

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

**COUNTRY REPORT
Portugal
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State of affairs up to 8 January 2007**

This report has been drafted for the European Network of Legal Experts in the non-discrimination field (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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INTRODUCTION

0.1 The national legal system

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

The most important legal text in Portugal is the Constitution, which was approved by Parliament on 2 April 1976 and since then amended seven times, most recently in 2005. Constitutional Law 1/2005 of 12 August 2005 introduced the seventh constitutional amendment. The Constitution of the Portuguese Republic is based upon the rule of law and the separation and interdependence of powers. The State is a unitary State and the Azores and Madeira constitute autonomous regions with their own institutions of self-government.

The organs with supreme authority in Portugal are the Presidency of the Republic, the Assembly of the Republic (Parliament), the Government and the Courts. The Assembly of the Republic is the representative assembly of all Portuguese citizens. It has the following legislative powers:

- to amend the Constitution (Article 161(a));
- to enact legislation on any subject other than those in the exclusive power of the Government under the Constitution (Article 161(c));
- to delegate to the Government the power to legislate (Article 161(d));
- to approve the political and administrative statutes of the autonomous regions of Madeira and Azores and the laws concerning elections of deputies to the regional parliaments (Article 161(b));
- to approve laws on major planning options and the State Budget upon proposal by the Government (Article 161(g));
- to approve international conventions (Article 161 (i));
- to propose to the President of the Republic that referenda be held in cases of relevant national interest (Article 161 (j)).

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

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

The Portuguese legal system has several kinds of laws: “laws”, which are approved by the Assembly of the Republic; “decree-laws”, which are approved by the Government, and “regional legislative decrees”, which are approved by the organs of the autonomous regions.

The legislative powers of the autonomous regions of Madeira and Azores were clarified by the Constitutional revision of 2004. According to the revised Constitution (Article 227), the autonomous regions have the following powers:

- (a) to legislate for the region in matters enumerated in the region's political and administrative statute that are not reserved to the Portuguese Sovereign organs;
- (b) to develop for the region the principles or the general rules contained in laws;
- (c) to make regulations for implementing national legislation;
- (d) to initiate legislation in line with the region's own statutes and elect Regional Assembly members.

The areas which are excluded from the legislative powers of the autonomous regions are civil status (Article 165(1)(a)), rights and freedoms (Article 165(1)(b)), definitions of crimes and sanctions and rules on criminal procedure (Article 165(1)(c)), general regulation of disciplinary infractions (Article 165(1)(d)), basic rules on social security and the national health system (Article 165(1)(f)), taxation (Article 165(1)(i)), and rules on Courts and tribunals (Article 165(1)(p)).

The legislative competence for anti-discrimination rules resides with the Portuguese Parliament and not the autonomous regions, although these have very important powers with regard to the implementation of such rules on the ground.

Synthesis:

The Portuguese legal framework on discrimination is based mainly on:

a) The Constitution of the Portuguese Republic of 2 April 1976¹, (hereafter 'the Constitution'): Article 1 – dignity of all persons; Article 8 – international law as integral part of Portuguese law; Article 13 – principle of equal treatment, prohibition of discrimination on a non-exhaustive list of grounds: ancestry, sex, race, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition and sexual orientation; Article 15 – equal treatment of aliens and stateless persons; Article 18 – fundamental rights binding on both public and private bodies; Articles 58 and 59 – equal treatment of all workers without discrimination; Article 69 – child protection; Article 70 – protection of young people; Article 71 – rights of disabled people; and Article 72 – rights of elderly people.

b) The Criminal Code of 3 September 1982² (revised several times) (hereafter 'the Criminal Code'): Articles 132 and 146 – homicide and assault motivated by racial or religious hatred; Article 239 – genocide; Article 240 – racial and religious discrimination; Articles 251 and 252 – insults on grounds of religion.

The Criminal Code is under revision. In what concerns non-discrimination on the ground of sexual orientation the main proposals go in the sense of non discrimination of the sanctions on the basis of homosexual or heterosexual relationships involved.

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

² *Código Penal de 3 de Setembro de 1982*

c) Law 134/99 of 28 August 1999 forbidding discrimination in the exercise of rights based on race, colour, nationality or ethnic origin³ covering fundamental rights, refusal or conditioning of economic, social or cultural rights.

d) Decree-law 111/2000 of 4 July 2000 was revoked by Law 35/2004 of 29 July 2004 regulating the Labour Code in accordance with Article 21 (2)(q) of Law 99/2003 of 27 August 2003 approving the Labour Code.

e) Law 18/2004 of 11 May 2004 transposing Council Directive 2000/43 of 29 June 2000 into Portuguese law, and establishing the principle of equality of treatment between persons irrespective of racial or ethnic origin and a legal framework to combat discrimination on the grounds of racial or ethnic origin⁴ (hereafter ‘Law 18/2004’). This law goes far beyond the Racial Equality Directive, as it prohibits discrimination based on nationality and colour. Article 3(1) provides that “For the purpose of this law the principle of equality of treatment means the absence of any discrimination, direct or indirect, based on racial or ethnic origin”. Article 3(2) states that “All actions or omissions affecting persons on the grounds of race, colour, nationality or ethnic origin, which violate the principle of equality, are considered as discriminatory practices.” Law 134/99 remains in force and can be applied subsidiarily under Articles 15 (2) and (4) of Law 18/2004 whenever it gives more benefits to the discriminated.

f) Law 99/2003 of 27 August 2003 adopting the Labour Code implements Directives 2000/43 and 2000/78 in Article 2 (o) and (p)⁵. – (hereafter ‘the Labour Code’);

The Labour Code implements the Framework Employment Directive 2000/78 but it prohibits discrimination also on grounds not foreseen in this Directive. Article 23 of the Code deals with anti-discrimination and forbids the practice of any discrimination, direct or indirect, based namely on ancestry, age, sex, sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, religion, political or ideological convictions and membership of a trade union.

g) Law 35/2004 of 29 July 2004 which regulates Law 99/2003 of the Labour Code and implements Directives 2000/43 and 2000/78⁶ (hereafter “Law 35/2004”). Directives 2000/43 and 2000/78 have been expressly implemented by Law 18/2004, the Labour Code and Law 35/2004.

h) Law 38/2004 of 18 August 2004 defining the general legal basis for the prevention of the causes of disability, and the qualification, rehabilitation and participation of people

³ *Lei n.º 134/99 de 28 de Agosto de 1999, proíbe as discriminações no exercício de direitos por motivos baseados na raça, cor, nacionalidade ou origem étnica e Decreto-lei n.º 111/2000 de 4 de Julho de 2000 regulamenta a lei que proíbe as discriminações no exercício de direitos por motivos baseados na raça, cor, nacionalidade ou origem étnica.* See text of Law 134/99 at <http://cidadevirtual.pt/cpr/legis2.html>. See text of Decree-law 111/2000 at <http://cidadevirtual.pt/cpr/legis2.html>

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

⁵ *Lei n.º 99/2003 de 27 de Agosto de 2003, aprova o Código de Trabalho.* The text of Law 99/2003 can be read at: [http://www.nae.uevora.pt/pdf/Lei_99-2003\(extr\).pdf](http://www.nae.uevora.pt/pdf/Lei_99-2003(extr).pdf)

⁶ *Lei n.º 35/2004 de 29 de Julho de 2004 regulamenta a Lei n.º 99/2003, de 27 de Agosto que aprovou o Código do Trabalho.* Text of Law 35/2004 available at: <http://www.portaldocidadao.pt/NR/rdonlyres/C017D4EB-37BC-4A20-8B41-FAC2BC21B997/0/Lei3520041.pdf>

with disabilities⁷. This law expressly repeals Law 9/89 of 2 May 1989 (Article 51) (hereafter “Law 38/2004”).

i) Law 16/2001 of 22 June 2001, the Law on Religious Freedom⁸ (hereafter “Law 16/2001”).

j) Constitutional Law 1/2004 of 24 July 2004 (Sixth Constitutional Revision)⁹ adds to Article 13 *in fine* the prohibition of discrimination based on sexual orientation reflecting the principles stated in Directive 2000/78 (hereafter “Law 1/2004”). The reference to sexual orientation in the Constitution facilitated the implementation of this Directive.

k) Decree-law 251/2002 of 22 November 2002¹⁰ was amended by Decree-law 27/2005 of 4 February 2005¹¹ establishing the High Commissariat for Immigration and Ethnic Minorities. The amendments have not altered the power structures and will be referred to throughout the report.

l) Law 18/2004 of 11 May 2004¹² was amended by Decree-law 86/2005 of 2 May 2005¹³, transposing into national law Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a legal framework to combat discrimination on the grounds of racial or ethnic origin.

m) Decree-law 163/2006 of 8 August 2006¹⁴ which approves the accessibility regime to buildings and public premises

n) Law 46/2006 of 28 August 2006¹⁵ prohibiting and punishing discrimination based on disability and on the grounds that a person has a pre-existing aggravated risk to their health (risco agravado para a saúde)

⁷ Lei n.º 38/2004 de 18 de Agosto de 2004 define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência. Text of Law 38/2004 at:

http://www.adm.ua.pt/legua/LegAdmPublica/Lei_38_2004.htm

⁸ Lei n.º 16/2001 de 22 de Junho de 2001, Lei da liberdade religiosa. Text of Law 16/2001 at:

http://www.adm.ua.pt/legua/pessoal/Lei_16_2001.htm

⁹ Lei Constitucional n.º 1/2004 de 24 de Julho de 2004 (Sexta Revisão Constitucional) adita ao artigo 13º *in fine*, Text: http://www.estig.ipbeja.pt/~ac_direito/introdlegis.html

¹⁰ Decreto-Lei 251/2002, de 22 de Novembro alterado pelo Decreto-lei 27/2005 de 4 de Fevereiro, diploma que institui o Alto-Comissariado para a Imigração e Minorias Étnicas

¹¹ Decreto-Lei 27/2005, de 4 de Fevereiro, diploma que institui o Alto-Comissário para a Imigração e Minorias Étnicas e que altera o Decreto-Lei 251/2002, de 22 de Novembro

¹² Lei n.º 18/2004 de 11 de Maio alterada pelo Decreto-lei 86/2005 de 2 de Maio, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica

¹³ Decreto-Lei 86/2005, de 2 de Maio, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE, do Conselho que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica, altera a Lei n.º 18/2004, de 11 de Maio.

¹⁴ Decreto-Lei 163/2006, de 8 de Agosto. Text at http://www.escadafacil.pt/catalogos/DL_163_2006.pdf

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

This law is applicable to the actions of all natural and legal persons, public or private and comprises all direct or indirect discrimination and it also does not oppose the taking of positive action. The fields covered by this law are: the access to employment, health economic activity, goods and services, rental or selling of estates, to building and premises, to public transports, to educational establishments among others.

This law applies in preference to early legislation.

o) Law 2/2006 of 17 April 2006 on Nationality entered in force on the 15 December 2006 together with Decree-law 237/A/2006 of 14 December 2006. This new legislation on nationality facilitates the integration of immigrants living in Portugal through naturalisation. The right-wing party PNR – Partido Nacional Renovador without representation in Parliament, is totally against this new law and consider it as anti-national.

0.2 State of implementation

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

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

The author considers that national law breaches the Directives on the following points:

- Associations have practically no right to intervene in administrative or legal proceedings to impose fines concerning discrimination at work (Article 9(2) of Directive 2000/78). As far as labour legislation is concerned, Article 477(d) of the Labour Code stipulates that trade union associations have the right to “initiate and intervene in legal cases and administrative proceedings in matters relating to the interests of their associates as provided for by law”. Also employers’ organisations cannot intervene to support their members when they are prosecuted for employment related to discrimination.

The Labour Code Procedure (approved by Decree-law 489/99 of 9 November 1999) in Article 5(5) stipulates that “In cases where the question is related to matters of workers’ personal interest their associations may intervene to assist their members as long as they declare by writing that intention”.

¹⁵ *Lei n.º 46/2006 de 28 de Agosto de 2006 que proíbe e pune a discriminação em razão da deficiência e da existência de risco agravado para a saúde.* Text of Law 46/2006 at http://www.snripd.pt/document/Lei_46_2006.txt

Only rules in the field of labour law on discrimination on the grounds of age, sexual orientation, disability, nationality, religion and political convictions have been established in addition to rules against discrimination on the grounds of race or ethnic origin. There is no general protection in the field of self-employment; Article 13 of the Labour Code grants only limited protection. The Portuguese Government regards its law as already implementing the Directive in respect of age. We consider that the Directive has been implemented but the positive measures have not so far been completely successful. But the positive measures for instance those aiming to facilitate the recruitment of older workers through formation and development of professional skills.

- No factors are specified to be taken into account in determining whether a disproportionate burden exists.

- There is insufficient dissemination of information about legal protection against discrimination at work (Article 12 of Directive 2000/78);

Law 35/2004 of 29 July 2004 imposes the duty on the employer to display in appropriate area information related to the worker's rights and duties according to the principles of equality and non-discrimination (Article 31). The violation of this disposition is considered as "contra-ordenação leve" (a minor offence) according to Article 473 of this law (punishable with a fine that may vary from 178 to 1,335 Euros). Article 23(1) of the Labour Code grants protection against discrimination on grounds of race or ethnic origin.

- Article 175 of the Criminal Code discriminates against homosexuals and may, in some cases, affect their access to work; conviction under this Article will appear in the person's criminal record. Their access to work may be affected and in some cases it can even be a cause of dismissal. The Constitutional Court has judged this Article unconstitutional. The amendments which are going to be introduced in the Criminal Code after its revision will be a solution to this question.

Two important legislative acts were introduced in Portugal on the field of discrimination based on disability:

Decree-law 163/2006 of 8 August 2006¹⁶ which approves the accessibility regime to buildings and public premises.

The social aim of this Government Decree is to integrate disabled people into society to enable them to take an active part in society and lead a normal life.

Law 46/2006 of 28 August 2006¹⁷ prohibiting and punishing discrimination based on disability and on aggravated risk to their health.

