

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

Country report

Non-discrimination

Portugal

2018

Including summaries in
English, French and
German



EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Portugal

Ana Maria Guerra Martins

Reporting period 1 January 2017 – 31 December 2017

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2018

PDF ISBN 978-92-79-85297-8

doi: 10.2838/717088

DS-04-18-403-3A-N

© European Union, 2018

CONTENTS

EXECUTIVE SUMMARY	5
RÉSUMÉ	12
ZUSAMMENFASSUNG	20
INTRODUCTION	28
1 GENERAL LEGAL FRAMEWORK	30
2 THE DEFINITION OF DISCRIMINATION	33
2.1 Grounds of unlawful discrimination explicitly covered	33
2.1.1 Definition of the grounds of unlawful discrimination within the directives	33
2.1.2 Multiple discrimination	35
2.1.3 Assumed and associated discrimination	35
2.2 Direct discrimination (Article 2 (2) (a))	36
2.2.1 Situation testing	37
2.3 Indirect discrimination (Article 2(2)(b))	37
2.3.1 Statistical evidence	38
2.4 Harassment (Article 2(3))	40
2.5 Instructions to discriminate (Article 2(4))	41
2.6 Reasonable accommodation duties (Article 2 (2) (b) (ii) and Article 5 Directive 2000/78)	42
3 PERSONAL AND MATERIAL SCOPE	47
3.1 Personal scope	47
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)	47
3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)	47
3.1.3 Private and public sector including public bodies (Article 3(1))	48
3.2 Material scope	48
3.2.1 Employment, self-employment and occupation	48
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))	49
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	50
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))	50
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))	51
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	51
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	53
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	53
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	57
3.2.10 Housing (Article 3 (1) (h) Directive 2000/43)	58
4 EXCEPTIONS	60
4.1 Genuine and determining occupational requirements (Article 4)	60
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	60
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	61
4.4 Nationality discrimination (Article 3(2))	62
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	62

4.6	Health and safety (Article 7(2) Directive 2000/78)	63
4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	64
4.7.1	Direct discrimination	64
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	65
4.7.3	Minimum and maximum age requirements	66
4.7.4	Retirement	66
4.7.5	Redundancy	68
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)	68
4.9	Any other exceptions	69
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	70
6	REMEDIES AND ENFORCEMENT	73
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	73
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	76
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	81
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	82
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	83
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	86
8	IMPLEMENTATION ISSUES	96
8.1	Dissemination of information, dialogue with NGOs and between social partners	96
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	97
9	COORDINATION AT NATIONAL LEVEL	99
10	CURRENT BEST PRACTICES	100
11	SENSITIVE OR CONTROVERSIAL ISSUES	101
11.1	Potential breaches of the directives (if any)	101
11.2	Other issues of concern	101
12	LATEST DEVELOPMENTS IN 2017	102
12.1	Legislative amendments	102
12.2	Case law	102
ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION...		105
ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS		107

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 2017. 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 those of Islam. Notwithstanding these factors, 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 aware 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 yet been completely successful. 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 few years, has not helped the implementation of positive or supportive 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. Accordingly, the national minimum wage has been increased, wage and pension cuts have been suppressed and some social benefits have been re-introduced. These measures contribute to a more equal society in general.

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.'

¹ Portugal, Law on political parties. Available at: <https://dre.pt/application/file/249115>.

² See Appeal No. 1013/12.5TTMTS.P1, decision of 3 November 2014, available at: www.dgsi.pt/jtrp.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 of the Portuguese parliament: www.parlamento.pt.

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

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.'

With regard to domestic legislation, the most recent statute related to non-discrimination issues is Law 93/2017 of 23 August 2017, which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin within the scope of social protection, including social security and healthcare, social benefits, education, access to and supply of goods and services which are available to the public, including housing, and culture.

This law extends the list of protected grounds, and gives a broader definition of discrimination, as well as modifying the composition and the powers of the Commission for Equality and Against Racial Discrimination and the legal regime of administrative sanctions. Finally, it introduces a mediation process.

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.⁴ Law 46/2006 of 28 August 2006⁵ 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* – ONGPDs) as well as state support for those organisations. Article 5(2) of this decree-law provides that in cases of crimes against people with disabilities, perpetrated on grounds of disability, ONGPDs are entitled to assist and support victims in criminal procedures.

As regards employment, Law 7/2009 of 12 February 2009 approves the Labour Code⁶ (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).

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.

⁴ Available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

⁵ Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

⁶ Available at: www.dgaep.gov.pt/upload/Legis/2009_1_07_12_02.pdf.

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 the right of associations to intervene in cases that fall under their scope, if the victim gives their consent.⁷

Article 240 of the Criminal Code⁸ covers discrimination based on race, colour, ethnic origin or nationality, religion, gender or sexual orientation. This article does not cover disability.

To sum up, the anti-discrimination directives 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 (1) (b) of Law 93/2017 of 23 August considers direct discrimination to occur when, due to racial or ethnic origin or other grounds (nationality, ancestry or place of origin), a person or a group 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 a person 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: refusal to provide or impeding 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.

⁷ Available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

⁸ The Criminal Code was approved by Decree-Law 48/95, last amended by Law 30/2015 of 22 April 2015. Available at: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

Law 93/2017 of 23 August, states in Article 3(1)(c) that indirect discrimination occurs, due to racial or ethnic origin or other grounds (nationality, ancestry or place of origin), whenever an apparently neutral provision, criterion or practice places a person or a group 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 protected characteristics which may be grounds for discrimination in a less advantageous situation compared with other persons.’

Portuguese law does not define racial discrimination. By contrast, it defines disability with particular care.

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 laws forbid discrimination on certain grounds.

Thus Law 93/2017 forbids discrimination on grounds of race/ethnic origin, nationality, ancestry and place of origin.

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.’

It thus 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 are 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 which enforce anti-discrimination law are:

- High Commissioner for Migration (HCM) assisted by the Commission for Equality and Against Racial Discrimination (CEARD). The mission of this body is to collaborate in the creation, implementation and evaluation of sectoral, cross-cutting 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). This body 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 12 (1) of Law 93/2017, associations with the objective of combating discrimination based on the ground of race/ethnic origin, nationality, ancestry and place of origin have the right to engage in judicial procedures on behalf of the interested persons, with their consent.

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

Disability NGOs (ONGPDs) 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 ONGPDs.

Law 46/2006 also provides in Article 15(1) that ONGPDs 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 procedures 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.

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 Commission for Equality and Against Racial Discrimination 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 Migration (HCM) (formerly the High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural*, ACIDI)),⁹ was created by Decree-law 31/2014 of 27 February 2014¹⁰ and has the responsibility to promote equality of treatment for everyone, 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 HCM is assisted by the Commission for Equality and Against Racial Discrimination (CEARD), which is responsible for the supervision of Law 93/2017. In order to achieve this goal, the Commission has acquired more powers, such as:

- to publicise cases of violation of this law (either court cases or cases brought to the attention of the Commission);
- to propose the revocation of statutes, regulations and administrative acts that contravene the principle of equality and non-discrimination;
- to provide victims with the relevant information for the defence of their rights;
- to decide on the application of 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.

The Commission has been expanded and currently comprises the High Commissioner for Migration, who presides, one representative of each parliamentary group, one representative of the members of government responsible for 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 also includes three individuals of recognised merit, who are co-opted by the other members. It does not have the power to bring any cases before the courts or to assist complainants in doing so.

⁹ It was regulated by Decree-law 167/2007 of 3 May 2007.

¹⁰ This decree-law repealed Decree-law 167/2007 of 3 May 2007, and creates the High Commission for Migration, 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>.

The HCM 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 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, it should be noted that in 2017 more cases had reached the higher courts than in the preceding years.

Administrative complaints are more frequent and, as they usually achieve the victim's 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. Moreover, some of these bodies are virtually unknown to the public.

There are no other potential breaches of the directives.

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).¹¹

Aucun conflit entre groupes religieux n'a été signalé en 2017. 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 facteurs, 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.¹² 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 pas encore 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 quelques années, 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 de l'appui 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. Par conséquent, le salaire minimum national a été augmenté, les restrictions appliquées aux salaires et aux pensions ont été levées et certaines prestations sociales ont été réintroduites – autant de mesures qui contribuent à une société plus égalitaire de façon générale.

2. Législation principale

La Constitution portugaise¹³ 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:

¹¹ Portugal, loi sur les partis politiques. Disponible sur: <https://dre.pt/application/file/249115>.

¹² Voir appel n° 1013/12.5TTMTS.P1, arrêt du 3 novembre 2014, disponible sur: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em.fun%C3%A7%C3%A3o,da.idade>.

¹³ Une version française de la Constitution peut être consultée sur www.parlamento.pt (rubrique Législation du site du parlement portugais).

«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».

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.»

Au plan national, l'acte législatif le plus récent en matière de non-discrimination est la loi 93/2017 du 23 août 2017, qui institue le régime juridique pour la prévention, l'interdiction et la lutte contre la discrimination fondée sur la race/l'origine ethnique, la nationalité, l'ascendance ou le lieu d'origine dans le cadre de la protection sociale, y compris la sécurité sociale et les soins de santé, des prestations sociales, de l'éducation, de l'accès et la fourniture de biens et de services offerts au public, y compris le logement, et de la culture.

Cette loi étend la liste des motifs protégés et élargit la définition de la discrimination; elle modifie la composition et les compétences de la Commission pour l'égalité et contre la discrimination raciale ainsi que le régime juridique des sanctions administratives; et elle instaure un processus de médiation.

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.¹⁴ La loi 46/2006 du 28 août 2006¹⁵ 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 travail¹⁶ (ci-après «le code du travail») et transpose, entre autres, la directive 2000/43/CE

¹⁴ Disponible sur: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

¹⁵ Disponible sur: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

¹⁶ Disponible sur: www.dgaep.gov.pt/upload/Legis/2009_07_12_02.pdf.

(directive sur l'égalité raciale) et la directive 2000/78/CE (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.

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.¹⁷

L'article 240 du code pénal¹⁸ 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.

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 1 sous b), de la loi 93/2017 du 23 août considère qu'une discrimination directe survient lorsque, en raison de son origine raciale ou ethnique ou de tout autre motif (nationalité, ascendance ou lieu d'origine), une personne ou un groupe est traité(e) de manière moins favorable qu'un(e) 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».

¹⁷ Disponible sur: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

¹⁸ 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: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

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; 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 93/2017 du 23 août dispose en son article 3, paragraphe 1 sous c) que «une discrimination indirecte survient en raison de l'origine raciale ou ethnique ou de tout autre motif (nationalité, ascendance ou lieu d'origine) chaque fois qu'une disposition, un critère ou une pratique apparemment neutre désavantage une personne ou un groupe 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'une des caractéristiques susceptibles de constituer un motif de discrimination».

Le droit portugais ne définit pas la discrimination raciale mais définit en revanche le handicap avec un soin particulier.

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 lois spécifiques interdisent la discrimination fondée sur des motifs particuliers.

Ainsi la loi 93/2017 interdit la discrimination fondée sur la race/l'origine ethnique, la nationalité, l'ascendance et le lieu d'origine.

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»

Il 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 (HCM) qui, assistée de la Commission pour l'égalité et contre la discrimination raciale (CEARD), 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 12, paragraphe 1, de la loi 93/2017, les associations ayant pour objet de combattre la discrimination fondée sur le motif de la race/de l'origine ethnique, de la nationalité, de la descendance ou du lieu d'origine, ont le droit d'engager des procédures judiciaires au nom 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.

