this definition is also relevant for the purposes of non-discrimination law and it is in accordance with the concept used in Joined Cases C-335/11 and C-337/11, *Ring and Skouboe Werge* of the European Court of Justice (ECLI:EU:C:2013:222).

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, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health. However, Law 46/2006 contains no definition of disability.

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

The provisions of Law 46/2006, of 28 August 2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, and complements Law 38/2004 of 18 August 2004, which defines the general principles of the legal system for the prevention of the causes of disability, and the rehabilitation and participation of people with disabilities, are also applicable to discrimination against persons with an aggravated risk to their health (*risco agravado para a sua saúde*). There is no definition of this concept.

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 people with disabilities but also persons with aggravated risk to their health (*risco agravado para a saúde*) (Article 3(b)).

The concept of 'disability' given in Law 46/2006 of 28 August 2006 is also in accordance with the CJEU decision on joined cases C-335/11 and C-337/11, *Ring and Skouboe Werge*.

Although the Labour Code also prohibits discrimination on the ground of aggravated risk to health, this concept is also not defined.

d) Age

With regard to the ground on age, the Constitution includes references to childhood (Article 69), youth (Article 70) and third age (Article 72) without mentioning the years of age corresponding to each situation.

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, 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.

e) Sexual orientation

There is no legal definition of sexual orientation.

The expression 'sexual orientation' will probably be interpreted by the courts as including only those people with a heterosexual, homosexual or bisexual orientation, which is the common meaning of the expression in Portuguese. However, so far there are no specific judicial precedents.

Constitutional Court decisions, such as Decision No. 513/03 of 28 October 2003 relating to the pensions rights after the death of a person in a homosexual relationship⁶⁰ have not defined sexual orientation.

2.1.2 Multiple discrimination

In Portugal, prohibition of multiple discrimination is not expressly included in the law. For instance, in criminal law, each ground of discrimination can be considered as a separate offence or as an aggravating circumstance. This means that the fact that someone is discriminated against on different grounds can be considered to be an aggravating circumstance because it reveals a greater guilt and perversity on the part of the discriminator.

The existence of multiple grounds of discrimination in labour law would require judicial interpretation in order to assess whether it constitutes several infractions or only an aggravating circumstance, thus justifying a higher fine.

In Portugal, there are neither specific rules nor cases dealing with situations of multiple discrimination. The discrimination cases reported so far have been treated under one single ground of discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Portugal, assumed discrimination as such is not explicitly prohibited by the law. However, assumed discrimination is prohibited according to the interpretation principles generally used by Portuguese courts where discrimination includes cases where discrimination is based on an incorrect assumption or perception of the reality. An incorrect assumption or perception by the perpetrator of the offence (discrimination) cannot be considered as a justification (Article 16 of the Criminal Code).

b) Discrimination by association

In Portugal, the following national law implicitly prohibits 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, gender, sexual orientation, gender identity, civil status, genetic heritage, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade union affiliation', and so set 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 as discrimination. Associated discrimination will be treated as discrimination.

⁶⁰ Constitutional Court, case law 513/2003. Available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20030513.html>.

The law does not explicitly refer to discrimination by association but the definition of discrimination and the general principles laid down by constitutional, criminal and administrative law require that discrimination by association should be treated as direct discrimination.

To sum up, Portuguese law is in line with the judgment of 17 July 2008 in CJEU Case C-303/06 *Coleman v Attridge Law and Steve Law*, (ECLI:EU:C:2008:415). However, there are no judicial precedents.

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

a) Prohibition and definition of direct discrimination

In Portugal, direct discrimination is prohibited in national law and is defined.

The definitions in Portuguese law of direct discrimination comply with those given in the directives.

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

'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 3(a) of Law 46/2006 states that

'direct discrimination occurs when people with disabilities is subject to less favourable treatment than another is, has been or would be in a similar situation.'

Article 4 of the above-mentioned law, gives some examples of direct discrimination: the refusal to provide or the impeding of the taking up of goods or services; an impediment to or limitation of access to and normal exercise of an economic activity; an impediment to or limitation of access to buildings and public spaces; or the adoption of measures which may limit access to new technologies.

Article 23(1)(a) of the Labour Code 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 5(2)(a) of Law 3/2011 defines direct discrimination as

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

b) Justification of direct discrimination

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

The Labour Code states in Article 25(2) that

'it does not constitute any discrimination when the behaviour based on a discrimination factor constitutes a justifiable and determining occupational requirement for the exercise of the profession, given the nature of the activity in question or the context of its implementation, where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate.'

The same reasoning is accepted by Article 3(3)(c) of Law 18/2004; Article 3(b) *in fine* of Law 46/2006; Article 3(b) *in fine* of Law 14/2008; and Article 5(4)(a) and (b) of Law 3/2011.

2.2.1 Situation testing

a) Legal framework

In Portugal the law is silent on situation testing. However, it cannot be used as evidence in court, as the New Code of Civil Procedure⁶¹ does not include this possibility (Articles 410 *et seq.*).

b) Practice

In Portugal situation testing is not used in practice.

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

a) Prohibition and definition of indirect discrimination

In Portugal, indirect discrimination is prohibited in national law and is defined. The definition of indirect discrimination in Portuguese law complies with those given in the directives.

Law 18/2004 of 11 May 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.’

Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health follows the same wording (Article 3(b)).

Article 23(1)(b) of the Labour Code uses similar wording.

Article 5(2)(b) of Law 3/2011 defines indirect discrimination as

‘when an apparently neutral provision, criterion or practice would put a person with one of the grounds of discrimination in a less advantageous situation compared with other persons.’

b) Justification test for indirect discrimination

According to Article 3(3)(c) of Law 18/2004, 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 3(b) of Law 46/2006 and Article 3(b) *in fine* of Law 14/2008 follow the same wording.

Under Article 23(1)(b) of the Labour Code, 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 directive is thus reproduced.

⁶¹ Portugal, Law 41/2013 of 26 June 2013, which approves the Code of Civil Procedure, entered into force on 1 September 2013.

Article 5(4)(a)(b) of Law 3/2011 adopts the definition of the justification for indirect discrimination in the Labour Code, but clarifies that the assessment of the legitimate objectives should take into account the nature of the activity or the context of its exercise, and gives examples of some activities where this type of discrimination can be justified, such as fashion, publicity or show business.

This is the only rule defining legitimate aims. The courts would decide what constitutes appropriate and necessary means, 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) Comparison in relation to age discrimination

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. The Oporto Court of Appeal made such a decision on a claim of age discrimination made by a worker. After ending the employment contract by mutual agreement with the employer, the worker claimed that he received a smaller compensation package than his younger colleagues in the same circumstances. After analysing the facts of the case, the Court of Appeal concluded that there was no age discrimination because the cause of the employment contract termination was different in the two circumstances. Whereas the first one was based on a mutual agreement between the worker and the employer, which presupposes a negotiation, the second one was due to the termination of the job and operates by law.⁶² The author of this report is not aware of other judicial decisions on this issue.

As with direct discrimination, the Labour Code provides examples of legitimate aims and necessary and appropriate means, mainly in employment policy, the labour market and professional training. Article 5(4)(c) states that it does not constitute discrimination if the difference of treatment based on age is necessary and appropriate to carry out legitimate aims, namely in relation to public employment policies, the labour market and professional training.

2.3.1 Statistical evidence

a) Legal framework

In Portugal there are national rules permitting data collection.

This point is covered by Law 67/98 of 26 October 1998⁶³ (Law on the Protection of Personal Data - *Lei da Protecção de Dados Pessoais*). Law 67/98 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.

Personal data are defined in Article 3 of Law 67/98 as any information relating to a clearly identified natural person (individual). Employers must inform the National Commission for the Protection of Personal Data (*Comissão Nacional de Protecção de Dados*) – CNPD – in

⁶² Oporto Court of Appeal, No. 1013/12.5TTMTS.P1, 3 November 2014. Available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade>.

⁶³ Portugal, Law 67/98 of 26 October 1998 (Diário da República Série I-A, de 26 October 1998). Entered into force on 27 October 1998.

advance as to what type of data they intend to collect and the purpose of keeping personal records.

Article 7(1) of Law 67/98 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.

There are some exceptions to this provision. Article 7(2) and (3) states:

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.

Article 17 of the Labour Code covers the protection of personal data. Employers in general are only allowed to keep records of the personal data of their workers after obtaining permission from the CNPD and with the consent of the worker. 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 those mentioned above.

Article 9(2) of the Law on Religious Freedom⁶⁴ prohibits the requirement to indicate one's religion in all contexts.

In Portugal, the use of statistical data is permitted by national law in order to design positive action measures (Article 8 of Law 22/2008 of 13 May 2008 – National Statistics Law).⁶⁵ These data are collected by Statistics Portugal (the *Instituto Nacional de Estatística* – INE), the Ministry of Labour and Social Solidarity, and some publications on social issues.

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 423-451 of the New Code of Civil Procedure of 2013 (*Novo Código de Processo Civil*)).

In civil, criminal and labour proceedings, claimants 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 New Civil Procedure Code, Articles 413 (object of the evidence), 417 (duty of cooperation with the discovery of truth), 418 (the judge may, on deeming it appropriate, require the parties to produce confidential data), 429 (duty of the other parties to present to the court the documents deemed necessary), 432 (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 480 and 483). These rules are applicable in all other types of procedures.

b) Practice

⁶⁴ Portugal, Law 16/2001 of 22 June 2001, (Diário da República, 1.^a Série A, n.º 143, p. 3666).

⁶⁵ Portugal, Law 22/2008 of 13 May 2008 (Diário da República, Série I, no. 92, 13 May 2008, p. 2617-2622).

In Portugal statistical evidence in order to establish indirect discrimination can be used in practice. However, this is not widespread. As far as the author of this report is aware, 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.

The evolution of practice in other countries influences our national law. It is quite common for Portugal's highest courts to quote legislation, court precedents and legal theory from other countries, as well as from European and international courts.⁶⁶

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Portugal, harassment is prohibited in national law and is defined.

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(1) of the Labour Code, in which harassment is defined as any form of unwanted behaviour, particularly based on a discriminatory factor, practised in the context of access to employment, self-employment, work or training, with the purpose or effect of upsetting or embarrassing the person, affecting her/his 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.

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.

Furthermore, Article 3(4) of Law 18/2004 defines harassment as any form of unwanted conduct related to racial or ethnic origin with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Definitions in similar terms are contained in Article 5(5) and 5(6) of Law 3/2011.

In Portugal harassment does explicitly constitute a form of discrimination (see Article 3(4) of Law 18/2004, Article 4(4) of Law 14/2008 and Article 29(1) of the Labour Code) and the concept of harassment in national law coincides with the notion of harassment that can be found in Article 2(3) of the directive.

The prohibition and the definition of harassment in national law are confirmed by the case law of the Supreme Court of Justice (Decision in the Procedure 712/12.6TTPRT.P1.S1 of 3 December 2014; Decision taken in the Procedure 420/06.7TTLSB.L1.S1 of 1 October 2014)

⁶⁶ See, among others, Constitutional Court Decision No. 416/2007 of 18 July 2007, which states that the Constitutional Court is bound to the international sources of law, namely the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

and by the case law of the Courts of Appeal (see Court of Appeal of Lisbon, Procedure 420/06.7TTLSB.L1-4 of 29 January 2014; Court of Appeal of Oporto, Procedure 661/06.7TTMTS-B of 24/2/2014).

Law 46/2006, which directly concerns disability discrimination, does not contain any provisions relating to harassment. However, taking into account the protection arising under the Labour Code for harassment, which also relates to disability, this is a sufficient protection.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Portugal the employer and the employee are liable (Article 551(1) of the Labour Code).

While Article 28 of the Labour Code grants the right to compensation for any discriminatory act, liability in general is ruled on in Articles 546 to 566 of the Labour Code, specifically in Article 551. This provision establishes the liability of the employer in general.

- Employers and service providers can be held liable for the actions of employees;
- 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;
- the individual harasser or discriminator can also be held liable. Prohibition of discrimination applies to all. Employers and workers may be held liable;
- (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 the actions occur in a situation in which the members represent these bodies, or they are acting in accordance with instructions given by a union or an association.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Portugal, instructions to discriminate are prohibited in national law, not only in the field of employment but also in the access and exercise of self-employment, social protection, social assistance, education, and access to goods and services. The concept of instruction to discriminate is not defined.

Article 23(2) of the Labour Code includes a provision specifically stating that it 'shall be deemed to constitute discrimination a mere order or instruction with the purpose of disadvantaging any persons by reason of one discrimination factor' and Article 3(5) of Law 18/2004 states that an instruction to discriminate on grounds of race or ethnic origin is considered a form of discrimination. Moreover, Article 5(1) of Law 46/2006 complements the articles laid down in the Labour Code. Under this article, adding to the Labour Code, 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 are deemed to be discriminatory practices against people with disabilities.

Article 5(3) of Law 3/2011 also considers discrimination a mere order or instruction with the purpose of disadvantaging any persons by reason of a discrimination factor.

b) Scope of liability for instructions to discriminate

In Portugal the instructor and the discriminator are liable (Article 10 of Law 18/2004 and Articles 23(2) and 28 of the Labour Code).

Article 11 of the Criminal Code, Article 7 of the General Rules on Minor Offences (*Regime Geral das contra-ordenações*) adopted by Decree-law 433/82 and Article 551 of the Labour Code set out the liability of legal persons for such actions.

Incitement is included in Article 240(2) of the Criminal Code, which 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. Such persons will be punished by imprisonment from six months to five years.