¹⁶ Decreto-Lei 163/2006, de 8 de Agosto. Text at http://www.escadafacil.pt/catalogos/DL_163_2006.pdf

¹⁷ Lei n.º 46/2006 de 28 de Agosto de 2006 que proíbe e pune a discriminação em razão da deficiência e da existência de risco agravado para a saúde. Text of Law 46/2006 at http://www.snripd.pt/document/Lei_46_2006.txt

According to Article 3 (c) of this law "persons with an aggravated risk to health" means any person or persons who suffer from an illness or disease causing long-duration organic, functional, progressive and potentially disabling health changes without any prospect of complete remission and originating changes in the physical, mental, emotional, social or economic life quality of patients and that may be a cause of early-years disability or of a significant reduction in their life expectancy." This covers situations in which the person has no disability yet but has a health situation that can change in one way that may in future result in a disability.

This new law complements the existing Law 38/2004 of 18 August 2004 which defines the general bases of the legal system for prevention, rehabilitation and participation of people with disability.

Also the Council of Ministers Resolution no. 9/2007 of 17 January 2007, approved the Plano Nacional de Promoção da Acessibilidade (National Plan for the Promotion of Accessibility). This Plan will be in force until 2015 and SNRIPD - Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência (National Secretariat for the Rehabilitation and Integration of People with Disabilities) will be the responsible body for its implementation. At the end of each civil year, they will have to deliver to the Government member with competence on the area of disability, a report concerning the execution of the measures foreseen in this Plan.

The promotion of accessibility to buildings and public premises, to transports and to the information communication technologies are the main axes of this plan and aim to increase competitiveness and employment, to reinforce social cohesion and to promote sustainable progress.

The social aim of this plan is to integrate disabled people into society to enable them to take an active part in society and lead a normal life. The environment created by this plan should be barrier-free and adapted to fulfil the needs of all people equally.

0.3 Case-law

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

- a. Name of the court
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

a. The Family and Minors Tribunal of Oporto

b. August 2006

c. Public prosecutor versus 13 minors

d. A trial of 13 minors (under the age of 15) accused by the public prosecutor of attempted murder of a Brazilian transsexual immigrant of 46 years of age (Gisberto Salce Júnior known as "Gisberta") for homophobic reasons, resulted in the conviction of the minors to 15 months in custody at a special educational school. They were

sentenced only for grievous bodily harm, attempted profanation of corps and omission of helping a person in danger.

The young people were accused of causing the death of Gisberta, who was found, having drowned after having been beaten and subjected to several types of physical violence. The Prosecution in the accusation considered that the motive for this murder was the sexual orientation of the victim. The Court did not consider proved that the crimes were motivated by the sexual orientation of the victim.

Decision: The Tribunal found that there had been no intentional killing and that Gisberta died due to drowning and not as a result of the ill-treatment the minors inflicted on her prior to the drowning. The Tribunal did not consider whether the sexual orientation of Gisberta or even her nationality were motives behind the killing and condemned them as follows:

- 6 of them for grievous bodily harm and attempted profanation of the corps to 13 months internment in an educational institution;
- 5 were condemned for grievous bodily harm to 12 months internment in an educational institution;
- 2 were condemned for omission of helping a person in danger to 12 months of probation with tutorial attendance.

This case had raised considerable debate in the newspapers.

A Portuguese gay association, “Portugal gay” had requested that the young people be charged with the “crime of hatred”. However, the initial accusation of attempted murder was replaced by crimes to the physical integrity, corpse profanation and omission of help. This sentence had, in general, been considered as too benevolent.

a. Criminal Tribunal of Coimbra

b. December 2006

c. Public Prosecutor versus Rosa Mayungo, an Angolan citizen

d. An Angolan citizen has distributed in Coimbra several documents to the general public complaining of being discriminated at her work in the Faculty of Medicine in Coimbra.

The texts were considered by the Court as an offence to the good name and reputation of the Faculty as the accusations of racism were considered not proved.

The defendant has been sentenced to 16 months imprisonment but the penalty has been suspended. One of the grounds of the sentence was the fact that the accusations of racism were not proven and that determined the penalty that has been imposed.

Other procedures:

We consider of interest to refer:

The PSP – Polícia de Segurança Pública under instructions of the public prosecutor and accompanied by a judge of instruction conducted a joint search during May 2006 to a

social housing quarter – Bairro da Torre in Camarate allegedly in search of illegal weapons.

It lasted more than five hours involving 600 policemen of the PSP and also of the Polícia Judiciária Militar and the group of Operações Especiais (Special Operations Forces). More than 150 police cars were used in this action.

The police destroyed in this operation doors and windows when forcing entrance to 138 houses (shanty housing). They also arrested 10 persons but released them after identification. This action aimed to combat the illegal traffic in weapons and was made following the previous detention of 29 persons at the end of March, suspected of trafficking illegal weapons.

The result of this search was the apprehension of 19 firearms (13 shotguns, 3 rifles and 2 pistols). According to the news published in the newspapers the people searched had no permits for the firearms.

Even though the entrance of the police to the houses had been authorised by a judge, several representatives of NGO's and newspapers criticised the violation of human rights namely the inviolability of the home. Also the disproportion between the means used and the results has been criticised.

The Ministry of Internal Affairs has been accused of racist and xenophobic behaviour as most of the houses belonged to people from ethnic minorities including Roma.

The official reaction was the one of the Minister of Internal Affairs who congratulated the police forces for their action. It has not been noticed the existence of judicial complaints. A political party Bloco de Esquerda, a left-wing party presented near the Assembleia Municipal de Loures (the Town Hall of Loures) a request for the Ministry of Internal Affairs in order to explain the grounds for that violent mega search of the police. The majority of the Assembly refused to follow Bloco de Esquerda.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

b) Are constitutional anti-discrimination provisions directly applicable?

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

a) Portuguese Constitutional principles apply to all areas covered by the Directives. They apply to a greater number of grounds for discrimination than the Directives, covering ancestry¹⁸, sex, race, language, territory of origin, religion, political or

¹⁸ (in Portuguese: ascendência). Ancestry means ancestral lineage. It corresponds to “birth” in Article 21(1) in the European Charter of Fundamental Rights.

ideological convictions, education, economic situation, social condition or sexual orientation (Articles 13 and 59).

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

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

The basic principles of non-discrimination are established in the Constitution of the Portuguese Republic which states in Article 1 that:

“Portugal is a sovereign Republic based upon the dignity of the human person and the will of the people and committed to building a free and just society united in its common purposes”.

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

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

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

Article 59(1) forbids discrimination at work of any worker on the grounds of age, sex, race, citizenship, country of origin, religion, political or ideological convictions etc., and Paragraph (2)(c) refers to the special protection of disabled people at work. Although it does not expressly refer to sexual orientation, it must be interpreted in connection with Article 13, which forbids discrimination on the ground of sexual orientation. It should also be noted that Article 9(h) of the Constitution considers “the promotion of equality between men and women” as one of the fundamental duties of the State. This confers on the State the duty to combat sexual discrimination and to assure effective equality of treatment between men and women.

Article 26(1) of the Constitution establishes, among other individual rights, the right to legal protection against any kind of discrimination “... protecção legal contra quaisquer formas de discriminação.” The Constitution thereby assures the effectiveness of constitutional anti-discrimination provisions.

The prohibition of discrimination on grounds of disability is provided for in Article 71(1) of the Constitution which establishes that “citizens who are physically or mentally disabled fully enjoy all rights and are subject to all duties established in the Constitution with the exception of those duties for which they are incapable”.

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

With regard to access to education, Article 74 of the Constitution states that “Everyone has the right to education; equal opportunity for access and success in schooling”. In education policies, the State must promote and support the access of disabled people to education and where necessary, support special education (Article 74(2)(g)). This constitutional provision aims to compensate for inherent disadvantages that may be suffered by disabled people in order to guarantee real equality of opportunity.

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

b) Anti-discrimination rules bind all State institutions and bodies. The principle of equality binds the legislature, judiciary and administration.

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

c) The wording of Article 18(1) referred to above is the object of various interpretations. All the main authors/commentators accept that the Constitutional clauses on equality can in some cases be enforced against private actors. They diverge about the extent to which and how the Constitutional provisions are directly applicable in private law. The question is still open; there are no judicial precedents. The Constitutional Court has not yet taken a clear decision on the effect of the non-discrimination and equality principles in private relationships (cf. judgment 98/95).

However, the provisions of the Labour Code (Article 23) and of Law 35/2004 (Articles 32 and 33) made clear that the constitutional clause can be enforced against private parties in labour relationships.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

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

Article 71(1) of the Constitution refers to the equality of treatment to disabled people.

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

Article 23 of the Labour Code prohibits discrimination on the grounds of ancestry, age, sex, sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, religion, political or ideological convictions and membership of a trade union.

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

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

Law 46/2006 of 28 August 2006 prohibits and punishes discrimination based on disability, and on aggravated risk to their health. Article 1(2) of this law states:

The provisions of this law are also applicable not only to disability but also to discrimination of persons on the ground of existence of an aggravated risk to their health (existência de risco agravado para a sua saúde) for example: paramiloide

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?

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

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

a) Racial discrimination is defined in Law 134/99 of 28 August 1999 as any distinction, exclusion, restriction or preference depending on race, colour, ancestry, national or ethnic origin that has as an objective or produces as a result the annulment or restriction of the entitlement, fruition or exercise in conditions of equality of rights, freedoms and guarantees or of economic, social or culture rights". This definition is also so broad that it covers discrimination based on association.

However, there is no legal definition for the notions of "race" and "ethnic origin" in this law.

Law 38/2004 of 18 August 2004 expressly repeals Law 9/89 of 2 May 1989 and gives a slightly different definition of a disabled person in Article 51.

Disability is defined in Article 2 of this law as follows: "a disabled person is one who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others". This definition is in accordance with the concept used in Case C-13/05 of the European Court of Justice.

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

The Portuguese definition intends to cover all the limitation or hinder ness to the activity and participation. It must be considered in relation with Law 46/2006 against discrimination on grounds of disability and on the existence of aggravated risk to their health.

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

The law recognises that people with disabilities do not constitute a homogenous group and that specific measures must therefore be taken in order to meet their different needs. It also defines rehabilitation as "a comprehensive and continuous process designed to correct a disability and to maintain, develop or restore the person's skills and capacities so that normal activity may be performed" (Article 3).

However, this law has not yet been implemented. The non-discrimination provision protecting disabled people contained in Article 23(1) of the Labour Code can be invoked by an individual in the field of employment. However, the non-implementation of Law 38/2004 means that anti-discrimination provisions cannot be invoked by an individual in areas other than employment.

The law, which contains 51 articles, is of a programmatic nature only in the sense that its articles refer to measures to be implemented in the future by government decrees but not yet detailed in the provisions of the law, for instance in relation to the prevention of accidents (Article 24), specific social security rights (Article 30), education and sports (Articles 34, 38, 39) and tax exemptions (Article 36). It uses very broad and vague wording.

Article 6 refers to the principle of non-discrimination as follows:

“...a person must not be discriminated against directly or indirectly due to his/her disability through actions or omissions and must benefit from positive measures in order to correct situations of inequality which persist in Portuguese society”.

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

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

b) As far as religion is concerned, the Office of the Attorney-General (Procurador Geral da República) has used the following definitions (proclamation no. 54/95, published in D.R. II Série, no. 222, 24/09/96): “Churches are large communities that are well-established in society, with a formal structure that is bureaucratic and hierarchical”; “Sects are in principle smaller and less organised”; “A religious confessions can be defined as a community based on a doctrine, manifested in a cult, and established according to rules addressed to the human group of followers (believers)”; “religious confessions are social aggregates unified by the communion of faith of their members; the religious confession has a doctrine, the fundamentals of faith are the religious principles accepted by the believers”.

This definition has been established in the context of religious and moral education in schools. It is regarded as an important element of interpretation of the law due to the general formulation that has been used by the Attorney-General even if it is not binding on the Courts.

So far the Committee for Religious Freedom has not given any definition of “religion” (religião) or “belief” (crença).

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

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

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

- In criminal cases: criminal liability starts at 16 years of age. Special legislation applies to persons between 16 and 21 years of age.

- In civil cases: Article 488(2) of the Civil Code establishes a presumption of non-existence of civil liability for minors aged less than seven years of age.

d) There are no specific rules dealing with situations of multiple discrimination.

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.

b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

a) Civil and administrative Portuguese law prohibits discrimination based on assumed characteristics. The principles of interpretation generally used in Portuguese courts cover cases where discrimination is based on an incorrect assumption.

An incorrect assumption by the perpetrator of the offence (discrimination) cannot be considered as justification under the general principles of criminal law. The principles of Article 16 of the Criminal Code relating to error (*error in persona*) are applicable in the enforcement of administrative sanctions, and consequently they apply to criminal and administrative sanctions.

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

Articles 22(2) and 23(1) of the Labour Code prohibits “employers’ discrimination against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic patrimony, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade unions affiliation” and so sets out the grounds of discrimination without any limitation as regards the actual situation of the worker and in such a broad way that it covers discrimination based on association.

Article 3(1) of Law 134/99 uses the wording: “Racial discrimination is considered any distinction, exclusion, restriction or preference depending on the race, colour, ancestry, national or ethnic origin that has as objective or produces as a result the annulment or restriction of the entitlement, fruition or exercise in conditions of equality of rights, freedoms and guarantees or of economic, social or culture rights”. Similarly, this definition is so broad that it covers discrimination based on association.

Article 3(2) of Law 18/2004 considers as discrimination any discriminatory practices that violate the principle of equality.

Assumed and associated discrimination will be treated as discrimination.

So far there are no Court judgements on this specific point,

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

a) How is direct discrimination defined in national law?

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

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

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

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

Article 32(2)(a) of Law 35/2004 defines direct discrimination as:

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

Article 4 of Law 46/2006 states that:

“It is considered that discriminatory practice against disabled persons occurs through acts or omissions, with intention or negligence on grounds of disability violate the principle of equality. For instance: the refusal to provide or the impeding of the taking up of goods or services; impediment to or limitation of access to and normal exercise of an economic activity; impediment to or limitation of access to buildings and public premises; the adoption of measures which may limit the access to new technologies”.

b) The law permits direct discrimination to be justified in very few cases, those covered by genuine occupational requirements.

Law 35/2004 regulating the Labour Code states in Article 32(2)(a) and (b) that “direct discrimination occurs when, on one of the grounds referred to [in Article 23(1) of the Labour Code] a person is treated less favourably than another is, has been or would be treated in a comparable situation”. The wording of Article 23(2) of the Labour Code and Article 32(2) of Law 35/2004 corresponds to the wording of the Directive. However, the law does not give any indication as to what is to be considered justifiable, determining, legitimate and proportionate.