La loi est muette sur l'utilisation du test de situation – 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 la Commission pour l'égalité et contre la discrimination raciale 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 HCM (ex-Haut-Commissariat à l'immigration et au dialogue interculturel – *Alto Comissariado para a Imigração e Diálogo Intercultural* ou ACIDI)¹⁹ a été instituée par le décret-loi 31/2014 du 27 février 2014²⁰ avec pour mandat de promouvoir, d'une part, l'égalité de traitement pour tous sans aucune discrimination fondée sur l'origine raciale ou ethnique, et, d'autre part, le dialogue avec la population

¹⁹ Il était régi par le décret-loi 167/2007 du 3 mai 2007.

²⁰ 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>.

immigrée, les minorités ethniques et les religions présentes dans le pays, et leur intégration.

La Haute Commission (HCM) est assistée de la Commission pour l'égalité et contre la discrimination raciale chargée de contrôler l'exécution de la loi 93/2017. Ses compétences ont été élargies à cette fin puisqu'elle peut désormais :

- publier les cas de violation de cette loi (qu'il s'agisse d'affaires judiciaires ou de dossiers portés à l'attention de la Commission);
- proposer l'abrogation de lois, de règlements et d'actes administratifs qui ne respectent pas le principe d'égalité et de non-discrimination;
- fournir aux victimes les informations utiles à la défense de leurs droits;
- statuer sur l'application de pénalités (amendes notamment) dans le cadre de processus administratifs.

La Commission conserve également certaines compétences antérieures lui permettant :

- de collecter toute information liée à des actes discriminatoires et d'appliquer les sanctions pertinentes;
- de recommander l'adoption des mesures législatives, réglementaires ou administratives qu'elle juge appropriées pour prévenir la discrimination fondée sur la race, la couleur de la peau, la nationalité ou l'origine ethnique;
- de promouvoir et de réaliser des études et des recherches en matière de discrimination raciale;
- de rédiger et de publier un rapport annuel sur la situation du Portugal en termes d'égalité de traitement et de discrimination raciale.

La Commission a été élargie et comprend désormais le Haut-Commissaire aux migrations, qui en assure la présidence, un représentant de chaque groupe parlementaire, un représentant des membres du gouvernement en charge des affaires intérieures, de la justice, de l'égalité et de la citoyenneté, de l'éducation, de la science, de la technologie et de l'enseignement supérieur, de l'emploi, de la solidarité et de la sécurité sociale, de la santé et de la culture, ainsi qu'un représentant du gouvernement régional des Açores et de Madère, deux représentants des associations de migrants, des associations de lutte contre le racisme, des associations de défense des droits de l'homme, des syndicats et des associations d'employeurs, et un représentant des communautés roms. Enfin, la Commission comprend également trois personnes aux mérites reconnus, lesquelles sont cooptées par les autres membres. Elle n'est pas habilitée à engager des poursuites en justice ni à aider des plaignants pour ce type d'action.

La HCM 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.

Il convient toutefois de noter une augmentation du nombre d'affaires parvenant aux juridictions supérieures par rapport aux années précédentes.

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. Plusieurs d'entre eux sont en outre pratiquement inconnus du grand public.

On ne constate aucune autre violation potentielle des directives.

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).²¹ Entsprechende Parteien gibt es daher nicht.

Aus dem Jahr 2017 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 die des Islam, angepasst. Ungeachtet dieser Punkte ist religiöse Vielfalt in der portugiesischen Gesellschaft ein ziemlich neutrales Thema.

Die portugiesische Gesellschaft ist sich der mit dem relativ neuen Thema der Altersdiskriminierung zusammenhängenden Probleme noch nicht vollständig bewusst und erkennt erst langsam deren Auswirkungen. Die Menschen beginnen jedoch, Altersdiskriminierung vor Gericht geltend zu machen.²² 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 sind aber noch nicht uneingeschränkt erfolgreich gewesen. 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 letzten paar Jahren als Reaktion auf die Finanz- und Wirtschaftskrise in Portugal getroffen 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 gerechteren Gesellschaft. Dementsprechend wurde der nationale Mindestlohn erhöht, Lohn- und Rentenkürzungen wurden aufgehoben und einige Sozialleistungen wurden wieder eingeführt. Diese Maßnahmen tragen zu einer insgesamt gerechteren Gesellschaft bei.

2. Wichtigste Rechtsvorschriften

Die portugiesische Verfassung²³ enthält mehrere Bestimmungen, die ein Diskriminierungsverbot enthalten. Artikel 13 ist eine allgemeine Verpflichtung zum Grundsatz der Gleichbehandlung. Artikel 13 Absatz 1 lautet: „Alle Bürger haben die gleiche gesellschaftliche Würde und sind vor dem Gesetz gleich“ und Artikel 13 Absatz 2 besagt:

²¹ Portugal, Gesetz über politische Parteien, abrufbar unter: <https://dre.pt/application/file/249115>.

²² Siehe Berufungsverfahren Nr. 1013/12.5TTMTS.P1, Entscheidung vom 3. November 2014, abrufbar unter: www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade.

²³ Eine englische Übersetzung der Verfassung findet sich auf der Webseite des portugiesischen Parlaments unter: www.parlamento.pt.

„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 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 Absatz 2 der portugiesischen Verfassung gilt:

„Die in ordnungsgemäß ratifizierten oder verabschiedeten internationalen Abkommen enthaltenen Normen haben nach ihrer offiziellen Verkündung auch in der innerstaatlichen Rechtsordnung Gültigkeit, solange sie den portugiesischen Staat völkerrechtlich binden.“

Was das innerstaatliche Recht betrifft, so ist das jüngste Gesetzeswerk, das sich mit Antidiskriminierungsfragen befasst, das Gesetz 93/2017 vom 23. August 2017, das den rechtlichen Rahmen zur Verhinderung, zum Verbot und zur Bekämpfung von Diskriminierung aufgrund von „Rasse“/ethnischer Zugehörigkeit, Nationalität, Abstammung und Herkunftsort im Rahmen des Sozialschutzes, einschließlich Sozialversicherung und Gesundheitsversorgung, Sozialleistungen, Bildung, Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich Wohnraum, und Kultur, festlegt.

Dieses Gesetz erweitert die Liste der geschützten Merkmale und liefert eine weiter gefasste Definition von Diskriminierung; außerdem ändert es die Zusammensetzung und die Befugnisse der Kommission für Gleichstellung und gegen Rassendiskriminierung und die gesetzlichen Regelungen für Verwaltungssanktionen. Schließlich führt es einen Mediationsprozess ein.

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.²⁴ Das Gesetz 46/2006 vom 28. August 2006²⁵ 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. Sanktionen sind in Artikel 9 und 10 des Gesetzes 46/2006 geregelt.

Die Gesetzesverordnung 106/2013 vom 30. Juli 2013 regelt die Statuten von NROs von Menschen mit Behinderungen (*organizações não governamentais das pessoas com deficiência*, ONGPDs) und die staatliche Förderung dieser Organisationen. Nach Artikel 5 Absatz 2 der Gesetzesverordnung sind ONGPDs in Fällen von Verbrechen gegen Menschen

²⁴ Abrufbar unter: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

²⁵ Abrufbar unter: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

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 Arbeitsgesetzbuch²⁶ (im Folgenden „Arbeitsgesetzbuch“) unter anderem die Richtlinie 2000/43/EG (Richtlinie zur Gleichbehandlung ohne Unterschied der „Rasse“) und die Richtlinie 2000/78/EG (Richtlinie zur Gleichbehandlung im Bereich der Beschäftigung) in nationales Recht umsetzt.

Artikel 24 Arbeitsgesetzbuch verbietet Diskriminierung aufgrund von Abstammung, Behinderung oder chronischer Erkrankung, Alter, „Rasse“, Geschlecht, ethnischer Herkunft, 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.²⁷

Artikel 240 Strafgesetzbuch²⁸ behandelt Diskriminierung aufgrund von „Rasse“, Hautfarbe, ethnischer Herkunft oder Nationalität, Religion, Geschlecht und sexueller Ausrichtung. Der Artikel deckt nicht den Diskriminierungsgrund Behinderung ab.

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 Absatz 1 Buchstabe b des Gesetzes 93/2017 vom 23. August liegt eine unmittelbare Diskriminierung vor, wenn eine Person oder Gruppe aufgrund ihrer

²⁶ Abrufbar unter: www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf.

²⁷ Abrufbar unter: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

²⁸ Das Strafgesetzbuch wurde per Gesetzesverordnung 48/95 angenommen und zuletzt geändert durch das Gesetz 30/2015 vom 22. April 2015, abrufbar unter: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

„Rasse“/ethnischen Herkunft oder aus anderen Gründen (Nationalität, Abstammung oder Herkunftsort) eine weniger günstige Behandlung erfährt als eine andere Person oder Gruppe in einer ähnlichen Situation erfährt, erfahren hat oder erfahren würde.

Nach Artikel 3 Buchstabe a des Gesetzes 46/2006

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

Artikel 4 des oben genannten Gesetzes enthält einige Beispiele für unmittelbare Diskriminierung: Verweigerung oder Behinderung der Versorgung mit Gütern oder Dienstleistungen, Behinderung oder Einschränkung des Zugangs zu und der normalen Ausübung einer wirtschaftlichen Aktivität, Behinderung oder Einschränkung des Zugangs zu Gebäuden und öffentlichen Räumen sowie das Ergreifen von Maßnahmen, die den Zugang zu neuen Technologien beschränken.

Nach Artikel 23 Absatz 1 Buchstabe a Arbeitsgesetzbuch 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 Absatz 2 Buchstabe 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.

Nach Artikel 3 Absatz 1 Buchstabe c des Gesetzes 93/2017 vom 23. August liegt eine mittelbare Diskriminierung aufgrund der „Rasse“/ethnischen Herkunft oder aus anderen Gründen (Nationalität, Abstammung oder Herkunftsort) vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren eine Person oder Gruppe gegenüber einer anderen benachteiligen.

Artikel 3 Buchstabe 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.

Artikel 23 Absatz 1 Buchstabe b Arbeitsgesetzbuch verwendet eine ähnliche Formulierung.

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

„wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen, auf die eines der geschützten Merkmale zutrifft, die ein Grund für Diskriminierung sein können, gegenüber anderen Personen benachteiligen.“

Das portugiesische Recht enthält keine Definition von Rassendiskriminierung. Im Gegensatz dazu wird Behinderung besonders sorgfältig definiert.

Eine Person mit Behinderung ist definiert als eine Person, die aufgrund des Verlusts oder der Anomalität einer psychologischen, intellektuellen oder anatomischen Struktur oder Funktion vermutlich in ihrer Leistungsfähigkeit beeinträchtigt ist und bei der Ausübung normaler Tätigkeiten unter Berücksichtigung des Alters, des Geschlechts und der herrschenden soziokulturellen Faktoren als benachteiligt gelten kann. 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 aus bestimmten Gründen.

So verbietet das Gesetz 93/2017 die Diskriminierung aufgrund der „Rasse“/ethnischen Herkunft, Nationalität, Abstammung und des Herkunftsorts.

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.“

Es steckt somit die Diskriminierungsgründe ohne jegliche Einschränkung bezüglich der tatsächlichen Situation des Arbeitnehmers und so weit gefasst ab, dass auch Diskriminierung aufgrund von Assoziierung oder Wahrnehmung abgedeckt ist.

