



European
Commission

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

Country report

Non-discrimination

Portugal

2019

including summary



Justice
and Consumers

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

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Portugal

Ana Maria Guerra Martins

Reporting period 1 January 2018 – 31 December 2018

***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, 2019

© European Union, 2019

PDF ISBN 978-92-76-00234-5

ISSN 2599-9176

doi:10.2838/947829

DS-BB-19-031-EN-N

CONTENTS

EXECUTIVE SUMMARY	5
INTRODUCTION	13
1 GENERAL LEGAL FRAMEWORK	15
2 THE DEFINITION OF DISCRIMINATION	18
2.1 Grounds of unlawful discrimination explicitly covered	18
2.1.1 Definition of the grounds of unlawful discrimination within the directives	18
2.1.2 Multiple discrimination	20
2.1.3 Assumed and associated discrimination	20
2.2 Direct discrimination (Article 2(2)(a))	21
2.2.1 Situation testing	22
2.3 Indirect discrimination (Article 2(2)(b))	22
2.3.1 Statistical evidence	23
2.4 Harassment (Article 2(3))	25
2.5 Instructions to discriminate (Article 2(4))	26
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	27
3 PERSONAL AND MATERIAL SCOPE	30
3.1 Personal scope	30
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)	30
3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)	30
3.1.3 Private and public sector including public bodies (Article 3(1))	31
3.2 Material scope	31
3.2.1 Employment, self-employment and occupation	31
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))	32
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	33
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))	33
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))	34
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	34
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	36
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	36
3.2.9 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)	40
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	41
4 EXCEPTIONS	43
4.1 Genuine and determining occupational requirements (Article 4)	43
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	43
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	44
4.4 Nationality discrimination (Article 3(2))	45
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	45
4.6 Health and safety (Article 7(2) Directive 2000/78)	46

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	47
4.7.1	Direct discrimination	47
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	48
4.7.3	Minimum and maximum age requirements	49
4.7.4	Retirement	49
4.7.5	Redundancy	51
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)	52
4.9	Any other exceptions	52
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	53
6	REMEDIES AND ENFORCEMENT	55
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	55
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	58
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	63
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	64
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	64
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	68
8	IMPLEMENTATION ISSUES	76
8.1	Dissemination of information, dialogue with NGOs and between social partners	76
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	77
9	COORDINATION AT NATIONAL LEVEL	79
10	CURRENT BEST PRACTICES	80
11	SENSITIVE OR CONTROVERSIAL ISSUES	81
11.1	Potential breaches of the directives (if any)	81
11.2	Other issues of concern	81
12	LATEST DEVELOPMENTS IN 2018	82
12.1	Legislative amendments	82
12.2	Case law	82
	ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION	85
	ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS	87

EXECUTIVE SUMMARY

1. Introduction

Portugal has a long tradition of contact with other cultures and peoples. Due to 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.¹ Therefore, such parties do not exist.

No conflicts have been reported between religious groups in 2018. 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 completely adapted to meet the needs of other religions, in particular those of Islam. Notwithstanding these factors, religious diversity remains a fairly non-controversial 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 whole 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 austerity measures that operated between 2010 and 2015 in particular, 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 reintroduced. These measures contribute to a more equal society in general.

At the beginning of 2018, the Council of Ministers adopted a resolution³ to approve the strategy *Portugal + Equal – National Strategy for Equality and Non-Discrimination 2018-2030*. The strategy includes three plans for action.⁴ The third plan concerns the fight against discrimination on the grounds of sexual orientation, identity, gender expression and sexual characteristics.

More recently, the Government amended the strategy *National Roma Communities Integration Strategy 2013-2020*.⁵

¹ Portugal, Portuguese Constitution, Article 46(4); Organic Law 2/2003, on political parties, 22 August 2003, Article 8, last amended by Organic Law 1/2018, 19 April 2018, available at:

https://www.parlamento.pt/Legislacao/Documents/Legislacao_Anotada/LeiPartidosPoliticos_Anotado.pdf.

² See Portugal, Porto Court of Appeal, judgment No. 1013/12.5TTMTS.P1 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 Portugal, Council of Ministers, Resolution 61/2018, 8 March 2018, *Diário da República*, Série I-A, No. 97, 21 May 2018.

⁴ The first two plans of action are the plan to promote equality and non-discrimination between men and women, and the plan to combat violence against women and domestic violence.

⁵ Portugal, Council of Ministers, Resolution 154/2018, 8 November 2018, *Diário da República*, Série I-A, No. 230, 29 November 2018.

2. Main legislation

The Portuguese Constitution⁶ includes a specific general clause on the principle of equality.⁷ Article 13(1) states that '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.'

This enumeration is not exhaustive, and other grounds such as age are protected.

The Constitution develops these principles in its 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); Protocol 12 of the ECHR; the International Convention on the Elimination of All Forms of Racial Discrimination; the revised European Social Charter; the UN Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, including the optional protocols on the right to individual and collective complaints; the International Labour Organization Convention 111 on Discrimination; and the UN Convention on the Rights of Persons with Disabilities. According to 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.'⁸

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 or ethnic origin, nationality, ancestry and place of origin within the scope of social protection, including in social security and healthcare, social benefits, education, access to and the supply of goods and services that 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 (CEARD) and the legal regime of administrative sanctions. Finally, it introduces a mediation process.

Law 38/2004 defines the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities.⁹ Law 46/2006¹⁰ prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*). Law 46/2006 – excepting the provisions with budgetary implications – came into force on 29 August 2006 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).

⁶ An English version of the Constitution can be consulted on the website of the Portuguese Parliament, available at: www.parlamento.pt.

⁷ Portugal, Portuguese Constitution, Article 13.

⁸ Portugal, Portuguese Constitution, Article 8(2).

⁹ Portugal, Law 38/2004, 18 August 2004, available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

¹⁰ Portugal, Law 46/2006, 28 August 2006, available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

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

With regard to employment, Law 7/2009 of 12 February 2009, which approves the Labour Code, transposes, among many other directives, 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 labour law there are specific rules against discrimination on the grounds of age, sexual orientation, disability, religion and political convictions, in addition to rules against discrimination on the grounds of race or ethnic origin.

Law 3/2011, which forbids any discrimination in access to and the exercise of self-employment, and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, came into 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 it 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.¹¹

Article 240 of the Criminal Code¹² 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 by legislation adopted with the specific purpose of transposition. Beyond this legislation, discrimination is prohibited in various other statutes, as well as in 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 applies in Portugal.

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

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

Article 3(1)(b) of Law 93/2017; Article 3(a) and Article 4 of Law 46/2006; Article 23(1)(a) of the Labour Code; and Article 5(2)(a) of Law 3/2011 are the main provisions that define direct discrimination.

¹¹ Portugal, Law 3/2011, 20 February 2011, available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

¹² Portugal, Criminal Code, approved by Decree-Law 48/95, last amended by Law 30/2015, 22 April 2015, available at: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis.

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

Article 3(1)(c) of Law 93/2017; Article 3(b) of Law 46/2006 of 28 August 2006; Article 23(1)(b) of the Labour Code; and Article 5(2)(b) of Law 3/2011 are the main provisions that define indirect discrimination.

Since 2017, national law also prohibits discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person).¹³

In a recent case involving the regulation of parental responsibility for a child with severe disability, the Court of Appeal of Lisbon took into consideration discrimination by association, deciding that both parents had the same duties vis-à-vis the child. The Court therefore ordered joint custody, even though the parents disagreed. The Court considered that in a situation in which a minor is seriously disabled and is totally dependent on third parties for any act of daily life, an order for joint custody fulfils the very important goal of involving parents under conditions of strict equality concerning personal and professional sacrifices. Although the decision does not expressly concern discrimination by association in employment, this ground was weighed in the Court's decision to order joint custody of the minor, because the mother alleged that she was severely harmed in respect of her professional life.¹⁴

Harassment is defined and prohibited by the Criminal Code, the Labour Code, and Law 3/2011. More recently, Law 93/2017¹⁵ 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.

Instructions to discriminate are dealt with as discrimination.

In Portugal, multiple discrimination is prohibited in Law 93/2017 (Article 3(1)(e) and Article 4(1)). According to these provisions, multiple discrimination is discrimination that results from a combination of two or more discriminatory factors.

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

A disabled person is defined as a person who, due to the loss or abnormality of a psychological, intellectual, anatomical structure or function that is likely to limit capacity, may be considered at a disadvantage in the exercise of normal activities, taking into account age, sex and prevailing socio-cultural factors. The definition of 'disability' in Portugal goes beyond a simple concept of disability, 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.

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

¹³ Portugal, Law 93/2017, 23 August 2017, Articles 3(1)(d) and 4(1).

¹⁴ Portugal, Court of Appeal of Lisbon, judgment of 28 November 2018, procedure 2261/17.7T8PDL.L1-7, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/10988407e6d97c068025838d005c694e?OpenDocument&Highlight=0,defici%C3%Aancia,poder,paternal>.