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

2.2.1 Situation Testing

- a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*
- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*
- c) *Outline important case-law within the national legal system on this issue.*
- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

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

b) There is no reluctance to use situational testing as evidence in Court, on the basis of ethical or methodology issues. The Courts will evaluate the evidence resulting from eventual situational tests according to their own evaluation on the credibility of the persons involved. It is quite common in Portuguese Courts to use as arguments legislation, court precedents and doctrine of other countries, mainly of European countries.

c) There is no significant case-law on this issue. The author does not know if situational testing has been used during a trial in a court of first instance because first instance cases are not reported on court web sites.

As far as the author knows there is no case law on this issue and according to the information available.

d) Situational testing is not being used in practice.

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

- a) *How is indirect discrimination defined in national law?*
- b) *What test must be satisfied to justify indirect discrimination?*
- c) *Is this compatible with the Directives?*
- d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

a) Law 18/2004 states in Article 3(3)(b) that “there is indirect discrimination whenever an apparently neutral provision, criterion or practice places persons of a certain race or ethnic origin in a less advantageous situation than other persons.” Article 32(2)(b) of Law 35/2004 uses similar wording.

b) According to Article 3(3)(c) of Law 18/2004, discrimination does not occur when behaviour is based on any of the above-mentioned factors and, due to the nature of the activities or the context in which they are carried out, that factor is a justified condition and determining for their exercise, provided that the objective is legitimate and that the condition is proportionate.

According to Law 35/2004, the Labour Code “indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons with one of the

characteristics referred to in Article 23(1) of the Labour Code in a less advantageous situation compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.

According to Article 32(2)(b) of this law, indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The text of Article 2(2)(b)(i) of the Directives is thus reproduced.

c) This wording is compatible with the Directives.

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

2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*
- b) *Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*
- c) *Please illustrate the most important case law in this area.*
- d) *Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

a) Statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts named by the parties or appointed by the court.

It is up to the court to evaluate the evidence resulting from the statistics. They are admissible if they can be produced as documents (Article 515 and 523 to 552 of the Civil Procedure Code). National census contains no relevant data for the purposes of this report.

In civil, criminal and labour proceedings, plaintiffs have the right to require through the Court that the data in possession of the respondents or third parties to determine a *prima facie* case of discrimination to be put at the Court’s disposal and, if necessary, subject to the appreciation of experts. This is provided for in Código de Processo Civil, articles 513 (object of the evidence), 519 (duty of cooperation to the discovery of truth), 519 A (the judge may when he deems it convenient require the parties to produce confidential data), 528 (duty of the other part to present to the Court the documents deemed necessary), 531 (documents belonging to third parts must also be surrendered to the Court if they are considered necessary as evidence).

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

b) No. There have been no cases in Portugal involving direct or indirect discrimination where statistics have played a major role. There is no reluctance to use statistical

evidence in Court, on basis of ethical or methodology issues. The Courts will evaluate the evidence resulting from eventual situational tests according to their own evaluation on the credibility of the persons involved. It is quite common in Portuguese Courts to use as arguments legislation, court precedents and doctrine of other countries, mainly of European countries.

c) There has been no important case-law involving statistics.

d) This point is covered by Law 67/98 of 26 October 1998, Lei da Protecção de Dados Pessoais (Law on the Protection of Personal Data), transposing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Article 7(1) of this law forbids the processing of personal data concerning philosophical or political convictions, membership of political parties or trade unions, religion, private life and racial or ethnic origin as well as data related to health and sexual life. This procedure is not often used and we have no knowledge that this has been used in contexts other than employment. As far as we know, no victim of discrimination has made a complaint based on the prohibition of processing personal data. There are no other exceptions to Article 7(1) apart from paragraphs (2) and (3) that state:

“The processing of data may be permitted in case of important public interest; when the individuals have given their consent; to protect the vital interest of the individual when the individual is unable through incapacity to give his/her consent; processing by a legal entity with no commercial interest (sans but lucrative) when it concerns only its members and provided that the data are not available to other persons without prior consent of the individuals; when necessary for a judicial procedure and for this specific procedure.

Employers in general are only allowed to keep records of their workforce regarding characteristics (personal data) of their workers after obtaining permission from the Comissão Nacional de Protecção de Dados - CNPD (the Commission for the Protection of Personal Data) and the consent of the worker. Personal data are defined in Article 3 of Law 67/98 of 26 October 1998, Law on the protection of personal data as any information related to a natural person (individual) clearly identified. Employers must inform the CNPD in advance as to what type of data they intend to collect and the purpose of keeping personal records. They must supply all the documentation related to the collection of data and indicate the procedure to be used, in particular on how they intend to obtain the agreement of the person involved. The exceptions are mentioned above.

2.4 Harassment (Article 2(3))

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

b) Is harassment prohibited as a form of discrimination?

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

a) For criminal law purposes, Articles 163(2) and 164(2), which concern sexual coercion and sexual abuse, define “harassment” for criminal purposes as the “abuse of authority resulting from a hierarchical, economic or work relationship, by means of an order or threat”.

This definition is more restrictive than that contained in Article 24 of the Labour Code and in Article 3(4) of Law 18/2004 where harassment is defined as any form of unwanted behaviour that is related to racial or ethnic origin and has the purpose or effect of affecting a person’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive¹⁹ environment.

Article 24(1) of the Labour Code states that harassment of employees and job applicants is to be considered a form of discrimination. Article 24(2) defines harassment as: “... any kind of unwanted behaviour related to one of the grounds referred to in section 1 of the previous Article, occurring in the context of an application for a job or in the context of actual employment, occupation or professional training, which has the purpose or the effect of affecting a person’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Article 24(3) 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 harassment. Article 23(1) of the Labour Code (which refers to Article 24) prohibits “employers’ discrimination against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic patrimony, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade unions affiliation” and so sets out the grounds of discrimination without any limitation concerning the actual situation of the worker and in such a broad way that it covers discrimination based on association.

The concept of harassment embedded in the Labour Code differs from the notion of harassment that can be found in Article 2(3) of the Directives by accepting that the purpose and effect of the harasser’s behaviour may either be to violate a person’s dignity or to create an intimidating, hostile, degrading, humiliating or disturbing working environment. It grants employees wider protection against harassment than the Directives. According to Law 18/2004 Article 3(4) and Article 24(1) of the Labour Code, harassment is considered a form of discrimination.

The general rules dealing with workers’ behaviour in the workplace (including Articles 121(1)(a) and 396(1)(3)(b)(c)(i) of the Labour Code, and the rules on the protection of workers and employees’ individual rights outlined by Articles 15 to 21 of the Labour Code and Article 70 et seq. of the Civil Law Code) would apply in some cases, providing workers with some protection against unwelcome conduct based on their sexual orientation.

Under Article 122(c) of the Labour Code the 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.

¹⁹ The Portuguese laws reproduce the exact wording of the Portuguese version of the Directive where “offensive” corresponds to “destabilizador”. This Portuguese word corresponds, in our opinion, better to the English word “disturbing”.

c) There are no additional sources on the concept of harassment.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

Article 32(3) of Law 35/2004 includes a provision specifically stating that “an order or instruction with the purpose of disadvantaging any persons by reason of one of the grounds referred to in Article 23(1) of the Labour Code shall be deemed to constitute discrimination”.

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

Article 5 of Law 46/2006 complements the articles laid down by the Labour Code. This Article considers the following to constitute discriminatory practices against disabled persons: the adoption of procedures, measures or criteria directly by the employer or through the instructions given to workers or job centres, which may make the recruitment of employees and the termination of the work contract conditional upon factors of a physical, sensorial or mental nature. Also 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.

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

a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. → does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

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

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

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

a) Articles 73 and 74 of the Labour Code establish that the employer has a duty to provide reasonable accommodation for disabled people. The State has a duty to give support to the employers. The burden is not considered disproportionate when it is compensated by the State (Article 74(3)).

Article 74 states that the employer shall adopt appropriate measures of positive action to enable a person with a disability or a chronic disease to have access to, participate in, or progress in his or her career, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The burden shall not be considered

disproportionate when it is sufficiently remedied by legal measures that exist within the framework of the national disability policy. The burden will not be considered disproportionate when it is compensated for by the State in terms still to be provided for in special legislation. This legislation has not yet been adopted. In addition,

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

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

Article 73 and Article 74 consider reasonable accommodation as a positive action.

Article 73(1) refers to the principle of equal treatment and Article 73(2) and (3) refer to positive action from the State. In this sense they are in accordance with Article 74, and in particular Article 74(2).

Article 74 refers to positive discrimination in favour of disabled people. When the burden will be recompensed by financial aid from the State, an employer’s refusal may be considered discrimination.

The National Action Plan for Employment for 2003 - 2006, adopted by Council of Ministers Resolution no. 185/2003 on 3 December 2003, includes positive action measures that aim to improve the employability and social and professional integration of people with disabilities and chronic diseases, such as the removal of architectural barriers in order to enable a person with a disability to participate in employment or vocational training.

The Prime Minister announced on the 4 December 2006 disability-specific measures for the period 2007-2009.

The Plan of Action for the Integration of People with Disabilities or those who are incapacitated foresees 95 measures and will be implemented between 2007-2009. This plan sets out a group of measures and actions which form a policy that is integrated and cross-sectoral aiming to promote the rehabilitation, integration and participation of people with disabilities in Portuguese society.

The three axes of the plan approved by the Council of Ministers on the 30 August are: access to employment and education, education, job qualifications and reasonable living conditions for people with disabilities.

Another objective of this plan is a 30 % increase in the social housing with the creation of residences where the people with disability will have autonomy. "Our commitment is to create 20 autonomous residences before 2009, as well as to create more 555 places in homes”.

b) Article 73(1) of the Labour Code guarantees equality of treatment of disabled people. The violation of this principle constitutes a serious offence and is punished by the same fines as discrimination.

Employers will be punished either for violating Articles 22(1) and 23(1) (discrimination) or Article 73(1), but not for both (i.e. they will not be punished twice). An individual to whom reasonable accommodation is denied can either complain to the General Labour Inspectorate which must investigate the situation or file a case in the Labour Courts.

Article 74 is headed “positive measures”. Paragraph (1) deals with the question of reasonable accommodation. It transcribes the wording of the Directive.

Once the special legislation referred to in Article 74(3) is adopted, the refusal to provide reasonable will be considered as a discriminatory act but as the law detailing financial assistance to be provided by the State has not yet been adopted, employers (particularly small and medium sized enterprises with fewer than 50 employees) claim that they face a disproportionate burden. Reasonable accommodation is considered a positive action and only after financial assistance is provided by the State, it will be possible to consider court actions based on Article 73 and Article 74.

c) National law has not implemented this duty in respect of any of the other grounds.

d) Decree-law 123/97 of 22 May 1997 required that buildings and infrastructure should be designed according to the needs of disabled people, in an accessible way. This Decree-law has been abrogated by Decree-law 163/2006, 8 August 2006 which approves the accessibility regime to buildings and public premises constitutes the regulation of the principles laid down in Law 38/2004, 18 August 2004, defining the general legal basis for the prevention of the causes of disability, and the qualification, rehabilitation and participation of people with disabilities.

The environment created by the legislation should be barrier-free and adapted to fulfil the needs of all people equally.

This Government Decree sets out the technical rules and measures to be taken into account in the public planning process. These rules need to be implemented in the design of several complementary spaces: open spaces and recreational areas, local roads and footpaths, the immediate vicinity of buildings, changes in building entrances and in the interiors of buildings. This Government Decree also sets out the design requirements to access both new and existing constructions (public and private), and the minimum dimensions and measurements, materials, etc. It also defines the problems encountered in existing constructions and recommends alternative solutions and modifications.

Legal entities (NGO’s and associations) representing disabled people interests have legal standing in Court to take cases on behalf of disabled individuals.

It will soon be possible to rely upon other legislation in a discrimination case, but so far there are no precedents.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
- b) *Would such activities be considered to constitute employment under national law?*

a) Portuguese legislation makes provision for sheltered or semi-sheltered accommodation and work for disabled workers in Decree-laws 40/83 of 25 January 1983, 194/85 of 24 June 1985, 299/86 of 19 September 1986 and 247/89 of 5 August 1989.

Employers will receive State funds for setting up facilities, their running costs and remuneration of workers. Work will be carried out in a Centro de Emprego Protegido (Sheltered Employment Centre) or in an “enclave” for semi-sheltered work, which is an area where disabled people can work in a normal workplace under adapted conditions²⁰.

b) These activities can be carried out:

(i) As a probationary (training) period of up to nine months which does not involve an employment relationship.

(ii) As employment involving a normal employment relationship.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

Article 23(1) of the Labour Code prohibits ‘employers’ from discriminating. This applies to natural and legal persons (Article 617 of the Labour Code). Article 23(1) of the Labour Code refers only to employers, but under Article 614 and 621 of the same Code, everyone is liable to administrative sanctions if they violate the provisions on equality and non-discrimination.

Article 396(3)(b), (c) and (i) specifically stipulate that a worker may be dismissed if s/he breaches co-workers’ rights, repeatedly enters into conflict with co-workers and if s/he commits any crime in the workplace against co-workers.

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

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

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

There are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives. All persons benefit from the protection of the anti-discrimination laws²¹.

²⁰ For further information on sheltered accommodation or work please visit http://portal.iefp.pt/Medidas/medidas/entidades/entidades_5_c.htm

²¹ See also Article 33(2)(a) of Law 35/2004 and Article 2(3) of Law 18/2004.

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

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

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

As regards liability, fines are increased for legal persons.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

- a) Employers and service-providers can be held liable for the actions of employees.
- b) They cannot be held liable for actions of third parties except if (i) a special duty of care is imposed by law; or (ii) a special relationship can be established, for instance with sub-contractors (Article 617(2) of the Labour Code).
- c) The individual harasser or discriminator is also held liable. The prohibition of discrimination applies to all. Employers and workers may be held liable.
- d) (i) Trade unions or other trade/professional associations are liable for the actions of their directors, representatives and officers; (ii) they are liable for the actions of their members only if they are in a situation in which they represent them or they are acting in accordance with instructions given by unions or by associations.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

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

Article 2(1) of the racial anti-discrimination Law 18/2004 is applicable to all sectors.