Artikel 129 Absatz 1 Buchstabe 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.“

Nach Artikel 331 Absatz 1 Buchstaben a und 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 Geltungsbereich

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 Hochkommissar für Migration (*Alto Comissário para as Migrações*, ACM), unterstützt durch die Kommission für Gleichstellung und gegen Rassendiskriminierung (*Comissão para a Igualdade e Contra a Discriminação Racial* – CICDR). Aufgabe dieser Stelle ist es, 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 (*Autoridade para as Condições de Trabalho*, ACT). Aufgabe dieser Stelle ist es, 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.

Verbände und Vereinigungen sind berechtigt, im Namen von Diskriminierungsopfern zu handeln. Nach Artikel 12 Absatz 1 des Gesetzes 93/2017 sind Verbände und Vereinigungen, deren Ziel es ist, Diskriminierung aufgrund der „Rasse“/ethnischen Herkunft, der Nationalität, der Abstammung und des Herkunftsortes zu bekämpfen, berechtigt, sich im Namen der betroffenen Personen und mit deren Zustimmung an Gerichtsverfahren zu beteiligen.

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

Behinderten-NROs (ONGPDs) sind nach Artikel 5 Absatz 2 der Gesetzesverordnung 106/2013 vom 30. Juli 2013, die die Statuten von ONGPDs definiert, berechtigt, im Namen von Diskriminierungsopfern Klage einzureichen.

Auch das Gesetz 46/2006 legt in Artikel 15 Absatz 1 fest, dass ONGPDs 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 können, soweit verfügbar, als Beweismittel eingesetzt werden. 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.

Gesetzliche Bestimmungen zum Einsatz von Situationstests existieren nicht und es gibt bislang auch noch keinen Präzedenzfall für deren Einsatz in Portugal.

Opfer von Diskriminierung können bei jeder Polizeidienststelle, bei der Kommission für Gleichstellung und gegen Rassendiskriminierung 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 Hochkommissariat für Migration (*Alto Comissário para as Migrações*, ACM; vormals: der Hochkommissar für Einwanderung und interkulturellen Dialog (*Alto Comissariado para a Imigração e Diálogo Intercultural*, ACIDI))²⁹ wurde im Zuge der Gesetzesverordnung 31/2014 vom 27. Februar 2014³⁰ geschaffen und ist dafür zuständig, die Gleichbehandlung aller Menschen, ohne Unterschied der „Rasse“ oder ethnischen Herkunft, sowie den Dialog mit und die Eingliederung von Zuwanderern, ethnischen Minderheiten und Religionen in Portugal zu fördern.

Die ACM wird von der Kommission für Gleichstellung und gegen Rassendiskriminierung (CICDR) unterstützt, die für die Überwachung des Gesetzes 93/2017 zuständig ist. Um dieses Ziel zu erreichen, hat die Kommission mehr Befugnisse erhalten, darunter folgende:

- Fälle, in denen gegen dieses Gesetz verstoßen wird (Gerichtsverfahren oder Fälle, die der Kommission zur Kenntnis gebracht werden) publik zu machen;
- die Aufhebung von Bestimmungen, Verordnungen und Verwaltungsakten vorzuschlagen, die gegen den Grundsatz der Gleichheit und Nichtdiskriminierung verstoßen;
- Betroffenen die für die Durchsetzung ihrer Rechte maßgeblichen Informationen zur Verfügung zu stellen;
- über die Verhängung von Sanktionen, beispielsweise Geldbußen, im Rahmen von Verwaltungsverfahren zu entscheiden.

Die Kommission behält auch einige der früheren Befugnisse, z.B. folgende:

- alle Informationen über diskriminierende Handlungen zu sammeln und die entsprechenden Sanktionen anzuwenden;
- den Erlass von Rechts- und Verwaltungsmaßnahmen zu empfehlen, die sie für angemessen hält, um Diskriminierung aufgrund von „Rasse“, Hautfarbe, Nationalität oder ethnischer Herkunft zu verhindern;
- Umfragen und Studien zum Thema Rassendiskriminierung zu fördern und durchzuführen;
- einen Jahresbericht über die Situation in Portugal in Bezug auf Gleichbehandlung und Rassendiskriminierung zu erstellen und zu veröffentlichen.

Die Kommission wurde erweitert und besteht derzeit aus dem Hochkommissar für Migration, der den Vorsitz führt, einem Vertreter jeder Fraktion, einem Vertreter der Regierungsmitglieder, die für Inneres, Justiz, Gleichstellung und Bürgerrechte, Bildung, Wissenschaft, Technologie und Hochschulbildung, Beschäftigung, Solidarität und soziale Sicherheit, Gesundheit und Kultur zuständig sind, sowie einem Vertreter der Regionalregierung der Azoren und Madeiras, zwei Vertretern von Migrantenverbänden, antirassistischen Vereinigungen, Menschenrechtsvereinigungen, Gewerkschaften und Arbeitgeberverbänden sowie einem Vertreter der Roma-Gemeinschaften. Schließlich gehören der Kommission auch drei Personen an, die sich durch besondere Verdienste

²⁹ Geregelt in der Gesetzesverordnung 167/2007 vom 3. Mai 2007.

³⁰ Diese Gesetzesverordnung hob die Gesetzesverordnung 167/2007 vom 3. Mai 2007 auf und ersetzte das Hochkommissariat für Einwanderung und interkulturellen Dialog durch das Hochkommissariat für Migration. Sie trat am 27. Februar 2014 in Kraft. Abrufbar unter: <https://dre.pt/application/file/572214>.

auszeichnen und von den anderen Mitgliedern hinzugewählt werden. Die Kommission ist nicht befugt, Fälle vor Gericht zu bringen oder beschwerdeführende Parteien dabei zu unterstützen.

Das ACM hat den Einsatz von Kulturmittlern entwickelt, um eine stärkere Integration der ethnischen Gruppe der Roma zu erreichen.

7. Zentrale Punkte

Als wichtigster Punkt ist hervorzuheben, 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. Das 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.

Es ist jedoch zu beachten, dass 2017 mehr Fälle vor die höheren Gerichte kamen als in den Vorjahren.

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. Darüber hinaus sind einige dieser Stellen in der Öffentlichkeit praktisch unbekannt.

Weitere potenzielle Verstöße gegen die Richtlinien bestehen nicht.

INTRODUCTION

The national legal system

According to Article 1 of the Constitution of the Portuguese Republic of 1976,³¹ '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 political 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 the 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

³¹ An English version of the Constitution can be consulted on the website:
www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.

matters that are within the exclusive power of the Assembly but which the Assembly delegates to it.

Jurisdictional function is assured by the 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 all courts (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 93/2017 of 23 of August 2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race/ethnic origin, nationality, ancestry and 'place of origin'.^{32 33}
- 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.³⁴
- Law 46/2006 of 28 August 2006,³⁵ which prohibits and punishes all forms of discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*), including in work and professional training. 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 Code³⁶ (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), following the grounds and the material scope of the directives. It entered into force on 1 May 2009 and in 2017 it was amended by Law 73/2017 of 16 August.³⁷
- 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.³⁸
- The Criminal Code approved by Decree-Law 48/95, last amended by Law 94/2017³⁹ of 23 August (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.
- Decree-law 163/2006 of 8 August 2006⁴⁰ approves the standards and rules governing physical access to buildings and public spaces. Entered into force on 9 February 2007.

³² This amounts to place of birth.

³³ Available at: <https://dre.pt/web/quest/home/-/dre/108038372/details/maximized>.

³⁴ Available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

³⁵ Available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

³⁶ Available at: http://www.dgaep.gov.pt/upload/Legis/2009_1_07_12_02.pdf.

³⁷ Available at: <https://dre.pt/application/conteudo/108001409>.

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

³⁹ Available at: <https://dre.pt/application/conteudo/108038373>.

⁴⁰ 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 this 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.'

This 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 their 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, states 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, [and] 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).⁴¹

Some of these 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 makes 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 on the legislator, the executive and 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.

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

⁴¹ This decision is available (in Portuguese) at: 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 defined in national law.

Law 93/2017 of 23 August establishing the legal regime for the prevention, prohibition and combating of discrimination on the ground of race/ethnic origin, nationality, ancestry and place of origin provides a definition of discrimination in general.

Discrimination is defined as follows:

'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.'

There is also no legal definition for the notion of 'race'. However, Article 4 of the above-mentioned law sets out a large number of discriminatory practices that are forbidden.

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, place of origin and language as suspect classifications, because they are foreseen in Article 13 of the Portuguese Constitution.

In Portugal, the culture of taking judicial action against discriminatory practices is almost non-existent. Therefore, in spite of exhaustive research by the author of this report, in 2017 there were no judicial decisions on racial discrimination.

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 the '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.’

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).

However, due to the lack of jurisprudence in this context it is impossible to provide any evidence base for this. In 2017, there is only one judgment⁴² – from the Court of Appeal of Oporto – dealing with discrimination on grounds of disability. As regards the definition of disability, the Court limits itself to copying into the decision the provisions of Law 38/2004, without any particular interpretation.

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 an 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*.

⁴² Procedure No. 2645/15.5T8GDM.P1 of 23 November 2017. Available in: www.trp.pt/d.

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

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 pensions rights after the death of a person in a homosexual relationship,⁴³ have not defined sexual orientation.

2.1.2 Multiple discrimination

In Portugal, prohibition of multiple discrimination is included in the recent Law No. 93/2017 of 23 August (Article 3 (1) (e) and Article 4 (1)).

According to these provisions multiple discrimination is that resulting from a combination of two or more discrimination factors.

In Portugal, there are no cases dealing with situations of multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Portugal, Law No. 93/2017 of 23 August prohibits any form of discrimination. Therefore discrimination by assumption is covered in Article 4 (1).

b) Discrimination by association

In Portugal, Law No. 93/2017 of 23 August prohibits discrimination based on association (Articles 3 (1) (d) and 4 (1)) with persons with particular characteristics, such as race/ethnic origin, and other grounds (nationality, ancestry and place of origin)

⁴³ Constitutional Court, case law 513/2003. Available (in Portuguese) at: <http://www.tribunalconstitucional.pt/tc/acordaos/20030513.html>.

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 (1) (b) of Law 93/2017 of 23 August considers direct discrimination to occur when, due to racial or ethnic origin or other grounds (nationality, ancestry and place of origin), a person or a group 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 a person 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.'

The definition included in 3 (1) (b) of Law No. 93/2017 of 23 August refers both to individuals and to groups.

The other ones refer only to individuals. To date, there is no case law extending these definitions to groups.

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(b) *in fine* of Law 46/2006; and Article 5(4)(a) and (b) of Law 3/2011.

However, Law No. 93/2017 does not permit any justification when it relates to direct discrimination.

2.2.1 Situation testing

a) Legal framework

In Portugal, situation testing is not clearly permitted. It cannot be used as evidence in court, as the New Code of Civil Procedure⁴⁴ does not include this possibility in Articles 410 *et seq.* relating to admissible means of evidence in trials.

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 93/2017 of 23 August, states in Article 3(1)(c) that,

'indirect discrimination occurs, due to racial or ethnic origin and other grounds (nationality, ancestry and place of origin), whenever an apparently neutral provision, criterion or practice places a person or a group 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(1)(c) of Law 93/2017, 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 follows 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

⁴⁴ Portugal, Law 41/2013 of 26 June 2013, which approves the Code of Civil Procedure, entered into force on 1 September 2013.

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.

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.⁴⁵ The author of this report is not aware of other judicial decisions on this issue.

As with direct discrimination, the Labour Code provides one example of legitimate aims and necessary and appropriate means. Article 5(4)(c) states that it does not constitute discrimination if the difference in 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 1998⁴⁶ on the Protection of Personal Data. 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.