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Portugal, the duty to provide reasonable accommodation for people with disabilities is included in the law, but is not defined.

This duty implicitly derives from Articles 85 and 86 of the Labour Code.

According to Article 85(1) of the Labour Code, people with disabilities or chronic disease are guaranteed equal treatment and Article 85(2) provides that the state will stimulate and support the actions of employers in contracting workers with disability or chronic disease and in making reasonable accommodation for them. Where the burden will be compensated for by financial aid from the state, an employer's refusal may be considered to be discrimination. Under Article 85(3) of the Labour Code, the violation of these principles constitutes a serious offence and is punishable by the same fines as discrimination.

Article 86 is headed 'positive measures in favour of the worker with disabilities and chronic disease' and the first paragraph deals with the question of reasonable accommodation, establishing that the employer has a duty to provide reasonable accommodation. That means that the employer must adopt appropriate measures 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 to be provided for in special legislation.

- b) Practice

The national law does not specify when the duty applies, it does not state the criteria for assessing the extent of the duty and there is no definition of 'reasonable'.

According to Article 86(2) of the Labour Code, the competent national authorities must advocate the adoption of these specific measures by employers and create incentives for action in this field. In other words, the state has a duty to provide support to employers.

In summary, the employer has an obligation to grant reasonable accommodation, if it does not require high expenses (the meaning of 'high expenses' has not been specified and the author of this report has not found any precedents on this matter). However, if an obligation requires high expenses, the employer must ask the state for funding and if the state refuses, the employer has no duty to make reasonable accommodation. The burden

is not considered disproportionate when it is compensated for by the state (Article 86(3) of the Labour Code).

The author of this report has not found any case law on this matter published on the database of the Institute for Information Technologies in Justice Affairs (*Instituto das Tecnologias de Informação na Justiça*) nor is there any reference to the issue on the website of the Authority for Working Conditions (*Autoridade para as Condições do Trabalho*). Likewise, there are no references to this matter on the website of the National Institute for Rehabilitation (*Instituto Nacional para a Reabilitação, I.P.*).⁶⁷

The Programme of Employment and Support for People with Disabilities and Incapacities (*Programa de Emprego e Apoio à qualificação das pessoas com Deficiência e Incapacidades*) provides several measures to support people with disabilities who have difficulties in beginning and making progress in their careers.⁶⁸

The adaptation of jobs and the elimination of architectural barriers are the responsibility of employers and may, exceptionally and under certain conditions, be financed by the Institute for Employment and Vocational Training (*Instituto de Emprego e Formação Profissional – IEFP*). 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 access to the workplace. According to the Authority for Working Conditions, violation of this provision may lead to a fine. It is possible to bring cases to either the Authority for Working Conditions or the labour courts.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming a reasonable accommodation is not different from the one for claiming protection from discrimination in general.

Portuguese law protects not only people with disability but also those with an aggravated risk to health (Law 46/2006 prohibits and punishes discrimination based on disability and on a pre-existing risk to health). People with an aggravated risk to health can also claim for reasonable accommodation.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Portugal, the duty to provide reasonable accommodation for people with disabilities outside the employment field has not the same consistency as the duty to provide reasonable accommodation in the field of employment.

Portuguese law in general does not explicitly provide for a duty to provide reasonable accommodation for people with disabilities in areas outside employment. However, Article 6 of Law 38/2004 states:

‘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.’

⁶⁷ INR website: <http://www.inr.pt/>.

⁶⁸ This programme is available at: http://www.cartasocial.pt/pdf/emprego_pdi.pdf.

Decree-law 163/2006 of 8 August 2006⁶⁹ approves the standards and rules governing physical access to buildings and public spaces and Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, provides for reasonable accommodation to people with disabilities, namely in the access to buildings, public transportation and school. This law goes beyond the field of employment.

According to Decree-law 3/2008 of 7 January 2008,⁷⁰ children with disabilities should be integrated into 'normal' classes (mainstream education) when possible and some special classes (separate classes but not necessarily separate schools, with specifically adapted programmes) must also 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, material in Braille, and physically accessible schools.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Portugal failure to meet the duty of reasonable accommodation does count as discrimination.

However, employers will be punished either for violating Articles 23(1) and 24(1) (discrimination) or Article 85(1) (failure to provide reasonable accommodation) of the Labour Code, 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 Authority for Working Conditions, which must investigate the situation, or file a case at the labour courts.

The potential sanction is a fine that is fixed, according to the degree of guilt and the size of the enterprise, between EUR 1 020 and EUR 2 550 in the case of negligence and EUR 2 550 to EUR 5 100 in the case of intent (*dolus*).

A refusal to provide reasonable accommodation will be considered as a discriminatory act, but as the law detailing financial assistance to be provided by the state has not yet been adopted, employers (particularly small and medium-sized enterprises with fewer than 50 employees) claim that they face a disproportionate burden. Benefits may be obtained from the Institute for Employment and Vocational Training.⁷¹ Until the state adopts the above-mentioned law, the state has to cover 100 % of the costs for an entitlement to accommodation to exist. Reasonable accommodation that does not cost any money at all is an intrinsic right and refusal to provide it is discriminatory.

The Programme of Employment and Support for People with Disabilities and Incapacities provides several measures to support people with disabilities who have difficulties in beginning and making progress in their careers.⁷²

The adaptation of jobs and the elimination of architectural barriers are the responsibility of employers and may, exceptionally, be financed by the Institute for Employment and Vocational Training under certain conditions. The Institute for Employment and Vocational Training part-finances enterprises to provide reasonable accommodation for employees

⁶⁹ Portugal, Decree-law 163/2006 of 8 August 2006 approves the standards and rules governing physical access to buildings and public spaces. Entered into force on 9 February 2007. Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/15200/56705689.pdf>.

⁷⁰ Portugal, Decree-law 3/2008 of 7 January 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. Available at: http://legislacao.min-edu.pt/np4/np3content/?newsId=1530&fileName=decreto_lei_3_2008.pdf.

⁷¹ Instituto de Emprego e Formação Profissional (IEFP): www.iefp.pt/.

⁷² This programme is available at: http://www.cartasocial.pt/pdf/emprego_pdi.pdf.

with disabilities in their premises, in order to overcome functional difficulties and eliminate physical barriers that prevent or hinder access to the workplace. According to the Authority for Working Conditions, violation of this provision may lead to a fine. Cases can be brought either to the Authority for Working Conditions or the labour courts.

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) Duties to provide reasonable accommodation in respect of other grounds

In Portugal there is no duty to provide reasonable accommodation in respect of other grounds in the public and in the private sector.

On religion, in Decision 544/14 of 15 July 2014, the Constitutional Court held that it stems from the broad constitutional protection of freedom of religion that a 'flexitime scheme' shall include time shifts, enabling the compatibility of working hours (and their due compensation) with the exercise of the religious freedom of the worker, because otherwise, she (the worker in the case) would be discriminated against on the ground of religion.⁷³

The Court of Appeal of Lisbon took a decision in the same direction in Procedure 449/10.0TTLS.L1-4 of 17 December 2014. According to the court, taking her religion into account, the worker had the right to suspend the period of work between Friday's sunset until the end of her shift. Absence from work because of religion cannot be considered unjustified and the disciplinary proceedings for this reason cannot be taken into account for the just cause for dismissal.

g) Accessibility of services, buildings and infrastructure

In Portugal national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

Portuguese law requires that services must be available to the public and designed and built in an accessible manner so that people with disabilities may use them (Articles 2 and 9 of Decree-law 163/2006). Elevators, rolling ramps, and buses with disabled access are examples of things that can facilitate the access of the disabled people to services.

Decree-law 163/2006 applies to central, regional and local administration facilities and the surrounding public spaces, as well as to public institutions that provide personalised services or public funds (Article 2(1)). In addition, the decree-law applies to buildings and public facilities related to health, education, social services, goods and services, transport, parking, housing, churches, museums, theatres, cinema, prisons, sport facilities, gardens, beaches, discos, hotels, etc.

Decree-law 163/2006 of 8 August 2006, which lays out the accessibility regulations for buildings and public spaces (gardens, museums, theatres, cinemas, etc.), 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 people with disabilities. The legislation stipulates that these spaces should be barrier-free and adapted to fulfil the needs of all people equally.

The decree-law 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-law also sets out the design

⁷³ Constitutional Court, Decision No. 544/14 of 15 July. Available at: <http://www.tribunalconstitucional.pt/tc/acordaos/20140544.html>.

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.

Many public spaces have already been adapted in accordance with the legislation on accessibility, but there is still a lot to do in this respect. To give an example, it is estimated that more than half of Portuguese courts still remain almost inaccessible to people with disabilities.⁷⁴

According to Article 10(1) of Decree-law 163/2006, a failure to provide accessibility in existing structures can be justified by the following grounds:

- when the works necessary for their implementation are disproportionately difficult;
- when they require the application of disproportionate economic and financial means or not available means;
- when they affect the cultural or historical heritage, whose morphological, architectural and environmental characteristics must be preserved.

In Portugal, national law does not contain a general duty to provide accessibility by anticipation for people with disabilities. However, Decree-law 163/2006 of 8 August 2006 approves the standards and rules governing physical access to buildings and public spaces, not only for existing structures but also and, above all, for new ones. This means that the legislature intends to provide accessibility by anticipation for disabled people. 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 had a gradual period of eight years for adaptation, but this period has now ended.

h) Accessibility of public documents

National law does not require public services in general to translate some or all of their documents into Braille or to use sign language. In practice, information is supplied on demand, for instance in tax offices and courts. In courts, interpretation in sign language or translation into Braille is used when the witness needs it.

⁷⁴ There are no statistics available.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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)

In Portugal, 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. Furthermore, discrimination based on nationality is specifically prohibited in Labour law (Article 24(1) of the Labour Code) and, in general, in Article 3(2) of Law 18/2004 of 11 May 2004.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Portugal, the personal scope of anti-discrimination law covers both natural and legal persons for the purpose of protection against discrimination.

According to Article 12(2) of the Constitution, legal persons have the rights and duties compatible with their nature, including personal rights.

In Portugal, Article 24(1) of the Labour Code prohibits 'employers' from discriminating. This applies to natural and legal persons (Article 551(1) and (3) of the Labour Code).⁷⁵ Thus, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination (Article 551(1) and (3) of the Labour Code). Fines are higher for legal persons than for natural persons (Article 554 of the Labour Code). 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.

The prohibition of discrimination on the ground of race and ethnic origin provided by Law 134/99 binds all natural and legal persons (Articles 2 and 9(1)). Similar reasoning applies to the prohibition of discrimination on the ground of disability contained in Law 46/2006 (Article 2(1)). However, Article 9 of Law 46/2006 and Article 12 of Law 14/2008 establish different sanctions for natural persons and for legal ones.

According to Article 11(1) of the Criminal Code, only natural persons are subject to criminal liability, except in cases specified by law. One such case is specifically the crime of discrimination on grounds of race, religion or sexual orientation set out in Article 240 (2) of the Criminal Code.

b) Private and public sector including public bodies

In Portugal, the personal scope of national law covers private and public sectors, including public bodies, for the purpose of protection against discrimination.

The equality and non-discrimination provisions of the Labour Code apply to all fields of private employment, including self-employment (Article 10 of the Labour Code), as well as to public sector employees (Article 4(1)(c), (d) and (e) of Law 35/2014).

⁷⁵ Article 351(2)(b)(c) and (i) specifically stipulates 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.

Anti-discrimination provisions on the grounds covered by the directives are also applicable to statutory offices (Article 17(1) of Decree-law 133/2013 of 3 October 2013).⁷⁶

Article 2 of Law 134/99 also binds all public or private persons.

Article 11(3) of the Criminal Code sets out the legal public persons that can be held liable to criminal responsibility, such as public undertakings.

Article 2(1) of Law 18/2004 and Article 2(1) of Law 46/2006 state expressly that those laws bind both the public and private sectors. Article 2(1) of Law 14/2008 follows the same sense.

The national provisions comply with the directives.

In Portugal, the personal scope of anti-discrimination law covers both private and public sector including public bodies for the purpose of liability for discrimination.

The public sector is liable for equality and non-discrimination in the same terms as the private sector (Article 4(1)(c) and (e) of Law 35/2014 of 20 June 2014, which approves the General Regime of the Contract Work for Public Sector)⁷⁷ and the private sector is liable according to Articles 23 to 32 of the Labour Code.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Portugal, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, military service, and holding statutory office, for the five grounds.

In Decision 544/14 of 15 July 2014, as mentioned above (section 2.6.(f)), the Constitutional Court held that it stems from the broad constitutional protection of freedom of religion that a 'flexitime scheme' should include time shifts, enabling the compatibility of working hours (and their due compensation) with the worker's exercise of their religious freedom, because otherwise, the worker would be discriminated against on the ground of religion.

A decision in the same direction was taken by the Court of Appeal of Lisbon in Procedure 449/10.0TTLRs.L1-4 of 17/12/2014, as mentioned above (section 2.6 (f)).

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))

In Portugal, national legislation includes 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 for the five grounds in both private and public sectors as described in the directives.

⁷⁶ Portugal, Decree-law 133/2013 of 3 October 2013 (Diário da República, série I, No. 191, 3 October 2013, pp. 5998-6002).

⁷⁷ Portugal, Law 35/2014 of 20 June establishes the regime for employment relations in public services. The law entered into force on 1 August 2014, last amended by Law 84/2015 of 7 August. Available at: http://www.sg.min-saude.pt/NR/rdonlyres/E0A3D8AB-0543-4E9A-BFE0-6703B5EB8B8B/41690/Lei84_2015.pdf.