The equality and non-discrimination provisions of the Labour Code apply to all fields of private employment and, until other specific regulations are passed, to public sector

employees (Article 1(2) of Law 35/2004) and Article 5 of Law 99/2003). Self-employment is explicitly referred to in the Labour Code in Article 13.

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

The Portuguese Government has opted to implement Directive 2000/78/EC (together with a considerable number of other EC directives) through a new, comprehensive Labour Code, which came into force on 1 December 2003, and through the adoption of supplementary provisions (Law 35/2004).

Articles 30 to 40 of Law 35/2004 develop the material scope of the provisions on equality and non-discrimination contained in the Labour Code (Article 32). These rules are applicable to all work relationships referred to in Article 13 of the Labour Code and in Article 1(2) of Law 35/2004.

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

- (a) selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy;
- (b) access to all types and to all levels of vocational guidance, vocational training, and retraining, including practical work experience;
- (c) pay and other pecuniary payments, promotions at all hierarchical levels and the criteria used in the selection of employees to be dismissed;
- (d) membership of, and 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 73 to 78 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 73 (1) states that these workers shall enjoy all the same rights and be subject to all the same duties as other workers as regards access to employment, training, job promotion and working conditions, except to the extent that their disability renders them unable to exercise them. The law does not lay out criteria determining when a person is unable to exercise such rights and duties. The decision is firstly that of the employer but it can be verified by the General Labour Inspectorate and by the Labour Courts, which can ultimately decide whether the person is really unable or not. As far as positive action is concerned, Paragraph 2 of the same Article states that the Portuguese State shall create incentives for hiring people with disabilities or chronic diseases.

However, there is no legislation on discrimination on the grounds of religion, belief, age, or disability in the field of self-employment and occupation, with the exception of Article 13 of the Labour Code which grants restricted protection in cases similar to an employment relationship.

Law 46/2006 prohibiting and punishing discrimination based on disability and on aggravated risk to health forbids in its Article 4 (b) all the discriminatory practises namely the impeachment or limitation of the access to exercise an economical activity.

Article 5 of the same law complements the articles laid down by the Labour Code. This Article considers the following to constitute discriminatory practices against disabled persons: the adoption of procedures, measures or criteria directly by the employer or through the instructions given to workers or job centres, which may make the recruitment of employees and the termination of the work contract conditional upon factors of a physical, sensorial or mental nature. Also 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.

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

The public sector is not dealt with differently to the private sector (Articles 5 and 6 of Law 99/2003).

The public sector has a quota of 5% for the employment of disabled people, and the private sector has a quota of 2%, but these quotas have never been implemented due to the lack of adequate regulations. No fines or sanctions are provided for by the law in case of non-application.

Self-employment is protected against any type of discrimination by the principles set out in the Constitution and specifically by the laws forbidding race discrimination. Discrimination on other grounds is forbidden by the Labour Code, which applies to independent work under the conditions set down in Article 13. This Article states that contracts that deal with employment are subject to the principles of the Code as regards equality of treatment and non-discrimination. This rule does not cover access to professions such as that of lawyer, doctor, or accountant, nor discrimination occurring in the exercise of independent practice.

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

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

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

a) Non-discrimination related to working conditions is covered by Article 33 of Law 35/2004 and Articles 22(1) and 23(1) of the Labour Code.

Protection covers employment and working conditions, including pay and dismissals, contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out. The employee cannot be asked to fill in a questionnaire containing unnecessary data.

b) The principles of non discrimination on all grounds covered by Directive 2000/78/EC are applicable to occupational pensions. The rules governing occupational pensions do

not contain specific exceptions. The Portuguese legal system, namely the Constitution, forbids any form of discrimination. Rules on occupational pensions must be interpreted in accordance with this principle.

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

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

Protection covers both “education” and “vocational training”.

Article 73 of the Labour Code grants equal treatment to disabled workers in vocational training but no specific measures are provided for.

Article 123(1) of the Labour Code establishes that employers must give professional training to workers according to their qualifications. Article 123(3) states that “The State should guarantee, in particular, the access of citizens to professional training and continual updating of knowledge and skills from when they start work, and should also support the operation of the training system through public funds”.

Article 124(e) establishes that one of the objectives of professional training must be to promote professional rehabilitation of disabled people especially to those whose disability results from a labour injury.

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

Article 33(1)(b) of Law 35/2004 refers to “orientation, training and professional retraining at any level including the acquisition of practical experience”²² and Article 73 of the Labour Code guarantees vocational training to disabled workers. Article 74 of the same Code refers to positive measures on vocational training to benefit disabled workers.

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

Article 2 of Law 46/86 of 14 October 1986 as amended by Law 115/97 of 19 September 1997 (the Basic Law on the Educational System)²³ grants all Portuguese citizens the

²² “orientação, formação e reconversão profissional de qualquer nível, incluindo a aquisição de experiência prática”,

²³ Lei n.º 46/86 de 14 de Outubro, Lei de Bases do Sistema Educativo

right to education and culture according to the Portuguese Constitution. Articles 16, 17 and 18 of this law refer to the right of disabled people to special education.

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

There are no specific provisions considering technical schools or universities and no Court cases are available on this subject. It is the author's opinion that anti-discrimination law will be applicable to vocational training in technical schools and universities.

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

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

Article 23(1) of the Labour Code states that “the employer cannot practice any discrimination, direct or indirect, based namely on ... religion, political or ideological convictions or trade union affiliation”. No discrimination is therefore allowed on the basis of membership of a trade union. Trade unions themselves cannot discriminate against their own members.

Article 33(1)(d) of Law 35/2004 protects the right to equal opportunities and treatment covers membership and involvement in an organisation of workers whose members carry out a particular profession including the benefits provided for by such an organisation.

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

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

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

Law 32/2002 of 20 December 2002 (the Basic Law on Social Security System) establishes in Article 8 the principle of equal treatment and forbids any kind of discrimination regarding beneficiaries.

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

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give

an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.

Discrimination is not permitted in these areas (Article 59 of the Constitution and Article 2(1) of Law 18/2004).

Law 32/2002 of 20 December 2002 (the Basic Law on Social Security System) establishes in Article 8 the principle of equal treatment and forbids any kind of discrimination regarding beneficiaries.

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

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Protection covers both “education” and “vocational training”.

Article 73 of the Labour Code grants equal treatment to disabled workers in vocational training but no specific measures are provided for.

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

The disabled person may work those hours if he/she so wish and if there is no danger to his/her health.

Article 33(1)(b) of Law 35/2004 refers to “orientation, training and professional retraining at any level including the acquisition of practical experience” and Article 73 of the Labour Code guarantees vocational training to disabled workers. Article 74 of the same Code refers to positive measures on vocational training to benefit disabled workers.

The principles of non-discrimination are applicable to education (Article 74 of the Constitution). Disabled children cannot be denied access to education on the grounds that they “cannot learn”. Disabled children or adults are placed in mainstream education whenever possible. No data are available on the percentage of disabled children attending mainstream schools.

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

This relates only to disabled people's right to special and adapted education that may be included in the mainstream education. Disabled persons have the right to special education if necessary.

The Labour Code is not relevant in the context of education.

For other grounds of discrimination, the principle of equal treatment is to be applied, but the Labour Code does not include specific positive actions for the Roma community.

Discrimination is unlawful in education. There have been several incidents of parents protesting against the presence of too many Roma children in schools.

Note: "too many" is a very subjective idea frequently used in the context of populist argument; it has nothing to do with the real proportion.

A case of discrimination against Roma children occurred in January 2005 in Bragança. The parents of other children opposed the presence of Roma pupils in school. The problem was solved by the intervention of the ACIME²⁴, and according to the ACIME's 2002-2005 report, Roma children remained in school.

Roma children attend schools according to their parents' declared place of residence. Schools in these areas are not the better ones and difficulties related to the Roma student's integration are frequent. There has been clear progress as regards literacy. The present generation of Roma is clearly in a better situation than their parents' generation. However, this new generation still faces discrimination relating to their level of education: they generally leave school earlier than other students, in the fourth grade (between the ages of 10 and 12), and do not complete the nine-year period of compulsory education (until ninth grade). Most leave school due to academic failure and having to repeat school years, and the majority 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 Roma children's social needs and values
- teachers' difficulty in understanding the children's situation.

Some problems have been encountered in schools between teachers and Roma students. Children leave school early as their parents expect them to work from a young age. The drop-out rate among girls is greater than among boys. Language problems have not been reported²⁵. The older generations are predominantly illiterate, and among children, total illiteracy is still around 25%, and affects predominantly girls²⁶.

²⁴ ACIME – Alto Comissariado para a Imigração e Minorias Étnicas (High Commissariat for Immigration and Ethnic Minorities)

²⁵ *Luíza Cortesão in Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas, 2005*

²⁶ *Mendes, Cortesão et al., in Pontes para outras viagens, Escola e comunidade cigana: representações recíprocas, 2005*

In a study published by ACIME²⁷ no relationship is established between rehousing and segregation or absenteeism at school. However, this study confirms that absenteeism of Roma children is greater than the others.

Another study²⁸ also published by ACIME concludes that absenteeism is due to the fact that the school is not perceived as a factor of valorisation and professional training. No relationship between rehousing and absenteeism is referred.

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

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

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

Article 3 of Law 18/2004 applies to discrimination on the basis of race or ethnic origin. Anti-discrimination rules are applicable to the supply of goods and services. The law is applicable to all goods and services available to the public. Goods and services available through private associations are excluded under the principle of freedom of association. According to Decree-law 594/74 of 7 November 1974 as amended by Decree-law 71/77 of 25 February 1977²⁹, private associations have the right to restrict goods and services to their members. This means that distinctions can be made on the basis of membership. However, access to membership itself cannot be based on discriminatory criteria.

The rules against discrimination based on disability applicable to the access to buildings, public premises and also to the supply of goods and services are contained in Decree-law 163/2006 of 8 August 2006 which approves the accessibility regime to buildings and public premises and in Law 46/2006 of 28 August 2006 which prohibits and punishes discrimination based on disability, and on aggravated risk to health.

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

To which aspects of housing does the law apply? Are there any exceptions?

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

The question of social housing in general makes it difficult to solve the problem of rehousing of Roma³⁰ which means to displace the Roma communities from camping sites and shanty towns to social houses. Frequently other inhabitants complain against the instalment of Roma in the buildings.

²⁷ Luíza Cortesão in *Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas*, 2005

²⁸ Maria Manuela F. Mendes in *Nós, os Ciganos e os outros*, 2005 (pages 98-121)

²⁹ Decreto-lei n.º 594/74, de 7 de Novembro, com as alterações introduzidas pelo Decreto-lei n.º 71/77 de 25 de Fevereiro

³⁰ Isabel Duarte et al. in *Coexistência Inter-Étnica, espaços e representações sociais.*, 2005

There have been reports of discrimination in Porto and Montemor-o-Novo and the ECRI report for 2005 (Third Report on Portugal) number 104 refers to discrimination against Gypsies in accessing to houses.

4. EXCEPTIONS

The new legislation on equality and non-discrimination in the workplace allows for some differences of treatment, and expressly states that indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 32(2)(b) of Law 35/2004).

4.1 Genuine and determining occupational requirements (Article 4)

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

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

This wording complies with Article 4(1) of Directive 2000/43. Article 3(2)(c) of Law 18/2004 does not refer to disability.

Article 23(1) of the Labour Code prohibits in effect all practices of direct and indirect discrimination by the employer on the grounds listed. According to the same Code, a difference in treatment which is based on a characteristic related to any of the grounds listed shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a justifiable and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate; Article 32(2) of Law 35/2004, which regulates Article 23(2) of the Labour Code, corresponds to the wording of Article 23(2) of the Labour Code.

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

4.2 Employers with an ethos based on religion or belief

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

b) Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?

a) The Labour Code does not contain a specific provision on this subject. Article 396 considers just cause for dismissal in general, and provides for dismissal when the behaviour of the worker makes the continuation of the work 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.

This wording could cover the cases of organisations with a religious ethos. Portuguese law has no specific rule dealing with issues arising from organisations with an ethos based on religion or belief.

Article 396 is very broad and concerns only “just cause for dismissal”. It could be applicable in other situations where “the behaviour of the worker makes the continuation of work relationship impossible from a practical point of view”. This Article could 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 a problem of just cause for dismissal this will have to be a subject of a court ruling.

Even if Article 396 of the Labour Code concerns only just grounds for dismissal we can deduce by analogy that conflicts between organisations with an ethos based on religion and belief and their employees would be solved on the basis of the same principle.

It is necessary to balance the Labour Code’s provisions on equality and non-discrimination with the Constitution’s guarantee of freedom of religion, which is also directly applicable under Article 41 of the Constitution. Article 3 of the Law on Religious Freedom states that churches are free to organise themselves, to exercise their functions and provide church services. There is no specific rule on religious and other organisations with an “ethos” such as political parties and philosophical organisations; consequently decisions have to be taken on a case by case basis. A decision on the contradiction between an individual’s convictions and the organisation’s ethos could affect the loyalty of the individual is yet to be taken by the Courts.

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

We have no knowledge of cases arising from employment by a church. There is no rule allowing discrimination which is forbidden by Article 23 of the Labour Code without any exception. This issue has not been the subject of a court case. As no complaints have been presented concerning the recruitment or dismissal of workers on the grounds of religion or belief, we cannot predict the courts’ interpretation. The only case reported was some years ago when a journalist in a daily newspaper connected with a political party was forced to leave the newspaper after he had left the party. The dispute was solved through a mutual agreement.

However, if such facts were proved, hiring and dismissing any worker who does not conform to professes religion would be much broader than the Directives permit and

this practice would be a violation not only of the Directives but also of the Portuguese law.

In what concerns Church ministers and their status and functions the Supreme Court (Supremo Tribunal de Justiça) in Case 04S276, 16 June 2004, considered that the relationship between the minister and the Church is not governed by the Labour Code.

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

b) There are no specific provisions or case-law regarding such disputes.

4.3 Armed forces and other specific occupations

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

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

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

b) 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 employment.

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) How does national law treat nationality discrimination?

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

a) Article 1 of Law 134/99 also forbids discrimination on the grounds of nationality. Article 3(2) of Law 18/2004 refers to discrimination on grounds of nationality and colour in addition to racial and ethnic origin.