⁴⁵ Oporto Court of Appeal, No. 1013/12.5TTMTS.P1, 3 November 2014. Available at: www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade.

⁴⁶ Portugal, Law 67/98 of 26 October 1998 on the protection of personal data [*Lei da Protecção de Dados Pessoais*], Diário da República Série I-A, de 26 October 1998, entered into force on 27 October 1998.

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 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 contained in Article 7(2) and (3): 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 Freedom⁴⁷ 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).⁴⁸ 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).⁴⁹

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).

⁴⁷ Portugal, Law 16/2001 of 22 June 2001 on religious freedom [*Lei da Liberdade Religiosa*], (Diário da República, 1.^a Série A, nº 143, p. 3666).

⁴⁸ Portugal, Law 22/2008 of 13 May 2008 on national statistics [*Lei das estatísticas nacionais*] (Diário da República, Série I, no. 92, 13 May 2008, p. 2617-2622).

⁴⁹ Law 41/2013 of 26 June 2013 [*Novo Código de Processo Civil*], Diário da República, 1.^a Série, No. 121 of 26 June.

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

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 Portuguese 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.⁵⁰

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.

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

Recently, Article 3 (1) (f) of Law 93/2017 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 or a group of persons and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This means that Law 93/2017 extends the concept of harassment, including the dignity of groups.

⁵⁰ See, among others, Constitutional Court Decision No. 416/2007 of 18 July 2007, which states that the Constitutional Court is bound by the international sources of law, namely the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

In Portugal, harassment does explicitly constitute a form of discrimination (see Article 3(2) of Law 93/2017, 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 definition of harassment in national law are confirmed by the case law of the Supreme Court of Justice (Decision in Procedure No. 299/14.5T8VLG.PI.S1 of 21 April 2016) and by the case law of the Courts of Appeal (see Court of Appeal of Guimarães, Procedure 222/15.0.0T8BGC-G1 of 2 June 2016 and Procedure 98/12 9 T.T. GMR. G1 of 18 February 2016 and Court of Appeal of Évora, Procedure 8928/15.7T8STB.E1 of 7 December 2016).

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 to 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, 'a mere order or instruction with the purpose of disadvantaging any person by reason of a discrimination factor' shall be deemed to constitute discrimination. Moreover, Article 5(1) of Law 46/2006 complements the articles laid down in the Labour Code. Under this article, in addition 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, sensory 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 person by reason of a discrimination factor.

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 or encouraging racial or religious discrimination. Such persons will be punished by imprisonment of between six months and five years.

More recently, Article 3 (3) of Law 93/2017 provides that instructions to discriminate are deemed as discrimination and are forbidden.

b) Scope of liability for instructions to discriminate

In Portugal, the instructor and the discriminator are liable (Articles 15 of Law 93/2017 and 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.

People who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, provoke acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting or encouraging racial or religious discrimination will be punished by imprisonment of between six months and five years (Article 240(2) of the Criminal Code).

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 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 disabilities 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 if it is sufficiently alleviated by legal measures that exist within the framework of national

disability policy. The burden will not be considered disproportionate if it is compensated for by the state in terms to be provided for in special legislation.

b) Practice

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 disproportionate expenses (the meaning of 'disproportionate expenses' has not been specified and the author of this report has not found any case law on this matter). However, if an obligation requires disproportionate 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 if 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 – IP*).⁵¹

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 and specific guidance to support people with disabilities who have difficulties in beginning and making progress in their careers.⁵²

c) Definition of disability and non-discrimination protection

The definition of a disability,⁵³ for the purposes of claiming reasonable accommodation is not different from that for claiming protection from discrimination in general.

Portuguese law protects not only people with disabilities but also those with an aggravated risk to health (although Law 46/2006 does not define disability, it 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 differs from the duty to provide reasonable accommodation in the field of employment.

⁵¹ INR website: www.inr.pt/.

⁵² This programme is available (in Portuguese) at: www.cartasocial.pt/pdf/emprego_pdi.pdf.

⁵³ As mentioned above, the definition of disability is included in Law 38/2004, of 18 August 2004, which is not an anti-discrimination law. According to Article 2, a disabled person is '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.'

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.'

Decree-law 163/2006 of 8 August 2006⁵⁴ 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 for people with disabilities, namely in access to buildings, public transportation and school. This law goes beyond the field of employment.

According to Decree-law 3/2008 of 7 January 2008,⁵⁵ 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. However, as the law detailing financial assistance to be provided by the state has not yet been adopted, some employers (particularly small and medium-sized enterprises with fewer than 50 employees) frequently claim – at least, more than larger enterprises – that they face a disproportionate burden.

⁵⁴ Portugal, Decree-law 163/2006 of 8 August 2006 [*Decreto-Lei no. 163/2006 de 8 de Agosto*] 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>.

⁵⁵ Portugal, Decree-law 3/2008 of 7 January [*Decreto-Lei nº 3/2008, de 7 de Janeiro*] 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: <https://dre.pt/web/guest/pesquisa-avancada/-/asearch/386871/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Decreto-Lei%22&types=SERIEI&numero=3%2F2008>.

Benefits may be obtained from the Institute for Employment and Vocational Training (*Instituto de Emprego e Formação Profissional – IEFP*).⁵⁶ Until the state adopts the above-mentioned law, it must cover 100 % of the costs for an entitlement to accommodation to exist. However, as the duty to provide reasonable accommodation always implies a judgment of proportionality, it might be that the duty exists, independently of the law detailing financial assistance to employers. Certainly, reasonable accommodation that does not cost any money at all is an intrinsic right and refusal to provide it is discriminatory.

In addition, the employer does not have any duty to ask for funding from the state and a failure to ask for funding does not lead to a breach of the reasonable accommodation duty.

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.⁵⁷

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 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 or private sectors.

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, s/he (the worker in the case) would be discriminated against on the ground of religion.⁵⁸

The Court of Appeal of Lisbon took a similar decision 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 sunset on Friday until the end of her shift. Absence from work because of religion cannot be considered unjustified and disciplinary proceedings for this reason cannot be taken into account as a just cause for dismissal.

However, there is no mention of reasonable accommodation.

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.

⁵⁶ *Instituto de Emprego e Formação Profissional* (IEFP): www.iefp.pt/.

⁵⁷ This programme is available at: www.cartasocial.pt/pdf/emprego_pdi.pdf.

⁵⁸ Constitutional Court, Decision No. 544/14 of 15 July. Available (in Portuguese) at: www.tribunalconstitucional.pt/tc/acordaos/20140544.html.

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). Lifts, rolling ramps and buses with disabled access are examples of things that can facilitate access by 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, cinemas, prisons, sports facilities, gardens, beaches, discos, hotels, etc.

Decree-law 163/2006 of 8 August 2006 expands on the principles laid out in Law 38/2004 of 18 August 2004.

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.⁵⁹

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 resources or resources that are not available;
- when they affect 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 had 10 years to be adapted to the new rules, while those constructed after 1997 had 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.

This law and the deadlines mentioned have actually had an impact, especially in new buildings, where accessibility for disabled people is compulsory. In the case of some older buildings, adaptation is sometimes rather difficult, but a serious effort has been made in order to make them accessible to disabled people.

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, sign language interpreting or translation into Braille is used when, for instance, a witness needs it.

⁵⁹ 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 1 of Law 93/2017 of 23 August 2017.

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

a) Protection against discrimination

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).⁶⁰ Thus, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. Fines are higher for legal persons than for natural persons (Article 554 of the Labour Code).

Law 93/2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the ground of race/ethnic origin, nationality, ancestry and place of origin applies to natural and legal persons (Article 2 (1)).

b) Liability for discrimination

Law 93/2017 provides that both natural and legal persons are liable in case of discrimination by action or omission (Article 15 (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 establishes different sanctions for natural persons and for legal ones.

An employer's customers cannot be held liable under the scope of the 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.

In Portugal, the personal scope of anti-discrimination law covers both natural and legal persons for the purpose of liability for discrimination, except in cases specified by law. One of these cases is Article 11(1) of the Criminal Code, which states that only natural persons are subject to criminal liability. However, even in criminal law there are some exceptions to the exception. One example is the case of hate crime, which is a crime that involves discrimination of a group on grounds of race, religion or sexual orientation set out in Article 240 (2) of the Criminal Code.

⁶⁰ 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.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Portugal, the personal scope of national law covers the 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).

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).⁶¹

Law 93/2017 is also binding on all public or private persons (Article 2 (1)).

Article 2(1) of Law 46/2006 states expressly that those laws bind both the public and private sectors.

The national provisions comply with the directives.

b) Liability for discrimination

In Portugal, the personal scope of anti-discrimination law covers both the private and public sectors, including public bodies, for the purpose of liability for discrimination. The public sector is liable for equality and non-discrimination on 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 for Contract Work for the Public Sector)⁶² and the private sector is liable according to Articles 23 to 32 of the Labour Code.

Article 2 (1) (2) of the Law 93/2017 also refers to the public and private sectors.

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

Article 9 (1) of Law 46/2006 also refers to the liability of the private sector and Article 9 (2) of Law 46/2006 refers to the public sector.

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.

⁶¹ Portugal, Decree-law 133/2013 of 3 October 2013 [*Decreto-Lei nº 133/2013, de 3 de outubro*] (Diário da República, série I, No. 191, 3 October 2013, pp. 5998-6002).

⁶² Portugal, Law 35/2014 of 20 June [*Lei nº 35/2014, de 20 de junho*] establishes the regime for employment relations in public services. The law entered into force on 1 August 2014 and was last amended by Law 73/2017 of 16 August 2017. Available at: <https://dre.pt/application/conteudo/108001409>.

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 prohibits discrimination in the following areas: 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 the private and public sectors, as described in the directives.

Article 24(1) of the Labour Code guarantees all workers the same opportunities and benefits 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.

Discrimination against migrants in employment is also prohibited in Portugal, due to the principle of equality that means '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' (Article 15 (1) of the Constitution).

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 stipulates 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, sensory 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 (see Articles 2 and 3 of Law 3/2011). Therefore, specific legislation now exists on discrimination on the grounds of religion, belief, age or disability in the field of self-employment.

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

In Portugal, national legislation prohibits discrimination in the following areas: 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, 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. 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 support self-employment, teleworking, part-time work and working 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 prohibits discrimination in the following areas: 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 prohibits discrimination in the following areas: 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 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.

Law 93/2017 covers social protection, including social security and healthcare (Article 2 (1) (a)).

The social security system must protect individuals in illness and old age and if they are disabled, widowed or orphaned, as well as if 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).

Law 4/2007 of 16 January 2007⁶³ (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 38/2004,⁶⁴ 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.

Migrants who legally reside in Portugal have the same rights of access to social protection as nationals.

Portuguese national law goes beyond the directives.

⁶³ Portugal, Law 4/2007 of 16 January 2007, basic law on the social security system [*Lei no. 4/2007 de 16 de Janeiro, Aprova as bases gerais do sistema de segurança social*], Diário da República, 1.ª série — No. 11 — 16 de Janeiro de 2007. Available at: www4.seg-social.pt/documents/10152/18664/LEI_4_2007.

⁶⁴ Portugal, Law 38/2004, defining the general framework of the legal regime regarding disability prevention [*Lei no. 38/2004 de 18 de Agosto Define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência*], Diário da República — I série-a No. 194 — 18 de Agosto de 2004. Available at: <https://dre.pt/application/file/480649>.

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 prohibits discrimination in the following areas: social advantages as formulated in the Racial Equality Directive.

Discrimination is not permitted in relation to 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, place 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 citizen 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.