Article 24(1) of the Labour Code guarantees all workers the same opportunities and benefit from equal treatment in terms of access to employment, and promotion. As such, neither applicants nor workers should be privileged or harmed on grounds of ancestry, gender, race, colour, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition, gender identity and sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, or membership of a trade union.

According to Article 24(2) of the Labour Code, which also applies to the public sector, '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 to 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 such workers will enjoy all the same rights and be subject to all the same duties as other workers as regards access to employment and job promotion, 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) of the Labour Code states that the Portuguese state will create incentives for hiring people with disabilities or chronic diseases.

Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing 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 provisions of the Labour Code and states that the following constitute discriminatory practices against people 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 of 15 February 2011, which forbids any discrimination in access to and exercise of self-employment, adopts the same terms as the Labour Code. Therefore, nowadays, specific legislation exists on discrimination on the grounds of religion, belief, age, or disability in the field of self-employment.

National law on discrimination includes access to employment, self-employment or occupation as described in the directives.

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

In Portugal, national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.

Protection against discrimination relating to working conditions is covered by Articles 23(1) and 24(1) of the Labour Code. The 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.

Articles 85 to 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 will enjoy all the same rights and be subject to all the same duties as other workers as regards 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) of the Labour Code states that the Portuguese state will create incentives for hiring people with disabilities or chronic diseases.

3.2.3.1 Occupational pensions constituting part of pay

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.

In respect of occupational pensions, the national discrimination law ensures the prohibition of discrimination on all the grounds covered by Directive 2000/78/EC.

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))

In Portugal, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

National law on discrimination includes access to vocational guidance and vocational training, advanced vocational training and retraining as defined and formulated in the directives.

Article 24(1) of the Labour Code guarantees that all workers are to have the same opportunities and benefit from equal treatment in terms of training.

Article 24(2)(b) of the Labour Code refers to the same rights in respect of 'guidance, training and vocational retraining at any level, including the acquisition of practical experience'.

Article 85 of the Labour Code grants equal treatment to workers with disabilities in vocational training, but no specific measures are provided for and Article 86 refers to positive measures on vocational training to benefit workers with disabilities.

Article 127(1)(d) of the Labour Code establishes that employers must provide vocational training to workers according to their qualifications and Article 130(d) of the Labour Code

states that one of the objectives of vocational training must be to promote vocational rehabilitation of people with disabilities, especially those whose disability results from a work-related injury.

Furthermore, the state must encourage self-employment, teleworking, part-time work and work from home.

Article 6(2) of the Labour Code 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.'

These rules also apply to the public sector.

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 Portugal, national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Trade unions are not allowed to discriminate against their own members or with regard to applications for membership (Article 441 of the Labour Code).

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

In Portugal, national legislation includes social protection, comprising social security and healthcare as formulated in the Racial Equality Directive.

The Constitution grants protection against all grounds of discrimination in general, not only in Article 13 but also in Article 26(1). Article 41(2) refers specifically to religion and forbids discrimination based on religious beliefs. Article 59 refers specifically to anti-discrimination in labour relations. According to Article 59(1):

'regardless of age, gender, race, citizenship, place of origin, religion and political and ideological convictions, every worker has, [namely] the right: (...) to work in conditions that are hygienic, safe and healthy'

and

'to assistance and fair reparation when he is the victim of a work-related accident or occupational illness.'

Furthermore, the Constitution covers social security explicitly in Article 63(1) and (2), and healthcare in Article 64. According to Article 63 on social security and solidarity, everyone has the right to social security and the state is charged with organising, coordinating and subsidising a unified and decentralised social security system, with the participation of the trade unions, other organisations that represent workers and associations that represent the other beneficiaries.

The social security system must protect individuals in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or the ability to work.

Article 64 on health states: 'everyone has the right to the protection of health and the duty to defend and promote health.' According to Article 64(2), the right to the protection of health will be fulfilled 'by means of a universal and general national health service which, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge.'

The Labour Code and the law in general do not contain any exceptions to the provisions regarding social protection. The principle is that discrimination is not allowed in these areas (Articles 13(2), 26(1) and 59(1) of the Constitution and Article 2(1)(a) and (b) of Law 18/2004).

Law 4/2007 of 16 January 2007⁷⁸ (the Basic Law on the Social Security System) establishes in Article 7 the principle of equal treatment that prohibits any kind of discrimination regarding beneficiaries on all grounds (racial or ethnic origin, religion or belief, disability, age, sexual orientation and nationality). Concerning nationality, it is admissible to impose conditions of residence and reciprocity.

Article 30 of Law 38/2004,⁷⁹ which defines the general framework of the legal regime with regard to prevention of disability and the training, rehabilitation and participation of disabled people, provides that the state will adopt the necessary and specific measures to ensure the social protection of people with disabilities, through cash or in-kind benefits with the aim of achieving personal autonomy and adequate professional and social integration.

National law goes beyond the directives.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

National law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

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

In Portugal, national legislation includes social advantages as formulated in the Racial Equality Directive.

Discrimination is not permitted in social advantages (see, first and foremost, Article 13 of the Constitution concerning the principle of equality, which also applies to social advantages, although judicial interpretation is required) in respect of the following grounds: ancestry, gender, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.

The Basic Law of the Social Security System (Law 4/2007 of 16 January 2007) sets out a system of citizens' protection (Articles 26 and following), which includes social advantages.

Law 4/2007 also establishes in Article 7 the principle of equal treatment in the access to social security and social advantages in general and forbids any kind of discrimination on any grounds, including gender or the nationality of beneficiaries.

In Portugal, due to the general principle of non-discrimination included in Article 13(2) of the Constitution, the grounds of age, disability, religion or belief and sexual orientation are also covered.

⁷⁸ Available at: http://www4.seg-social.pt/documents/10152/18664/LEI_4_2007.

⁷⁹ Available at: <https://dre.pt/application/file/480649>.

The scope of Law 18/2004, which partially transposes Directive 2000/43/EC into national law, expressly includes social advantages (Article 2(1)(b)).

In Portugal, the lack of definition of social advantages does not raise special problems.

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

In Portugal, national legislation includes education as formulated in the Racial Equality Directive.

The general principles of equality and non-discrimination enshrined in Article 13 of the Constitution are applicable to education. Consequently, no one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, gender, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.

In addition, the Constitution refers to the right to education in Chapter III on cultural rights and duties.

Article 74(1) of the Constitution states that everyone will possess the right to education, and that the right to equal opportunities and to access and success in schooling will be guaranteed. Article 74(2) provides that,

‘in implementing the education policy, the state shall be charged with:

- a) ensuring universal, compulsory and free basic education;
- b) creating a public, and developing the general, preschool system;
- c) guaranteeing permanent education and eliminating illiteracy;
- d) in accordance with his capabilities, guaranteeing every citizen access to the highest levels of education, scientific research and artistic creation;
- e) progressively making all levels of education free of charge;
- f) inserting schools into the communities they serve and establishing links between education and economic, social and cultural activities.’

Furthermore, Article 2 of Law 46/86 of 14 October 1986, (the Basic Law on the Education System),⁸⁰ as amended by Law 115/97 of 19 September 1997 and Law 49/2005 of 30 August 2005, grants all individuals the right to education and culture in accordance with the Constitution.

Anti-discrimination law is also applicable to vocational training in technical schools and universities, and also covers life-long learning courses.

Besides establishing a basic educational policy, Law 46/86 of 14 October 1986 declares that education is universal, compulsory, and free of charge for all children until the age of nine years.

Article 4(1)(h) and (i) of Law 134/99 of 28 August 1999 provide that ‘the denial or limitation of access to public or private educational institutions’ amounts to discrimination. ‘The constitution of classes or other internal measures of organisation in public or private educational institutions according to racial discrimination criteria, unless such criteria are justified by the objectives referred in Article 3(2)’, are also considered to be discriminatory practices.

Article 24 of Law 16/2001 of 22 June 2001 (Law on Religious Freedom) provides the possibility and the conditions for religious teaching in public educational institutions.

⁸⁰ Portugal, Law 46/86 of 14 October 1986 (*Lei No. 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.

Although discrimination against students is not explicitly prohibited in this provision, this should be considered implicitly included.

Article 3(2)(f) of Law 18/2004 of 11 May 2004 provides that discriminatory practices through actions or omissions due to race, colour, nationality or ethnic origin violate the principle of equality in respect of the denial or limitation of access to a public or private educational institution.

Article 2(f) and 2(l) of Law 60/2009 of 6 August 2009 (Regime for the implementation of sex education in schools)⁸¹ aim to promote education against discrimination on grounds of sexual orientation, but this is limited to the obligation for schools to teach on the prohibition of discrimination on sexual orientation.

a) Pupils with disabilities

In Portugal, the general approach to education for pupils with disabilities does raise problems.

The state is charged with: promoting and supporting disabled citizens' access to education and supporting special education when necessary; protecting and developing Portuguese sign language, as an expression of culture and an instrument for access to education and equal opportunities; ensuring that immigrants' children are taught the Portuguese language and enjoy access to Portuguese culture; and ensuring that immigrants' children receive adequate support in order to enable them to effectively enjoy the right to education. That duty means that 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.

Articles 16, 17 and 18 of the Basic Law on the Education System refer to the right of people with disabilities to special education and Article 20 relates to the education of adults.

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

According to Decree-law 3/2008 of 7 January 2008⁸² – one of the aims of which is to combat discrimination (Article 2) – children with disabilities should be integrated into normal classes (mainstream education) when possible, and some special classes (separate classes but not necessarily separate schools; with specifically adapted programmes) must also 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, 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. However, as the Ministry of Education has no database on pupils with disabilities, the extent of such difficulties cannot be fully confirmed.

Article 4(h) and 4(i) of Law 46/2006 of 28 August 2006 state that the denial or limitation of access to, public or private educational institutions, as well as any means of compensation / appropriate support for the specific needs of students with disabilities, and the establishment of classes or the adoption of other internal organisational measures in

⁸¹ Portugal, Law 60/2009 of 6 August 2009, which establishes a framework for sex education in schools. Entered into force on 7 August 2009. Available at: http://www.igualdade.gov.pt/images/stories/documentos/legislacao/legislacao/educacao/Lei_educacao_sexual.pdf.

⁸² Portugal, Decree-law 3/2008, 7 January 2008. Available at: <http://dre.pt/pdf1s/2008/01/00400/0015400164.pdf>.

public or private education institutions, according to criteria of discrimination on grounds of disability, unless such criteria are justified by the objectives referred to in Article 2, are considered to be discriminatory practices.

b) Trends and patterns regarding Roma pupils

In Portugal, there are some specific patterns existing in education regarding Roma pupils, such as segregation.

The school drop-out rate among Roma children is very high (more than 50%), as shown by the figures provided by the Portuguese authorities. Very few Roma children pursue their studies beyond the first four years of school. According to non-governmental sources, there are currently fewer than 10 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.⁸³

Roma children sometimes face hostility from non-Roma parents, who have pressured school officials not to enrol Roma children in the past.

In spite of the outlawing of discrimination in education, the new generation of Roma still faces such problems: they generally leave school earlier than other pupils (between the ages of 10 and 12), and do not complete the nine-year period of compulsory education (up to ninth grade). Most Roma children leave school because of academic failure and having to repeat school years. The majority of Roma children 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 and to address them, 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 posts.

As the European Union has asked Member States to prepare national strategies for the integration of Roma communities, with a view to fighting exclusion and acting in accordance with European values and the economic model adopted in the European Union, the Portuguese Government approved the *National Roma Communities Integration Strategy 2013-2020* adopted by the Council of Ministers Resolution 25/2013 of 27 March 2013 (in force since 17 April 2013), supporting the idea that 'Despite recent progresses [sic], additional efforts still need to be undertaken in what concerns Roma communities.'⁸⁴

Drawing attention to the efforts undertaken by the High Commission for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural*)⁸⁵ and the extremely important role of trained Roma mediators who have been placed in several

⁸³ See Guedes, M., Magano, O., Candeias, P. (2014) *Estudo Nacional sobre as Comunidades Ciganas*, (National Study on the Roma Communities), ACM, December 2014, p. 92 ff. and p. 205 ff. Available at: <http://www.acm.gov.pt/documents/10181/52642/estudonacionalComunidades.pdf/f4aa9b13-797d-40bb-a3b3-1c4011b05760>.

⁸⁴ *National Roma Communities Integration Strategy 2013-2020*, p. 3: http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.

⁸⁵ The High Commission for Immigration and Intercultural Dialogue was recently replaced by the High Commission for Migration (ACM). See below section 7.

municipalities across the country, the Portuguese Government has sought to define a series of collaborative policies leading to the effective integration of Roma communities in Portuguese society by 2020, while ensuring respect for Roma traditions and culture.

The *National Roma Communities Integration Strategy 2013-2020* identifies the education difficulties as it follows:

'Roma communities face serious integration difficulties in Portugal. It is well known that Roma youngsters are required to overcome several obstacles in order to acquire an education and obtain gainful employment. Low education levels, poor academic performance and high early school leaving rates obviously contribute to this situation. Educational instruments and strategies implemented in recent years with a view to promoting equal educational opportunities have effectively increased school attendance and improved the academic performance of new social groups. However, these initiatives have fallen short of the intended goals in what concerns Roma communities.

In this sense, new systems must be developed or the existing systems adjusted to the specific characteristics of the Roma population, in order to ensure that all individuals complete compulsory education and have access to further education or professional training, both during school years and throughout their professional lives.