Discrimination on the grounds of nationality may be considered as discriminatory. It is possible in the sphere of employment to discriminate on the basis of nationality but only for reasons related to residence rights and work permits.

Discrimination based on nationality is forbidden in Article 23(1) of the Labour Code. Article 87 of the same Code grants foreign workers equal rights with Portuguese citizens, provided they are legally permitted to work in the country. They must, in general, have a written contract of employment (Article 88(1) of the Labour Code) and produce documents proving they have a work permit or residence permit (Article 158 of Law 35/04).

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

4.5 Work-related family benefits

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

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

a) Civil status and family situation are among the prohibited grounds for discrimination referred to in Articles 22(2) and 23(1) of the Labour Code.

Law 7/2001 of 11 May 2001 adopting protective measures on “de facto unions”³¹ (hereafter Law 7/2001), does not explicitly impose on public and/or private entities a general duty to treat “de facto unions” as equal to marital status. “De facto unions” have only the rights specifically referred to in law. This law is applicable to same-sex couples and gives unmarried partners that live together as husband and wife for at least two years a certain number of rights and benefits. Those relating with this question are:

- civil servants and employment benefits: partners living in a “de facto union” have the same rights that married civil servants enjoy regarding vacations, absences, leave, and placements; the same happens to private sector workers with regard to vacations, absences and leave.(Article 3(b) and (c)). In the present legal situation it is possible to contest that benefits not covered by Article 3(b) and (c) above may be limited to employees who are married.

However this can also be interpreted in some cases as a violation of Article 22(2) and 23(1) of the Labour Code and a violation of the principles laid down in the Constitution. We tend to consider that this will depend on the type and nature of benefits offered to married couples. If they can be considered as remuneration under the definition given by Article 249 of the Labour Code, we would tend to say that discrimination is not allowed, but we are not aware of any legal precedents on this issue.

b) Portuguese law does not recognise marital status for same sex couples. They are treated as “de facto unions” and are covered by Law 7/2001.

The answer given in a) above is applicable here.

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

³¹ Lei n. º 7/2001 de 11 de Maio de 2001, _adopta medidas de protecção das uniões de facto. The text of Law 7/2001 can be accessed at <http://portugalgay.com/politica/parlamento03.asp>

4.6 Health and safety

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

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

Disabled individuals cannot decide for themselves that they wish to accept such a risk. An employer can exclude a disabled person on the grounds that the work will pose a risk to the disabled person's health and safety. The employer will not be excluded from liability if the disabled individual suffers any harm in such circumstances (Articles 273 and 274 of the Labour Code).

It is the employer who assesses what measures are needed in order to protect the health and safety of disabled employees. This can be reviewed by the Labour Inspectorate and the General Health Inspectorate³² and by the Labour Courts (the disabled person can challenge the employer's decision before the Labour Courts).

Law 38/2004 of 18 August 2004 sets out the general legal basis as regards the prevention of the causes of disability, and the rehabilitation and participation of people with a disability, and was introduced by Decree-law 441/91 of 14 of November 1991 (the Basic Law on Safe and Healthy Working Conditions) as amended by Decree-law 133/99 of 21 April 1999. This Law 38/2004 expressly repealed Law 9/89 of 2 May 1989 (Article 51) as already mentioned, but as the decrees necessary to implement the law have not been adopted, the law is inoperative and in practice we rely on the previous legislation and regulations.

Articles 73 to 78 of the Labour Code contain provisions aiming to ensure the health and safety of disabled people at work and to secure better integration and adaptation to work. The law provides for several positive action measures to be agreed between the employer and the State concerning reasonable accommodation and between the employer and the employee, such as a flexible timetable and exemption from overtime and night work whenever necessary. Collective agreements can include other measures of protection. The disabled people can opt to work these hours if no risk to their health or other's health is posed.

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

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive

³² *Inspecção de Saúde da Direcção Geral de Saúde*

2000/78, account being taken of the European Court of Justice in the Case C-144/04, *Mangold* ?

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

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

a) Article 33(3) of Law 35/2004 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." It corresponds to the exact wording of the Directive.

Legal rules or collective agreements justifying the above-mentioned measures must be periodically evaluated and modified if they are no longer justifiable (Article 33(4)).

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

b) Portuguese law does not allow other differences of treatment based on age, with the exception of positive measures in favour of young people. The Constitutional Court considered unconstitutional the exclusion of young people between 18 and 25 years of age from a social benefit (Judgment no. 509/2002 of the Constitutional Court on discrimination of young people in access to social integration benefits). The ground for the decision was Article 1 of the Constitution (respect for dignity). The Court did not consider necessary to examine the implications of Article 13 (equality of treatment), but referred it as an *obiter dictum*.

c) It is possible under the Portuguese legislation to fix ages for admission to the scheme or entitlement to benefits under it in the cases of occupational pension schemes.

Pension's schemes must respect the principle of non-discrimination but they can fix ages for admission or entitlement if these can be justified under the conditions of the specific pension scheme.

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

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

Articles 53 to 70 of the Labour Code and Articles 114 to 146 of Law 35/04 contain a detailed set of rules protecting younger workers. Workers (whatever their age) who are still in high school or at university have the right to work up to six hours per week (Article 149 of Law 35/04). They are exempt from overtime (Article 150), and they may benefit from 10 days unpaid leave in addition to normal holiday allowance.

Articles 127 to 137 of Law 35/04 establish conditions for the vocational integration of younger workers with no professional qualifications.

Article 56 of the Labour Code establishes conditions for employing minors who have no professional qualifications or have not completed compulsory education (up to ninth grade).

The Institute for Employment and Professional Training³³ has a duty to supervise the implementation of these measures through a monitoring Commission (Comissão de Acompanhamento) in which the social partner members of the Permanent Commission for Social Dialogue³⁴ are represented.

There are no specific provisions for older workers.

Persons with caring responsibilities have certain rights:

- maternity leave of up to 120 days (Article 35 of the Labour Code and Article 68 of Law 35/2004);
- paternity leave of 5 days and of up to 120 days if the mother does not take leave (Article 36 of the Labour Code and Article 69 of Law 35/2004);
- the parent or guardian of a minor with a disability or chronic disease is entitled to special working conditions, namely reduced working hours (Article 37 of the Labour Code and Articles 70 and 82 of Law 35/2004);
- in the case of adoption, the adoptive parent(s) is/are granted 100 days leave (Article 38 of the Labour Code and Article 71 of Law 35/2004);
- Article 39 of the Labour Code and Articles 72 and 73 of Law 35/2004 grant the right to leave work for medical consultations and feeding a baby.

We must also refer to Article 40 of the Labour Code and Article 74 of Law 35/2004 which grants leave to assist minors, namely minors especially those with a disability or chronic disease.

Article 41 of the Labour Code and Article 75 of Law 35/2004 grant grandparents the right to leave of absence to take care of their grandchildren in some cases.

Articles 42 to 51 of the Labour Code and Articles 75, 76, 78, 79, 80, 81, 83, 96, 97, 98 and 101 of Law 35/2004 set out special working conditions for persons with caring responsibilities such as parental leave of three months, part-time work and flexible hours.

4.7.3 Minimum and maximum age requirements

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

The normal minimum age for access to employment is 16 years (Article 55(2) of the Labour Code). According to Article 55(3), persons of less than 16 years of age who have completed compulsory schooling (which in Portugal is nine years) are allowed to

³³ Instituto de Emprego e Formação Profissional (IEFP): www.iefp.pt/

³⁴ Comissão Permanente de Concertação Social

be employed doing very simple tasks that will not damage their health and personal development from the age of approximately 14 years.

According to Article 55(3) of the Labour Code and Law 35/2004, minors of less than 16 years of age are allowed to work provided they have already finished compulsory education and the tasks set are simple. Compulsory education corresponds to ninth grade and children begin school at the age of six. (Article 6(1) and (2) of Law 46/86 of 14 October 1986, Basic Law on the Educational System). Children normally end their basic education at the age of 15. The General Labour Inspectorate must be informed of the employment of these persons (Articles 55 (4) and 56(3) of the Labour Code). Articles 116 to 119 of Law 35/04 prevent those of less than 18 years of age from undertaking several types of activities such as industrial slaughtering, activities which necessitate contact with high tension electric energy or preparing dangerous chemical products. Articles 122 to 126 of Law 35/2004 of 29 July 2004 also set out tasks (activities) which are limited to people aged 16 years or more. There are limitations on the participation of persons less than 18 years of age in public shows (Articles 138 to 146 of Law 35/2004).

For some types of public service, such as in the army or the police, there is an age limit for access to employment. This is covered by Article 6 of the Directive.

The normal minimum age requirement for public servants is 18 years.

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

4.7.4 Retirement

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

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

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

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

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

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?

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

a) (i) For public servants there is a mandatory retirement age of 70 years, and they must start receiving their pensions.

(ii) A public servant can receive a pension from Caixa Nacional de Pensões (CNP) and can still work if s/he is authorised by the Ministry, but in this case s/he will receive only one third of the normal remuneration.

(iii) Private employees have no mandatory retirement age. They can be receiving a pension and working at the same time, but in this case their contracts must be changed under Article 692 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.

b) (i) There is no legal normal age to begin to receive payments from occupational pension schemes. In the private sector payments can be deferred or a person can collect a pension and still work by agreement between the parties.

(ii) The normal age to start receiving payments from occupational pension schemes is between 60 and 65 years of age.

(iii) These payments can be deferred.

(iv) In some cases the individual can collect a pension and still work if the employer so agrees.

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

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

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

(ii) Article 392 of the Labour Code states that if the employee is 70 years of age or over, the duration of his/her labour contract should be six months on a renewable basis, subject to termination with 60 days notice.

The retirement age is the same for women and men.

4.7.5 Redundancy

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

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

a) Age is not taken into account but seniority is referred to in Article 403(2) of the Labour Code as one of the criteria for redundancy and collective dismissals. Workers with less seniority are generally selected for collective dismissals.

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

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

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

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

No, the laws implementing the Directives do not include any specific exceptions concerning public security, public order or similar but we must consider that these exceptions are implicit. In a case of conflicting rights, Article 335 of the Civil Code states that the right which is considered to be of higher value must prevail (this is for the courts to evaluate on the basis of the Constitution and general principles of law). Limitations of fundamental rights are dealt with by Article 18(2) of the Constitution: the law can restrict rights in cases provided for in the Constitution, but the restrictions must be limited to what is necessary to safeguard other rights or interests that are protected by the Constitution. Limitations of the main fundamental rights on the basis of public security, public order or similar are accepted by Constitutional law experts, but the latter differ on the extent of the limitations. There have been precedents in the Constitutional Court on this subject so far.

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

4.9 Any other exceptions

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

There are no other exceptions. Article 25 of the Labour Code states that positive action measures are not discriminatory.

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

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

b) Do measures of positive action exist in your country? Which are the most important?

Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

a) Article 8 of Law 18/2004 and Article 2 of Decree-law 251/2002 of 22 November 2002, establishing the High Commissariat for Immigration and Ethnic Minorities³⁵ are relevant in relation to race.

(i) Article 8(1) of Law 18/2004 states that it is up to the High Commissioner to promote equality of treatment among all persons, without any discrimination based on racial or ethnic origin. Article 2(h) of Decree-law 251/2002 states that it is within the competence of the High Commissioner to cooperate in creating and implementing active policies of social integration as well as combating the exclusion of immigrants and ethnic minorities, in particular by stimulating transversal cooperation between public administration and municipalities. The law does not contain any specific measures.

(ii) Roma community

Positive actions have been developed by the ACIME namely in:

- regulations and permits for travelling salespeople, which prevails as the main activity of this community;
- support of Roma NGOs and NGOs involved in the work with the Roma community

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

Coloured and Roma people often live in the districts of towns dominated by shanty or social housing. Many of the Roma are still living in “bairros de barracas” or “acampamentos” (shantytowns and illegal camping places). They have been integrated with other groups such as immigrants to Portugal legal and illegal. Some municipalities³⁶ have made an effort to eradicate shanty housing through a special rehousing programme, mainly after 1995. This has occurred for example in the Lisbon and Porto areas as well as Beja, Braga, Coimbra, Elvas, Évora, Setúbal. Newspapers sometimes publish incidents related to the accommodation of Roma families. The question of social housing in general makes it difficult to solve the problem of rehousing of Roma.

As far as courts and police are concerned, “Both institutions are relatively discriminatory.”³⁷

Cultural mediators have been introduced, recruited from among the Roma community to establish bridges between children, families and schools (Law 105/2001 of 31 August

³⁵ *Decreto-lei 251/2002 de 22 de Novembro de 2002 cria o Alto Comissariado para a Imigração e Minorias Étnicas*

³⁶ *Imigrantes e Mudanças Sócio-Urbanísticas nos Bairros das áreas Metropolitanas, Gabinete do Parlamento Europeu, 2005*

³⁷ *Mendes, Maria Manuela Ferreira in Nós, os ciganos e os outros, 2005, SOS Racismo, Saúde e Liberdade, ciganos, números abordagens e realidades, 2001*

2001 introducing social and cultural mediators)³⁸. The functions of cultural mediators (Article 2 of Law 105/2001) are to work in promoting social dialogue, to help the inclusion of ethnic minorities, to intervene when necessary in social and educational procedures, and to assist individuals in their contacts with public or private services. They are bound to respect the privacy and the confidentiality of all information.

The associations working in the areas of migration and cultural diversity are asking the ACIME to subsidise the post of cultural mediators. If the required conditions are met, the ACIME will subsidise the recruitment and employment of a cultural mediator. The ACIME does not allocate a specific budget for cultural mediators (71 mediators in Lisbon and 22 in Porto). So far we have not obtained figures about the employment of cultural mediators.

In 2005 the ACIME promoted the week of Cultural Diversity to spread good practices in intercultural education. Studies and surveys have influenced the general policy of the ACIME. For instance, a structure called the “Gabinete de Educação e Formação” (Office for Education and Training) has been set up in the ACIME, dealing with apprenticeship and training in schools.

The Roma community is represented in the Commission for Equality and Against Racial Discrimination. No specific measures have been taken apart from those above mentioned.

b) According to Article 25 of the Labour Code, “legislative measures of a specifically defined temporary nature, benefiting certain disadvantaged groups, including groups defined by reference to sex, reduced working capability, disability or chronic illness, nationality or ethnic origin, enacted with the aim of guaranteeing the exercise, in conditions of equality, of the rights provided for in this Code and of correcting a situation of factual inequality persisting in social life, shall not be considered discriminatory”. So far this article has not been implemented.