The scope of Law 93/2017 expressly includes social advantages (Article 2 (1)(b)).

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

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

In Portugal, national legislation prohibits discrimination in the following areas: 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 has 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),⁶⁵ 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.

These provisions also apply to migrants, who are not treated differently under anti-discrimination legislation and benefit on an equal footing with nationals from the enforcement and implementation of anti-discrimination law in the field of education.

To the knowledge of the author, there are no reported cases concerning discrimination against or segregation of migrant children. The reported cases of children being discriminated against or segregated relate to Roma, irrespective of whether or not they are migrants.

To the knowledge of the author, there is no case law in the field of education where migrants were involved. The only example of special policies which aim to address discrimination against migrants in the field of education concerns Roma pupils and will be mentioned below.

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. Basic education lasts for nine years. Irregular migrant children do not have access to education on an equal footing with other migrants.

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

Article 2(f) and 2(l) of Law 60/2009 of 6 August 2009 (Regime for the implementation of sex education in schools)⁶⁶ aims to promote education against discrimination on grounds of sexual orientation, but this is limited to the obligation for schools to teach the prohibition of discrimination on grounds of sexual orientation.

Law 93/2017 also covers education (Article 2 (c)).

a) Pupils with disabilities

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

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. This duty means that children with disabilities cannot be denied access to

⁶⁵ 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.

⁶⁶ Portugal, Law 60/2009 of 6 August 2009, establishing a framework for sex education in schools [*Lei no. 60/2009 de 6 de Agosto Estabelece o regime de aplicação da educação sexual em meio escolar*], Diário da República, 1.ª série — N.º 151 — 6 de Agosto de 2009. Entered into force on 7 August 2009. Available at: www.igualdade.gov.pt/images/stories/documentos/legislacao/legislacao/educacao/Lei_educacao_sexual.pdf.

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 2008⁶⁷ – 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 (apart from 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 states 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 public or private educational 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.⁶⁸

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

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.

⁶⁷ Portugal, Decree-law 3/2008, 7 January 2008 [*Decreto-Lei nº 3/2008 de 7 de Janeiro*], Diário da República, 1.ª série — N.º 4 — 7 de Janeiro de 2008. Available at: <http://dre.pt/pdf1s/2008/01/00400/0015400164.pdf>.

⁶⁸ See Guedes, M., Magano, O., Candeias, P. (2014) *Estudo Nacional sobre as Comunidades Ciganas*, (National Study on the Roma Communities), HCM, December 2014, p. 92 ff. and p. 205 ff. Available at: www.acm.gov.pt/documents/10181/52642/estudonacionalComunidades.pdf/f4aa9b13-797d-40bb-a3b3-1c4011b05760.

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.'⁶⁹

Drawing attention to the efforts undertaken by the High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural*)⁷⁰ and the extremely important role of trained Roma mediators who have been placed in several municipalities across the country, the Portuguese government has sought to define a series of collaborative policies leading to the effective integration of Roma communities into Portuguese society by 2020, while ensuring respect for Roma traditions and culture.

The *National Roma Communities Integration Strategy 2013-2020* identifies the educational difficulties as 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.

⁶⁹ *National Roma Communities Integration Strategy 2013-2020*, p. 3:
http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.

⁷⁰ The High Commissioner for Immigration and Intercultural Dialogue was recently replaced by the High Commissioner for Migration (HCM). See below, Section 7.

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.⁷¹

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 prohibits discrimination in the following areas: access to and supply of goods and services as formulated in the Racial Equality Directive.

Law 93/2017 is applicable to access to and supply of goods and services, including housing (Article 2 (1) (d)).

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 93/2017 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 1977,⁷² 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.

⁷¹ *National Roma Communities Integration Strategy 2013-2020*, pp. 45-46:

http://ec.europa.eu/justice/discrimination/files/roma_portugal_strategy_en.pdf.

⁷² Portugal, Decree-law 594/74 [*Decreto-Lei no. 594/74 de 7 de Novembro*]. Available at:

<http://pt.legislacao.org/download/pdf/decreto-lei-n-o-594-74-associacoes-associacao-constituicao-estatutos-38660>; Portugal, Decree-law 71/77 [*Decreto-Lei no. 71/77 de 27 de Setembro*]. Available at: <http://pt.legislacao.org/download/pdf/lei-n-o-71-77-autorizacao-ensino-duracao-assembleia-51022>.

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

In Portugal, national legislation prohibits discrimination in the following areas: 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 93/2017 (Article 2 (1) (d)).

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. Since 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 right to housing and access to private and public spaces for disabled people (Article 32).

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 of or making conditional the sale, lease or sublease, as well as the access to bank loans for residential property purchases, and the refusal or penalty in the execution of insurance contracts' in relation to people with disabilities will be considered as a discriminatory practice.

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.

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.

Migrants are not treated differently under anti-discrimination legislation and they benefit on an equal footing with nationals from the enforcement and implementation of anti-discrimination law in the field of housing. In practice, they are not discriminated against.

To the knowledge of the author, they benefit from public housing under the same conditions as nationals.

There is no major anti-discrimination case law in the field of housing where migrants were involved and no major policies which aim to address discrimination against migrants in the field of housing.

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 (*Programa Especial de Realojamento – PER*), set up by the national authorities, which has enabled many Roma families to leave the shanty towns where they were 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 High Commissioner for Immigration and Intercultural Dialogue (*Alto Comissariado para a Imigração e Diálogo Intercultural – ACIDI*) and is now the High Commissioner for Migration (*Alto Comissariado para as Migrações*).

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 in effect prohibits 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)).

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 2013,⁷³ which establishes the legal regime for teaching and the organisation of Catholic religious and moral education at state primary and secondary 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 proposed by the bishop of the diocese. With regard to 'dismissal', Article 10 states that the teacher may no longer teach the subject of Catholic religious and moral education if a proposal is submitted by the bishop of the diocese, properly grounded, which demonstrates that the teacher has ceased to fulfil 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 ministry 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/EC), but the conditions for access inevitably limit employment on the basis of 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.

⁷³ Available at: <https://dre.pt/application/file/261022>.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

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

Article 1 of Law 93/2017 forbids discrimination on the grounds of nationality.

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, 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 on foreign nationals, stateless persons and European citizens states that foreign nationals 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 for 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, restricted 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 bodies 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.

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 direct and indirect 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',⁷⁴ explicitly imposes, in some cases on public and private entities, a general duty to treat *de facto* unions as equal to marital status.

De facto unions have only the rights specifically referred to in law. This law is applicable to same-sex couples and gives unmarried partners who 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 holidays, absence, leave and placements; the same applies to private sector workers with regard to holidays, 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 could 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. There is no case law on this matter.

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

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

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 Inspectorate (*Inspecção de Saúde da Direcção Geral de Saúde*) 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 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

⁷⁴ Available at: <https://dre.pt/application/dir/pdf1s/2010/08/16800/0376403768.pdf>.

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.

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 the ground of 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 to date.

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/EC.

Article 25(2) and (3) of the 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, and 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*)⁷⁵ are represented.

There are no specific provisions for older workers.

People 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 adult 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 people 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 employment relations in the public sector (Article 4(1)(c) to (f) of Law 35/2014).

⁷⁵ Comissão Permanente de Concertação Social website: <http://www.ces.pt/concertacao-social/atribuicoes>.

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. Compulsory education ends with completion of the 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 under 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,⁷⁶ 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 into the second system. In short, the Portuguese legal system in this area is rather complex.

In Portugal, there is a state pension age (70 years old), 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, which modifies the legal regime for social protection in case of disablement and old age) has 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

⁷⁶ Available at: <https://dre.pt/web/guest/pesquisa-avancada/-/asearch/522781/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Lei%22&types=SERIEI&número=4%2F2007>.

of 55. It is envisaged that the retirement age will increase annually (Law 4/2007, which approves the general basis of the social security system⁷⁷ and Decree-law 187/2007, which establishes and regulates the legal protection system for disability and retirement in the general social security system).⁷⁸ If a public 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 wish to work longer, the pension can be deferred until the age of 70.

An individual can collect a pension and still work.

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)).

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 2006.⁷⁹

In Portugal, there is no standard 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 wish 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.

⁷⁷ Available at: www.dgap.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-4e8140f46f49&ID=318.

⁷⁸ Available at: www.previsao-sgfp.pt.

⁷⁹ This law regulates the establishment and functioning of pension funds and pension fund managers and transposes into Directive 2003/41 / EC of the European Parliament and of the Council of 3 June activities and supervision of institutions for occupational retirement provision. Available at: <https://dre.pt/application/file/538934>.

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

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 aged 70 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, Article 18 of the Constitution may be invoked. 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 permitted 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 2 (3) of Law 93/2017 allows positive action measures.

Article 27 of the Labour Code states that positive action measures are not discriminatory. According to this provision, legislative measures shall not be considered discrimination if they are of a specifically defined temporary nature, benefiting certain disadvantaged groups, including groups defined by reference to gender, reduced working capacity, disability or chronic illness, nationality or ethnic origin, and if they are 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 which persists in society.

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) provides 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 it is 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 benefit.

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 the total intake reserved for students with disabilities.

As far as health services are concerned, people who are officially recognised as disabled 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 status.

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,⁸⁰ 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.

⁸⁰ The National Immigrant Support Centres bring together in one place various services needed by immigrants when they are in Portugal. See more information at <https://www.portaldocidadao.pt/en/web/alto-comissariado-para-as-migracoes/centros-nacionais-de-apoio-ao-imigrante-cnai->.

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

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 to apply 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 the courts 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 issues 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).⁸¹ 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 with the labour courts and to give evidence or to present witnesses.

⁸¹ Portugal, Labour Procedure Code (*Código de Processo do Trabalho*). Available at: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=487&tabela=leis&so_miolo.

Administrative procedures and administrative courts (for the public sector)

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, last 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 the private sector)

The Authority for Working Conditions (*Autoridade para as Condições de Trabalho*)⁸² 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 bodies 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, bodies and agents of the Public Administration must cooperate with the Ombudsman in the fulfilment of its mission.

The Ombudsman has also paid special attention to discrimination cases.

Action by the Commission for Equality and Against Racial Discrimination

According to Article 11 (1) of Law 93/2017, any litigation arising from the application of the law may be settled by means of a mediation procedure on the initiative of the Commission for Equality and Against Racial Discrimination or at the request of the parties and with the consent of the offender and the victim.

For offences committed under Law 93/2017, the Migration has the authority to initiate an administrative procedure. The decision, including the application of penalties and that the level of the fine, is the responsibility of the Permanent Commission of the Commission for Equality and Against Racial Discrimination.

The respondent has the right to appeal to the courts against the fines. 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 must 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 also applies to foreign nationals. However, the length and complexity of the procedure may act as deterrents to those seeking redress.

⁸² Portugal, Decree-law 167-E/2013 of 31 December 2013 (*Decreto-Lei nº 167-C/2013 de 31 de dezembro*), entered into force on 1 January 2014. Available at: [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 (*Decreto Regulamentar n.º 47/2012 de 31 de julho*), available at: <https://dre.pt/application/dir/pdf1sdip/2012/07/14700/0395903962.pdf>.

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,

‘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 establishes the penal mediation process).

Cases can be brought within a period of up to 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 offence.

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 a deterrent is the length of the procedure and the difficulty of 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 12 (1) of Law 93/2017, associations with the objective of combating discrimination based on the ground of race/ethnic origin, nationality, ancestry and place of 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 must 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.

NGOs registered abroad can also act on behalf or in support of victims.

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 National Institute for Rehabilitation (*Instituto Nacional para a Reabilitação*).