¹⁵ Portugal, Law 93/2017, 23 August 2017, Article 3(1)(f).

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.

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 also 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:

The High Commission for Migration (HCM) (Alto Comissariado para as Migrações – ACM) assisted by CEARD. The mission of this body is to collaborate in the mainstreaming of equal treatment based on racial or ethnic origin throughout:

- 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. This body does not enforce the law.

The Authority for Working Conditions (Autoridade para as Condições do Trabalho – 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 enforcing anti-discrimination law is very important. However, this body has competence only in employment. 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.

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, which defines their statutory basis.

Law 46/2006 also provides, in Article 15(1), that ONGPDs and all organisations that defend and promote 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, which approves the procedural rules for administrative offences in the areas of labour and social security, also grants trade unions legal standing to intervene in administrative proceedings in support of a worker.

With regard to proof of discrimination, once some elements of proof of the existence of discrimination have been established, the burden of proof will shift, and the respondent has a duty to prove that the facts alleged are not discriminatory. This principle does not apply to criminal procedures or to actions in which, according to the law, it is the responsibility of a court or other jurisdiction to carry out the investigation. In practice, this principle has raised some difficulties in the courts.

Statistics, if available, can be used as evidence. They are considered as documents and can 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 situation 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, CEARD or 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, which are doubled for legal persons.

6. Equality bodies

The High Commission for Migration (HCM), formerly the High Commission for Immigration and Intercultural Dialogue (Alto Comissariado para a Imigração e Diálogo Intercultural – ACIDI),¹⁶ was created by Decree-Law 31/2014.¹⁷ The HCM is responsible for the promotion of equality of treatment for everyone, without any discrimination on the grounds of racial or ethnic origin, and for the promotion of dialogue with, and the integration of, immigrants, ethnic minorities and religions in the country.

The HCM is assisted by CEARD, which is responsible for supervising adherence to Law 93/2017. In order to achieve its goals, the HCM has acquired more powers, which include the ability:

- to publicise cases of violation of this law (either court cases or cases brought to the HCM's attention);

¹⁶ The High Commission for Immigration and Intercultural Dialogue was regulated by Decree-Law 167/2007, 3 May 2007.

¹⁷ Portugal, Decree-Law 31/2014, 27 February 2014, repealing Decree-Law 167/2007 of 3 May 2007 and replacing the High Commission for Immigration and Intercultural Dialogue with the High Commission for Migration, available at: <https://dre.pt/application/file/572214>.

- 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 HCM also retains some of the powers awarded to the previous body, such as the power:

- 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 HCM has been expanded and currently comprises the High Commissioner for Migration, who acts as the chair; one representative of each parliamentary group; one representative among 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; one representative of the regional government of the Azores and Madeira; two representatives of migrants' associations, anti-racist associations, human rights associations, trade unions and employers' associations; and one representative of the Roma communities. It also includes three individuals of recognised merit, who are chosen by the other members. It does not have the power to bring any cases before the courts or to assist complainants in doing so.

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 been not many reports of cases of discrimination on the grounds of race, ethnic origin, religion, disability, sexual orientation or gender. However, this does not mean that such cases do not exist.

In Portugal, it is common to approve legislation that is 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 burden on 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. There are therefore very few judicial decisions on such issues. There are two main reasons for this. First, for all judicial procedures, victims have to instruct a lawyer and advance some funds. Secondly, the length, complexity and difficulty of obtaining evidence may act as a disincentive to victims seeking redress.

However, it should be noted that in 2018, a case involving discrimination by association reached a higher court.

Administrative complaints are more frequent. As they usually achieve the victim's objective of ending the discrimination and/or being compensated for damages –

according to Portuguese law, damages can be ordered in administrative proceedings – they are often considered to provide 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.

INTRODUCTION

The national legal system

According to Article 1 of the Constitution of the Portuguese Republic of 1976, '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)).

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 in which they are warranted by national interest (Article 161(j) of the Constitution).

The Assembly of the Republic has exclusive legislative powers on some matters, and partially exclusive legislative powers on others. For instance, it 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 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 multifaceted, 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 93/2017,¹⁸ which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin.¹⁹
- Law 38/2004, which defines the general legal basis for the prevention of the causes of disability and the training, rehabilitation and participation of people with disabilities.²⁰
- Law 46/2006, 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.²¹ This law was regulated by Decree-Law 34/2007.²²
- Labour Code (Law 7/2009),²³ which transposes, among many other directives, 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 2018 it was amended by Law 14/2018.²⁴
- Law 3/2011, which forbids any discrimination in access to and the exercise of self-employment, and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC.²⁵
- The Criminal Code, approved by Decree-Law 48/95, last amended by Law 44/2018²⁶ (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 the grounds of race, religion or sexual orientation; Articles 251 and 252 – insults on the grounds of religion; Article 253 – violence or threats against funeral processions or ceremonies; and Article 254 – desecration of a corpse or a cemetery.
- Decree-Law 163/2006²⁷ approves the standards and rules governing physical access to buildings and public spaces.

¹⁸ Portugal, Law 93/2017, 23 August 2017, available at: <https://dre.pt/web/guest/home/-/dre/108038372/details/maximized>.

¹⁹ This amounts to place of birth.

²⁰ Portugal, Law 38/2004, 18 August 2004, available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

²¹ Portugal, Law 46/2006, 28 August 2006, available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

²² Portugal, Decree-Law 34/2007, 15 February 2007, available at: <https://dre.pt/web/guest/pesquisa/-/search/518015/details/maximized>.

²³ Portugal, Law 7/2009, 12 February 2009, available at: http://www.dgaep.gov.pt/upload/Legis/2009_1_07_12_02.pdf.

²⁴ Portugal, Law 14/2018, 19 March 2018, available at: http://cite.gov.pt/asstscite/downloads/legislacao/Lei_14_2018.pdf.

²⁵ Portugal, Law 3/2011, 15 February 2011, available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

²⁶ Portugal, Law 44/2018, 9 August 2018, available at: <https://dre.pt/web/guest/pesquisa/-/search/115946549/details/maximized>.

²⁷ Portugal, Law 163/2006, 8 August 2006, 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 of Portugal includes the following general provisions dealing with non-discrimination:

- Article 13 is a specific general clause on the principle of equality. Paragraph 1 enshrines the principle of equal treatment before the law and paragraph 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 who are 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 that are not predominantly technical and the rights and duties which, according to the Constitution or the law, are restricted to Portuguese citizens.
- Article 26(1) enshrines the right to legal protection against any form of discrimination. The Constitution thereby guarantees legal remedies for violations of the anti-discrimination provisions.

In addition to these general principles and provisions, the Constitution includes, in the chapter on workers' rights, freedoms and guarantees, a prohibition on 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. 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 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 Article 59(1) of the Constitution does not expressly refer to sexual orientation or to disability, it must be interpreted in connection with Article 13, which forbids discrimination on a non-exhaustive list of grounds. This list can include the protection of other grounds, such as age.

In Title III, which concerns economic, social and cultural rights and duties, the Constitution includes the right to the protection of health (Article 64(2)(a) and (b)). This right is universal. It 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, tends to be free of charge, and by the creation of economic, social, cultural and environmental conditions that specifically guarantee the protection of childhood, youth and old age. The Constitution charges the state, as a priority, with the responsibility of guaranteeing every citizen, regardless of their economic situation, access to preventive, curative and rehabilitative medical care (Article 63(3)(a)).

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; to provide for the treatment, rehabilitation and integration of citizens with disabilities and 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 the rights of those citizens, 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 that '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'. 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)). 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, which enshrines the general clause on the principle of equality.

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).²⁸

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

²⁸ Portugal, Constitutional Court, judgment No. 232/2003 of 13 May 2003, available at: www.tribunalconstitucional.pt/tc/acordaos/.

substantive consequences, given that the legal regimes of both groups of fundamental rights are rather different.

Article 18(1) of the Constitution establishes the legal force of the provisions on rights, freedoms and guarantees. It 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 that 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 binding only when special conditions are met (for instance, when sufficient administrative and financial resources are provided by the Government). On the other hand, according to an alternative doctrinal approach, although Article 18 of the Constitution does not apply to the binding effect of social rights, they are supposed to be similar to the rights, freedoms and guarantees in that respect. 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. Where 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.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives:

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) Racial or ethnic origin

Racial discrimination is not defined in national law.

Law 93/2017, which establishes 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 Law 93/2017 sets out a large number of discriminatory practices that are forbidden.

Discrimination on the grounds of racial origin is also prohibited 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 covered in Article 13 of the Portuguese Constitution.

In Portugal, a culture of taking judicial action against discriminatory practices is almost non-existent. Therefore, in spite of exhaustive research by the author of this report, it appears that in 2018 there was no case law in this area.

However, in the author's view, the Portuguese courts would, if such a case was brought to court, decide in accordance with the definition of 'ethnicity' provided by the Court of Justice of the European Union (CJEU) in its *CHEZ* judgment (C-83/14, paragraph 46).

b) Religion and belief

The term 'religion' is also not defined in national law. However, according to Law 16/2001 (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)).