(i) Specific Provisions of the Labour Code against Discrimination on the Ground of Disability:

Articles 73 to 78 of the Labour Code refer to workers who have a disability or suffer from a chronic disease.

As regards promoting employment opportunities for a person with a disability, Article 73(2) states that the Portuguese State shall create incentives for hiring people with disabilities or chronic diseases.

According to paragraph (3) of the same Article, public authorities shall also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies shall give incentives to employers to include measures to help these people retain their employment when developing a strategy for managing disability in the workplace.

³⁸ *Lei n.º 105/2001 de 31 de Agosto, que estabelece o estatuto legal do mediador sócio-cultural.*

Several rights are guaranteed to workers with disabilities: the right to be exempted from a specific amount of workinghours. Article 75) if medically proven that it would constitute a danger to their health or safety at work; the right not to perform extra working hours (Article 76) and the right not to work during the night if that is considered to constitute a risk to their health or to the safety of the workplace (Article 77). The risk must be objectively evaluated and not solely by the employer.

The Code also states in Article 78 that laws or collective agreements may introduce provisions that are more favourable to the protection of workers with disabilities or chronic diseases than to the employer, whilst bearing in mind the interests of both.

We should also highlight the Labour Code rules on tele-working (Articles 233 to 243), which is considered in Portugal as a positive action (Article 26(2) of Law 38/2004). This new method of working may benefit citizens with a disability, since many of the tasks that were previously carried out in factories or in offices can now be done at home or from any place where the worker has access to the necessary tools. According to Article 236 of the Code, tele-workers have the same rights and the same duties as other workers in relation to training, job promotion and working conditions.

Article 75 of the Labour Code exempts disabled workers from working more than eight hours per day. Article 76 exempts them from working overtime and Article 77 exempts them from night work

Article 28 of Law 38/2004 establishes quotas for the employment of persons with disabilities of up to 2% for private enterprises and up to 5% for the public sector, but these have never been implemented.

(ii) Furthermore we would like to mention some successful positive actions such as:

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

Also Decree-law 163/2006 of 8 August 2006 which approves the accessibility regime to buildings and public premises, Law 46/2006 of 28 August 2006 prohibiting and punishing discrimination based on disability and on aggravated risk to health, the Plan of Action for the Integration of People with Disabilities and the National Plan for the Promotion of Accessibility provide positive actions concerning disabled people.

Another action has been recently implemented and deserves mention:

Some buses which assure the connection between hospitals and institutions for the support of disabled people are now equipped with access ramps for wheelchairs.

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

6. REMEDIES AND ENFORCEMENT

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

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*
- c) *Can a person bring a case after the employment relationship has ended?*

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

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

a) Racial discrimination in general

The High Commissioner for Immigration and Ethnic Minorities acts in many cases as a (*de facto*) mediator to try to solve conflicts and avoid formal legal procedures.

For the offences committed under Law 134/99 and Law 18/2004, the High Commissioner for Immigration and Ethnic Minorities has the authority to impose penalties.

He initiates an administrative procedure and after having heard the parties and the Permanent Committee of the Commission on Equality (CEARD), decides whether a fine should be imposed and how much that should be. The respondent has the right to appeal to the courts against the fines imposed by the ACIME. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure. The victims have the right to sue for damages in court.

Civil damages can be awarded for all types of discrimination under the general principles of Articles 483, 484, 496 of the Civil Code. In labour law, it should be noted that Article 26 of the Labour Code expressly states that the occurrence of any discriminatory act gives the worker or job applicant 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 Civil Code).

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

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

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

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

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

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

Labour discrimination

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

No specific procedures for mediation in relation to discrimination are provided for in the Labour Code. However, the rules for the Labour Courts make it mandatory for the judge presiding over a case to hold at least one conciliation conference between the parties before trial and require him/her to try and mediate in any labour dispute coming under his/her jurisdiction (Articles 32(2), 36(2), 51(1)(2), 55(2) and 70(1) of the Code of Procedure in Labour Courts). Article 541(f) of the Labour Code also states that collective agreements should include mechanisms for conciliation (Articles 583, *et seq.*), mediation (Articles 587, *et seq.*) and arbitration (Articles 564, *et seq.*) regarding labour disputes.

For the most part, conflicts under Directive 2000/78 will fall within the competence of these Labour Courts. In cases of employment discrimination, the case will be instructed and investigated by the General Labour Inspectorate (*Inspecção Geral do Trabalho*) which will check the facts that have been reported by the victims or any other person.

The General Labour Inspectorate is responsible for monitoring the enforcement of the Labour Code's provisions on equality and non-discrimination, for investigating any complaints arising from the infringement of such provisions and for imposing the administrative sanctions set out in the Code for such violations.

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

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

According to Article 614 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 either as minor (*leves*), serious (*graves*) or very serious (*muito graves*) offences. A violation of the provisions on equality and non-discrimination is considered a very serious offence. Other offences related to the application of Directive 2000/78/EC may be considered as minor or serious offences.

The violation may affect disabled people in general or a specific person. So far no fines have been imposed. In addition, the disabled person is entitled to compensation for the damages (losses) he or she has directly suffered. We have been unable to trace any cases of this.

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

Many court buildings have not been adapted to facilitate access for disabled people, and in most cases old buildings are very hard to access. Decree-law 163/2006 provides for the removal of architectural barriers but establishes a delay up to 8 years (Article 23) for the removal.

The Portuguese Disability Association³⁹ has repeatedly stated that Decree-law 123/97⁴⁰ of 22 May 1997 on the removal of architectural barriers to public buildings and services to secure accessibility has hardly been enforced: buildings housing public services must by law facilitate access by disabled people but in practice many of the buildings, including the Labour Courts themselves, have not yet been adapted.

During court procedures, information in Braille should be provided as well as sign language interpretation if necessary. There are no specific rules for the courts and the General Labour Inspectorate about dealing with individuals with a learning disability.

Mediation is not foreseen for dispute resolution for public servants (*funcionários públicos*). They have to file an action in the administrative courts.

b) (i) Mediation by the High Commissioner of Immigration and Ethnic Minorities is not binding.

(ii) Mediation by Labour Courts is binding.

³⁹ *Associação Portuguesa dos Deficientes*

⁴⁰ *Decreto-lei 123/97 de 22 de Maio sobre acessibilidade aos edifícios públicos, equipamento colectivos e via pública*: http://www.diramb.gov.pt/data/basedoc/TXT_LN_8146_1_0001.htm

The procedure of mediation in criminal law is being implemented by the Ministry of Justice and the “Julgados de Paz” (Justice of peace) will be later competent for it.

c) Yes, within a period of one year (Article 381(1) of the Labour Code). However, public servants normally go to court three months after receiving notice of the decision that affects them.

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

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

a) in support of a complainant

b) on behalf of one or more complaints (please indicate if class actions are possible)

a) (i) Article 7 (2) Directive 2000/43/EC is covered by Article 5 of Law 18/2004 and stipulates that associations may engage in judicial or other procedures in support of a complainant. This gives to them the right to legal standing in civil and criminal cases concerning race discrimination and in some administrative proceedings.

Article 5 of Law 18/2004 states:

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

Also Law 46/2006 in Article 15(1) foresees to disabled people associations and other similar organisations defending the rights and interests of disabled people, the right to intervene in support or on behalf of the complainant in his/hers respective legal procedures. Those entities have the right to follow the administrative procedure aiming to impose fines based on the practice of any discriminatory act referred to in this law. In case of a crime committed against a disabled person these entities have the right to be assistants in those crime lawsuits.

The appliance of this law will be followed by SNRIPD – Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência (National Secretariat for the Rehabilitation and Integration of People with Disabilities).

Also Decree-law 163/2006 on accessibility for the disabled foresees that legal entities (NGO’s and associations) representing disabled people interests have legal standing in Court to take cases on behalf of disabled individuals.

(ii) However, in cases of minor offences (contra ordenações) they have only the right to denounce and to file a complaint with the Comissão para a Igualdade e Contra a Discriminação Racial (the Commission for Equality and Against Racial Discrimination) and the Alto-Comissariado para a Imigração e Minorias Étnicas (the High Commissariat for Immigration and Ethnic Minorities). Individual complainants need to be identified only if this is necessary to substantiate the complaint.

They do not have the right to appeal if the complaint is dismissed nor the right to answer the appeal of a guilty person against a decision imposing a fine as the law on the appeal procedure in case of minor offences (contra-ordenações) only grants the right of appeal to the guilty person or the Public Prosecutor.

Article 53(1) of Código de Procedimento Administrativo (Procedural Code for Public Administration) grants to NGOs whose aim is to protect a certain general interest the option of intervening in the administrative procedure and consequently to appeal to administrative courts if they consider it necessary. However, we do not see many opportunities for using this Article in cases related to discrimination as this article is intended to cover interventions in matters related to environment problems.

(iii) Article 9(2) Directive 2000/78/EC is covered by Article 477(d) of the Labour Code but only trade unions have the right to intervene in the defence and protection of their members.

Furthermore Article 640 of the Labour Code grants legal standing to trade unions in administrative procedures imposing fines in cases of violation of the anti-discrimination rules of this Code with the right to file an appeal or to answer the appeal of the guilty person. Article 5 of the Labour Procedure Code (Código de Processo do Trabalho) allows the intervention of trade unions in employment cases. Other NGOs do not have these rights.

b) Trade Unions and NGOs in cases referred in a) have the right to act on behalf of one or more complainants. Class actions, in the sense of collective actions, i.e. actions with several complaints are possible in civil, criminal and labour procedures under Article 5(2)(c) of the Labour Procedure Code (the Code containing rules of procedure for labour actions in accordance with Decree-law 480/99 of 9 November 1999) states that trade unions may file actions, in representation of their members who authorise them to do so in cases related to the general violation of individual rights of identical nature. Article 5(3) states that the authorisation is presumed if the member does not manifest any opposition after being informed by the trade union of its intention to file the action.

- Law 33/95 of 31 August 1995 (Acção Popular Civil – People’s Civil Action) which covers some sorts of class actions does not seem to be applicable in the areas discussed here.
- Article 53(1) of the Código do Procedimento Administrativo grants to NGOs some rights to legal standing that can be used in some administrative procedures.

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

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

According to Article 23(3) of the Labour Code, it is for the person who considers him or herself discriminated against to substantiate the existence of the alleged discrimination, by naming the worker or workers he or she feels are, have been or would be treated

more favourably; it shall be for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination. Article 35 of Law 35/2004 states that “whenever the existence of a discriminatory practice concerning access to employment, professional training, or working conditions is alleged, Article 23(3) of the Labour Code regarding the burden of proof shall apply”. A presumption of discrimination is created once the employee can demonstrate the existence of facts that allow for such a presumption to be established. It is up to the employer to prove that his or her actions are not to be considered discriminatory.

It should be noted that Article 23(3) of the Labour Code applies to all grounds of discrimination mentioned in Article 22(2). The complainant has to establish the facts from which discrimination may be presumed. Once they have been established, the burden of proof will shift, since the employer has the duty to prove that the facts alleged in court are not true or justified. If the employer fails to prove that there has been no discrimination the employee shall win.

Article 6(1) of Law 18/2004 states that the victim of discrimination has to present facts from which the existence of such discrimination may be inferred; it is up to the respondent to prove that the differences of treatment are not the result of any of the factors mentioned in Article 3, which refers to discrimination on grounds of race, colour, nationality or ethnic origin and indicates, as examples, some typical discriminatory practices.

The victim must demonstrate the act of discrimination and present facts to substantiate it. The defendant must show in turn that the differential treatment had no racial or ethnic origin basis.

This principle does not apply to criminal procedure nor to actions when 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)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

Article 122(a) of the Labour Code prohibits the employer from “opposing, in any way whatsoever, the exercise by the worker of his/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 374(1)(a)(d) considers 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. According to Article 34 of Law 35/2004 acts of retaliation are null and void.

Based on these provisions (and also on the provisions set forth in Articles 396(1)(2) and 429(c) of the Labour Code), any kind of victimisation is considered illegal under the labour law.

There is no specific mention of protection of witnesses and of people that help a victim of retaliation, but if retaliation is proven the above rules should be applicable, considering the comprehensive wording of the law.

In Article 7 of Law 18/2004 is provided that acts of retaliation are null and void. It does not mention witnesses but they must be considered as protected. However, no other sanctions are provided for retaliation.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

c) Is there any information available concerning:

- the average amount of compensation available to victims

- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

a) Racial discrimination in general is a summary administrative offence (contra-ordenação). Law 134/99 and Decree-law 111/2000 consider that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions. Article 15 of Law 18/2004 makes reference to the above regulations.

Decree-law 111/2000 was repealed by Law 38/2004, however, Article 15 of Law 18/2004 states that for infringements related to discriminatory practices Articles 9 and 10 of Decree-law 111/2000 are still applicable, consequently these articles must be considered still in force.

The fines may vary from 400 to 2,000 Euros and are doubled for legal persons.

If the offence results from the omission of a duty, the application of the sanction does not prevent the offender from carrying out this duty if it is still possible. The High Commissioner for Immigration and Ethnic Minorities may apply the following ancillary sanctions:

- publication of the decision;
- public reprehension (admonition) of the perpetrators of discriminatory practices;
- confiscation of property;
- prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities;
- removal of the right to the benefits granted by public bodies or services;
- removal of the right to participate in trade fairs;
- removal of the right to participate in public markets;
- compulsory closing of premises owned by the perpetrators;
- suspension of licences and other permits.

Labour discrimination at work

The Labour Code does not consider discrimination a crime, but only a summary administrative offence (*contra-ordenação*). Article 620 of the Labour Code expressly states that these offences are also punishable in the case of negligence.

Administrative fines are defined by reference to the offence's degree of gravity, to the subjective nature of the offence (either intentional or non-intentional) and to the annual turnover of the offender (if it is a legal person). The amount of the fine varies according to several parameters (Article 620 of Law 99/2003 – the Labour Code) namely the degree of fault (intent or negligence), seriousness of the offence, and turnover of the employer. With the exception of the offence referred to on page 5 all the offences related to discrimination at work are considered very serious offences (Article 642 of the Labour Code).