It is essential for the school system to adopt the role of cultural interface between different communities, in addition to becoming a second home for Roma children and their families, by respecting them and widening their expectations, in order to contribute to their personal and professional success.

The integration of Roma communities will only become a reality once both communities (the majority and the minority) are able to build a society where both cultures coexist peacefully and comfortably, i.e., where the cultural values of each community are respected and national and constitutional values are observed. The school system plays a very relevant role in this process, not only through the children it educates, but also through its influence on their families and the community in general.

Ensuring equal access to education while simultaneously respecting Roma values and traditions is the main goal to be achieved in the area of education. On the other hand, it must be ensured that better education will translate into increased participation in society and an effective improvement in the quality of life of Roma communities. In this sense, it is essential to ensure that Roma students are able to acquire the required skills to overcoming any existing obstacles and transitioning successfully into employment.⁸⁶

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

In Portugal, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

The rules against discrimination based on race or ethnic origin are applicable to access to and supply of goods and services. Thus, Article 4(1)(c) of Law 134/99 of 28 August 1999 (Prohibition of discrimination based on race, colour, nationality or ethnic origin) considers as a discriminatory practice the limitation of access to goods and services by any natural

⁸⁶ *National Roma Communities Integration Strategy 2013-2020*, pp. 45-46:
http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.

or legal person and Article 3(2)(a) of Law 18/2004 of 11 May 2004 considers as a discriminatory practice the limitation of access to goods and services.

The rules against discrimination based on disability are also applicable to access to buildings, public spaces and the supply of goods and services, and are contained in Decree-law 163/2006 of 8 August 2006, which sets out access regulations for buildings and public spaces, and in Law 46/2006 of 28 August 2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (Article 4).

The other grounds of discrimination are not expressly mentioned in national law, but they should logically be covered, due to the constitutional principle of equality and non-discrimination (although there is no case law to support this interpretation).

3.2.9.1 Distinction between goods and services available publicly or privately

In Portugal, national law distinguishes 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).

For instance, Law 18/2004 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 1977,⁸⁷ 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.

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

In Portugal, national legislation includes housing as formulated in the Racial Equality Directive.

National law on discrimination also covers housing.

Discrimination related to access to housing is prohibited by Law 134/99 and by Law 18/2004 on grounds of racial or ethnic origin and disability, which 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 those grounds (Article 2(1)(b) of Law 18/2004).

As for other grounds (religion or belief, age or sexual orientation) a person must rely on the constitutional principles that prohibit discrimination on all grounds. As long as the Constitution prohibits discrimination in all fields (Article 13), housing is included whatever the grounds are. All Portuguese laws must be interpreted in conformity with the Constitution. Every Portuguese court should refuse the application of laws that may violate the principles and rights guaranteed by the Constitution.

With regard to housing for people with disabilities, Law 38/2004 of 18 August 2004, which defines the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities, states that the state will adopt specific measures with the aim of ensuring the rights to housing, and the access to private and public spaces of disabled people (Article 32).

⁸⁷ Portugal, Decree-law 594/74. Available at: <http://pt.legislacao.org/download/pdf/decreto-lei-n-o-594-74-associacoes-associacao-constituicao-estatutos-38660>; Portugal, Decree-law 71/77. Available at: <http://pt.legislacao.org/download/pdf/lei-n-o-71-77-autorizacao-ensino-duracao-assembleia-51022>.

The main goal of this law is to integrate people 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. Article 4(c) of Law 46/2006 of 28 August 2006 states that 'the refusal or conditioning of the sale, lease or sublease, as well as the access to bank loans for house purchase, and the refusal or penalty in the execution of insurance contracts' to people with disabilities will be considered as a discriminatory practice.

An example of a judicial decision concerning alleged discrimination on the ground of disability in the conclusion of an insurance contract is the ruling of Guimarães Court of Appeal of 29 April 2015.

The claimants (a husband and his wife, who has a disability) alleged a breach of the equality principle enshrined in Law 46/2006 in a procedure before the Court of Appeal of Guimarães. According to the claimants, the defendant insurer refused the conclusion of an insurance contract, because of the medical situation of the woman claimant. It was alleged that the insurance company considered that this contract should take into consideration the total and permanent disability of the woman claimant, which naturally had financial consequences (they had to pay a higher premium). The insurance company counterargued that the claimants had prior knowledge of this situation and this did not constitute any problem. According to the insurance company, the claimants had received less favourable treatment because of the risk of aggravated health and disability of the woman.

The court admitted that Law 46/2006 establishes the principle of equal treatment (or non-discrimination) in the financial sector, particularly in access to housing loans and life insurance of persons with disability or aggravated health risk. The Court of Appeal of Guimarães stated that the practice of any act of discrimination against persons with disabilities (or aggravated health risk) deserves full legal repudiation and should be sanctioned immediately in terms of liability, because that sets out the obligation to compensate for property damage and personal injuries in general terms (Law 46/2006, Article 7(1)). After the final judgment, the convictions are mandatorily published, at the offender's expense, in the daily periodical with the largest circulation in the country (Article 7(3)-(5) of the above-mentioned law).

The court also drew attention to the fact that considering the objectives of Law 46/2006 - and taking for granted that equality is the objective to be achieved and not the starting point - the legislature established special rules on the burden of proof in relation to actions based on discrimination on grounds of disability or aggravated health risk, which must be appropriate to the nature of the matter in question.

Furthermore, the court considered that the burden of proof on the victim of discrimination is only to allege facts that might indicate discrimination. The comparison to consider, with a view to establishing the existence of discrimination on grounds of disability or aggravated health risk is not a comparable situation to another person with the same health problems, but, with another person without such health problems, who is in the same situation - that is to say, someone who wants access to bank credit and life insurance.

With regard to indirect discrimination, the court decided that the discrimination was not proved because the applicants had been given prior knowledge of the insurance contract rules by the insurer and they had accepted them.⁸⁸

Mortgages are provided on special terms, provided that the property concerned is to be the permanent residence of the disabled person. There are also special loans available to adapt houses for people with disabilities.

⁸⁸ Guimarães Court of Appeal, Procedure No. 31/11.5TBCHV.G1, 29 April 2015. Available at: <http://www.dgsi.pt/jtrq.nsf/86c25a698e4e7cb7802579ec004d3832/1f69b7eeedaae9380257eec0052652b?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,raz%C3%A3o,da,defici%C3%Aancia>.

Decree-law 163/2006 of 8 August 2006 on the accessibility of public and private services, regional, local and central administration, and public institutions 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 that hinder the implementation of this law, and provides for alternative solutions and modifications.

Article 2(3) of this Decree-law provides that technical standards on accessibility will apply to residential buildings.

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 such authorisations in respect of private buildings.

Buildings constructed before 1997 have 10 years (running from the entry into force of Decree-law 163/2006) to be adapted to the new rules, while those constructed after 1997 have five years (running from the entry into force of Decree-law 163/2006) to be adapted. New houses and apartments have a gradual period of eight years for adaptation.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Portugal there are no general patterns of housing segregation and discrimination against the Roma.

Social housing in Portugal is managed by the state, autonomous regions and municipalities. The state is responsible for setting housing budgets and defining regulations for the allocation of social dwellings, according to income-based criteria.

Given the universal right to housing programmes and the equality principle, which applies to all communities and ethnic groups, no specific measures have been proposed for Roma communities. Nevertheless, efforts have been undertaken in order to ensure that Roma communities benefit from housing policies, in accordance with the principles of equal treatment and non-discrimination, albeit considering their specific culture and lifestyle.

The difficulties connected with social housing in general make it difficult to solve the specific problem of rehousing Roma, 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 last ECRI *Fourth Report on Portugal* (2013), refers to discrimination against Roma in access to housing.

It has been estimated that many Roma communities still live in shanty towns despite the Special Programme for Re-housing (PER - *Programa Especial de Realojamento*), set up by the national authorities, which has enabled many Roma families to leave the shanty towns where they living 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 what was formerly the ACIDI, and is currently the ACM.

Several projects have been implemented by different municipalities.

Despite the efforts undertaken to promote social integration, many Roma individuals continue to be affected by extreme poverty, social exclusion and poor housing conditions. In this sense, the Portuguese Government in the above-mentioned *National Roma Communities Integration Strategy 2013-2020* considers that 'it is essential to create synergies between the entities responsible for housing issues, so that suitable measures, able to meet the specific needs of these vulnerable communities, may be defined and implemented.'

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Portugal, national legislation provides for an exception for genuine and determining occupational requirements.

The legislation on equality and non-discrimination in the workplace allows for some differences of treatment. Article 25(1) of the Labour Code prohibits in effect all practices of discrimination by the employer on the grounds listed. According to the code, a difference in treatment that is based on a characteristic related to any of the grounds listed will 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 same reasoning is accepted by Law 3/2011 of 15 February 2011 concerning the prohibition of discrimination in access to and exercise of self-employment (Article 4(4)) and by Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (Article 5(3)).

According to a decision of the Court of Appeal of Oporto from 24 February 2014 in Procedure 361/12.9TTMTS.P1, the termination of the employment contract by supervening impossibility, due to the fact that it is absolutely and definitively impossible for the worker to perform the work as the employer needs it, should be evaluated taking into account not only the point of view of the worker, but also the point of view of the employer.

On the one hand, the worker had acquired a global permanent disability of 70 %, and was unable to work beyond 19 hours over a week, not exceeding five days of continuous work. On the other hand, the employer had always organised activity by rotating shifts and that method of organisation was completely justifiable.

In this particular case, the Court of Appeal considered that the employer did not have any obligation to organise a fixed work schedule only for this worker, as long as that would interfere with the structure and operation of the company.

In this case the court considered that the termination of the employment contract was in conformity with the law and the employer had no duty to provide reasonable accommodation.

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.

We 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 (Article 4(2) Directive 2000/78)

In Portugal, national law does not explicitly provide for an exception for employers with an ethos based on religion or belief. However, this exception can be derived from the combination of several legal provisions.

First, 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, although Article 25(2) of the Labour Code states:

'it does not constitute any discrimination when the behaviour based on a discrimination factor that constitutes a justifiable and determining occupational requirement for the exercise of the profession, given the nature of the activity in question or the context of its implementation, where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate.'

Religion or belief may be considered a justified discrimination factor, provided the employer has an ethos based on such religion or belief.

Secondly, 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 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 that would have to be the subject of a court ruling.

Finally, 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. The freedom of organisation may include the exclusion of contracting a worker with a different religion or belief.

The same reasoning applies to other organisations with an 'ethos', such as political parties and philosophical organisations. 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 to be taken by the courts, but so far there have been no examples. The issue must be solved on a case-by-case basis.

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 and the same applies to political parties.

The Portuguese law and practice respects Article 4(2) of Directive 2000/78.

- Religious institutions affecting employment in state funded entities

In Portugal, 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 (the Catholic Church in Portugal can also select religious teachers in state schools).

The recruitment and the necessary qualifications for teachers of Catholic religious and moral education (*educação moral e religiosa católica*) are covered by Decree-law 70/2013 of 23 May 2013,⁸⁹ which establishes the legal regime of teaching and organisation of the Catholic religious and moral education at primary and secondary public schools, under the terms of the 2004 concordat between the Portuguese state and the Vatican, signed on 18 May 2004, and approved by Resolution of the Assembly of the Republic No. 74/2004, of 16 November. Under Article 3(2) of Decree-law 70/2013, the teacher to be hired is

⁸⁹ Available at: <https://dre.pt/application/file/261022>.

proposed by the bishop of the diocese. As for 'dismissal', Article 10 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.

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

In Portugal, national legislation does not provide for a specific exception for the armed forces in relation to age or disability discrimination (Article 3(4) of Directive 2000/78), but the conditions for access inevitably limit employment due to age and physical ability.

In fact, 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 (Article 3(2))

a) Discrimination on the ground of nationality

In Portugal, in spite of the constitutional principle of equivalence between Portuguese citizens and foreigners, stateless persons and EU citizens, national law still includes some exceptions relating to difference of treatment based on nationality.

Article 15 of the Constitution regarding foreigners, stateless persons and European citizens states that foreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens.

However, political rights, the exercise of public functions that are not predominantly technical in nature and the rights and duties that the Constitution and the law reserve exclusively to Portuguese citizens are excepted from the provisions of the previous paragraph. This does not apply to the citizens of Portuguese-speaking states who reside permanently in Portugal.

The appointment to the offices of President of the Republic, President of the Assembly of the Republic, Prime Minister and President of any of the supreme courts, and for service in the armed forces and the diplomatic corps are, in principle, reserved to Portuguese citizens.

Under reciprocal terms, the law may accord foreigners who reside in Portugal the eligibility to vote for and stand for election as officeholders of local authority organs and under reciprocal terms, the law may also accord citizens of European Union Member States who reside in Portugal the eligibility to vote for and stand for election as Members of the European Parliament.

As regards discrimination on the grounds of nationality, this is also forbidden in Article 13 of the Constitution.

Article 1 of Law 134/99 forbids discrimination on the grounds of nationality. Stateless persons benefit from the same protection as foreigners and 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)). Article 4 of the code grants foreign workers and stateless individuals equal rights with Portuguese citizens, provided that 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 that they have a work or residence permit (Article 5(1)(b) of the Labour Code).

In Portugal, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.

In 2015 the Portuguese Constitutional Court made a relevant ruling on this issue: Ruling No. 296/15 of 25 May 2015.⁹⁰

Under an abstract *ex post facto* review case brought before the Constitutional Court, the Attorney-General questioned the constitutionality of two rules that formed part of the legal regime governing the Social Integration Income (RSI), which is a social benefit included in the welfare subsystem and is designed to support people experiencing serious economic hardship. There are two aspects to the RSI: the benefit itself is a cash payment to provide for the most basic needs of the recipient and his/her household; and it requires the beneficiary to enter into an integration contract intended to help with his/her social and occupational integration.