Although there is no case law on this issue, in the opinion of the author, the definition of religion provided by the CJEU in *Achbita* (C-157/15, paragraph 28) must be observed by Portuguese courts where it coincides with the definition followed by the European Court of Human Rights.

c) Disability

In contrast, Law 38/2004, 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, as, according to the rules and principles of legal interpretation, all provisions must be interpreted in systematic way. The definition is in accordance with the concept used in the CJEU's judgment of 11 April 2013 in *Ring and Skouboe Werge* (joined cases C-335/11 and C-337/11; 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 2018, there were no judgments dealing with discrimination on the grounds of disability.

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 in Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, and complements Law 38/2004, which defines the general principles of the legal system on 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. 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 (Article 3(b)).

The concept of 'disability' that can be extracted from a joint reading of Law 38/2004 and Law 46/2006 is in accordance with the CJEU's judgment in *Ring and Skouboe Werge*.

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

d) Age

With regard to the ground of age, the Constitution includes references to childhood (Article 69), youth (Article 70) and the third age (Article 72) without mentioning the specific ages that correspond to each status.

There are no restrictions on 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, and 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.

2.1.2 Multiple discrimination

Multiple discrimination is prohibited in the recent Law 93/2017 (Article 3(1)(e) and Article 4(1)).

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

In Portugal, there is no case law dealing with multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

Law 93/2017 prohibits any form of discrimination. Discrimination based on a perception or assumption of a person's characteristics is prohibited in Article 4(1) of the said law.

There is no recent case law dealing with discrimination by assumption.

b) Discrimination by association

Law 93/2017 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 including nationality, ancestry and place of origin etc.

Portuguese law is in line with the CJEU's judgment of 17 July 2008 in *Coleman v Attridge Law and Steve Law* (C-303/06; ECLI:EU:C:2008:415).

In a recent case²⁹ involving the regulation of parental responsibility of a child with severe disability, the Court of Appeal of Lisbon took into consideration discrimination by association, deciding that both parents had the same duties vis-à-vis the child. The Court therefore ordered joint custody, even though the parents disagreed. The Court considered that in a situation where a minor is seriously disabled and is totally dependent on third parties for any act of daily life, an order for joint custody fulfils the very important goal of involving parents under conditions of strict equality concerning personal and professional sacrifices. Although the decision does not expressly concern discrimination by association in employment, the mother alleged that her professional life was profoundly harmed by the duties she had vis-à-vis the child and that she was discriminated against in employment due to this situation. This argument weighed heavily in the Court's decision to order joint custody of the minor.

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

a) Prohibition and definition of direct discrimination

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

Article 3(1)(b) of Law 93/2017 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 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

²⁹ Portugal, Court of Appeal of Lisbon, judgment of 28 November 2018, procedure 2261/17.7T8PDL.L1-7, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/10988407e6d97c068025838d005c694e?OpenDocument&Highlight=0,defici%C3%A2ncia,poder,paternal>.

‘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 Article 3(1)(b) of Law 93/2017 refers both to individuals and groups.

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

b) Justification for direct discrimination

The law permits direct discrimination to be justified in a very few areas that are 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 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 in national law. It cannot be used as evidence in court, as the New Code of Civil Procedure³⁰ 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 and defined in national law. The definition of indirect discrimination in Portuguese law complies with the definitions given in the directives.

Law 93/2017 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.’

³⁰ Portugal, Law 41/2013, 26 June 2013, approving the Code of Civil Procedure, entered into force on 1 September 2013.

Law 46/2006, 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 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 in relation to which 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 CJEU and of the European Court of Human Rights. However, no such cases have come to court so far.

2.3.1 Statistical evidence

a) Legal framework

In Portugal, there is legislation regulating the collection of personal data.

This is Law 67/98,³¹ on the protection of personal data, which was amended by Law 32/2008 of 17 July 2008.

In spite of the entry into force of the General Data Protection Regulation (GDPR) on 26 May 2018, this law shall remain in force in all respects that are not contrary to the GDPR until it is amended, replaced or revoked.

In fact, the Government has presented to Parliament a proposal to implement the GDPR (Proposal No. 120/XIII), but so far it has not yet been approved.

Personal data, which were defined in Article 3 of Law 67/98, are now defined in Article 4(1) of the GDPR. Article 9 of the GDPR replaces Article 7(1) of Law 67/98, which dealt

³¹ Portugal, Law 67/98, on the protection of personal data (*Lei da Protecção de Dados Pessoais*), 26 October 1998, *Diário da República*, Série I-A, 26 October 1998.

with the processing of personal data. The exceptions to the law were contained in Article 7(2) and (3). Currently, Article 9 of the GDPR admits an extensive number of exceptions.

Aside from the Law on Data Protection, Article 17 of the Labour Code also covers the protection of personal data. Employers are, in general, allowed to keep records of the personal data of their workers only after obtaining permission from the Portuguese Data Protection Authority (Comissão Nacional de Proteção de Dados – CNPD) and with the consent of the worker in question. They must supply all the documentation relating to the collection of the data and indicate the procedure to be used, including in particular how they intend to obtain the agreement of the person involved. The exceptions are those mentioned above.

Article 9(2) of Law 16/2001, on religious freedom,³² prohibits the requirement to indicate one's religion in all contexts.

In Portugal, statistical evidence is permitted by national law in order to establish indirect discrimination.

Statistics, if available, can be used as evidence. They are considered as documents and can 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).³³

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 – the national statistics law).³⁴ These data are collected by Statistics Portugal (Instituto Nacional de Estatística – INE); the Ministry of Labour and Social Solidarity; and some publications on social issues.

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 that are 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: Article 413 (object of the evidence); Article 417 (duty of cooperation with the discovery of truth); Article 418 (the judge may, on deeming it appropriate, require the parties to produce confidential data); Article 429 (duty of the other parties to present to the court the documents deemed necessary); and Article 432 (documents belonging to third parties must also be surrendered to the court if they are considered necessary as evidence).

The court may also appoint experts to determine certain facts on the 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 is not used in practice. As far as the author of this report is aware, there have been no cases in Portugal involving direct or indirect discrimination in which statistics have played a major role.

³² Portugal, Law 16/2001, on religious freedom (*Lei da Liberdade Religiosa*), 22 June 2001, *Diário da República*, Série I-A, No. 143, p. 3666).

³³ Portugal, Law 41/2013, on the new Civil Procedure Code (*Novo Código de Processo Civil*), 26 June 2013, *Diário da República*, Série I-A, No. 121, 26 June 2013.

³⁴ Portugal, Law 22/2008, on national statistics (*Lei das estatísticas nacionais*), 13 May 2008, *Diário da República*, Série I-A, No. 92, 13 May 2008, pp. 2617-2622.

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.³⁵

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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, especially if it is 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 has defined 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 to include the dignity of groups.

In Portugal, harassment explicitly constitutes 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 Courts of Appeal.³⁶

³⁵ See, among others, Portugal, Constitutional Court, judgment No. 416/2007 of 18 July 2007, which states that the Constitutional Court is bound by international sources of law, namely the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union.

Law 46/2006, which directly concerns disability discrimination, does not contain any provisions relating to harassment. However, taking into account the protection from harassment under the Labour Code, which also relates to disability, the law offers sufficient protection.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, 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 covered by Articles 546 to 566 of the Labour Code, specifically 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 the 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.

In Portugal, instructions explicitly constitute a form of discrimination.

Article 23(2) of the Labour Code expressly states that, 'a mere order or instruction with the purpose of disadvantaging any person by reason of a discriminatory 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.

³⁶ Portugal, Court of Appeal of Porto, judgment of 7 May 2018, procedure 2326/16.2T8VNG.P1, available at [http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7e394362a4d2ffb4802582c1002efa1a?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o](http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7e394362a4d2ffb4802582c1002efa1a?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o;);
Court of Appeal of Porto, judgment of 8 November 2018, procedure 1312/17.0T8VNG.P1, available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4e1d5ab64d051c2b80258384003ee0d9?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>;
Court of Appeal of Évora, judgment of 4 April 2018, procedure 903/16.0T8STC.E1, available at: <http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/bd0b9c871857dc0b8025827b002d2a41?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>.

Article 5(3) of Law 3/2011 also considers that discrimination can involve a mere order or instruction with the purpose of disadvantaging any person by reason of a discriminatory 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 the 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 discrimination and are forbidden.

b) Scope of liability for instructions to discriminate

In Portugal, the instructor and the discriminator are liable (Article 15 of Law 93/2017 and Articles 23(2) and 28 of the Labour Code).

Article 11 of the Criminal Code; Article 7 of the General Rules on Minor Offences (*Regime Geral das contra-ordenações*) adopted by Decree-Law 433/82 of 27 October 1982; 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 the 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 on employers to provide reasonable accommodation for people with disabilities is included in the law, and is not defined.

This duty derives from Articles 85 to 88 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'. 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 and participate in work, to progress in his or her career and to undertake 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, or if it is compensated for by the state in terms to be provided for in special legislation.