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 (CEARD) (*Comissão para a Igualdade e Contra a Discriminação Racial*) and the High Commissioner for Migration (HCM)⁸³ (*Alto Comissariado para as Migrações – ACIDI*). 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 an 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.

⁸³ ACIDI website: www.om.acm.gov.pt.

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.

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. Although membership is a necessary condition for trade union standing, this is not monitored, which means the trade union may also intervene in cases in which the worker is not a member of the trade union.

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.

According to Article 12 of Law 93/2017, NGOs with the objective of combating discrimination based on the ground of race/ethnic origin, nationality, ancestry and place of origin have the right to engage in judicial procedures on behalf of the interested persons, with their approval.

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.'

Disability NGOs (*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 ONGPDs.

Decree-law 106/2013 of 30 July 2013 defines the statute for NGOs of people with disabilities (ONGPD) as well as the state support for those organisations.⁸⁴ The title of ONGPD is specifically used for NGOs which work with 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.

⁸⁴ Portugal, decree-law 106/2013 of 30 July 2013 (*Decreto-Lei nº 106/2013 de 30 de julho*). Available at: <https://dre.pt/application/file/498646>.

Article 5(2) of this decree-law provides that, where crimes have been committed against people with disabilities, perpetrated on the ground 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.⁸⁵

The ONGPD with 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 set out in cooperation protocols adopted by the ONGPD and the INR. After approval, they are published on the INR IP website and funding is subsequently awarded.

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

In general NGOs can engage in support for 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 shifting the 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 12 (1) of Law 93/2017.

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.

⁸⁵ See Portugal, Decree-law 31/2012 of 9 February 2012 (*Decreto-lei 31/2012, de 9 de Fevereiro*), which approves the organic structure of the INR - National Institute for Rehabilitation [Lei orgânica do *Instituto Nacional para a Reabilitação*, I.P.]. Entry into force: 10 February 2012. Repealed Decree-law 217/2007 of 29 May.

The 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. LGBT organisations are also entitled to engage in the court proceedings when the case concerns issues outside employment.

c) Actio popularis

In Portugal, national law allows associations, organisations or 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 12 (1) of Law 93/2017 associations may act in support of rights and collective interests.

As for Article 31 of the New Civil Procedure Code, they can act in *acciones populares* when their aim is to protect unspecified persons or interests against discrimination or to protect fundamental rights. 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 for NGOs if 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 shifting burden of proof.

d) Class action

In Portugal, national law allows associations, organisations or 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 a 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 *acciones 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 bring proceedings in the 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 an 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.

The worker must indicate in their claim which ground is related to the difference of treatment that they have suffered and must 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 other colleagues.

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 93/2017 (Article 14 (1)). That means the victim of discrimination must present facts from which the occurrence of such discrimination may be inferred. It is up to the respondent to prove that the differences in treatment are not the result of any of the factors mentioned in the Law. 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 race/ethnic origin, nationality, ancestry or place of 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 must 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 procedures 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 13 of Law 93/2017, 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 93/2017 states that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions.

According to Article 16 (1) and (2) of Law 93/2017, fines may vary between one and ten times the monthly value of the index of social support for individuals and between four and twenty times the same monthly value for legal persons, respectively.

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 (Article 16 (5) of Law 93/2017).

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 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 (HCM) (*Alto Comissariado para as Migrações*) assisted by the Commission for Equality and Against Racial Discrimination (CEARD) (*Comissão para a Igualdade e contra a Discriminação Racial*).

Recently, the Commission for Equality and Against Racial Discrimination has undergone a restructuring in accordance with Law No. 93/2017 of 23 August 2017.⁸⁶ This law establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race/ethnic origin, nationality, ancestry⁸⁷ and place of origin⁸⁸ (entered into force on 1 September 2017 (Article 29 of Law No. 93/2017)).

Law 93/2017 repealed the former legal regime for non-discrimination on the ground of race and ethnic origin, seeking for a more cross-cutting and comprehensive normative approach concerning the prevention, prohibition and combating of discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin, and introducing significant modifications into the composition (Article 7) and the powers of the Commission for Equality and Against Racial Discrimination (Article 8).

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 provide the competent entities and bodies with recommendations for measures 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. Government entities, bodies and agencies must cooperate with the Ombudsman in the fulfilment of its mission.

The Ombudsman has also paid special attention to certain discrimination cases. 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 foreign nationals not admitted into the country. 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.

Scope of action, governance structure and membership of the designated bodies

The competences referred to in Article 13(2) of the Racial Equality Directive are currently exercised by the HCM, assisted by the CEARD.

The HCM is a public institution integrated into the Presidency of the Council of Ministers, with administrative and financial autonomy and its own assets. It is assisted by the CEARD, which is a consultative organ of the HCM.

The HCM 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

⁸⁶ Published on 23 August 2017, available at: <https://dre.pt/web/guest/home//dre/108038372/details/maximized>.

⁸⁷ Ancestry means family origin.

⁸⁸ This means place of birth.

government working within the Presidency of the Council of Ministers (Article 1(2) of Law 31/2014).

The CEARD promotes equality and non-discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin (Articles 1 and 8 (1) of Law No. 93/2017), covering all the areas that fall under the scope of the Racial Equality Directive and work at national level.

The competences of the HCM are laid down in Decree-law 31/2014 of 27 February 2014. Under Article 3 (Purpose and powers of the High Commission), its competences are as follows:

- to fight any forms of discrimination on the grounds of race, skin colour, nationality, ethnic origin or religion, through positive awareness, education and training activities, and also via the applicable sanctions specified in law;
- to raise public awareness and to sponsor studies on immigration, ethnic minorities, intercultural dialogue and inter-religious dialogue; and
- to promote dialogue between religions through increased knowledge of other cultures and religions and the promotion of an attitude of mutual respect and regard for diversity both within the national borders and in Portugal's relations with the rest of the world.

In addition, the HCM carries out surveys and publishes reports and recommendations.

It has commissioned academic experts to conduct surveys on discrimination and related issues and set up the Observatory for Immigration (*Observatório da Imigração*),⁸⁹ which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

For the purposes of the Racial Equality Directive, the most relevant functions of the person leading the HCM are:

- to coordinate and chair the Council for Migration;
- to coordinate and chair the CEARD and its Permanent Commission;
- to represent the High Commission;
- to supervise all HCM departments;
- to issue binding decisions concerning fines.

b) Political, economic and social context for the designated body

After overcoming the financial and public debt crises, there is more political support for the designated bodies. The current government, due to its own political left-wing tendency, but also due to the support of the Communist Party and the Left Bloc in the Parliament, is much more attentive to equality and non-discrimination issues in general and to the equality bodies in particular. However, the role of the equality bodies has not significantly increased in the last two years.

To the knowledge of the author of this report, there is no political interference in the governance of the bodies, but this may be the result of the fact that these bodies have little relevance in the context of the promotion of equality and non-discrimination.

During the years of the financial and public debt crises all public bodies suffered budget cutbacks and the HCM was no exception. However, there is no evidence of disproportionality compared to other public bodies. In 2016 (most recent information

⁸⁹ Observatório da Imigração, see website: www.oi.acidi.gov.pt/.

available) the budget of the HCM increased by EUR 1 million. 54% of the budget was allocated to non-profit associations.

There is an increasing level of popular debate supporting equality and diversity. The mass media often discuss issues of equality and non-discrimination on the grounds of race and ethnic origin and report situations in which equality and non-discrimination have been called in question.

By contrast, there is rather less public debate about the equality bodies, due to their low profile. In practical terms, there is no support for or hostility towards the equality bodies. Most people do not know who they are or what they do.

When there are issues relating to equality and non-discrimination on the grounds of race and ethnic origin, it is the member of government responsible for equality and citizenship or the members of parliament who are more concerned with these issues, such as the Left Bloc, which tend to intervene in the media. The participation of the equality bodies in this type of debate – when it exists – is accessory.

c) Institutional architecture

As we have already mentioned, the HCM has a mandate as a national institution for migration and when issues of discrimination on the grounds of race and ethnic origin, nationality, ancestry and place of origin arise, the HCM is assisted by the CEARD.

The HCM is not like an Ombudsman. In Portugal the Ombudsman is a constitutional body (Article 23 of the Portuguese Constitution), whereas the HCM was created by legislation.

Information on the percentage of staff resources and budget dedicated to the equality mandate is not available.

There is no updated information for 2017 concerning the nature and level of focus accorded to the equality/anti-discrimination mandate in the work of the designated body. However, the HCM's activity report for 2016 devotes just five of its 98 pages to the fight against racism and non-discrimination. Therefore, our assessment is that level of attention devoted to the equality/anti-discrimination mandate is rather low.

Previous activity reports had even less focus on equality and discrimination issues.

The visibility of the HCM (and the CEARD) is generally very low, including the equality mandate.

d) Status of the designated body/bodies – general independence

i) Status of the body

Being a public institution, according to Article 4 (1) of the Framework Law on Public Institutions (Law No.3/2004 of 15 January⁹⁰), the HCM is a public law legal person and has organs and its own assets.

As in all public institutions the governing body is designated by a joint ordinance (*portaria*) of the prime minister and the responsible member of the government, following a proposal from the latter (Article 19 (3) of Law No.3/2004 of 15 January). Therefore, the High Commissioner is not elected.

⁹⁰ Portugal, Law 3/2004 of 15 January [Lei n.º 3/2004 de 15 de Janeiro], available at: <http://data.dre.pt/eli/lei/3/2004/01/15/p/dre/pt/html>.

The budget for the HCM comes from several sources, such as: self-generated income (i.e. by payment for its services and publications); European Union and international financing; transfers of money from other national, regional or international bodies; and state budgetary resources.

The High Commissioner, assisted by the CEARD, has no specific budget.

The HCM is accountable to the Court of Auditors (*Tribunal de Contas*) for the way in which it spends its budget and for expenses incurred.

According to the Framework Law on Public Institutions (Article 34 of Law No.3/2004 of 15 January) and the HCM statutes, included in the Administrative Rule (*Portaria*) No. 227/2015 of 3 August,⁹¹ the HCM has the power to recruit and manage staff, which may be based on the Labour Code or on the General Regime for Contract Work for the Public Sector, which was approved by Law 35/2014 of 20 June 2014⁹² (Article 34 (1) of Law No.3/2004 of 15 January). In both cases, under the terms of Article 34 (3) of Law No.3/2004 of 15 January, staff recruitment shall respect the following principles:

- a) publicising the job offer by the most suitable means;
- b) equality of conditions and opportunities for candidates;
- c) reasons for the decision.

The HCM is under the direct authority of the prime minister or the responsible member of the government. This 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. The same applies to the CEARD.

The governance structure of the HCM comprises a Directive Council, a Single Tax Supervisor and a Council on Migration (Article 4 of Decree-law 31/2014 of 27 February 2014). The Directive Council comprises the High Commissioner, who presides, and another member (Article 5 of Decree-law 31/2014 of 27 February 2014). The Single Tax Supervisor is the body responsible for monitoring the legality, regularity and financial and patrimonial management of the HCM (Article 7 of Decree-law 31/2014 of 27 February 2014 and Article 26 of the Framework Law on Public Institutions - Law No.3/2004 of 15 January). The Council on Migration is the body for consultation, support and participation in the definition of the general lines of action of the HCM and the decision-making of the Directive Council, ensuring the participation and collaboration of public and private entities in the definition and implementation of migration policies (Article 8 (1) of Decree-law 31/2014 of 27 February 2014).