Under one of those rules, the right to Social Integration Income (RSI) was subject to the fulfilment of a number of requisites, one of which was that if the applicant was not a national of a European Union (EU) Member State, a European Economic Area (EEA) country, or another state with an agreement with the EU permitting the free movement of persons, he/she must have resided in Portugal legally for the last three years. Another rule denied the RSI in cases in which the remaining members of the applicant's household (except for children below the age of three) had not also lived in Portugal for at least the last three years.

The Constitutional Court declared both rules unconstitutional based on the following reasons.

The Constitution requires an attitude of openness towards foreign citizens, and as a rule grants them the same rights and subjects them to the same duties as Portuguese citizens. Over the years the Constitutional Court has confirmed this in its jurisprudence, in which it has recognised the principle of equivalence as a specific imperative general principle applicable to matters linked to the status of foreigners. Where a core set of universal rights with constitutional or international origins is concerned, this principle is valid for every foreigner, and not just those whose presence in Portugal complies with all the applicable rules. The legislature can establish exceptions to this principle, subjecting the enjoyment of certain rights to the possession of Portuguese nationality, but only if the restriction is constitutionally legitimate.

The constitutional provision that enshrines the principle of equivalence itself establishes a number of exceptions. A restriction can be constitutionally legitimate if the legislature acts in order to safeguard another constitutionally protected right or interest and the restriction is necessary to that end – i.e. if the limiting measure is necessary, appropriate, and proportional in the strict sense of the term. In the legal regime governing the entry into, presence in and departure and removal of foreigners from Portuguese territory, the Portuguese state has created a number of requirements intended to prevent persons without adequate means of subsistence from entering and remaining in the country. The law imposes requisites which signify that a person must already possess or have access to

⁹⁰ Available at: <http://www.tribunalconstitucional.pt/tc/en/acordaos/20150296s.html>.

such means before a residence permit, be it temporary or permanent, can be granted; and only those foreign citizens who hold a valid residence permit of either type can apply for the RSI.

The Administration has the opportunity to verify whether foreign citizens who ask leave to enter or remain in Portuguese territory are economically autonomous, thereby impeding any abnormal flow of foreigners without resources who might place an excessive burden on the social security system.

The court acknowledged the compelling nature of the interest in preventing excessive costs for the social security system, and the need to ensure a certain prior connection with the country in order to avoid both an inconstant presence and the award of unfair benefits. However, it said that imposing a requirement for three years of legal residence would necessarily undermine the possibility of timely access to a benefit the purpose of which is to ensure that citizens experiencing serious economic hardship and social and occupational marginalisation possess the minimum resources needed for subsistence. By subjecting the right to a welfare benefit that provides a minimally dignified standard of living – a right that results from the combination of the principle of the dignity of the human person and the right to social security in cases of hardship – the legislature would be subjecting foreigners to a sacrifice that was disproportionate in relation to the purposes of the restriction. This legislative option affected people in very vulnerable situations, who did not possess the immediate means to provide for their household's most basic needs, and who had been allowed to enter Portugal in compliance with the rules laid down by the legislature itself, namely with regard to the requisites in terms of sources of income or other material means. The court said that when weighed up against the very limited costs of the RSI within the overall social security budget and the tiny amount spent on awarding it to beneficiaries who are not Portuguese nationals (the amount of the RSI is itself small, and it is given to a very limited group of beneficiaries), the legislative solution was clearly disproportionate.

The court considered that the imposition of a three-year requirement was excessive and conflicted with the right to a welfare benefit the purpose of which is to ensure the most basic means of subsistence. As such, it found the rule unconstitutional on the ground that it was in breach of the principle of proportionality.

b) Relationship between nationality and 'race or ethnic origin'

There is no case law concerning the relationship between nationality and race and ethnic origin, but discrimination on grounds of nationality may also constitute discrimination on grounds of ethnic origin.

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

a) Benefits for married employees

In Portugal it would constitute unlawful discrimination in national law if an employer only provides benefits 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, as amended by Law 23/2010 of 30 August 2010, adopting protective measures on 'de facto unions',⁹¹ explicitly imposes, in some cases on public and private entities, a general duty to treat *de facto* unions as equal to marital status.

⁹¹ Available at: <https://dre.pt/application/dir/pdf1s/2010/08/16800/0376403768.pdf>.

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 connected with employment and occupation (Article 3(1) of Law 23/2010).

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.

b) Benefits for employees with opposite-sex partners

In Portugal, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

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

a) Exceptions in relation to disability and health/safety

In Portugal, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

An employer can exclude a disabled person on the grounds that the work will pose a risk to that person's health and safety. It is not for the individuals with disabilities to decide for themselves that they wish to accept the health and safety risks, as 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.

The situation can be reviewed by the Authority for Working Conditions, the General Health Inspectorate⁹² 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 the prevention of the causes of disability and the training, rehabilitation and participation of people with disabilities (Articles 4 to 15).

Articles 85-88 of the Labour Code contain provisions that seek to ensure the health and safety of people 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. People with disabilities can opt to work such hours if no risk is posed to their health or the health of others.

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.

⁹² *Inspecção de Saúde da Direcção Geral de Saúde.*

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

4.7.1 Direct discrimination

In Portugal, national law provides an exception for direct discrimination on age.

a) Justification of direct discrimination on the ground of age

In Portugal, it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age.

Article 25(3) of Labour Code 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.

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

Portuguese law complies with the directive and with the jurisprudence of the Court of Justice. However, no published court cases have been found covering this point.

The courts will take the judgment in *Mangold*, C-144/04, EU:C:2005:709, and the judgment in *Kucukdeveci*, C-555/07, EU:C:2010:21, into consideration when interpreting the issue; the author of this report has no knowledge of any court case on this issue, so far.

b) Permitted differences of treatment based on age

In Portugal, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

Article 25(2) and (3) of Labour Code admits differences of treatment on the grounds of age if 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.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Portugal national law allows 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) of the directive.

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

In Portugal, there are special conditions set by law for younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection.

Articles 66 to 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 and night shifts (Articles 73-76). This means that employers cannot ask them to work more than the normal agreed hours.

The Institute for Employment and Vocational Training (*Instituto de Emprego e Formação Profissional* (IEFP)) has a duty to supervise the implementation of these measures through a Monitoring Commission (*Comissão de Acompanhamento*) on which the social partner members of the Permanent Commission for Social Dialogue (*Comissão Permanente de Concertação Social*)⁹³ are represented.

There are no specific provisions for older workers.

Persons with caring responsibilities have certain rights:

- maternity or paternity leave of up to 120 working days or 150 consecutive days (Article 40(1) of the Labour Code);
- the parent or guardian of a minor or not 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 working days' leave or 150 consecutive days' leave for the first adoptive child (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 of the Labour Code grants leave to assist minors, especially those with a disability or chronic disease and Article 50 grants grandparents the right to leave of absence to take care of their grandchildren in certain circumstances.

These rules apply with the necessary adaptations to the employment relations in the public sector (Article 4(1)(c) to (f) of Law 35/2014).

4.7.3 Minimum and maximum age requirements

In Portugal, there are exceptions permitting minimum and 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 that they have already finished compulsory education and the tasks set are simple and will not damage their health and personal development.

⁹³ Comissão Permanente de Concertação Social website: <http://www.ces.pt/31#4A>.

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 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 – judges, prosecutors, lawyers, notaries, bailiffs and judicial mediators or judicial referees, for example – 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 to 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

a) State pension age

Article 63(1) of the Portuguese Constitution deems the social security system a public statutory system that must be granted by the Portuguese State.

The general basis of the social security system,⁹⁴ which was approved by Law 4/2007, establishes two social security systems. The first one is the 'system of social citizenship protection' and the second one is called the 'contribution system'. State old-age pensions are integrated in the second system. In short, the Portuguese legal system in this area is rather complex.

In Portugal there is a state pension age, at which individuals must begin to collect their state pensions.

For public sector workers, the state pension age is 66 (Decree-law 167-E/2013 and Ordinance 378-G/2013 have changed the state pension age from 65 to 66). 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 early retirement from the age of 55. It is envisaged that the retirement age will increase annually (Law 4/2007, which approves the general basis of the social security system⁹⁵ and Decree-law 187/2007, which establishes and regulates the legal protection system for invalidity and retirement in the general social security system).⁹⁶ If a worker continues working after the age of 66 (the normal pensionable age), the pension will be increased until they reach 70 years.

If an individual wishes to work longer, the pension can be deferred.

An individual can collect a pension and still work.

⁹⁴ Available at: <http://www.dgap.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-4e8140f46f49&ID=318>.

⁹⁵ Available at: <http://www.dgap.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-4e8140f46f49&ID=318>.

⁹⁶ Available at: http://www.previsao-sgfp.pt/cont_legislacao.asp?legislacao=46.

In fact, a public servant can receive a pension from the National Pension Fund (*Caixa Nacional de Pensões*) and still work if she or he has authorisation from the ministry, but in such a case she or he would receive only one third of normal remuneration.

Private employees 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)).

According to the Decision of the Court of Appeal of Lisbon of 9 July 2014 in Procedure 696/12.TTLNB.L1-4, the status of being retired achieved by a worker employed by a certain company is not in itself an impediment to the conclusion of an employment contract with another company. The new employer should not rely on the subsequent knowledge of the situation of the employee, which existed before his admission to the company, with the aim of invoking the contract's expiry, based on the provisions of Articles 343(c) and 348(1) of the Labour Code.

b) Occupational pension schemes

In Portugal, occupational social security schemes are rare, due to the universal scope of the general public social security system. The Portuguese legislation regarding occupational social security systems is Decree-Law No. 12/2006 of 20 January 2006.⁹⁷

In Portugal, there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

In the private sector, if an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

An individual 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.

c) State imposed mandatory retirement ages

In Portugal there is a state-imposed mandatory retirement age for public employees.

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

The retirement age for lawyers is 65. Even if lawyers are retired they may be allowed to continue practising by the Bar Association (*Ordem dos Advogados*).

d) Retirement ages imposed by employers

In Portugal, in the public and private sector, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract or collective bargaining or unilaterally.

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.

e) Employment rights applicable to all workers irrespective of age

⁹⁷ Available at: <https://dre.pt/application/file/538934>.

The law on protection against dismissal and other laws protecting employment rights apply to all workers, irrespective of age.

However, 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)).

f) Compliance of national law with CJEU case law

In Portugal, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

So far there has been no discussion or court cases concerning Article 348 of the Labour Code and its compliance with the directive and CJEU case law.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Portugal, national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

In practical terms, age is not taken into account, but seniority is, due to the fact that the amount of compensation increases depending on the worker's seniority (Articles 366 and 372 of the Labour Code). Therefore, workers with less seniority are generally selected for dismissal.

b) Age taken into account for redundancy compensation

In Portugal national law provides compensation for redundancy. This is not affected by the age of the worker.

As we have already mentioned, 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.

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)

In Portugal, national law implicitly includes 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, prevention of criminal offences, protection of health or protection of the rights and freedoms of others, but these exceptions seem to be implicit.

Generally speaking, all these exceptions can be considered as restrictions to fundamental rights. Therefore, one can invoke Article 18 of the Constitution. The law may only restrict rights, freedoms and guarantees 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 they differ with regard to the extent of the limitations.

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

4.9 Any other exceptions

In Portugal, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

a) Scope for positive action measures

In Portugal the possibility to adopt positive action measures in respect of racial or ethnic origin, religion or belief, disability, age, disability or sexual orientation is provided for in national law.

Article 13 of the Constitution permits positive action on grounds of racial or ethnic origin, religion or belief, age disability or sexual orientation,

Articles 69 to 72 of the Constitution provide for positive actions on grounds of age (childhood, youth and old age) and disability.

Article 4 of Law 18/2004 allows positive action measures in order to prevent discrimination on grounds of race or ethnic minorities.

Article 27 of the Labour Code states that positive action measures are not discriminatory. According to this provision, it shall not be considered discrimination the legislative measure of a specifically defined temporary nature, benefiting certain disadvantaged groups, including groups defined by reference to gender, 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 the code and of correcting a situation of factual inequality persisting in social life.

In practice, there are no specific positive measures in respect of religion/belief or sexual orientation.

b) Main positive action measures in place on national level

As regards disability, the Labour Code contains specific anti-discrimination provisions. Articles 85 to 88 of the Labour Code refer to workers who have a disability or a chronic disease. As regards promoting employment opportunities for disabled people, Article 85(2) states that the state will create incentives for hiring people with disabilities or chronic diseases. According to the same article and Article 86(2), the state will also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies will give incentives to employers to include measures to help such people retain their employment in the context of developing a strategy for managing disability in the workplace.

Otherwise, 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 people 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 duties as other workers in relation to training, job promotion and conditions of work.

Article 28 of Law 38/2004 establishes quotas for the employment of people with disabilities of up to 2 % for private enterprises and up to 5 % for the public sector. No sanctions are specified in cases where an employer fails to comply with the quota and nor are there statistics on the number of people with disabilities employed under the quota. As a consequence, one cannot know whether the quotas are being enforced or not.