Articles 87 and 88 of the Labour Code provide 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.

b) Practice and case law

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' or 'disproportionate burden'.

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 the matter). 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 in 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. Likewise, there are no references to this matter on the website of the National Institute for Rehabilitation (Instituto Nacional para a Reabilitação – INR).³⁷

c) Definition of disability and non-discrimination protection

The definition of a disability³⁸ for the purposes of claiming reasonable accommodation is no different from the definition 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) Failure to meet the duty of reasonable accommodation for people with disabilities

In Portugal, failure to meet the duty of reasonable accommodation in employment for people with disabilities counts as discrimination.

³⁷ The National Institute for Rehabilitation (Instituto Nacional para a Reabilitação) website is available at: www.inr.pt/.

³⁸ 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.'

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 ACT, which must investigate the situation, or file a case in 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 and 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 the financial assistance to be provided by the state has not yet been adopted, employers of small and medium-sized enterprises with fewer than 50 employees frequently claim that they face a disproportionate burden, or at least a greater burden than larger businesses.

Benefits may be obtained from the Institute for Employment and Vocational Training (Instituto de Emprego e Formação Profissional – IEFP).³⁹ Until the state adopts the above-mentioned law, it might be necessary for it to cover 100 % of the costs to enable 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. It is worth noting that further clarification and judicial interpretation is needed on this point. It is certainly the case that reasonable accommodation that does not cost any money at all is an intrinsic right, and a 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 adaptation of jobs and the elimination of architectural barriers are the responsibility of employers and may, in exceptional circumstances, be financed by the IEFP under certain conditions. The IEFP part-finances enterprises to provide reasonable accommodation for employees with disabilities in their premises, in order to overcome functional difficulties and eliminate physical barriers that prevent or hinder access to the workplace. According to ACT, a violation of this provision may lead to a fine. Cases can be brought to either ACT 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).

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

In Portugal, there is a duty to provide reasonable accommodation for people with disabilities in the area of education, according to Decree-Law 3/2008. (see below, Section 3.2.8.a).

- f) Duties to provide reasonable accommodation in respect of other grounds

In Portugal, there is a legal duty to provide reasonable accommodation in respect of other grounds in the public sector and in the private sector.

³⁹ The Institute for Employment and Vocational Training (Instituto de Emprego e Formação Profissional) website is available at: www.iefp.pt/.

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. That means that irregular migrants have the right not to be discriminated against. 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.

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.

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).⁴⁰ 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 Code).

Law 93/2017, which establishes 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

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

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

However, there are exceptions specified by law. One such exception is set out by 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 against a

⁴⁰ Portugal, Labour Code – 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.

group on the grounds of race, religion or sexual orientation, as set out in Article 240(2) of the Criminal Code.

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

a) Protection against discrimination

In Portugal, the personal scope of national anti-discrimination 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).⁴¹

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, which approves the General Regime for Contract Work for the Public Sector),⁴² and the private sector is liable according to Articles 23 to 32 of the Labour Code.

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

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

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.

⁴¹ Portugal, Decree-Law 133/2013, 3 October 2013, *Diário da República*, Série I-A, No. 191, 3 October 2013, pp. 5998-6002.

⁴² Portugal, Law 35/2014, establishing the regime for employment relations in public services, 20 June 2014, entered into force on 1 August 2014, last amended by Law 73/2017, 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))

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 the 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 that 'foreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens' (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 first to be taken by the employer, but it can be verified by the Authority for Working Conditions and by the labour courts, which can ultimately decide whether or not the person really is incapable. 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 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, which forbids any discrimination in access to and the 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 in relation to 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 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 first to be taken by the employer, but it can be verified by ACT and by the labour courts, which can ultimately decide whether or not the person really is incapable. 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.

3.2.4 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 prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

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 Code states that one of the objectives of vocational training must be to promote the 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 social protection, including 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 4/2007⁴³ (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 38/2004,⁴⁴ which defines the general framework of the legal regime with regard to the 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 benefits in kind, 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, because there is a constitutional principle of equivalence of rights (Article 15 of the Constitution) between nationals and non-nationals.

Age, disability, religion or belief and sexual orientation are also covered.

a) 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.

⁴³ Portugal, Law 4/2007, Basic Law on the Social Security System (*Aprova as bases gerais do sistema de segurança social*), 16 January 2007, *Diário da República*, Série I-A, No. 11, 16 January 2007, available at: www4.seg-social.pt/documents/10152/18664/LEI_4_2007.

⁴⁴ Portugal, Law 38/2004, defining the general framework of the legal regime regarding disability prevention (*Define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência*), *Diário da República*, Série I-A, No. 194, 18 August 2004, available at: <https://dre.pt/application/file/480649>.

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

In Portugal, national legislation prohibits discrimination in 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 and sexual orientation. The Basic Law on the Social Security System (Law 4/2007) sets out a system of citizen protection (Article 26 and subsequent articles), which includes social advantages.

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

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 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 to 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, pre-school 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, (the Basic Law on the Education System),⁴⁵ as amended by Law 115/97 and Law 49/2005, 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. However, irregular migrant children do not have access to education on an equal footing with other migrants.

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 children, irrespective of whether or not they are migrants.

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

Anti-discrimination law is 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 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 (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 (Regime for the implementation of sex education in schools)⁴⁶ aims to promote education against discrimination on the grounds of sexual orientation, but this is limited to the obligation for schools to teach the prohibition of discrimination on such grounds.

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

a) Pupils with disabilities

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

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

⁴⁵ Portugal, Law 46/86, Basic Law on the Education System (*Lei de Bases do Sistema Educativo*), 14 October 1986. The consolidated version of this law with the amendments introduced by Law 115/97 of 19 September 1997 was republished as Law 49/2005 on 30 August 2005.

⁴⁶ Portugal, Law 60/2009, establishing a framework for sex education in schools (*Estabelece o regime de aplicação da educação sexual em meio escolar*), 6 August 2009, *Diário da República*, Série I-A, No. 151, 6 August 2009, available at: <https://dre.pt/pesquisa/-/search/494016/details/maximized>.

enjoy the right to education. This duty means that children with disabilities cannot be denied access to education on the grounds that they 'cannot learn'. Children or adults with disabilities are to be placed in mainstream education whenever possible.

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

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

According to Decree-Law 3/2008⁴⁷ – 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 the non-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.

To the knowledge of the author of this report, there is no case law on this topic.

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

The school drop-out rate among Roma children used to be very high (more than 50 %), as shown by the figures provided by the Portuguese authorities. Very few Roma children pursued their studies beyond the first four years of school. According to non-governmental sources, there were very few Roma students in higher education. Roma girls were particularly likely to leave school at a very early age because of cultural reasons and sexist traditions.⁴⁸

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

⁴⁷ Portugal, Decree-Law 3/2008, 7 January 2008, *Diário da República*, Série I-A, No. 4, 7 January 2008, available at: <http://dre.pt/pdf1s/2008/01/00400/0015400164.pdf>.

⁴⁸ See Guedes, M., Magano, O., Candeias, P. (2014), *Estudo Nacional sobre as Comunidades Ciganas (National Study on the Roma Communities)*, HCM, pp. 92 ff, 205 ff, available at: www.acm.gov.pt/documents/10181/52642/estudonacionalComunidades.pdf/f4aa9b13-797d-40bb-a3b3-1c4011b05760.

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

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

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

Some problems have been encountered between teachers and Roma students in schools and, to address them, some initiatives have been taken to encourage school attendance by Roma children. One example is the creation of posts for socio-cultural mediators (some of Roma origin), who act as liaison points between families and schools. The Portuguese authorities have said that the school attendance rate for Roma children has risen since the creation of these posts. In 2018, there were 155 mediators.⁴⁹

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*. The strategy, which was adopted by the Council of Ministers Resolution 25/2013 of 27 March 2013 (in force since 17 April 2013), supports the idea that 'Despite recent progresses [sic], additional efforts still need to be undertaken in what concerns Roma communities.'⁵⁰ Since the implementation of the strategy, the need to introduce changes, both to the strategy's definition – particularly in relation to the clarification and implementation of measures – and in the identification of priority intervention areas, especially gender equality, knowledge of Roma people and their participation in the implementation of the strategy, has been evident.

The Government has therefore decided to review the strategy in order to adjust its objectives and targets and, consequently, to enhance its impact on the improvement of the living conditions of the people and communities involved. The priority is to improve the schooling, professional integration and living conditions of Roma people in situations of social exclusion, and to recognise and boost intervention through intercultural mediation, improve information and knowledge and combat discrimination against Roma people.

Therefore, after hearing from the municipalities, the associations of Roma communities and civil society in general, the Council of Ministers adopted Resolution 154/2018 of 8 November 2018,⁵¹ which extends the strategy until the end of 2022.

The strategy underlines the fact that, according to the most recently available data, despite some improvements, discrimination, poverty and social exclusion continue to affect the Roma.

