



European network of legal experts in gender equality and non-discrimination

NEWS REPORT

Country:	Portugal
Title:	Law 93/2017 establishing the legal regime of prevention, prohibition and fight against discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin
Date:	16 October 2017
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<u>Context</u>	
Issue at stake:	The legal regime of prevention, prohibition and fight against discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin
Ground of discrimination:	Race/ethnic origin, and other (nationality, ancestry and territory of origin)
Source:	Legislation / Parliament
Field:	Social protection, including social security and health care, social benefits, education, access to and supply of goods and services, which are available to the public, including housing, and culture
Applicable law:	Law 93/2017 of 23 August 2017 ¹

Content

Law: On 20 February 2017, the Government introduced to the Parliament a Proposal of Law² with the aim to promote the existence of legislative instruments that systematize and update the legal framework within the equality and non-discrimination policies following the fight against poverty, social exclusion and inequalities commitment previewed in its programme.

As a consequence, on 7 July 2017, the Portuguese Parliament passed a law, which sets up the legal regime of prevention, prohibition and fight against discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin.

This Law repealed the former legal regime of non-discrimination on the ground of race and ethnic origin composed of Law 18/2004 of 11 May 2004, which transposed Directive 2000/43/EC (the Racial Equality Directive) of 29 June 2000 into the domestic legal order³ and Decree-law 86/2005 of 02 May 2005,⁴ which amended the former law, as well as Law 134/99 of 28 August 1999, which prohibited discrimination in the exercise of rights based on race, colour, nationality or ethnic origin⁵ (Article 28 of Law 93/2017), seeking a more transversal and comprehensive normative approach.

¹ Published on 23 August 2017, available at: <https://dre.pt/web/quest/home/-/dre/108038372/details/maximized>.

² Proposal of Law 61/XIII.

³ Available at: <http://dre.pt/pdf1sdip/2004/05/110A00/29712974.pdf>.

⁴ Available at: <https://dre.pt/application/file/534485>.

⁵ Available at: <https://dre.pt/application/dir/pdf1sdip/1999/08/201A00/59455947.pdf>.

Law 93/2017 was published in the Portuguese official journal of 23 August 2017 and entered into force on 1st September 2017 (Article 29 of Law 93/2017).

This law is divided in five chapters. Chapter one encloses the object (Article 1), the scope of application (Article 2) some definitions (Article 3), examples of discriminatory practises (Article 4) and the minimal level of protection (Article 5). Chapter two concerns the composition, competence and functioning of the Commission for Equality and Against Racial Discrimination (Articles 6 to 9). Chapter three refers to the protection and enforcement means (Articles 10 to 15). Chapter four consecrates the procedural regime of claims (Articles 16 to 26). Chapter five comprises the transitory and final provisions (Articles 27 to 29). The present law innovates in the following aspects:

- a) Extension of the list of protected grounds (Article 1);
- b) Broader definition of discrimination (Article 3);
- c) Modification of the composition (Article 7) and the powers of the Commission for Equality and Against Racial Discrimination (Article 8);
- d) Modification of the legal regime of administrative sanctions (Article 16-26);
- e) Introduction of a mediation process (Article 11).

First of all, the list of protected grounds is extended to also include the grounds of ancestry and territory of origin.

Secondly, Article 3, besides the definition of discrimination, direct discrimination, indirect discrimination, harassment and instruction to discriminate, which are almost copy/paste of the corresponding definitions included in former laws, also introduces the definition of discrimination by association, and multiple discrimination, which is an innovation of this law.

The Law defines «multiple discrimination» as resulting from the combination of two or more grounds of discrimination. In this case the permitted objective justification concerning indirect discrimination applies to all relevant grounds. There are no direct consequences of multiple as opposed to one-ground discrimination.

All definitions are totally in accordance with EU law and EU case-law.