With regard to the Roma community, positive actions have been implemented in the past and they will continue in the future, as a result of the resolution recently approved by the Portuguese Government (see section 3.2.8 above), which contains the *National Roma Communities Integration Strategy 2013-2020 [Estratégia Nacional para a Integração das Comunidades Ciganas]*. The strategy lists several measures to be taken before 2020 in the following strands: education, health and housing, citizenship, anti-discrimination, gender equality, justice and security.

Besides the National Roma Communities Integration Strategy, the action of the Portuguese Government in the area of immigration has repercussions in the areas covered by the directives.

Roma people (like any other Portuguese citizens) 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.

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

Finally, people with disabilities are also exempt from income tax under certain circumstances, and benefit from preferential tax arrangements. Under Articles 35(1)(n), 53 and 54 of the Labour Code, which are also applicable to the public sector, parents of minors with disabilities have the right to special working conditions.

With respect to social security, people 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 2 % of total intake reserved for students with disabilities.

As far as health services are concerned, people with disabilities are exempt from any fees within the National Health Service (*Serviço Nacional de Saúde (SNS)*), as long as they can provide proof of their disability.

With regard to transport, people 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 people with disabilities, if they can prove that they need a car to carry out their work.

As far as minority ethnic groups are concerned, immigrants, especially newcomers, face competitive disadvantages or specific vulnerabilities that 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 engage, with a diversified set of support offices (dealing with family reunification, employment, legal support, and so on), which speeds up access to fundamental rights.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Portugal the following procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation).

Judicial procedures

Control of constitutionality procedure

Each and every court has jurisdiction to apply the principle of equality. Furthermore, the courts may not apply norms that contravene this principle (Article 204 of the Constitution). The refusal of the application of any norm on the grounds of its unconstitutionality or the application of a norm whose unconstitutionality has been raised during the proceedings may be the subject of an appeal to the Constitutional Court against court decisions (Article 280(1) of the Constitution).

Labour courts procedures (for private sector)

Specialised labour courts (*Tribunais do Trabalho*) deal with discrimination in employment in the private sector. They are part of the general judicial 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. These courts also deal with appeals regarding sanctions imposed by administrative agencies for non-compliance with employment laws.

Alternative disputes resolution in labour law (private sector)

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 them to try to mediate in any labour dispute coming under their jurisdiction (Articles 32(2), 36(2), 51(1), 51(2), 55(2) and 70(1) of the Labour Procedure Code – the code containing the 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, Decree-law 38/2003 of 8 March 2003, Decree-law 259/2009 of 13 October 2009 and Law 63/2013 of 27 August).⁹⁸ Mediation by labour courts is binding.

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.

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.

Administrative procedures and administrative courts (for the public sector)

⁹⁸ Portugal, Labour Procedure Code. Available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=487&tabela=leis&so_miolo= .

For public employees, the law provides a system of internal (hierarchical) administrative appeals that, once exhausted, allows public employees to challenge final decisions taken by public bodies before the administrative courts (Article 4(3)(d) of Law 13/2002 of 19 February 2002, latest amended by Law 20/2012 of 14 of May 2012, entered into force on 15 May 2012).

Mediation is not an option for dispute resolution for public employees. They are required to file an action in the administrative courts.

Criminal law procedures

If the discrimination is considered a crime under the Criminal Code, the victim may lodge a complaint with the police or the Public Prosecution Service (*Ministério Público*), or bring a civil case to a court.

Procedures for mediation in criminal law are currently implemented by the Ministry of Justice. In the biggest Portuguese towns, there are Justices of the Peace (*Julgados de Paz*), who can also work in mediation.

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 people with disabilities in general, or specific individuals. So far, no fines have been imposed. A disabled person is also entitled to compensation for the damage (losses) he or she has directly suffered.

Civil law procedures

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.

In multiple discrimination cases, the damages could be higher, taking the aggravated conduct of the perpetrator into account. As far as the author of this report is aware, there is no case law in this area.

Non-pecuniary damages do not include interest. Pecuniary damages may, to some extent, include interest or take the devaluation of money into consideration, 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 that they can award.

Administrative procedures (for private sector)

The Authority for Working Conditions (*Autoridade para as Condições de Trabalho*)⁹⁹ 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 for such violations as set out in the code.

It should be stressed that the Authority for Working Conditions has played a useful role in combating discrimination on the grounds of nationality and, in some cases, disability.

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.

Ombudsman

According to Article 23(1) of the Constitution, citizens may submit complaints against actions or omissions by the public authorities to the Ombudsman (*Provedor de Justiça*), who will assess them without the power to take decisions and will send the competent entities and organs the recommendations needed to prevent or make good any injustices. The Ombudsman's work is independent of any non-judicial or judicial remedies provided for in the Constitution or the law. The entities, organs and agents of the Public Administration must cooperate with the Ombudsman in the fulfilment of his mission.

The Ombudsman has also paid special attention to discrimination cases.

Action by the High Commissioner for Migration

The High Commissioner for Migration acts in many cases as a (*de facto*) mediator to try to solve conflicts and avoid formal legal procedures. Mediation by the High Commissioner is not binding.

For offences committed under Law 134/99 and Law 18/2004, the High Commissioner for Migration 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 and Against Racial Discrimination, 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 High Commissioner for Migration. 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.

b) Barriers and other deterrents faced by litigants seeking redress

For all the judicial procedures mentioned above, the victims have to instruct a lawyer and advance some funds. They are, however, entitled to legal assistance (*apoio judiciário*) if they do not have sufficient financial means to cover a lawyer's fees and litigation costs. This is also valid for foreigners. However, the length and complexity of the 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 Ombudsman (*Provedor de Justiça*).

According to Article 526 (2) and (3) of the Labour Code,

⁹⁹ Portugal, Decree-law 167-E/2013 of 31 December 2013, entered into force on 1 January 2014. Available at: [http://www.act.gov.pt/\(pt-PT\)/SobreACT/QuemSomos/Missao/Documents/Decreto-Lei_167_c_2013.pdf](http://www.act.gov.pt/(pt-PT)/SobreACT/QuemSomos/Missao/Documents/Decreto-Lei_167_c_2013.pdf) See also: Implementing Decree 47/2012 of 31 July 2012, available at: <https://dre.pt/application/dir/pdf1sdip/2012/07/14700/0395903962.pdf>.

'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.'

Mediation can be used as a means to overcome the barriers of judicial and administrative procedures.

In criminal cases there is no time limit as penal mediation may start at any time (there is only the stipulation that the case must be concluded within three months under Article 5(1) of Law 21/2007 of 12 June 2007, which creates the penal mediation process).

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

In procedures to impose fines, the case must have been initiated, according to Decree-law 433/82 of 27 October 1982 on General Rules on Minor Offences (Article 27), within a period of one, three or five years from the date the offence occurred, depending on the seriousness of the offences.

As mentioned above, employees may benefit without cost from the support of the Public Prosecutor and the Authority for Working Conditions and they may also benefit from legal aid.

The most common factor acting as deterrent is the length of the procedure and the difficulty in obtaining evidence.

c) Number of discrimination cases brought to justice

In Portugal there are no available statistics on the number of cases related to discrimination brought to justice.

d) Registration of discrimination cases by national courts

In Portugal discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Portugal associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.

Associations

According to Article 5 of Law 18/2004:

'associations with the objective of combating discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf (...) of the interested persons, with their approval.'

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.

The victim's authorisation must be given in writing. In the case of minors or persons under guardianship, the authorisation of their parents or guardian is required.

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

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

Decree-law 163/2006 on accessibility for people with disabilities also provides that legal entities (NGOs and associations) representing people 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.

In cases of minor offences (*contra-ordenações*), these organisations have the right to denounce the discriminator and file a complaint with the Commission for Equality and Against Racial Discrimination (*Comissão para a Igualdade e Contra a Discriminação Racial*) and the High Commission for Migration¹⁰⁰ (*Alto Comissariado para as Migrações – ACM*). Individual complainants need be identified only if this is necessary to substantiate the complaint.

Trade unions

Trade unions are entitled under national law (Article 5 of the Labour Procedure Code, Decree-law 480/99 of 9 November 1999, and Articles 5 and 8 of Law 3/2011) to act on behalf of victims of discrimination.

It is also possible for trade unions to engage in some cases on behalf of victims of discrimination in judicial or administrative procedures under the Labour Code and the Labour Procedure Code.

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 demonstrate any opposition after being informed by the trade union of its intention to file the action.

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

Members of trade unions are entitled to free access to legal representation. The Public Prosecution Service represents all workers in cases before the labour courts.

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.

¹⁰⁰ ACIDI website: <http://www.oi.acidi.gov.pt/>.

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 the code, with the right to file an appeal or to answer an appeal by the person found guilty. Article 5 of the Labour Procedure Code (*Código de Processo do Trabalho*) allows the intervention of trade unions in employment cases.

NGOs

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, and are entitled to act on behalf of the victims of discrimination (Article 7 of Law 3/2011). Some immigrants' NGOs focus on their own communities.

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.'

NGOs of people with disabilities (*organizações não governamentais das pessoas com deficiência* – ONGPD) are entitled to act on behalf of victims of discrimination, according to Article 5(2) of Decree-law 106/2013 of 30 July 2013 defining the statute of ONGPD.

Decree-law 106/2013 of 30 July 2013 defines the statute for NGOs of people with disabilities (ONGPD) as well as the state support to those organisations.¹⁰¹ The title of ONGPD is specifically used for the NGOs of people with disabilities.

These organisations pursue the following objectives:

- a) The defence and promotion of the rights and interests of people with disabilities and their families, in order to integrate them at social and family level, their enhancement and personal and professional fulfilment;
- b) The elimination of all forms of discrimination towards people with disabilities;
- c) The promotion of equal treatment of people with disabilities.

Article 5(2) of this decree-law provides that where crimes have been committed against people with disabilities, perpetrated on grounds of disability, the ONGPD are entitled to assist and support victims in criminal procedures. The National Institute for Rehabilitation (*Instituto Nacional para a Reabilitação*, I.P. (INR IP)) is the principal interlocutor for institutional support to ONGPD.¹⁰²

The ONGPD of generic representation (NGOs which represent people with disabilities in general) are entitled to financial support through the INR IP. The INR is a public institution and therefore funding comes from the state budget according to criteria of equality and equity fixed in cooperation protocols adopted by the ONGPD and INR. After approval, they are published on the INR IP website and consequent funding is given.

¹⁰¹ Available at: <https://dre.pt/application/file/498646>.

¹⁰² See Portugal, Decree-law 31/2012 of 9 February 2012, which approves the organic structure of the INR - National Institute for Rehabilitation (Instituto Nacional para a Reabilitação, I.P.). Entry into force: 10 February 2012. Repealed Decree-law 217/2007 of 29 May.

Immigrant and anti-racism NGOs have legal standing only in cases concerning racist crimes.

In general the NGOs can engage in support of the victims in criminal judicial procedures, and under Law 3/2011 they can engage on behalf of victims in administrative procedures. Legal entities (NGOs and associations) representing the interests of people with disabilities have legal standing in court to bring cases on behalf of disabled individuals.

NGOs (such as *SOS Racismo* and the Portuguese Association for Victim Support - *Associação Portuguesa de Apoio à Vítima*), trade unions and the Public Prosecution Service are entitled under national law (Labour Procedure Code, Decree-law 480/99 of 9 November 1999, Articles 5 and 8 of Law 3/2011) to act on behalf of victims of discrimination.

Article 55(1)(c) of the Administrative Procedure Code grants legal persons, including 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.

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

b) Engaging in support of victims of discrimination

In Portugal associations/organisations/trade unions are also entitled to act in support of victims of discrimination.

Associations are entitled to act in support of victims of discrimination under Article 5 of Law 18/2004.

Trade unions are entitled to act in support of victims of discrimination (Article 5 of the Labour Procedure Code, Decree-law 480/99 of 9 November 1999, and Articles 5 and 8 of Law 3/2011).

Article 23 of Law 107/2009 approving the procedural rules for administrative offences in relation to labour and social security also grants legal standing for trade unions to intervene in administrative proceedings in support of the worker.

ONGPD and all organisations defending and promoting the interests of people with disabilities have legitimacy to intervene in support of the interested party (Article 15(1) of Law 46/2006).

NGOs (such as *SOS Racismo* and the Portuguese Association for Victim Support), trade unions and the Public Prosecution Service are entitled under national law (Labour Procedure Code, Decree-law 480/99 of 9 November 1999, Articles 5 and 8 of Law 3/2011) to act on behalf of victims of discrimination.

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

c) Actio popularis

In Portugal national law allows associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**).

National law allows associations to act in the public interest. Under Article 31 of the New Civil Procedure Code, they can act in *ações populares* when their aim is to protect unspecified persons or interests against discrimination or to protect fundamental rights. This article also allows all citizens, associations and foundations, as well as the Public Prosecution Service, to have standing to intervene and initiate actions in order to protect general interests.

Actio popularis in civil cases is only permitted to NGOs when their by-laws have the protection of the concerned interest as an objective.

In labour law, under Article 5(1) of the Labour Procedure Code, trade unions can intervene to protect, in general, individual rights without there being an identified victim. 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.

d) Class action

In Portugal national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

The laws distinguish between actio popularis, where no specific victim exists, and class actions, where there are a number of complainants, and establish different conditions for each of them.

Class actions are possible in civil, criminal and labour procedures. The prosecution of hate crimes by NGOs is considered an actio popularis if no specific victim exists.