Very serious offences are punishable as follows:

- a) when committed by an employer whose turnover is less than 500,000 Euros, fines can vary from 1,780 to 3,560 Euros in the case of negligence and from 4,005 to 8,455 Euros in the case of intent (*dolus*);
- b) when committed by an employer whose turnover is equal to or higher than 500,000 Euros but less than 2,500,000 Euros, fines can vary from 2,848 to 7,120 Euros in the case of negligence and from 7,565 to 16,910 Euros in the case of intent (*dolus*);
- c) when committed by an employer whose turnover is equal to or higher than 2,500,000 Euros but less than 5,000,000 Euros, fines can vary from 3,738 to 10,680 Euros in the case of negligence and from 10,680 to 24,920 Euros in the case of intent (*dolus*);
- d) when committed by an employer whose turnover is equal to or higher than 5,000,000 Euros but less than 10,000,000 Euros, fines can vary from 4,895 to 12,460 Euros in the case of negligence and from 12,950 to 35,600 in the case of intent (*dolus*);
- e) when committed by an employer whose turnover is equal to or higher than 10,000,000 Euros, fines can vary from 8,010 to 26,700 Euros in the case of negligence and from 26,700 to 53,400 Euros in the case of intent (*dolus*).

If the employer responsible for the violation of the rules is not an enterprise, fines can vary from 890 to 2,225 Euros in the case of negligence and 2,225 to 4,450 Euros in the case of intent (*dolus*).

If the discriminatory treatment occurs during the recruitment process, 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 23(1) of the Labour Code refers only to employers, but it is fair to assume that under Article 614 of the same Code everyone (and not only employers) is liable to administrative sanctions if they violate the Labour Code's provisions on equality and

non-discrimination as Article 614 refers to “qualquer sujeito” which means “any person” that violates the rules.

The Labour Code specifically considers legal persons as 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 617(2)). A decision imposing an administrative fine for a violation of the Labour Code’s provisions on equality and non-discrimination can also be published (Article 627(2)), in the manner ordered by Article 642(2).

Sanctions for the Violation of Disability Anti-discrimination Provisions:

The Labour Code specifies in Articles 641 to 648 which offences are considered as very serious and serious in cases related to discrimination. It should be noted that the criteria to distinguish among very serious, serious and minor offences are not clear or necessarily logical. The Labour Code considers for instance in Article 646 (1) that the violation of Article 73(1), which forbids discrimination against disabled people, is a “very serious offence”. In Article 646(2), however, a violation of Article 77, which exempts disabled workers from night work, is a “serious offence”.

Article 473(3) of Law 35/2004 considers a violation of Article 31, which introduces the duty to provide information about the rights and duties of workers in matters of equality and non-discrimination, to constitute a “minor offence”.

If the person is found guilty of discriminatory acts more than once (recidivist), s/he may be liable to ancillary penalties in addition to a fine, which may include the temporary withdrawal of a public authorisation to carry out activities in an enterprise, a ban on competing for a public contract and/or the publication of the decision.

Any discriminatory provisions included in an employment contract are, under Articles 294 of the Civil Code and 114(1) of the Labour Code, considered null and void and can be declared so by the Labour Courts.

The payment of compensation for pecuniary and non-pecuniary (moral) damages suffered by victims of discrimination is covered by Article 26 of the Labour Code. There is no ceiling on the amount of compensation that can be awarded. We have not found any court cases on this issue.

The sanctions provided by law are effective, proportionate and dissuasive. According to the information available, sanctions have only been imposed in a few cases.

According to Law 46/2006 forbidding disability discrimination, the practice of discriminatory acts gives the disabled person the right to compensation for moral damages/injury to feelings. Furthermore, the law foresees a pecuniary sanction of between approx. 2,000 to 4,000 Euros.

Penal sanctions: Article 239 of the Criminal Code defines and prohibits genocide, direct public incitement to commit genocide, and conspiracy to commit genocide. Article 240 of the Criminal Code punishes discrimination on grounds of race or religion. Paragraph 1 of this article makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage racial or religious discrimination,

hatred or violence. It also prohibits participation or assistance, including financial assistance, to such organisations or such organised propaganda activities. Paragraph 2 of Article 240 punishes anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin with the intention of inciting to or encouraging racial or religious discrimination. Paragraph 2 also punishes anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin, particularly by denying war crimes and crimes against peace or humanity, with the intention of inciting to or encouraging racial or religious discrimination.

Under Article 132(2)(e) of the Criminal Code on homicide, motives of racial, religious or political hatred 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 racist motives constitute aggravating circumstances for all offences. This means that, for other offences, it is left to the courts to decide, on a case-by-case basis, whether racial motives constitute an aggravating circumstance. Apart from the case described above (page 5) we have not found any other cases where racist motives have been considered as an aggravating circumstance.

Articles 251 and 252 deal with outrage (affronts and insults) and troubles and disorders affecting the normal provision of church services as crimes punishable with imprisonment of up to one year or with a daily fine for up to 120 days.

Article 254 considers as a crime the profanation of any cemetery punishable by up to two years imprisonment or a daily fine for up to 240 days.

Civil sanctions: According to Article 25 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 according to the general rules on (civil) liability (Articles 483 *et seq.* of the Civil Code). In some cases the employer (if the perpetrator is not the employer him/herself) may also be sued for damages together with the person who is held legally responsible for the discrimination complained of under Article 500 of the Civil Code (joint and several liability).

Under Article 70 of the Civil Code individuals may institute legal proceedings to protect themselves against any unlawful interference with their physical or psychological personality.

Furthermore, victims are entitled to ask the courts to put a stop to such interference or, where there is a threat of such interference, to prevent it. Thus far Articles 70 and 483 of the Civil Code have not been applied in cases of discrimination.

In the context of education, victims could also apply for this injunctive relief but it would be more practical to apply to the General Inspectorate of Education of the Ministry of Education (Inspeção Geral da Educação).

b) There is no ceiling on the amount of compensation that can be awarded as civil damages.

c) There is no information available on the compensation amount available to victims. No court cases on this issue have been reported.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

f) Is the work undertaken independently?

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?

Specialised bodies:

High Commissariat for Immigration and Ethnic Minorities (ACIME)

According to Article 8(1) of Law 18/2004 of 11 May 2004 as amended by Decree-law 86/2005 of 2 May 2005, it is the responsibility of the Alto Comissariado para a Emigração e Minorias Étnicas – the ACIME (High Commissariat for Immigration and Ethnic Minorities) in accordance with the regulations under Decree-law 251/2002 of 22 November 2002 amended by Decree-law 27/2005 of 4 February 2005, to promote the equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin.

It is the competence of the High Commissariat in particular:

Article 8(2)

“to propose through the Commission for Equality and Against Racial Discrimination (CEARD), normative measures aiming to abrogate any norms or rules contrary to the principle of equality of treatment.

to provide the necessary assistance to the victims of discrimination so that they can defend their rights.”

The High Commissariat deals not only with discrimination but also with immigration. For the purposes of Directive 2000/43/EC the relevant bodies which are included in the structure of the High Commissariat are:

- 1 - *Comissão para a Igualdade e Contra a Discriminação Racial* – Commission for Equality and Against Racial Discrimination (CEARD) and
- 2 - *Alto-Comissário para a Imigração e Minorias Étnicas* – High Commissioner for Immigration and Ethnic Minorities.

The competences referred to by Article 13(2) of Directive 2000/43/EC are exercised by these two bodies:

(1) The Commission for Equality and Against Racial Discrimination (CEARD) which was created by Law 134/99 of 28 August 1999 that prohibits discrimination in the exercise of rights based on race, colour, nationality or ethnic origin.

This Commission for Equality is chaired by the High Commissioner for Immigration and Ethnic Minorities and is composed of the following members:

- 2 elected by the Portuguese Parliament;
- 1 appointed by the Ministry of Labour and Solidarity;
- 1 appointed by the Ministry of Education;
- 2 from Immigrant Associations;
- 2 from Anti-Racist Associations;
- 2 from Trade Unions;
- 2 from Employers' Associations;
- 2 from Associations for the Defence of Human Rights;
- and 3 persons to be designated by the other members.

A Permanent Commission of three persons exists within the Commission for Equality. This is chosen from among the members of the Commission (two) and it is chaired by the High Commissioner. It advises on fines to be imposed. The advice is not binding.

Members of the Commission for Equality are appointed for three years.

The members of the Commission appointed by the Ministries can be removed by them.

Other members cease their functions when they no longer represent the associations.

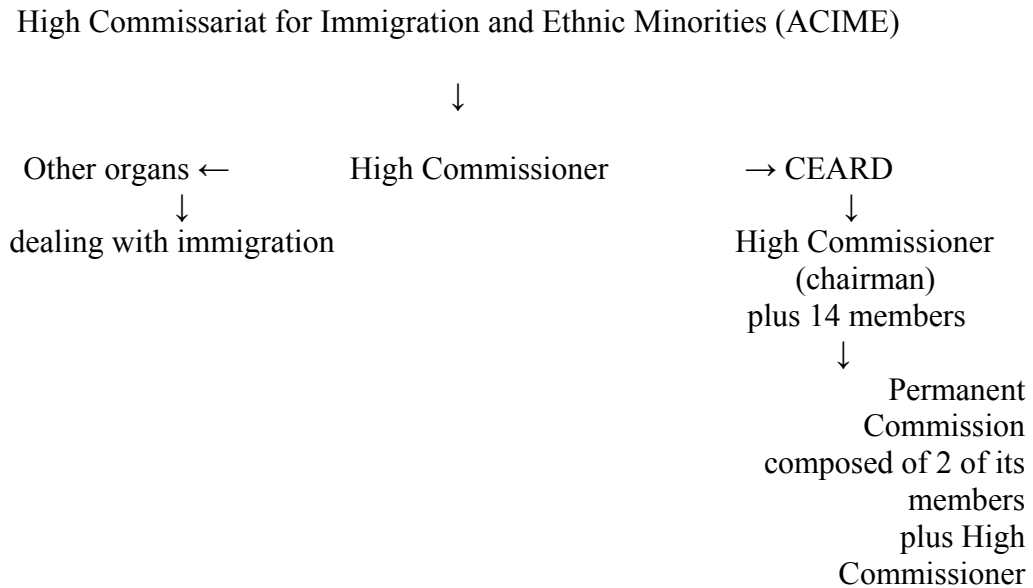
(2) The High Commissioner for Immigration and Ethnic Minorities was created by Decree-law 251/2002 of 22 of November 2002.

Today the main functions of the High Commissioner are:

- 1 – To supervise all services of the High Commissariat
- 2 – To chair the Commission for Equality (CEARD) and its Permanent Commission
- 3 – To make binding decisions concerning fines

According to Article 4 (2) of Decree-law 251/2002, the High Commissioner is appointed for a three year period and can be removed from office by the Prime Minister.

The structure of the High Commissariat (ACIME) is shown in the following organigram:



b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

Status:

Both bodies (the High Commissioner and the Commission for Equality) cover discrimination not only on the grounds of race, ethnic origin but also on the grounds of nationality and the High Commissioner is the Portugal's CERD representative (Notice 95/2001 of the Foreign Office of 24 August 2001)⁴¹.

According to Article 8 of Law 18/2004, these bodies cover all the areas that fall under the scope of the Racial Equality Directive (Article 3) and work on the national level.

The Commission for Equality (CEARD) and the High Commissioner has no specific budget. Their expenses are paid by the Budget of the High Commissariat which is as follows:

2004 – 4,674,194 Euros

2005 – 4,754,413 Euros

2006 – 5,824,570 Euros

This money comes from the annual national fiscal budget and the budget of the Ministry for Social Security and other parts of the government. The budget allocation of the High Commissariat forms part of the budget of the Presidency of the Council of Ministers. The High Commissariat (which includes both bodies) is accountable for the way it spends the budget and for expenses incurred in the Court of Auditors (Tribunal de Contas).

⁴¹ *Aviso n.º 95/2001 do Ministério dos Negócios Estrangeiros, 24 de Agosto de 2001*

The High Commissariat receives an annual transfer of around 3,750,000.00 Euros from the budget of the Institute for Employment and Professional Qualification, which is a body of the Ministry for Social Security. This transfer is included in the figures cited above. Decree-law 251/2002 refers to finances in Article 11(1).

There is no separate allocation for assisting victims in the High Commissariat's budget; however lawyers employed by the High Commissariat give legal assistance to the victims.

There are no specific human resources allocated to the bodies. Employees work for the High Commissariat and exercise their functions, when necessary, according to the competences listed by Article 13 of the Directive. The High Commissariat had around 33 full time staff covering all its areas of competence in 2005.

Only three members of the High Commissariat are civil servants. All the other members are not civil servants. They have better employment conditions than civil servants but they can be fired more easily.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

Competences:

The Commission for Equality (CEARD) has the authority to conduct independent surveys concerning discrimination, to publish independent reports and make recommendations concerning discrimination. It has to write annual reports describing its activities and evaluating its effectiveness. These reports are submitted to the Government and made public, and are published on the High Commissariat web site⁴². A special site for the Commission for Equality (CEARD) will be set up in the near future.

These competences are contained in:

Article 5(2) of Law 134/99 of 28 August 1999 establishes the competence of the Commission:

“(b) to gather all information related to discriminatory acts and to apply the related sanctions;

(c) to recommend the adoption of legislative, regulations or administrative measures that it deems adequate to prevent the practice of discrimination based on grounds of race, colour, nationality or ethnic origin;

(d) to promote and conduct surveys and investigation related to racial discrimination;

(f) to write and publish an annual report on the situation in Portugal concerning equality of treatment and racial discrimination.”

⁴² www.acime.gov.pt

High Commissariat (ACIME)

The High Commissariat also carries out surveys and writes and publishes reports and recommendations but there is no a specific budget allocated for these tasks. It has contracted academic experts to conduct surveys on discrimination and related problems and set up the Observatory for Immigration⁴³, which is composed of representatives of academic institutions and guarantees the scientific standard of the surveys. So far no specific surveys on the prevalence and forms of racial and ethnic discrimination have been published.