⁴⁹ See HCM (2018), *Relatório de atividades 2018 (Activities Report 2018)*, available at: https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7.

⁵⁰ Portugal (2013), *National Roma Communities Integration Strategy 2013-2020*, p. 3, available at: https://www.acm.gov.pt/documents/10181/52642/ENICC_en.pdf/bc4d6288-1626-4fcd-baa0-9feb8da7860d.

⁵¹ Portugal, Resolution 154/2018, 8 November 2018, *Diário da República*, Série I-A, No. 230, 29 November 2018.

With regard to education, in the academic year 2016-2017 65 % of Roma children and youth attending school received the highest level of social benefits. The school drop-out rate for girls remains considerably higher than the drop-out rate for boys.

Taking into account this scenario, the strategy aims to ensure effective access for Roma people to education, educational success and lifelong learning by aiming:

- To promote and strengthen the capacity of cluster and non-cluster schools for the integration and educational success of Roma children and young people in primary and secondary education;
- To promote the integration and success of Roma students in higher education;
- To strengthen the basic skills of illiterate Roma men and women;
- To train social services and child protection workers.

As a consequence of the strategy, the situation of Roma education has improved.

In the academic year 2017-2018, the second edition of the operational programme for promoting education (OPRE) was implemented; it ended in September 2018. In this edition, 32 scholarships were awarded, and most of the programme fellows (25) were awarded high-level degrees (first degree or masters). Overall, 64 % of the fellows concluded their studies successfully, and it is worth noting that the participation of women has increased to 12 %.⁵²

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

In Portugal, national legislation prohibits discrimination in access to and the 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 and 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, 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).

a) 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.

⁵² See HCM (2018), *Relatório de atividades 2018 (Activities Report 2018)*, available at: https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7.

According to Decree-Law 594/74, as amended by Decree-Law 71/77,⁵³ private associations have the right to restrict the supply of goods and services to their members. This means that distinctions can be made on the basis of membership. However, membership itself cannot be based on discriminatory criteria.

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

In Portugal, national legislation prohibits discrimination in the areas of 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, 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 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.

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 in which migrants have been involved, and no major policies that aim to address discrimination against migrants in the field of housing.

⁵³ Portugal, Decree-Law 594/74, 7 November 1974, available at: <http://pt.legislacao.org/download/pdf/decreto-lei-n-o-594-74-associacoes-associacao-constituicao-estatutos-38660>; Decree-Law 71/77, 27 September 1977, available at: <http://pt.legislacao.org/download/pdf/lei-n-o-71-77-autorizacao-ensino-duracao-assembleia-51022>.

a) Trends and patterns regarding housing segregation for Roma

In Portugal, there are no legal trends and 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 European Commission against Racism and Intolerance (ECRI) *Fourth Report on Portugal* (2013) refers to discrimination against the Roma in access to housing.

It has been estimated that many Roma communities still live in shanty towns despite the Special Programme for Rehousing (*Programa Especial de Realojamento*), 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 the former equality body, the High Commission for Immigration and Intercultural Dialogue, which is now the High Commission for Migration.

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 2013-2022*, which has been reviewed, considers that it is essential to guarantee Roma individuals and families equal access to housing and that it is necessary to improve their housing conditions as well as combating spatial segregation.

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 in 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)).

The same reasoning is accepted by Law 3/2011 concerning the prohibition of discrimination in access to and the 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)).

The author considers 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 a 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 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. It can be deduced 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. Article 351 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) 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

Religious institutions are permitted to select people (on the basis of their religion) to hire or 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 of and necessary qualifications for teachers of Catholic religious and moral education (*educação moral e religiosa católica*) are covered by Decree-Law 70/2013.⁵⁴ It establishes the legal regime for the teaching and 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, which was signed on 18 May 2004 and approved by Resolution of the Assembly of the Republic 74/2004, of 16 November 2004. 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 – properly grounded – is submitted by the bishop of the diocese that 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.

⁵⁴ Portugal, Decree-Law 70/2013, 23 May 2013, 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.

Discrimination on the grounds of nationality is 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 Code).

Despite 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 citizens of Portuguese-speaking states who reside permanently in Portugal.

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 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 in elections and stand for election as office-holders of local authority bodies. Under reciprocal terms, the law may also accord citizens of European Union Member States who reside in Portugal the eligibility to vote in elections and stand for election as Members of the European Parliament.

b) Relationship between nationality and 'racial 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 or 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 provided 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, as amended by Law 23/2010, which adopts protective measures on '*de facto* unions',⁵⁵ 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. It is worth noting that the law is slightly uncertain on this point.

b) Benefits for employees with opposite-sex partners

In Portugal, it would constitute unlawful discrimination in national law if an employer provided 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 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 ACT, 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 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 enable them to work.

The law provides for several measures to be agreed between the employer and the state, and between the employer and the employee, concerning reasonable accommodation,

⁵⁵ Portugal, Law 7/2001, 11 May 2001, amended by Law 23/2010, 30 August 2010, available at: <https://dre.pt/application/dir/pdf1s/2010/08/16800/0376403768.pdf>.

such as a flexible timetable and exemption from overtime and night work, as and when necessary. Collective agreements can include other protective measures. People with disabilities can opt to work such hours if no risk is posed to their health or the health of others.

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

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 for specific exceptions for direct discrimination on the ground of age. For instance, physicians are exempted from performing night-time emergency service from the age of 55.

a) Justification of direct discrimination on the ground of age

In Portugal, national law provides for justifications for direct discrimination on the ground of age.

Article 25(3) of the 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 CJEU. However, no published court cases have been found that cover this point.

The courts will take the CJEU judgments in *Mangold* (C-144/04; EU:C:2005:709) and *Kucukdeveci* (C-555/07; EU:C:2010:21) into consideration when interpreting the issue; the author of this report has no knowledge of any Portuguese court case on this issue to date.

b) Permitted differences of treatment based on age

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 entitlement to benefits of occupational pension schemes

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 for 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. The most common fixed ages are 60, 62 and 65.

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 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 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)⁵⁶ 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 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).

⁵⁶ The Permanent Commission for Social Dialogue (Comissão Permanente de Concertação Social) website is available at: <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 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). Children normally end their basic education at 15 years of age. ACT must be informed of the employment of such persons (Articles 55(4) and 56(3) of the Labour Code). Article 72(3) of the 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.

For legal professions – judges, prosecutors, lawyers, notaries, bailiffs and judicial mediators or judicial referees, for example – there is no minimum 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 ages of 22 to 25.

The maximum age for the exercise of the said professions is dictated by the age of the mandatory retirement. That means nobody should accede to legal professions after the age of retirement, with the exception of lawyers, who may be allowed to continue practising by the Bar Association (Ordem dos Advogados).

4.7.4 Retirement

a) State pension age

In Portugal, there is a state pension age (70 years old), at which individuals must begin to collect their state pensions.

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,⁵⁷ 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 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.

For public sector workers, the state pension age is 66 years and five months (Decree-Law 167-E/2013). Ordinance 378-G/2013, which modifies the legal regime for social protection in the case of disability 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

⁵⁷ Details available at: <https://dre.pt/web/quest/pesquisa-avancada/-/asearch/522781/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Lei%22&types=SERIEI&numero=4%2F2007>.

reduction in the value of their retirement pension. This will depend on the number of years worked and the age at which early retirement is requested. People are entitled to request early retirement from the age of 55. It is envisaged that the retirement age will increase annually (Law 4/2007, which approves the general basis of the social security system,⁵⁸ and Decree-Law 187/2007, which establishes and regulates the legal protection system for disability and retirement in the general social security system).⁵⁹ If a public worker continues working after the age of 66 (the normal pensionable age), the pension will be increased until they reach 70.

If an individual wish to work for longer, their pension can be deferred until the age of 70.

An individual can collect a pension and still work.

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 the 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)).

In 2018, the compulsory retirement age was 70 in the public sector, which means the end of the employment relationship for public servants.

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 12/2006.⁶⁰

In Portugal, there is no normal age at which 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 for 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. Recently, Decree-Law 6/2019 of 14 January 2019 has permitted the extension of the work relationship in the public sector. For private employees, there is no mandatory retirement age.

⁵⁸ Details available at: www.dgaep.gov.pt/index.cfm?OBJID=91f17207-d63e-4f78-a525-4e8140f46f49&ID=318.

⁵⁹ Details available at: www.previsao-sgfp.pt.

⁶⁰ Portugal, Decree-Law 12/2006, 20 January 2006, available at: <https://dre.pt/application/file/538934>. This Law regulates the establishment and functioning of pension funds and pension fund managers and transposes into law Directive 2003/41/EC of the European Parliament and of the Council of 3 June regarding activities and the supervision of institutions for occupational retirement provision.

The retirement age for lawyers is 65. Even if lawyers are retired, they may be allowed to continue practising by the Bar Association.

d) Retirement ages imposed by employers

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

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers, even if they remain in employment after attaining pensionable age or any other 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 mandatory 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 because the amount of compensation for workers with greater seniority is sometimes too high.