In labour law, under Article 5(2) of the Labour Procedure Code, only trade unions can intervene to protect individual rights in class actions. They may bring class actions under Article 5(2) of the Labour Procedure Code, which states:

'legitimacy of trade unions and employers' associations

1. Trade unions and employers' associations have standing as claimants in proceedings concerning rights relating to collective interests they represent.
2. Trade unions can also exercise the right of class action on behalf of workers and replacement as authorised:
 - a) In proceedings relating to measures taken by the employer against employees who belong to the governing bodies of the trade union or any office in this exercise;
 - b) In proceedings relating to measures taken by the employer against its members who were elected as workers representatives;
 - c) In class actions for the violation as a matter of generality, individual rights of similar nature of their associated workers.'

Trade unions may use all types of proceedings available and the types of remedies provided by the Labour Procedure Code.

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

Trade unions and NGOs also have the right to act on behalf of one or more complainants. Class actions, in the sense of collective actions (actions with several complainants, functioning on the opt-in model), are possible in civil and administrative law.

- Law 83/95 of 31 August 1995 (*Acção Popular Civil* - People's Civil Action) covers some kinds of class action;

- Article 55(1)(c) of the Administrative Procedure Code grants to NGOs some rights to legal standing that can be used in some administrative procedures.

According to Article 68(1)(2) of the Criminal Procedure Code, any person may accuse in case of crimes of discrimination as set out in Article 240 of the Criminal Code. This provision covers both associations and natural persons.

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

In Portugal national law requires a shift of the burden of proof from the complainant to the respondent in labour law.

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 and it is for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination.

This provision applies to all the grounds of discrimination mentioned in Article 24(1) of the Labour Code.

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.

The law has a restrictive requirement that the rule on the shifting of the burden of proof may only benefit the worker when, besides invoking a unfavourable difference of treatment, the worker also invokes and shows elements related to the ground of discrimination that they consider to be the origin of the different treatment.

However, the worker has to indicate in their claim which ground is related to the difference of treatment that they have suffered and has to argue: a) a ground of discrimination, giving *prima facie* elements and b) a difference of treatment based on this ground. An example might be the argument: a) because he is of Roma origin, b) he has a lower wage than the others.

If the complainant does not invoke a specific ground (according to Article 23 of the Labour Code) as the cause of the discrimination, the burden of proof is not shifted.

The complainant must establish a correlation between the ground of discrimination and the difference in treatment.

If no facts that can be integrated into one of these categories of discriminatory acts are claimed, the rule regarding the shifting of the burden of proof will not be applicable.

National law also requires a shift of the burden of proof from the complainant to the respondent in Law 18/2004 and Law 46/2006.

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.

Article 6(1) of Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, provides that the victim of discrimination has to present facts from which the occurrence of discrimination on grounds of disability may be inferred. It is up to the respondent to gather means of proof that the differences of treatment are not based on any factors mentioned in Articles 4 and 5 (discrimination on grounds of disability in work and in the access to employment, in the access to and supply of goods and services, housing, education, sign language and transport).

By contrast, 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.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Portugal there are legal measures of protection against victimisation.

Article 331(1)(a) to (d) of the Labour Code 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 for the grounds of race and ethnic origin. This is covered by Article 7 of Law 18/2004, which states that acts of retaliation are null and void. It does not expressly mention witnesses, but they must be considered to be protected.

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 the comprehensive wording of the law into account.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

Administrative offences (*contra ordenações*)

Racial discrimination in general leads to a *contra-ordenação* (summary administrative offence). Law 134/99 states that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions. Article 15 (2) of Law 18/2004 refers to Law 134/99 and to the general regime of minor offences.

According to Article 9 of Law 134/99, fines may vary between one and five times the minimum monthly national wage for individuals and they 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 High Commissioner for Migration 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.

In the field of employment, Article 554 of the Labour Code establishes the maximum and minimum value of the fines, including for offences based on discrimination, which depends on the company's business volume, the offender's degree of guilt and the degree of seriousness of the infraction.

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 'any person'.

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) and (4)).

With regard to sanctions for the violation of disability anti-discrimination provisions, the Labour Code specifies in Articles 548 to 555 which offences are considered very serious or serious in cases related to discrimination. It should be noted that the criteria that 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 people 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 sanctions provided by law are effective, proportionate and dissuasive.

Finally, according to Law 46/2006 forbidding discrimination on the ground of disability, the perpetration of discriminatory acts gives a disabled person the right to compensation for moral damages. In addition, the law provides a pecuniary sanction of approximately EUR 2 000 to EUR 4 000.

Penal sanctions

The Criminal Code covers discrimination based on almost every ground.

Article 240(1) imposes a punishment of imprisonment from one to eight years on anyone who establishes organisations or engages in organised propaganda activities that incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Article 240(2) imposes a penal sanction of imprisonment from six months to five years 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 a 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 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 are 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 racist 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' are fines of between EUR 1 and EUR 49.80, calculated on the basis of the income of the guilty party, as laid down in Article 47(2) of the Criminal Code, with a minimum of 10 days and a maximum of 120 days. If they are not paid, these fines can 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.

Under Article 70 of the Civil Code, individuals may initiate 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.

b) Ceiling and amount of compensation

There is no ceiling on the amount of compensation that can be awarded as civil damages. No information is available regarding average amounts of compensation awarded to victims of discrimination.

c) Assessment of the sanctions

There is no information available on the amount of compensation awarded to victims. No court cases on this issue have been reported in the jurisprudence websites or legal books.

In conflicts governed by the Labour Code, compensation is awarded, for example, in case of dismissal. Payments normally correspond to the amount normally paid for unjustified dismissal.

The author has not found any court case indicating the amount of compensation awarded and there are no studies or information available on the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive.

In theory, sanctions should be effective, dissuasive and proportionate.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The specialised body for the promotion of equal treatment with regard to racial and ethnic discrimination is the High Commissioner for Migration (ACM), which was formerly the High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI)),¹⁰³ and which was created by Decree-law 31/2014 of 27 February 2014.¹⁰⁴ All statutory references made to the ACIDI are deemed to be applicable to the ACM.

The ACM is assisted by the Commission for Equality and Against Racial Discrimination (CEARD) (*Comissão para a Igualdade e Contra a Discriminação Racial*).

The ACM is a public institution integrated in the indirect administration of the State, with administrative and financial autonomy.

- b) Status of the designated body/bodies – general independence

First, attention must be drawn to the fact that the ACM carries out the duties assigned to it by the Presidency of the Council of Ministers under the superintendence and authority of the Prime Minister or another member of the Government working within the Presidency of the Council of Ministers (Article 1(2) of Law 31/2014).

The budget of the ACM comes from several sources, such as: self-generated income (i.e. by payment for its services and publications); European Union and international financing; transfer from other national, regional or international bodies; and state budgetary resources.

The CEARD and the High Commissioner (who is the head of the ACM) have no specific budgets. Their expenses are paid from the ACM budget.

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 ACM 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 section 7(d) below). In practice no concerns have ever been raised.

The ACM is under the direct authority of the Prime Minister. That means that the Commissioner is in direct contact with Government authorities and is in a position to monitor their activities closely and to influence them. However, the ACM 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.

The independence of the equality body is not stipulated in law. The ACM's powers are laid out in Decree-law 31/2014 of 27 February 2014, and there is no guarantee of its independence.

¹⁰³ It was governed by Decree-law 167/2007 of 3 May 2007.

¹⁰⁴ This decree-law repealed Decree-law 167/2007 of 3 May 2007, and creates the High Commissioner for Migration, which replaces the High Commissioner for Immigration and Intercultural Dialogue. Entered into force on 5 March 2014. Available at: <https://dre.pt/application/file/572214>.

It must be emphasised that, from a legal point of view, the situation with regard to equality bodies is too complex and they are not independent.

c) Grounds covered by the designated body/bodies

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 bodies (the High Commissioner and the CEARD) deal with discrimination, not only on the grounds of race and ethnic origin, but also on the ground of nationality.

d) Competences of the designated body/bodies – and their independent exercise

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 the responsibility of the ACM 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.

According to Article 8(2) of Law 18/2004, the ACM has the power:

- to propose, through the 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 included in the structure of the ACM are:

- 1) High Commissioner for Migration (Alto Comissário para as Migrações).
The main functions of the High Commissioner are:
 - a) to coordinate and chair the Council for Migration;
 - b) to coordinate and chair the Commission for Equality and Against Racial Discrimination (CEARD) and its Permanent Commission;
 - c) to represent the High Commission;
 - d) to supervise all ACM departments (the High Commission);
 - e) to issue binding decisions concerning fines.
- 2) Commission for Equality and Against Racial Discrimination (CEARD) (Comissão para a Igualdade e Contra a Discriminação Racial).

The competences referred to in Article 13(2) of the Racial Equality Directive are exercised together by the CEARD and the High Commissioner. According to Article 6 of Law 134/99, 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 also be dismissed by them. Other members cease their functions when they no longer represent the associations that 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. Such advice is not binding.

As mentioned above, the Commission for Equality and Against Racial Discrimination and the High Commissioner work under the authority of the Prime Minister. In practical terms, the interference of the political power may be slight, but it cannot be said that they work independently from the Government.

The competences of the ACM, as represented by the High Commissioner, are laid down in Decree-law 31/2014 of 27 February 2014. Under Article 3 (Purpose and powers of the High Commissioner), 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 ACM carries out surveys and publishes reports and recommendations.

It has commissioned academic experts to conduct surveys on discrimination and related problems and set up the *Observatório da Imigração* (Observatory for Immigration),¹⁰⁵ 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.

Due to the potential influence of the Prime Minister mentioned above, one cannot affirm that the ACM and the CEARD conduct independent surveys, publish independent reports and issue independent recommendations on discrimination issues.

Neither the ACM nor the CEARD have the competence to provide independent assistance to victims.

¹⁰⁵ Observatório da Imigração – website: <http://www.oi.acidi.gov.pt/>.

In Portugal, in practice the competence to provide independent assistance to victims is held by an NGO - the Portuguese Association for Victim Support (*Associação Portuguesa de Apoio à Vítima*) (APAV).

According to its recent annual report,¹⁰⁶ in 2014 the APAV gave assistance to a significant number of victims of crimes connected with several grounds of discrimination:

- racial, religious and sexual discrimination (23 victims);
- sexual harassment (25 victims);
- sexual harassment of a minor (13 victims);
- sexual harassment of a disabled person (5 victims);
- sexual coercion – 64 victims.

Furthermore, the APAV also gave assistance to victims of administrative offences, such as:

- sexual harassment (16 victims);
- discrimination on the grounds of race, religion, gender, age, nationality and gender (36 victims).

In comparison with former years, the number of APAV's clients has increased remarkably.

The APAV is an NGO that is completely independent from the political power and other institutions.

e) Legal standing of the designated body/bodies

In Portugal, the designated body (the ACM) has legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination.

With regard to the legal standing, Article 12 of Law 18/2004 states:

Competence

Any person or institution with knowledge of a situation that 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 High Commissioner for Immigration and Intercultural Dialogue, currently the ACM;
- the 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 first three bodies referred to above will 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 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

¹⁰⁶ Available at: http://apav.pt/apav_v2/images/pdf/Estatisticas_APAV_Relatorio_Anual_2014.pdf.

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 to be a crime under the relevant provisions of the Criminal Code, the file is sent to the Public 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 Commission for Migration 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 Authority for Working Conditions (*Autoridade para as Condições do Trabalho*),¹⁰⁷ formerly the *Inspecção Geral do Trabalho* (General Labour Inspectorate), to the General Inspectorate for Territorial Administration (*Inspecção Geral da Administração do Território* (IGAT)) and the Local Administration Inspectorate (*Inspecção Geral da Administração Local*).

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 General Inspectorate for Territorial Administration, and in a few cases the Health Inspectorate (*Direcção-Geral da Saúde*), the Economic Activities Inspectorate (*Autoridade de Segurança Alimentar e Económica* (ASAE)) and the Local Administration Inspectorate. They also have regular formal and informal contact with the NGOs and employees' organisations that are represented on the CEARD, as well as formal and informal contacts with the APAV (see above) and the Bar Association (*Ordem dos Advogados*).

The equality bodies cannot be considered to be tribunals but are rather promotional bodies providing legal advice and support to victims of discrimination, building awareness and promoting good practices.

f) Quasi-judicial competences

In Portugal, the equality bodies are not quasi-judicial institutions.

The ACM is not a quasi-judicial institution. It is an administrative body that 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. Its decisions may be appealed in the courts.

The same can be said in relation to CEARD.

Brief mention must be made of the activities of the Ombudsman, who also acts in cases of discrimination on any grounds, contributing 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

¹⁰⁷ Autoridade para as Condições do Trabalho (ACT) – website: www.act.gov.pt.

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.

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.

g) Registration by the body/bodies of complaints and decisions

In Portugal, the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.) and present them in their annual reports. These data are available to the public.

h) Roma and Travellers

The specialised body in Portugal, the High Commission for Migration considers the Roma as a priority issue.

The ACM 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 ACM 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 that members of the Roma community experience with integration into the Portuguese labour market, amongst other matters.

The ACM also intends to rely on the use of intercultural mediators to achieve greater integration of this ethnic group.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Dissemination of information

The ACM provides information on its website about discrimination in general and discrimination on grounds of race and ethnic origin.

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 been very visible so far. The law does not specifically require employers to provide information in a form that is accessible to all people with disabilities. Trade unions have done some work on this issue.

The Directorate General of Employment and Labour Relations (*Direcção Geral do Emprego e das Relações de Trabalho*) provides on its website (<http://www.dgert.msess.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.

Dialogue with NGOs

Several Government agencies and the ACM 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.

The ACM promotes and engages in dialogue with NGOs that work with the Roma and several Roma associations. This means that it is acquainted with the major problems that the Roma community still faces in Portugal.