The CEARD, which specialises in equality and non-discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin, may function with an enlarged composition (with all members) or as a permanent commission (Article 7 (1) of Law No. 93/2017), composed of the president and two members designated by the commission (Article 7 (3) of Law No. 93/2017).

The CEARD is composed of the High Commissioner for Migration, who presides, one representative of each parliamentary group, one representative of the

⁹¹ Portugal, Administrative Rule 227/2015 of 3 August [*Portaria n.º 227/2015 de 3 de agosto*], available at: <http://data.dre.pt/eli/port/227/2015/08/03/p/dre/pt/html>.

⁹² Portugal, Law 35/2014 of 20 June [*Lei n.º 35/2014, de 20 de junho*] establishes the regime for employment relations in public services. The law entered into force on 1 August 2014 and was last amended by Law 84/2015 of 7 August. Available at: <https://dre.pt/web/guest/pesquisa-avancada/-/asearch/25676932/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Lei%22&types=SERIEI&numero=35%2F2014>.

members of the government responsible for 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 also includes three individuals of recognised merit, who are co-opted by the other members (Article 7 of Law 93/2017).

Apart from the members of Parliament, none of these members are elected.

The CEARD meets ordinarily once quarterly and extraordinarily whenever convened by the High Commissioner, on the recommendation of the permanent commission. The HCM is responsible for ensuring technical support and administrative facilities, as well as other functioning facilities (Article 9 of Law No. 93/2017).

ii) Independence of the body

The independence of the equality body is not stipulated in law. The HCM's powers are set out in Decree-law 31/2014 of 27 February 2014, and there is no guarantee of its independence. It must be emphasised that, from a legal point of view, the equality bodies are not independent.

The High Commissioner and the CEARD work under the authority of the prime minister. In practical terms, interference by political powers may be slight, but it cannot be said that the bodies work independently of the government.

In our opinion, the HCM is not an independent body.

e) Grounds covered by the designated body/bodies

The HCM deals with equality and non-discrimination not only on the grounds of race and ethnic origin, but also on the grounds of nationality, place of origin and language.

According to Article 3 of Decree-law 31/2014 of 27 February 2014, the mission of the HCM comprises working on the definition, implementation and evaluation of public policies, and sectoral policies on migration, relevant to the attraction of migrants in national, international and Lusophone contexts, and contributing to the integration of immigrants and ethnic groups, in particular the Roma communities, and the management and evaluation of diversity among cultures, ethnicities and religions.

Therefore, this Equality Body is more oriented towards discrimination against migrants than towards equality and non-discrimination on the grounds of race in general. In practice discrimination against migrants is its priority issue, as evidenced by the powers listed in Article 3 (2) of Decree-law 31/2014 of 27 February 2014 (mentioned above).

The CEARD is the specialised body for equality and non-discrimination on the grounds of race and ethnic origin.

f) Competences of the designated body/bodies – and their independent and effective exercise

i) Independent assistance to victims

- Independence

In Portugal, the HCM has the competence to provide independent assistance to victims, including to provide victims of discrimination with information necessary for the defence of their rights; to put forward parties, provided they give their consent, for mediation processes, without prejudice to non-judicial means of conflict resolution that are required by law; and to receive complaints and open administrative sanctions proceedings (*processos de contraordenação*).

According to Article 8 (2) of Law No. 93/2017, these competences are exercised by the CEARD.

Although not much information is available on how the equality bodies exercise these competences, we can probably assume that they are exercised in an independent way, without interference from the government.

However, it should be highlighted that the HCM has no competence to assist victims in judicial procedures, which could be more sensitive from a political point of view.

- Effectiveness

There is no information available on the effectiveness of the HCM.

- Resources

There is no specific budget allocated for independent assistance to victims and no specific staff.

ii) Independent surveys and reports

In Portugal, according to the law, the HCM could carry out surveys and publish reports. However, in practice, there are no relevant surveys or reports for 2017.

The HCM has previously commissioned academic experts to conduct surveys on discrimination and related issues and set up the Observatory for Immigration (*Observatório da Imigração*),⁹³ which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

- Independence

When reports are commissioned, the HCM's competence in this area is effectively exercised in an independent manner, in practice. This means that the prime minister and the government do not generally interfere directly in the work of the HCM (and the CEARD). The problem is that the CEARD and the HCM are almost invisible because they do not tend to exercise their competences.

⁹³ Observatório da Imigração, see website: www.oi.acidi.gov.pt/.

- Effectiveness

In terms of effectiveness, there are no data regarding the scale/level and quality of independent surveys and reports. However, when there are problems of racial discrimination in Portugal (which does not happen very often) the HCM is almost always absent.

Therefore, the general impression, at least among academics, is that the body is somewhat ineffective.

- Resources

Given the competences that the equality body effectively exercises, the level and quality of staff and financial resources available are sufficient. However, these resources would not be sufficient if the CEARD were to exercise all the new competences for which it is empowered by Law 93/2017.

iii) Independent recommendations

In Portugal, the CEARD may issue independent recommendations on discrimination issues. According to Article 8 (2) (d) of Law No. 93/2017, the CEARD may recommend the adoption of legislative, regulatory and administrative measures it deems appropriate for the prevention, prohibition and combating of discrimination on the grounds of race, ethnic origin and nationality and to make recommendations to the government on any related matter.

However, there is no evidence of any recommendation in recent years.

- Independence

In terms of independence, recommendations could be proposed in an independent manner, in practice.

- Effectiveness

In terms of effectiveness, there are no available data regarding the scale/level and quality of independent recommendations.

- Resources

Given the competences that the CEARD effectively exercises, the level and quality of staff and financial resources are sufficient.

iv) Other competences

The CEARD also has competences:

- to promote education, training and awareness-raising on human rights and the prevention and combating of discrimination on the grounds indicated in Article 1;
- to promote the establishment of codes of good practice in combating discrimination on the grounds indicated in Article 1 of the Law 93/2017;
- to propose measures aimed at removing provisions laws, regulations and administrative provisions against the principle of equality and non-discrimination;

- to articulate with the competent bodies in the field of discrimination on the grounds other than those indicated in Article 1 of Law No. 93/2017, in cases of multiple discrimination.

v) Positive duties

In Portugal, the non-discrimination law in general does not impose positive duties on employers, service providers and public authorities.

g) Legal standing of the designated body/bodies

In Portugal, the designated body (the HCM) has no legal standing to bring discrimination complaints either on behalf of identified victims or on behalf of victims who are not identified. In addition, the HCM has no legal standing either to bring discrimination complaints ex officio to court or to intervene in legal cases concerning discrimination, such as *amicus curiae*.

However, in accordance with Article 11 of Law No. 93/2017, any dispute emerging from the application of this law can be resolved through a mediation procedure, which is initiated by the CEARD or at the request of the parties, and with the consent of the offender and the victim or their legal representatives.

The CEARD does not have the power to refer a case to a court of law if mediation is unsuccessful. Claimants must seek judicial redress themselves, for instance in employment cases.

Only associations and non-governmental organisations have legal standing to bring discrimination complaints on behalf of identified victims or non-identified victims and to intervene in legal cases concerning discrimination (Article 12 of Law No. 93/2017).

h) Quasi-judicial competences

In Portugal, the equality bodies are not quasi-judicial institutions.

The HCM is not a quasi-judicial institution. It is a public institution with 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 administrative sanctions. Its decisions may be appealed in the courts.

Due to the scarcity of decisions (the last ones go back to 2014), no proper assessment can be undertaken on how decisions are respected, followed up and implemented.

There is no case law on this issue.

i) Registration by the body/bodies of complaints and decisions

In Portugal, the equality bodies register the number of complaints received and decisions by ground, field and type of discrimination (Article 24 of Law 93/2017).

These data are available to the public.

According to the HCM's activity report of 2016,⁹⁴ the CEARD received 119 complaints, of which 18 were considered to be administrative sanctions proceedings, 72 were referred to

⁹⁴ Available in Portuguese here: www.acm.gov.pt/documents/10181/27754/ACM_RA_2016_int.pdf/23b5460f-ff80-4410-b3d1-657415b968b6.

other entities, five were converted into mediation proceedings, nine were not admissible and the remaining await a preliminary decision.

According to the HCM's activity report of 2015,⁹⁵ the CEARD received 84 complaints, of which 13 were converted in administrative sanctions proceedings, 33 were referred to other entities, seven were converted into mediation proceedings, 11 were not admissible and the remaining await a preliminary decision.

According to the HCM'S activity Report of 2014,⁹⁶ the CEARD received 60 complaints, of which 32 were referred to other entities, six were converted into mediation proceedings and 20 were not admissible.

j) Planning

The HCM has two strategic plans - the Strategic Plan on Migration 2015-2020, approved by the Council Ministers Resolution No. 12-B/2015 of 20 March,⁹⁷ and the National Strategy for the integration of Roma communities 2013-2020, approved by the Council Ministers Resolution No. 25/2013 of 27 March.⁹⁸

The HCM has an annual work plan, which is included in the activities report of the previous year. This means the work plan for 2017 is part of the 2016 activities report. It is available on the HCM website.⁹⁹

The HCM publishes an annual activities report, which is available on its website.¹⁰⁰

According to Article 8 (4) of Law 93/2017, the CEARD shall elaborate an annual report on equality and non-discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin. This report should include information on discriminatory practices and applied sanctions, as well as impact assessment of the adopted measures on men and women, in articulation with the Commission for Gender Equality and the Commission for the Equality at Work and Employment.

This report must be sent to the Assembly of the Republic and the member of the government responsible for citizenship by the end of the first quarter of each year and afterwards it should be published on the website of the HCM (Article 8 (5) of Law No. 93/2017).

There is no recent evaluation of the implementation of the strategic plan of the equality bodies.

k) Stakeholder engagement

The equality bodies seek to engage civil society associations, such as SOS Racism, migrants' associations, Roma associations and local government entities, such as municipalities and public bodies.

⁹⁵ Available in Portuguese here: www.acm.gov.pt/documents/10181/27754/RA_ACM2015_AF-digital.pdf/e6981891-4429-4f0d-9dfb-1ad43f78a373.

⁹⁶ Available in Portuguese here: www.acm.gov.pt/documents/10181/43252/ACM+RA2014+final+net.pdf/69ab808c-d71c-4511-a574-91ba86625d84.

⁹⁷ Available in Portuguese here: www.acm.gov.pt/-/plano-estrategico-para-as-migracoes-pem-.

⁹⁸ Available in Portuguese here: www.acm.gov.pt/-/estrategia-nacional-para-as-comunidades-ciganas-enicc-concig.

⁹⁹ Available in Portuguese here: www.acm.gov.pt/documents/10181/43252/ACM+RA2014+final+net.pdf/69ab808c-d71c-4511-a574-91ba86625d84.

¹⁰⁰ www.acm.gov.pt/acm.

The equality bodies also engage with business/employer/service provider networks and organisations.

As far as we know the equality bodies do not engage with trade union or employee associations.

The level and nature of engagement by the equality bodies with the Roma and migrants' associations is the most visible and involves many activities, including cultural ones.

l) Accessibility

The HCM and the CEARD have accessible and publicly visible offices, at the same address.

The HCM has a central office for supporting the integration of migrants and a network of local and regional centres to support the integration of migrants in partnership with the municipalities and civil society.

The HCM conducts outreach activities to local areas and communities.

The HCM has procedures in place to identify and respond to the access needs of specific complainants, for instance for people who speak different languages and people with literacy issues. There is a telephone translation service and a migrant support line.