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 has been 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 restrict rights, freedoms and guarantees only 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 on 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, positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability, age, disability and sexual orientation.

Article 13 of the Constitution permits positive action on the grounds of racial or ethnic origin, religion or belief and sexual orientation. Age and disability are not expressly mentioned, but as the enumeration is exemplificative, they are deemed to be included therein.

Articles 69 to 72 of the Constitution provide for positive actions on the 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 and benefit 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 that persists in society.

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

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 experience difficulties in beginning and making progress in their careers.⁶¹

b) Quotas in employment for people with disabilities

In Portugal, national law provides quotas for people with disabilities in employment.

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 in which an employer fails to comply with the quota, and there are no statistics on the number of people with disabilities employed under the quota. As a consequence, one cannot know whether or not the practice on quotas is complied with.

There are no recent data available on levels of compliance with the quotas.

In the private sector, national law provides for specific anti-discrimination provisions, such as 2 % for quotas.

Articles 85 to 88 of the Labour Code refer to workers who have a disability or a chronic disease. With regard to promoting employment opportunities for disabled people, Article

⁶¹ Portugal (2012), *Programa de Emprego e Apoio à qualificação das pessoas com Deficiência e Incapacidades* (*Programme of Employment and Support for People with Disabilities and Incapacities*), available at: www.cartasocial.pt/pdf/emprego_pdi.pdf.

85(2) provides that the state will create incentives for hiring people with disabilities or chronic diseases. According to Article 85(2) and Article 86(2), the state will also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies will give employers incentives to include measures to help such people to retain their employment in the context of developing a strategy for managing disability in the workplace.

In addition, several rights are guaranteed for 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 (for instance, by a physician) and not solely by the employer (Article 87(2)).

The Labour Code 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, while 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 Code, teleworkers have the same rights and duties as other workers in relation to training, job promotion and conditions of work.

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:

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 2013).⁶² 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.

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

⁶² 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.

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 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 an administrative offence (*contra-ordenação*), for which an administrative fine (*coima*) can be imposed. The Labour Code classifies these administrative offences according to their degree of gravity as minor (*leves*), serious (*graves*) or very serious (*muito graves*) 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) that 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 wide discretionary powers in relation to the amount of non-pecuniary damages that they can award.

Administrative procedures (for the private sector)

ACT⁶³ is responsible for monitoring the 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 ACT 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 ACT on 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 CEARD 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 President of CEARD has the authority to initiate an administrative procedure. The decision, including the application of penalties and the level of the fine, is the responsibility of the Permanent Commission of CEARD.

The respondent has the right to request judicial review of the administrative decision, as does the victim. Associations and NGOs whose aim is to prevent and combat discrimination have the right to request a judicial review or to intervene in judicial review proceedings if requested to do so by the victim.

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 a deterrent to those seeking redress.

As far as administrative procedure is concerned, the victim has the right to ask for information on the case and if necessary to complain to the Ombudsman.

⁶³ Portugal, Decree-Law 167-E/2013, 31 December 2013, 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, 31 July 2012, available at: <https://dre.pt/application/dir/pdf1sdip/2012/07/14700/0395903962.pdf>.

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 on General Rules on Minor Offences (Article 27), within a period of one, three or five years from the date that 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 ACT, 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 that are 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 and 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 or 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 proven by the aims of the associations as 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 or 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 INR.

Decree-Law 163/2006, on accessibility for people with disabilities, 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, these organisations have the right to denounce the discriminator and file a complaint with CEARD and the HCM. 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 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 (*Código de Processo do Trabalho*) 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.

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 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 that a trade union may also intervene in cases in which the worker is not a member of the 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 NGOs that deal with immigrants 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 or 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.’

NGOs that deal with people with disabilities (ONGPDs) are entitled to act on behalf of victims of discrimination, according to Article 5(2) of Decree-Law 106/2013, which defines the statute for ONGPDs.

Decree-Law 106/2013 also defines the state support for such organisations.⁶⁴ The title of ‘ONGPD’ is used specifically for NGOs that 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 against people with disabilities;
- c) the promotion of equal treatment of people with disabilities.

Article 5(2) of this Decree-Law provides that, where crimes have been committed against people with disabilities, perpetrated on the ground of disability, ONGPDs are entitled to assist and support victims in criminal procedures. The INR is the principal interlocutor for institutional support with regard to ONGPDs.⁶⁵

Generic ONGPDs (NGOs that represent people with disabilities in general) are entitled to financial support through the INR. The INR is a public institution, and funding therefore comes from the state budget according to the criteria for equality and equity set out in cooperation protocols adopted by the ONGPDs and the INR. After approval, the criteria are published on the INR website, and funding is subsequently awarded.

⁶⁴ Portugal, Decree-Law 106/2013, 30 July 2013, available at: <https://dre.pt/application/file/498646>.

⁶⁵ See Portugal, Decree-Law 31/2012, approving the structure of the National Institute for Rehabilitation (Lei orgânica do Instituto Nacional para a Reabilitação), 9 February 2012, repealing Decree-Law 217/2007 of 29 May 2007.

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 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 and 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 does 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 (joining existing proceedings)

In Portugal, associations, organisations and 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 and Articles 5 and 8 of Law 3/2011).

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

The ONGPDs 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 and 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 court proceedings where a 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.

Under 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. Article 31 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.

However, there is no tradition of using *actio popularis* in Portugal.

Actio popularis in civil cases is permitted for NGOs only if their by-laws state 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 individual rights in general 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 with regard to shifting the burden of proof.

d) Class action

In Portugal, national law allows associations, organisations and 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 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 *actio popularis*.

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 (People's Civil Action – *Acção Popular Civil*) covers some kinds of class action;
- Article 55(1)(c) of the Administrative Procedure Code grants 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 in 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 himself or herself to be discriminated against to substantiate the occurrence of the alleged discrimination by naming the worker or workers he or she feels are, have been or would be treated more favourably. It is for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination.

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 in that the rule on the shifting of the burden of proof may benefit the worker only when, besides invoking an unfavourable difference of treatment, they also invoke and show 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 that 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 or 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 the 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 the grounds of disability in work and in 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 for 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 for witnesses or for 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 summary administrative offence (*contra-ordenação*). 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 10 times the monthly value of the index of social support for individuals and between four and 20 times the same monthly value for legal persons.

If the offence results from the omission of a duty, the application of the sanction does not prevent the offender from carrying out this duty if it is still possible (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 Code, everyone (not only employers) is liable to administrative sanctions if they violate the Code's provisions 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 offences that are considered to be 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 Article 294 of the Civil Code and Article 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, which forbids 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 the 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 the 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, in a public meeting, in writing intended for dissemination or by any other means of social communication, defames or insults an individual or a group of individuals on the grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Those who incite or encourage racial, religious or sexual discrimination are subject to a term of imprisonment ranging from six months to five years.

Under Article 132(2)(4) of the Criminal Code on homicide, motives based on hatred on the 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 desecration 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.

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) may also be sued for damages, together with the person who is held to be 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 the 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 in legal books.

In conflicts governed by the Labour Code, compensation is awarded – for example, in the 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 Commission 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, CEARD underwent a restructuring in accordance with Law 93/2017.⁶⁶ The Law, which entered into force on 1 September 2017, establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry⁶⁷ and place of origin⁶⁸ (Article 29).

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

⁶⁶ Portugal, Law 93/2017, 23 August 2017, available at: <https://dre.pt/application/conteudo/108038372>.

⁶⁷ 'Ancestry' means family origin.

⁶⁸ 'Place of origin' means place of birth.

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

CEARD promotes equality and non-discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin (Articles 1 and 8(1) of Law 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. Under Article 3 on the 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 has set up the Observatory for Immigration (Observatório da Imigração),⁶⁹ 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 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

Since Portugal has overcome its 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 increased significantly in the past 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 a 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 that it experienced a disproportionate effect in comparison with other public bodies. In 2016,

⁶⁹ Portugal, Observatory for Immigration (Observatório da Imigração), website available at: <https://www.om.acm.gov.pt/>.

from the most recent information 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 on 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 issues arise 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 – such as the Left Bloc, which tends to intervene through the media – who are more concerned with them. The equality bodies participate in this type of debate – when it exists – only as an accessory.

c) Institutional architecture

In Portugal, the designated body does not form part of a body with multiple mandates.

The HCM has a mandate as a national institution for migration. When issues of discrimination on the grounds of race and ethnic origin, nationality, ancestry and place of origin arise, the HCM is assisted by 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.

There is no updated information for 2018 concerning the nature and level of focus accorded to the equality and anti-discrimination mandate in the work of the designated body. The HCM's *Activities Report 2017* devotes just five of its 98 pages to the fight against racism and non-discrimination. Therefore, the level of attention devoted to the equality and anti-discrimination mandate can be assessed as being rather low.

In previous activities reports, there was even less focus on equality and discrimination issues.

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

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

i) Status of the body

As a public institution, according to Article 4(1) of the Framework Law on Public Institutions (Law 3/2004),⁷⁰ 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 3/2004). Therefore, the High Commissioner is not elected.