Concerning the composition (Article 7) of the Commission for Equality and Against Racial Discrimination, it comprises the High Commissioner for Migrations, who presides, one representative of each parliamentary group, one representative of the Members of Government responsible for the Internal Affairs, Justice, Equality and Citizenship, Education, Science, Technology and Higher Education, Employment, Solidarity and Social Security, Health and Culture as well as one representative of the Regional Government of Azores and Madeira, two representatives of migrants' associations, antiracist associations, human rights associations, trade unions and employers' associations and one representative of Roma communities. Finally, it is composed of three personalities of recognised merit, who are co-opted by other members.⁶

As before the Commission may function with all members or as a permanent commission, composed of the president and two members designated by the commission (Article 7 (3)).

The supervision of the present law is basically a competence of the Commission (Article 6) and in order to achieve this goal, the Commission has acquired more powers. Among others, one has to underline:

- The publication of the cases of violation of this law (either court cases or cases brought to the attention of the Commission);

⁶ The former Commission was, according to Article 6 of Law 134/99, also chaired by the High Commissioner but there were fewer members (two elected by the Portuguese Parliament; one appointed by the Ministry of Labour and Social Solidarity; one appointed by the Ministry of Education; two from immigrant associations; two from anti-racist associations; two from trade unions; two from employers' associations; two from associations for the defence of human rights; and three persons to be designated by the other members.

- To propose revocation of statutes, regulations and administrative acts that contravene the principle of equality and non-discrimination;
- Providing victims with the relevant information for the defence of their rights;
- Decisions of applying penalties, such as fines, within administrative processes;

The Commission also retains some of the former powers, such as:

- 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.

Another topic that has undergone profound changes has been the legal regime of administrative penalties. The law enshrines that all discriminatory practices shall be subjected to administrative sanctions and the parameters of the penalties (Article 16). The competence for initiating the proceedings belongs to the President of the Commission, who is the High Commissioner for Migration and is empowered with the instruction of the proceeding. This proceeding shall respect the due process of law (Articles 20-21).

Finally, the new mediation process is driven by the Commission or at the request of the parties (Article 11) and it is without prejudice of the judicial procedure and other means of conflict solution.

Apart from the innovative aspects, there is to some extent the continuity with the former laws. The personal and the material scope of the law do not undergo on relevant modifications. Thus, the law extends to natural and legal persons in public and in private sector (Article 2 (1)) and covers social protection, including social security and health care, social benefits, education, access to and supply of goods and services, which are available to the public, including housing, and culture (Article 2 (1) (a) to (e)). Moreover, the law permits positive actions measures in order to compensate the disadvantages related to race/ethnic origin, nationality, ancestry and territory of origin (Article 2 (3)).

The law expressly accepts to be applied without prejudice to the provisions of the Labour Code, the General Regime for Contract Work for the Public Sector and Law 3/2011 of 15 February 2011 on prohibition of any discrimination in access to and exercise of self-employment (Article 2 (2)). In other words, concerning the protection against discrimination in the domain of employment, public work and self-employment, the above-mentioned laws prevail over the present law. Article 5 enshrines the principle of more favourable treatment. As the goal of this law is the protection against discrimination, it accepts that other more favourable laws prevail over itself.

Key points of analysis: Firstly, it is the first time that the legal regime transposing Directive 2000/43/EC into the domestic legal order is subjected to a rather deep reflection that led to withdrawing the former legislation. Secondly, the law updates the legal regime in accordance with European Law and the case-law of the Court of Justice of the EU, for instance, including definitions, such as multiple discrimination or discrimination by association. However, the law does not expressly mention European Union Law. Finally, the new legal framework of the Commission for Equality and Against Racial Discrimination is more compatible with European Union Law. Although it is still dependent of the Government, it also acquires more independence. The enlarged composition of the Commission includes more representatives of anti-discrimination associations and members of national parliament, which means that the weight of the representatives of the government decreases. In addition, the fines that will be paid to the Commission will contribute to a certain budgetary independence.

Without prejudice to a further and more elaborated analysis in the national report of 2017, it seems to me that the updated and transversal approach of equality and non-discrimination enshrined in this law shall be assessed as a positive one.

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<https://dre.pt/web/guest/home/-/dre/108038372/details/maximized>.