Apparently, the equality body only responds to and accommodates access needs relating to language.

m) Roma and Travellers

The specialised body in Portugal (the HCM) considers the Roma to be a priority issue.

The HCM is seeking 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 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 HCM 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 HCM 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 information on its website (www.dgert.msess.pt/) on national policy measures in this field as well as on the European Union actions to combat discrimination. It also makes the relevant documents available.

Dialogue with NGOs

Several government agencies and the HCM 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 activities in this area. NGOs are represented in several commissions.

The HCM promotes and engages in dialogue with NGOs which 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 HCM'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 HCM, 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 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 development of policies promoting social integration and combating exclusion.

- Commission for Equality and Against Racial Discrimination (CEARD) (*Comissão para a Igualdade e contra Discriminação Racial*) – 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 – Law on freedom of religion);
- National Institute for Rehabilitation (*Instituto Nacional para a Reabilitação* (INR))¹⁰¹ (Decree-law 217/2007 of 29 May 2007);
- National Council for the Rehabilitation and Integration of People with Disabilities (*Conselho Nacional para a Reabilitação e Integração das Pessoas com Deficiências* (CNRIPD)) (Article 1 of Decree-law 225/97 of 27 August 1997);
- Permanent Council for Social Dialogue (*Conselho Permanente de Concertação Social* (CPCS)) (Decree-law 74/84 of 2 March 1984);
- Economic and Social Council (*Conselho Económico e Social* (CES)) (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 Commission for Equality and Rights of Women (*Comissão para a Igualdade e para os Direitos das Mulheres*) and also the functions of the Commission for Equality in Employment and Labour (*Comissão para Igualdade no Trabalho e Emprego*) 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 bound by them and can

¹⁰¹ Instituto Nacional para a Reabilitação (INR) website: www.inr.pt/.

be so declared by any court, as provided for 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 HCM 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 Fifth National Plan for Equality – Gender, Citizenship and Non-discrimination 2014-2017 (*V Plano Nacional para a Igualdade – Género, Cidadania e não Discriminação 2014-2017*) was approved in December 2013. This plan implemented 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 also be 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 that support mainstream education. In higher education, faculties have an admissions quota of 2 % of total intake reserved for students with disabilities.

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)

The current government and Parliament have been making significant efforts to improve the compliance of Portuguese legislation with the directives, as evidenced by the approval of Law 93/2017, mentioned many times above.

However, the potential breach of the directives concerning the lack of, at least, formal independence of the specialised body that deals with racial and ethnic discrimination has not been completely removed. Nevertheless, the new Law 93/2017 makes significant efforts to ensure the specialised bodies conform to the powers envisaged in Article 13 of the directive.

Other legislation is in compliance with the directives.

11.2 Other issues of concern

Other key issues of concern with regard to the implementation and practical application of the anti-discrimination directives at 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 the country's financial and economic weakness, for instance, does not function properly. This particularly applies to the implementation of social rights.
- Scarcity of case law – as this report shows, relevant case law is rather rare, due to a certain lack of awareness of discrimination issues.
- Barriers to access to justice – the length of the procedures and the costs involved are two disincentives to accessing justice.
- Lack of independence of the equality body.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

Law 93/2017 23 of August 2017 establishing the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race/ethnic origin, nationality, ancestry and place of origin.¹⁰²

12.2 Case law

Name of the court: Oporto Court of Appeal

Date of decision: 23 November of 2017

Name of the parties: -----

Reference number: Procedure No 2645/15.5T8GDM.P1

Address of the webpage:

www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/d599c71c6843caf0802581f40059c0c5?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o

Brief summary: The complainant filed a petition seeking the conviction of the defendant and the payment of EUR 7 500 as compensation for civil liability for non-material damage. Furthermore, the complainant requested the payment of interest due at the legal rate from the date of payment until full payment. For this the defendant argued, in summary, that the complainant resides in an autonomous part of a building of which the defendant was the administrator. The complainant, being visually impaired, requested the defendant to send all the documents digitally, which the defendant did not do, causing the complainant moral damages.

The defendant contested the case, challenging the facts alleged by the complainant, and claiming, moreover, that the irregularities verified were due to his inexperience, he did not intend to humiliate or discriminate against the defendant, nor put him in a disadvantageous position compared with the other apartment owners. The administration and the defendant did not have adequate means.

After hearing the case, without a prior hearing or an order to identify the subject of the litigation and set forth the topics of the evidence, a final hearing and a judgment were handed down on 30 March 2010, which dismissed the action and acquitted the defendant's claim.

Disagreeing with this decision, the complainant appealed to the court of second instance. This appeal was based on Law 46/2006 of 28 August 2006, which prohibits and punishes all forms of discrimination based on disability and on a pre-existing risk to health and on the Civil Code provisions of non-contractual civil liability.

The Court of Appeal confirmed the decision of the first instance, deeming that the complainant did not present sufficient facts to show that he had been discriminated against by the defendant, as his (complainant) fault, in the administrator / apartment relationship such as to substantiate the obligation to compensate for non-material damage.

The proven and indicated omissions by the defendant, as administrator of the apartment block and to the person of the complainant do not constitute discriminatory practices on the ground of visual impairment, which would imply an obligation to compensate for non-material damages.

It was not proved that the instability, anxiety and aggravation of the mental health of the complainant was directly and necessarily due to the defendant's omissions in the scope of this apartment block / administrator relationship. In accordance with the provisions of

¹⁰² Available at: <https://dre.pt/web/guest/home/-/dre/108038372/details/maximized>.

Article 563 CC, this evidence would have been necessary. In this case, other anomalous circumstances contributed decisively to the aggravation of the mental health of the complainant.

Name of the court: Lisbon Court of Appeal

Date of the decision: 21 December 2017

Name of the parties: -----

Reference number: Procedure No. 3225/16.3T8PDL.L1-4

Address of the webpage:

www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/1d9ea2c39da4ce0180258220003c9411?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o

Brief summary: Following a situation of unlawful dismissal, the first instance judgment ordered the employer to pay damages to the employee based on harassment as set out in Article 29 (1) of the Labour Code.

The Court of Appeal assessed whether in the present case the requirements for harassment are satisfied, concluding that the employer exercised harassment against the worker because:

- a) over a period of one month, the worker's supervisor adopted a set of inappropriate behaviours;
- b) the supervisor had at least two outbursts of anger that ended with the expression, "I do not want you here, you are useless";
- c) the worker's colleagues were not allowed to give assistance to the worker when she was nervous after one of the supervisor's outbursts;
- d) the following month the supervisor informed the worker she was fired;
- e) the disciplinary procedure was not followed.

Name of the court: Lisbon Court of Appeal

Date of the decision: 5 April 2017

Name of the parties: -----

Reference number: Procedure No. 3805/15.4T8BRR.L1-4

Address of the webpage:

www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/a788e3eb96ecef0880258114004d2dc6?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o

Brief summary: In this case, the employee terminated the contract of employment that linked him to the employer, because he was denied the status of student-worker and had been a victim of acts of moral harassment practised by the Vice-President of the enterprise, from the moment he applied for it, which caused him health problems.

When organising the working hours of a student worker, the employer should, whenever possible, adjust the work schedule so as to enable the student to attend classes and travel to their educational establishment. If this is not possible, the worker is entitled to a work exemption, depending on the normal weekly working period. In this case, it was five hours (Article 90, paragraph 3, c) of the CT) and not eight as the employee wanted.

Working hours should be established by agreement between employer and employee and should also regulate the form of compensation for the work provided and this can include an equivalent reduction in working time. In this case, the law gives the worker the initiative to determine the exact moment at which the reduction must take place or, failing that, the employer must establish it.

Concerning the moral harassment either with or without a discriminatory intent, the Court considered that none had been proved. Consequently, the employee could not invoke harassment as a cause for the termination of the employment contract.

Since the work contract had a duration of 12 months, pursuant to paragraph 3 of Article 245 of the Labour Code, the total amount of leave or corresponding remuneration may not exceed the annual holiday period, taking into account the duration of the contract.

Name of the court: Évora Court of Appeal

Date of the decision: 13 July 2017

Name of the parties: -----

Reference number: Procedure No. 532/11.5TTSTR.E1

Address of the webpage:

www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/f016d253ef814c1980258192002ee9ea?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o

Brief summary: BB (employee) sued CC, SA (employer), invoking moral harassment in his job which led him to terminate his contract, requesting recognition of the lawfulness of his act and that the employer should be ordered to compensate him according to his remuneration and his seniority, to return the amount discounted by advance notice, to pay compensation for non-pecuniary damages in the amount of EUR 50 000.00 and also to deliver all the documents and detailed information regarding the Pension Fund. The Court of Appeal of Évora decided:

1. In situations of a continuing or lasting character, which are aggravated with the passage of time, the 30-day period available to the worker to resolve the contract with invocation of just cause is only counted from the moment the effects of the violation of the employer assume such seriousness that the continuation of the contract of employment becomes intolerable for the worker.
2. The 30-day period shall begin to run only when the worker is aware of all the facts which enable them to judge the seriousness and extent of the damage to their rights, in particular in order to assess whether it is possible to maintain the employment relationship.
3. The judgment to be formulated regarding the expiry of the right of withdrawal does not coincide with the evaluation of just cause.
4. Bullying is characterised by the repetitive nature of the conduct, the persistence of hostility, and the consequences on the physical and mental health of the victim and their employment.
5. According to the motivation of the conduct, two types of psychological harassment occur: emotional / psychological harassment, usually aimed at obtaining a psychological effect on the victim, desired by the harasser (*animus nocendi*); and strategic harassment, which leads to a perverse management technique, aimed at defined strategic objectives, used as a means to circumvent prohibitions of dismissal without just cause, and, on the other hand, as an instrument for changing power relations in the workplace, work or to implement certain corporate culture and / or discipline standards.
6. An unsuccessful negotiation for revocation of the contract of employment by mutual agreement does not constitute a culpable violation of the worker's legal or conventional guarantees, especially when the company's compensation proposal is presented in amounts that are much higher than those that would have resulted from the mere application of the contract's legal criteria.
7. There is no moral harassment which would render it impossible to maintain the employment relationship in the case of a manager with considerable autonomy due to his position and seniority in the company, who for three years coexists peacefully with the separation of areas of business that the company operated (imposed by the intervention of a public authority), continuing to direct one of these areas and being involved in relevant management activities, participating in the process of restructuring the business and developing the business model for the next five years (2011 to 2015).
8. The non-existence of moral harassment is also implied by the fact that the employee continues to receive awards of merit and is offered the direction of a new area of business of the company.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Portugal
Date: 1 January 2018

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 28/2016 of 23 August 2016 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 93/2017 Abbreviation: 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 of adoption: 23 of August 2017 Entry into force: 1 September 2017 Latest amendments: N/A Web link: https://dre.pt/web/guest/home/-/dre/108038372/details/maximized Grounds covered: race/ethnic origin, nationality, ancestry and territory of origin
	Administrative law
	Material scope: Social protection, social assistance, education, access to and supply of goods and services, housing, health and culture
	Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate, discrimination by association, and multiple discrimination and legal regime of administrative 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: 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	Title of the law: Law 38/2004 Abbreviation: N/A Date of adoption: 18 August 2004 Latest amendments: N/A

(including amending legislation)	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 the law: Decree-law 31/2014 Abbreviation: HCM 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
Title of legislation (including amending legislation)	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: 1 January 2018

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	25.11.2016	No, derogations/reservations	Yes	Yes
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	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	07.05.2002	No	N/A	No
International Covenant on Economic, Social and Cultural Rights	07.10.1976	31.07.1978	No	Yes	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

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries
(http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>)