⁷⁰ Portugal, Law 3/2004, 15 January 2004, 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 Commission, assisted by 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 3/2004) and the HCM statutes, included in the Administrative Rule (*Portaria*) 227/2015,⁷¹ 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, as approved by Law 35/2014⁷² (Article 34(1) of Law 3/2004). In both cases, under the terms of Article 34(3) of Law 3/2004, 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 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). The Directive Council comprises the High Commissioner, who presides, and another member (Article 5 of Decree-Law 31/2014). 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 and Article 26 of the Law 3/2004 – the Framework Law on Public Institutions). The Council on Migration is the body that provides consultation and support and participates 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).

CEARD, which specialises in equality and non-discrimination on the grounds of race or 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 93/2017), composed of the President and two members designated by the commission (Article 7(3) of Law 93/2017).

CEARD is composed of the High Commissioner for Migration, who presides; one representative of each parliamentary group; one representative from the members of the Government responsible for internal affairs, justice, equality

⁷¹ Portugal, Administrative Rule 227/2015 (*Portaria* 227/2015), 3 August 2015, available at: <http://data.dre.pt/eli/port/227/2015/08/03/p/dre/pt/html>.

⁷² Portugal, Law 35/2014, establishing the regime for employment relations in public services, 20 June 2014, entered into force on 1 August 2014, last amended by Law 84/2015 of 7 August 2015, available at: <https://dre.pt/web/quest/pesquisa-avancada/-/asearch/25676932/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Lei%22&types=SERIEI&numero=35%2F2014>.

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 the Azores and Madeira; two representatives of migrants' associations, anti-racist 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 chosen by the other members (Article 7 of Law 93/2017).

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

Ordinarily, CEARD meets once quarterly, and extraordinarily whenever it is convened by the High Commissioner on the recommendation of the Permanent Commission. The HCM is responsible for ensuring the provision of technical support and administrative facilities, as well as other functioning facilities (Article 9 of Law 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, 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 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 the opinion of the author, 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, the mission of the HCM comprises working on the definition, implementation and evaluation of public policies and sectoral policies on migration that are relevant to attracting 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 (mentioned above).

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 exercise

i) Independent assistance to victims

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 guide the 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 93/2017, these competences are exercised by 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.

ii) Independent surveys and reports

In Portugal, according to the law, the HCM can carry out surveys and publish reports. However, in practice, the sole report that it published in 2018 was the *Activities Report*.

The HCM has previously commissioned academic experts to conduct surveys on discrimination and related issues and set up the Observatory for Immigration,⁷³ which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

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

iii) Recommendations

CEARD has competence to make recommendations on discrimination issues. According to Article 8(2)(d) of Law 93/2017, CEARD may recommend the adoption of legislative, regulatory and administrative measures as it deems appropriate for the prevention, prohibition and combating of discrimination on the grounds of race, ethnic origin and nationality, and may make recommendations to the Government on any related matter.

In 2018, CEARD made a single recommendation. It concerned the principle of not referring to race, ethnic origin, colour, nationality, ancestry or territory of origin in the context of documents.⁷⁴ This recommendation was addressed to public entities, the media, publishing companies, public figures and individuals.

With regard to independence, recommendations can in practice be proposed in an independent manner.

iv) Other competences

⁷³ Portugal, Observatory for Immigration (Observatório da Imigração), website available at: www.oi.acidi.gov.pt/.

⁷⁴ <https://www.cicdr.pt/documents/57891/110180/CICDR.PDF/8eb9dba1-fce4-4dbe-bf77-282f533e0774>.

CEARD also has other 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 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 93/2017, in cases of multiple discrimination.

g) Legal standing of the designated body/bodies

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

However, in accordance with Article 11 of Law 93/2017, any dispute emerging from the application of this Law can be resolved through a mediation procedure, which is initiated by CEARD or at the request of the parties, and with the consent of the offender and the victim or their legal representatives.

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 NGOs 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 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 it is not considered to be 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 most recent decisions date back to 2014), no proper assessment can be undertaken with regard to 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 made 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 most recently available report, its *Activities Report 2018*,⁷⁵ CEARD received 346 complaints. Of those, 56 were considered to be administrative sanctions proceedings; 99 were referred to other entities; 134 were not admissible and 57 are awaiting a preliminary decision.

j) Stakeholder engagement

In Portugal, the designated body, as part of the implementation of its mandate, engages with stakeholders such as SOS Racismo, migrants' associations, Roma associations and local government entities such as municipalities and public bodies.

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

As far as the author is aware, the equality bodies do not engage with trade union or employee associations.

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

k) Roma and Travellers

The specialist 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, including the experience of other countries in this matter, the sizes of fines, the creation of specific places for street trading and town councils' awareness of street trading issues, as well as the training needs of the Roma; the need for support from social services for the integration of Roma families into society; measures for positive discrimination; and the difficulties that members of the Roma community experience with integration into the Portuguese labour market, among other matters.

The HCM also intends to rely on the use of intercultural mediators to achieve greater integration of this ethnic group.

⁷⁵ HCM (2018), *Relatório de atividades 2018 (Activities Report 2018)*, available at: https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The HCM provides information on its website about discrimination in general and discrimination on the grounds of race and ethnic origin specifically.

In respect of labour matters, Article 24(4) of the Labour Code imposes on employers a duty to display on their premises information on the rights and duties of workers in relation to equality and non-discrimination. However, the 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 provide information in an accessible way.

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 European Union actions to combat discrimination. It also makes the relevant documents available.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

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 that work with the Roma and with 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.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 of Directive 2000/43 and Article 13 of Directive 2000/78)

Dialogue between social partners takes place within several commissions and bodies, ensuring the participation of associations representing immigrants, human rights activists, trade unions, employers' associations and social solidarity institutions in the development of policies promoting social integration and combating exclusion.

- Commission for Equality and Against Racial Discrimination (CEARD) (Comissão para a Igualdade e contra a Discriminação Racial) – mentioned above;
- Commission for Religious Freedom (Comissão da Liberdade Religiosa - CLR). (Article 52 ff. of Law 16/2001, amended by Law 91/2009 – Law on Freedom of Religion);

- National Institute for Rehabilitation (Instituto Nacional para a Reabilitação – INR)⁷⁶ (Decree-Law 217/2007);
- 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);
- Permanent Council for Social Dialogue (Conselho Permanente de Concertação Social – CPCS) (Decree-Law 74/84);
- 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, 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 and Article 2(1) of Decree-Law 1/2012, the Commission for Citizenship and Gender Equality is mandated to promote equality between men and women. It took over this role from the former Commission for Equality and Rights of Women (*Comissão para a Igualdade e para os Direitos das Mulheres*) and it has also taken on the functions of the Commission for Equality in Employment and Labour (*Comissão para Igualdade no Trabalho e Emprego*) in respect of the promotion of equality.

d) Addressing the situation of Roma and Travellers

There no specific body or organ appointed at a national level to address Roma issues.

A number of Roma and non-Roma associations are attempting to build bridges between the majority in society and Roma communities, and they 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, with information programmes to prevent children working as beggars.

Initiatives have been taken by NGOs and the IEFP to train Roma – particularly younger members of the community – for employment. Racist prejudices still persist among certain employers, which mean that the Roma suffer racial discrimination in recruitment. This often ends up discouraging young Roma jobseekers.

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.

⁷⁶ Portugal, National Institute for Rehabilitation (Instituto Nacional para a Reabilitação), website available at: www.inr.pt/.

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. They are to be so deemed by those bound by them and can 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, with regard to 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 still in force that are contrary to the principle of equality.

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 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 EU instruments.

There are several municipal anti-racism and anti-discrimination plans in Portugal.

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 their total intake reserved for students with disabilities.

People with disabilities are exempt from any fees in 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 effective positive action measures in order to achieve 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 for the specialist body that deals with racial and ethnic discrimination has not been completely removed. Nevertheless, the new Law 93/2017 makes significant efforts to ensure that the specialist bodies conform to the powers envisaged in Article 13 of the directive.

Other legislation complies 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:

- The 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 applies in particular 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 2018

12.1 Legislative amendments

There were no relevant legislative amendments in 2018.

12.2 Case law

Name of the court: Supreme Court of Justice

Date of decision: 20 June 2018

Name of the parties: -----

Reference number: Procedure 31947/15.9T8LSB.L2.S1

Link:

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/d2d102c75406e069802582b3003ee9e0?OpenDocument>

Brief summary: The facts: the employee worked in a restaurant in the professional category of first waiter, which comprises primary and secondary functions. In the beginning, the employee was assigned primary functions related to his category. Subsequently, the employer changed his functions, assigning the employee only the socially less important functions related to that professional category.

The employee alleged that he had been discriminated against in comparison with other employees in the same category.

The decision: the Court decided that, if a contract of employment is concluded in which an employee is assigned certain functions, a subsequent change in the tasks that correspond with that professional category by the employer, in which the worker is assigned only the socially less important functions, violates the provisions in Article 118 of the Labour Code.