Above all, the ACM'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.

A number of Roma and non-Roma associations are attempting to build bridges between the majority in society and Roma communities, and are actively looking for solutions to the main problems encountered by their communities all over the country. A Roma Monitoring Group, sponsored by the ACM, 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.

Initiatives have been taken by NGOs and the Institute for Employment and Vocational Training (IEFP) to train Roma – particularly the 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 jobseekers.

Dialogue between social partners

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.

- *Comissão para a Igualdade e contra Discriminação Racial* [Commission for Equality and Against Racial Discrimination (CEARD)] – mentioned above;
- Commission for Religious Freedom [*Comissão da Liberdade Religiosa* (CLR)]. (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)¹⁰⁸ [National Institute for Rehabilitation] (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 People 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).

The Workers Commissions (*Comissões de Trabalhadores*), their coordinating commissions (*Comissões Coordenadoras*), trade unions and employers' organisations may advise on proposed legislation that 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 Permanent Commission for Social Dialogue (*Comissão Permanente de Concertação Social*), 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 Directive 2002/14/EC, which covers social dialogue.

Under the terms of Article 15 of Decree-law 164/2007 of 3 May 2007 and Article 2 (1) of Decree 1/2012 of 9 January 2012, 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.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

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 the Labour Code, states that provisions contained in collective agreements that are already in force and contrary to the provisions set out 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

¹⁰⁸ Instituto Nacional para a Reabilitação (INR) website: <http://www.inr.pt/>.

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 section a) above.

b) Rules contrary to the principle of equality

There are no laws, regulations or rules that are contrary to the principle of equality still in force.

9 COORDINATION AT NATIONAL LEVEL

The office of the ACM 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 Legislative Policy and Planning Office (*Gabinete de Política Legislativa e Planeamento* (GPLP)) is responsible for planning the implementation of directives and other Community instruments.

There are several anti-racism and anti-discrimination plans in Portugal.

The *V Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2014-2017* (*Fifth National Plan for Equality – Gender, Citizenship and Non-discrimination 2014-2017*) was approved in December 2013. This plan will implement the previous measures aimed at fighting discrimination based on gender, sexual orientation and gender identity. As already mentioned, the Commission for Citizenship and Gender Equality (CIG) will be also the coordinating body for this plan.

10 CURRENT BEST PRACTICES

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 2 % of total intake reserved for students with disabilities (see section 3.2.8 above).

People with disabilities are exempt from any fees within the national public health service (*Serviço Nacional de Saúde* (SNS)), as long as they can provide proof of their disability (see section 5(b) above).

People 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 people with disabilities, if they can prove that they need a car to carry out their work (see section 5(b) above).

As far as minority ethnic groups are concerned, immigrants, especially newcomers, face competitive disadvantages or specific vulnerabilities that require positive action measures to enable effective equality (see section 5(b) above). 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 engage with a diversified set of support offices (dealing with family reunification, employment, legal support, and so on), which speeds up their access to fundamental rights (see section 5(b) above).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

One potential breach of the directives concerns the lack of, at least, formal independence of the specialised body that deals with racial and ethnic discrimination (see section 7(b) above). Other legislation is in compliance with the directives.

11.2 Other issues of concern

Other key issues of concern with regards to the implementation and practical application of the anti-discrimination directives on the national level are:

- Difference between the written law and its practical effect. In Portugal, it is rather common to approve legislation that would be completely appropriate to achieve certain goals, but which, due to our current financial and economic weakness, for instance, does not function properly. This particularly applies to the implementation of social rights.
- Lack of case law – as this report shows, relevant case law is somewhat rare, due to a certain lack of sensitivity to discrimination issues.
- Barriers to access to justice – the length of the procedures and the costs involved are two disincentives to accessing justice (see section 6.1(b) above).
- Lack of independence of the equality body (see section 11.1).

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

- Law 35/2014 of 20 June 2014 establishes the regime for employment relations in public services;¹⁰⁹ entered into force on 1 August 2014, amended by Law 84/2015 of 7 August.¹¹⁰
- Law 28/2015 of 14 April, which amended the Labour Code, which consecrates the gender identity within the scope of the right to equality in the access to employment and self-employment. This law entered into force on 15 April.¹¹¹

12.2. Case law

Name of the court: Constitutional Court

Date of decision: 25 May 2015

Name of the parties: -----

Reference number: Ruling No. 296/15

Address of the webpage:

<http://www.tribunalconstitucional.pt/tc/en/acordaos/20150296s.html>

Brief summary: Under an abstract *ex post facto* review case brought before the Constitutional Court by the Attorney-General, the court declared the unconstitutionality of two rules, which imposed a three-year legal residence in Portugal for the recognition of the right to the Social Integration Income (RSI) if the applicant was not a national of a European Union (EU) Member State, a European Economic Area (EEA) country, or another state with an agreement with the EU permitting the free movement of persons and denied the RSI in cases in which the remaining members of the applicant's household (except for children below the age of three) had not also lived in Portugal for at least the last three years. The court considered that the legislative solution was clearly disproportionate.

Name of the court: Supreme Court of Justice

Date of decision: 3 December 2014¹¹²

Name of the parties: -----

Reference number: Procedure 712/12.6TTPRT.P1.S1

Address of the webpage: <http://www.dgsi.pt/jstj.nsf?OpenDatabase>

Brief summary: Harassment implies real and manifestly humiliating conducts, affecting the worker's dignity, to which two more elements are associated: a certain length and consequences. According to Article 29 (1) of the Labour Code, the purpose of upsetting or embarrassing the victim is not necessary and it suffices that this result is the effect of the behaviour.

Name of the court: Oporto Court of Appeal

Date of the decision: 26 March 2015

Name of the parties: -----

Reference number: 589/11.9TVPRT.P1 – 3.^a

Address of the webpage: <http://www.trp.pt/jurispitij.html>.

Brief summary: According to the court, in spite of being fully aware of the content and grounds of the sentence, the defendant (a lawyer) had divulged indications or even extracts from a sentencing speech, which did not refer to the convicted person but to the Roma community in general. The court considered that the lawyer's behavior had caused damages to the author – the judge who read out the criminal sentencing decision – and, consequently, he was obliged to compensate the judge. These damages resulted from comments made by the lawyer including decontextualized extracts of the judgment, which

¹⁰⁹ Available at: http://www.sippeb.pt/sippeb/2014/06/LGTFP_Lei-nº-35-201420junho1.pdf.

¹¹⁰ Available at: http://www.sg.min-saude.pt/NR/rdonlyres/E0A3D8AB-0543-4E9A-BFE0-6703B5EB8B8B/41690/Lei84_2015.pdf.

¹¹¹ Available at: http://www.cite.gov.pt/asstscite/downloads/legislacao/Lei_28_2015.pdf

¹¹² The decision was published in 2015.

created a negative image of the magistrate, and which were made by the lawyer, knowing that such excerpts were not based on her own ideas, but on witness statements. The defendant was sentenced to pay to the author compensation of EUR 10 000 (and interest).

Name of the court: Court of Appeal of Guimarães

Date of the decision: 29 of April 2015

Name of the parties: -----

Reference number: No. 31/11.5TBCHV.G1

Address of the webpage: <http://www.dgsi.pt/jtrg.nsf/>

Brief summary: The applicants (a husband and his wife, who has a disability) alleged a breach of the equality principle enshrined in Law 46/2006 in a procedure before the Court of Appeal of Guimarães.

According to the claimants, the defendant (the insurer) refused the conclusion of an insurance contract, because of the medical situation of the woman claimant. It was alleged that the insurance company considered that this contract should take into consideration the total and permanent disability of the woman claimant – which naturally had financial consequences (they had to pay a higher premium). The insurance company counterargued that the claimants had prior knowledge of this situation and this did not constitute any problem. According to the insurance company, the claimants had received less favorable treatment because of the aggravated health risk and disability of the woman.

The court admitted that Law 46/2006 establishes the principle of equal treatment (or non-discrimination) in the financial sector, particularly in access to housing loans and life insurance of persons with disability or aggravated health risk. Further, the Court of Appeal of Guimarães stated that the practice of any act of discrimination against people with disabilities (or aggravated health risk) deserves full legal repudiation and should be sanctioned immediately in terms of liability, because that sets the obligation to compensate for property damage and personal injuries in general terms (Article 7(1) of Law 46/2006). After the final judgment, the convictions are mandatorily published, at the offender's expense, in the daily periodical with the largest circulation in the country (Article 7(3)-(5) of the above-mentioned law).

The court also drew attention to the fact that considering the objectives of Law 46/2006 - and taking for granted that equality is the objective to be achieved and not the starting point - the legislature established special rules on the burden of proof in actions based on discrimination on the grounds of disability or aggravated health risk, and those should be appropriate to the nature of the matter in question.

Furthermore, the court considered that for the victim of discrimination, the burden of proof is to allege facts that might indicate discrimination. The comparison term to consider, with a view to establishing the existence of discrimination on grounds of disability or aggravated health risk is not a comparable situation to another person with the same health problems, but, with another person without such health problems, who is in the same situation – that is to say, someone who wants access to bank credit and life insurance.

With specific regard to indirect discrimination, the court decided that the discrimination was not proved because the applicants had been given prior knowledge of the insurance contract rules by the insurer and they had accepted them.¹¹³

¹¹³ Guimarães Court of Appeal, Procedure No. 31/11.5TBCHV.G1, 29 of April 2015. Available at: <http://www.dgsi.pt/jtrg.nsf/86c25a698e4e7cb7802579ec004d3832/1f69b7eeedaae9380257eec0052652b?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,raz%C3%A3o,da,defici%C3%Aancia>.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Portugal

Date: 31 December 2015

Title of legislation (including amending legislation)	Title of the law: Law 7/2009 Abbreviation: Labour Code Date of adoption: 12 February 2009 Entry into force: 1 May 2009 Latest amendments: Law 28/2015 of 14 April 2015 Web link: N/A Grounds covered: ancestry, age, gender, sexual orientation, civil status, genetic heritage, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade union affiliation
	Labour law
	Material scope: private employment
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate
Title of legislation (including amending legislation)	Title of the law: Law 18/2004 Abbreviation: law transposing the Racial Equality Directive Date of adoption: 11 May 2004 Entry into force: 12 May 2004 Latest amendments: Decree-law 86/2005 of 2 May 2005 Web link: https://dre.pt/application/file/264264 Grounds covered: race and ethnic origin
	Administrative law
	Material scope: transposes the Council Directive 2000/43 (hereafter 'the Racial Equality Directive') of 29 June 2000 into domestic legal order,
	Principal content: principle of equality of treatment between persons irrespective of racial or ethnic origin
Title of legislation (including amending legislation)	Title of the law: 134/99 Abbreviation: N/A Date of adoption: 28 August 1999 Entry into force: 1 January 2000 Latest amendments: N/A Web link: https://dre.pt/application/file/532477 Grounds covered: racial or ethnic origin
	Administrative law
	Material scope: forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin
	Principal content: prohibition of racial discrimination, victimisation, sanctions
Title of legislation (including amending legislation)	Title of the law: Law 46/2006 Abbreviation: N/A Date of adoption: 28 August 2006 Entry into force: 29 August 2006, except the provisions that have budgetary implications Latest amendments: N/A Web link: https://dre.pt/application/file/540732 Grounds covered: Grounds protected: disability
	Civil/administrative/criminal law

	Material scope: prohibits and punishes discrimination based on disability and on a pre-existing risk to health
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate, discrimination in employment, sanctions
Title of legislation (including amending legislation)	Title of the law: Law 38/2004 Abbreviation: N/A Date of adoption: 18 August 2004 Latest amendments: N/A Entry into force: 23 August 2004 Web link: https://dre.pt/application/file/480649 Grounds covered: disability
	Administrative law
	Material scope: general legal basis for prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities
	Principal content: fundamental principles, intervention of public and private entities; public policies
Title of legislation (including amending legislation)	Title of the law: Law 3/2011 Abbreviation: N/A Date of adoption: 15 February 2011 Latest amendments: N/A Entry into force: 20 February 2011 Web link: https://dre.pt/application/file/279688 Grounds covered: any ground of discrimination
	Civil/Labour/Procedural law
	Material scope: 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
	Principal content: self-employment
Title of legislation (including amending legislation)	Title of the law: Decree-law 31/2014 Abbreviation: ACM Date of adoption: 27 February 2014 Latest amendments: N/A Entry into force: 5 March 2014 Web link: https://dre.pt/application/file/572214 Grounds covered: race and ethnic origin; nationality
	Administrative law
	Material scope: creates the High Commissioner for Migration, which replaces the High Commissioner for Immigration and Intercultural Dialogue
	Principal content: Mission, structure, budget

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Portugal

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd.mm. YYYY	Date of ratification (if not ratified please indicate) Dd.mm. YYYY	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)	22.09.1976	09.11.1978	Articles 5 and 7	Yes	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	-----	----- -	-----
Revised European Social Charter	03.05.1996	30.05.2002	No	Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	07.10.1976	31.07.1978	No	No	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.2002	No	No	No
International Covenant on Economic, Social and Cultural Rights	07.10.1976	31.07.1978	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	29.04.1982	24.08.1982	No	No	Yes
Convention on the Elimination of Discrimination	24.4.1980	30.07.1980	No	Yes	Yes

tion Against Women					
ILO Convention No. 111 on Discrimination	15.06.1958	19.11.1959	No	No	Yes
Convention on the Rights of the Child	26.11.1990	21.09.1990	No	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	23.09.2009	No	No	Yes

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