The conduct described in the preceding paragraph, in a situation in which the employer assigns to other workers with the same seniority the tasks that are part of the fundamental nucleus of the functions that have been agreed with all, in the absence of a motive legitimising such a difference in treatment, constitutes discrimination in accordance with Article 25 of the Labour Code. The employee shall be compensated in respect of the non-patrimonial damages that he experienced, in accordance with Articles 496 and 566 of the Civil Code.

Name of the court: Supreme Court of Justice

Date of decision: 5 September 2018

Name of the parties: -----

Reference number: Procedure 31947/15.9T8LSB.L2.S1

Link:

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/d2d102c75406e069802582b3003ee9e0?OpenDocument>

Brief summary: In this case, the Court decided that not any and all violations of the employer's obligations towards the employee can be considered to constitute bullying, requiring an unlawful or at least ethically objectionable final objective to be verified as such.

Even if it can be deduced from Article 29 of the Labour Code that the legislator does not require the intentional element to ascertain the existence of moral harassment, it is required that conduct by the company occurs that intensely and unequivocally infringes the values protected by the norm: respect for the psychological integrity and morale of the worker. In other words, the court does not require proof of intent, but it does require a certain intent on the part of the employer, which is a disrespect for the psychological integrity and morale of the worker.

Name of the court: Court of Appeal of Coimbra

Date of decision: 4 December 2018

Name of the parties: -----

Reference number: Procedure 8637/17.2T8CBR.C1

Link:

<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/e38fe4ae1fe345b3802582f80054f892?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>

Brief summary: In this case, a worker undertook sexual harassment against a female colleague.

According to the Court, the practice of acts against a work colleague, in the place of work and during the time of work, can justify the preventive suspension of the worker by the employer. The said conduct can be seen as constituting one of two types of illicit behaviour - administrative sexual harassment, envisaged in article 29(3)(5) of the CT2009, and criminal sexual harassment, envisaged in article 170 of the Penal Code.

Name of the court: Court of Appeal of Porto

Date of decision: 7 May 2018

Name of the parties: -----

Reference number: Procedure 2326/16.2T8VNG.P1

Link:

<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7e394362a4d2ffb4802582c1002efa1a?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>

Brief summary: In this case, the hierarchical superior of a certain worker reduced his duties; attributed some of his duties to his subordinates; made joking comments and inappropriate personal assessments in the presence of third parties; made detailed daily reports over a long period of time; promoted some subordinates without his knowledge, and sat the worker against the wall with his back to the subordinates.

According to the Court, the distinction between conflict and harassment does not focus on what is done or how it is done, but on the frequency or duration of what is done. Harassment should be seen as an exaggerated conflict.

A situation of moral harassment or mobbing is established when there are aspects in the conduct of the employer towards the employee (through the respective hierarchical superior), that, although when analysed separately cannot be considered illicit, when globally considered as a whole, given their extension over time (for several months), are apt to create in the worker a discomfort and malaise at work that hurts their respective professional dignity and moral, physical and psychological integrity.

Occupational harassment is intended to intimidate, diminish, humiliate, frighten and consume the victim emotionally and intellectually, with the aim of eliminating them from the organisation or satisfying the insatiable need to assault, control and destroy on the part of the harasser, who takes advantage of the organisational situation (reorganisation, cost reduction, bureaucratisation, drastic changes, etc.) to channel a series of psychopathic impulses and tendencies.

In view of the material conduct found in the records, the Court concluded that there was intentional persecutory conduct by the employer towards the worker, which breached the worker's professional dignity and his physical and mental integrity.

Name of the court: Court of Appeal of Porto

Date of decision: 8 November 2018

Name of the parties: -----

Reference number: Procedure 1312/17.0T8VNG.P1

Link:

<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4e1d5ab64d051c2b80258384003ee0d9?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>

Brief summary: In this case, A., a female worker in a hotel, complained about the behaviour of the manager of the hotel, a superior of A, and of an assistant director. With the intention of humiliating her, both sent her an email from a customer of the hotel. According to them, the email was addressed to A. The email criticised the professional conduct of A., but without giving any reasons. In addition, with the intention of disturbing and embarrassing her, the email was sent with the superior's knowledge to other co-workers of A. Later on, six other emails with excessive criticism that had no basis were sent to A. As a result, A. not only felt shame, sadness and anxiety, but experienced low self-esteem, crying episodes and strong depression.

According to the Court, although the conduct took place over a relatively short period of time (about a month and a half, until A. sought medical help), such conduct violated the dignity of the worker and her physical, psychological and moral integrity, as well as affecting her duties. It had a purpose that was not only reprehensible, but also unlawful, inasmuch as it humiliated and distressed the worker, not through isolated acts but by a quantitatively intense succession and reiteration of acts (that occurred over a month and a half) for illicit purposes (humiliation, embarrassment, and disruption), which contributed to the aforementioned depression.

Even if, hypothetically, such behaviour did not form part of a pattern of psychological harassment, it was unlawful. Unlawful damage was suffered by A., supporting the contention that damages – for depression suffered, albeit not exclusively – shall, given the seriousness of the conduct, go to those who deserve protection of their rights.

In the circumstances described in the case, compensation of EUR 6 000 for non-pecuniary damages incurred by A. was deemed to be adequate.

Name of the court: Court of Appeal of Évora

Date of decision: 4 April 2018

Name of the parties: -----

Reference number: Procedure 903/16.0T8STC.E1

Link:

<http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/bd0b9c871857dc0b8025827b002d2a41?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>

Brief summary: In this case, after the employee had refused a proposal for an agreement to terminate their employment contract without compensation, the behaviour of the employer (through the hierarchical superior) changed. He started giving orders to the worker in a superior tone and gesticulating in front of other workers and ordered the worker to list all the material in a container, which involve his staying at work for four days to complete the task without contacting colleagues or associates of the employer. Afterwards, the employer decided that the task had not been correctly executed. In addition, the superior, in discussion with the worker, was verbally aggressive and raised a hand to the worker. Finally, the superior divulged the contents of the worker's Facebook messages by printing them out, aiming to humiliate, deprecate and marginalise the worker, cause them discomfort and malaise and hurt their personal and professional dignity. Such conduct resulted in repercussions to the health and life of the worker.

The Court deemed that the behaviour of the employer constituted moral harassment.

Therefore, it was deemed fair and adequate that the worker was awarded compensation to the value of EUR 10 000 to compensate for moral damages suffered.

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: 31 December 2018

Title of the law: Law 7/2009

Abbreviation: Labour Code

Date of adoption: 12 February 2009

Entry into force: 1 May 2009

Latest relevant amendments: Law 14/2018 of 19 March 2018

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 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 relevant 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 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 relevant 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 the law: Law 38/2004

Abbreviation: N/A

Date of adoption: 18 August 2004

Latest relevant amendments: N/A

Entry into force: 23 August 2004

Web link: <https://dre.pt/application/file/480649>

<p>Grounds covered: disability</p> <p>Administrative law</p> <p>Material scope: general legal basis for prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities</p> <p>Principal content: fundamental principles, intervention of public and private entities; public policies</p>
<p>Title of the law: Law 3/2011</p> <p>Abbreviation: N/A</p> <p>Date of adoption: 15 February 2011</p> <p>Latest relevant amendments: N/A</p> <p>Entry into force: 20 February 2011</p> <p>Web link: https://dre.pt/application/file/279688</p> <p>Grounds covered: any ground of discrimination</p> <p>Civil/Labour/Procedural law</p> <p>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</p> <p>Principal content: self-employment</p>
<p>Title of the law: Decree-law 31/2014</p> <p>Abbreviation: HCM</p> <p>Date of adoption: 27 February 2014</p> <p>Latest relevant amendments: N/A</p> <p>Entry into force: 5 March 2014</p> <p>Web link: https://dre.pt/application/file/572214</p> <p>Grounds covered: race and ethnic origin; nationality</p> <p>Administrative law</p> <p>Material scope: creates the High Commissioner for Migration, which replaces the High Commissioner for Immigration and Intercultural Dialogue</p> <p>Principal content: Mission, structure, budget</p>

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Portugal

Date: 31 December 2018

Instrument	Date of signature	Date of ratification	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 Against Women	24.4.1980	30.07.1980	No	Yes	Yes

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

GETTING IN TOUCH WITH THE EU

In person

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: https://europa.eu/european-union/contact_en.

On the phone or by email

Europe Direct is a service that answers your questions about the European Union. You can contact this service: – by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls), – at the following standard number: +32 22999696, or – by email via: https://europa.eu/european-union/contact_en.

FINDING INFORMATION ABOUT THE EU

Online

Information about the European Union in all the official languages of the EU is available on the Europa website at: https://europa.eu/european-union/index_en.

EU publications

You can download or order free and priced EU publications from: <https://publications.europa.eu/en/publications>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see https://europa.eu/european-union/contact_en).

EU law and related documents

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>.

Open data from the EU

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, for both commercial and non-commercial purposes.