Decree-law 251/2002 of 22 November 2002 as amended by Decree-law 27/2005 of 4 February 2005, states in Article 2 (Competences of the High Commissariat):

Article 2

“(d) to fight against racism and xenophobia and to eliminate discrimination on grounds of race, ethnic origin or nationality;

(f) to promote the study of the theme of social inclusion and ethnic minorities, in collaboration with social partners, social solidarity institutions and other public or private bodies relevant in this matter;

(h) to collaborate and cooperate in the creation and implementation of active policies for social inclusion and to combat exclusion through interdepartmental action by public administration (public authorities).”

Complaints

Complaints can be filed to both bodies by individual citizens, NGOs, employees' organisations, etc. They benefit from the support of High Commissariat staff, who receive the complaints and pass the file to the Commission for Equality or to the High Commissioner. They do not conduct investigations on individual complaints themselves. They provide legal assistance to the victims in their offices and in cooperation with the Bar Association. Practical assistance is provided by UVIDRE (see below).

According to CEARD hundred and ninety complaints have been received by this Commission in the last six years. Complaints were presented by individuals and NGOs. Most of them were related with discrimination in access to work and work conditions as well as discriminatory way of attending people in hospitals and schools.

Fines have been imposed in only two cases: one concerning the refusal to rent a house and another related to discrimination at work. The other cases have been closed without any decision due to lack of evidence.

There are still sixty cases pending. The difficulties rely on obtaining evidence of the discriminatory attitudes and the length of time taken by the investigations.

⁴³ Observatório da Imigração, site www.oi.acime.gov.pt

d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

Assistance to victims:

The High Commissioner has the responsibility to provide independent assistance to victims of discrimination, to conduct independent surveys concerning discrimination and to publish independent reports and make recommendations concerning discrimination.

A protocol was signed on 17 November 2004 between the High Commissariat and APAV - Associação Portuguesa de Apoio à Vítima (the Victims' Support Association) to create UAVIDRE – “Unidade de Apoio à Vítima Imigrante e de Discriminação Racial ou Étnica” - a unit to give assistance to immigrants facing discrimination and to the victims of racial or ethnic discrimination. This protocol lasts for a period of one year and is renewable. The protocol gives financial support of 38,000 Euros to the unit and entered into force in May 2005.

From May 2005 to March 2006, UAVIDRE has received 374 complaints most of them on domestic violence (80,7%) mainly on women ill-treatment specially from the age of 26 to 35 years. There were few complaints on racial or ethnic discrimination: only 8 complaints between January and September 2006. This number led the associations involved in the project to reinforce campaigns of information on this subject.

The Commission for Equality and Against Discrimination and the High Commissioner has at least five specially qualified and trained members to assist the victims of discrimination, consisting of two lawyers, one psychologist, one social assistant and one generalist.

There is staff in the High Commissariat who can also assist the victims.

The assistance consists in:

- providing information on anti-discrimination legislation and possible legal action against discrimination;
- helping the victim to formulate an official complaint (to be issued by the Equality Body itself or to initiate court proceedings);
- providing opportunities to come to an amicable settlement (mediation) between the victim and the (alleged) perpetrator;
- hearing the complaint made by the victim and giving a binding decision on the case.

According to the High Commissioner's Office, most of the cases are solved by mediation which in some way satisfies the victims.

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

Legal standing:

As concerns legal standing of both bodies, the situation is as follows:

(i) Article 12 of Law 18/2004 states:

Competence

Any person or institution having knowledge of a situation which may be considered to be infringing the law should bring the case to the attention of one of the following entities:

- A Member of the Government whose responsibilities include the area of equality;
- The High Commissioner for Immigration and Ethnic Minorities (*Alto-Comissário para a Imigração e Minorias Étnicas*);
- The Commission for Equality and Against Racial Discrimination (*Comissão para a Igualdade e contra a Discriminação Racial*);
- The relevant Inspectorate General concerning the matter.

The entities referred to in (a), (b) and (c), after receiving notice of any infraction, shall then forward the case to the relevant Inspectorate General, which will expedite the matter.”

Cases are frequently referred to the *Inspecção do Trabalho* (the Labour Inspectorate), the *IGAT – Inspecção Geral da Administração do Território*, (the General Inspectorate of the Territory Administration) and the *Inspecção Geral da Administração Local*, (the Local Administration Inspectorate).

(ii) According to Article 13(2) of Law 18/2004, the binding judgment (imposing a penalty) is the competence and responsibility of the High Commissioner for Immigration and Ethnic Minorities after having heard the opinion of the Permanent Commission (*Comissão Permanente*) outlined in Article 7(2) of Law 134/99 of 28 August 1999. The Permanent Commission is composed of the High Commissioner and two members of the Commission for Equality and Against Racial Discrimination.

The staff of the High Commissariat (which comprises both bodies) has the power to mediate and they frequently act as mediators between the complainant and the accused. They do not have the power to refer the case to a court if mediation is unsuccessful. The claimant has to seek judicial redress in employment cases him or herself.

(iii) When the discrimination can be considered a crime under the relevant provisions of the Criminal Code, both bodies send the file to the offices of the Public Prosecutor, the competent authority for bringing a criminal case to court.

(iv) Both bodies (the Commission for Equality and Against Racial Discrimination and the High Commissioner) have no powers of investigation. According to Article 12 (2) of Law 18/2004 they are authorised to only receive complaints and must send the file for investigation to the General Inspectorate which is responsible for the area in question.

The General Inspectorates are bodies within Ministries that have powers to hear witnesses and to conduct all investigations necessary in cases involving the areas covered by the Ministry concerned. Both bodies are in formal and regular contact with the General Inspectorates (the Labour Inspectorate, the General Inspectorate for Territorial Administration, the Health Inspectorate, the Economic Activities Inspectorate and the Local Administration Inspectorate).

Both bodies are in formal and regular contact with the judicial system through the offices of the Public Prosecutor when a case of discrimination involves a crime.

They have regular and formal and informal contact with NGOs and employees' organisations which are represented in the Commission for Equality and Against Racial Discrimination and also in the Conselho Consultivo para os Assuntos da Imigração, COCAI (the Advisory Board for Immigration Affairs) which is also chaired by the High Commissioner. They also have formal and informal contact with the APAV (see above) and the Bar Association. (Ordem dos Advogados).

In summary:

1 - Law 18/2004 of 11 May 2004 creates the High Commissariat for Immigration and Ethnic Minorities as the body designated for the purposes of Article 13 of the Directive. However, the competences referred to in Article 13 (2) of the Directive are split between two bodies of the High Commissariat: the Commission for Equality and Against Racial Discrimination (Body 1) and the High Commissioner (Body 2).

2 - The High Commissioner is, however, responsible for all the activities of the High Commissariat, in particular immigration and ethnic minorities.

3 -The tasks concerning immigration and ethnic minorities are so broad that they account for a large proportion of the High Commissioner's time.

4 - Matters relating to immigration and ethnic minorities are very demanding as concerns financial and human resources.

5 - The implementation of Directive 2000/43/EC is only one among the many functions of the High Commissariat and of the High Commissioner.

As the Protocol with APAV only entered in force in May 2005, it is still too soon to have an opinion on its effectiveness in assisting victims.

f) Is the work undertaken independently?

Independence:

Bearing in mind that the experience of implementing the Directive is very recent and that the legal treatment of issues relating to racial discrimination is relatively new in Portuguese society, we tend to consider that the effectiveness of the Equality Bodies is not affected by the fact of having a single mandate and that the Commission for Equality and Against Racial Discrimination and the High Commissioner work

independently. We have doubts that the competences of the Equality Commission are in accordance with the Directive.

The existence for many years of an Ombudsman who also acts in cases of discrimination on any grounds helps the effectiveness and independence of the system. The Ombudsman (Provedor de Justiça) is an independent office appointed by Parliament. His or her main tasks are to defend and promote the rights, freedoms, safeguards and lawful interests of citizens, by ensuring, through informal means (that is without any judicial procedure), that the authorities exercise their powers fairly and in compliance with the law. The Provedor de Justiça has addressed a number of matters concerning racism, in particular against non-nationals and the Roma community, making recommendations to public authorities.

The High Commissioner is (as already mentioned) appointed and dismissed by the Prime Minister. S/he is independent in his/her functions but the appointment involves a political decision. In periods of political instability its independent status may be affected.

We must stress that the legal situation in Portugal as concerns equality bodies is too complex from the legal point of view.

The result is that there are some practical limitations in fulfilling responsibilities related to the implementation of the Directive, for instance:

The procedure for hearing and investigating cases is too complex:

The complaint is filed either with the Commission for Equality or the High Commissioner.

After a preliminary examination the complaint is sent to the General Inspectorate deemed to be competent. Sometimes conflicts of competence arise between two General Inspectorates and have to be solved by the Ministry of Presidency.

The Inspectorates take too long to conduct investigations.

The file returns to the Commission for Equality for the opinion of its Permanent Commission and only after that is a binding decision issued by the High Commissioner the fine is imposed.

8. IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

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

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

a) As regards discrimination in general, the ACIME has made considerable efforts to disseminate information. The book “Combate ao Racismo – Sistema Jurídico” (“Fighting Against Racism – The Legal System”), published by the High Commissioner, contains not only the main legislation but also a form for submitting a complaint about discrimination. It also informs readers that all public services have a “Yellow Book” (Livre Amarelo), in which any complainant may register his/her complaint against any discrimination by public services. The ACIME publishes a monthly Bulletin, makes radio and television programmes and has financed the publication of books on anti-discrimination.

In labour matters, Article 31 of Law 35/04 imposes on employers the duty to display in their premises information related to the rights and duties of workers in relation to equality and non-discrimination. However, the dissemination of information against discrimination in workplaces has not, so far, been very visible. The law does not specifically require employers to provide information in a form which is accessible to all disabled people. Trade unions have done some work in relation to this matter.

The General Directorate of Employment and Work (Direcção Geral do Emprego e das Relações de Trabalho) on its website (www.dgert.msst.gov.pt) provides information on national policy measures in this field and the European Community Action Programme to combat discrimination. It also makes the relevant documents available.

b) and c) Dialogue with NGOs and social partners takes place within several commissions and bodies, which ensures the participation of associations representing immigrants, human rights activists, trade unions, employers’ associations and social solidarity institutions in the elaboration of policies promoting social integration and combating exclusion. These are:

CITE – Comissão para a Igualdade no Trabalho e no Emprego⁴⁴
[Commission for Equality in Labour and Employment]
(Article 494 and ff. of Law 35/2004)

The Commission for Equality in Labour and Employment (CITE) is a tripartite entity created in 1979. It is composed of representatives from government and social partners (the Portuguese Retail and Services Confederation – CCP, the General Confederation of Portuguese Workers – National Trades Union – CGTP-IN, the Confederation of Portuguese Industry – CIP, and the General Workers’ Union – UGT).

It is namely competent for equality and non-discrimination between women and men in labour, in employment and in vocational training and also for receiving complaints and issue legal opinions concerning equality and non-discrimination in labour and employment, cooperating with the Inspector-General of Labour (IGT) in the application of legislation on equality and non-discrimination in labour, employment and vocational training, registering all legal decisions sent by the courts concerning equality and non-discrimination between men and women and promoting studies and research, disseminate legislation and legal opinions concerning equality and non-discrimination

⁴⁴ You can access CITE at: www.cite.gov.pt/

in labour, employment and vocational training. Women may require the support of CITE if they feel discriminated on any ground in employment and in this case if the complaint is considered reasonable, CITE may ask for the intervention of IGT.

Access to European and national law is provided through its site.

CIDM – Comissão para a Igualdade e para os Direitos das Mulheres⁴⁵
[Commission for Equality and Women's Rights]
(Decree-law 166/91 of 9 May 1991)

CICDR – Comissão para a Igualdade e contra Discriminação Racial
[Commission for Equality and Against Racial Discrimination] (CEARD) – mentioned above

CLR – Comissão da Liberdade Religiosa
[Commission for Religious Freedom]
(Article 52 ff. of Law 16/2001)

SNRIPD – Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência⁴⁶
[National Secretariat for the Rehabilitation and Integration of Persons with Disabilities]

CNRIPD – Conselho Nacional para a Reabilitação e Integração das Pessoas com Deficiências
[National Council for the Rehabilitation and Integration of Persons with Disabilities]
(Article 1 of Decree-law no 225/97 of 27 August 1997)

CPCS – Conselho Permanente de Concertação Social
[Permanent Council for Social Dialogue]
(Decree-law 74/84 of 2 March 1984)

Under Article 4 of Law 115/99 of 3 August 1999 on immigrants associations⁴⁷, the latter have the right to be heard concerning immigration policy and legislation.

CES – Conselho Económico e Social
[Economic and Social Council]
(Article 92 of the Constitution)

Social dialogue:

The Workers' Commissions (Comissões de Trabalhadores), their Coordinating Commissions (Comissões Coordenadoras), the trade unions and the employers' unions may give their advice on proposed legislation which affects the rights and duties of employers and employees before it is approved (article 525 of the Labour Code). According to Article 526 of the same Code, the Permanent Commission for Social Dialogue (Comissão Permanente de Concertação Social) which is composed of representatives from trade unions, employers' unions and the State and is part of the

⁴⁵ CIDM website www.cidm.pt/

⁴⁶ SNRIPD available at: www.snripd.pt

⁴⁷ Lei n.º 115/9947 de 3 de Agosto de 1999 regime jurídico das associações de imigrantes

Economic and Social Council, may also give its advice on proposed legislation. These procedures are in accordance with Article 11 of the Directive on social dialogue.

Articles 494 to 496 of Law 35/2004 of 29 July 2004 regulate the composition and competences of the Commission for Equality in Employment in the Workplace (Comissão para a Igualdade no Trabalho e no Emprego) with the objective (among others) of promoting equality and non-discrimination between men and women at work.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

a) 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. On the other hand, Article 14(1) of Law 99/2003 of 27 August 2003, in the introduction to the Labour Code, states that the provisions contained in collective agreements that are already in force and contrary to the provisions set forth in the Labour Code have to be replaced within one year of the enactment of the statute or be considered null and void.

Other provisions that may be included in future contracts, collective agreements, internal rules of undertakings, rules governing independent occupations and professions (if applicable), and rules governing workers' and employers' organisations, to the extent to which they may breach the equality and non-discrimination provisions of the Labour Code, will also, of course, be invalid and are to be so deemed by those that are bound by them and can be so declared by any court, as provided either by the general rules of contract law (e. g., Articles 285 et seq. of the Civil Code) or by the provisions of the Labour Code itself (under Article 533(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, in what concerns the hierarchy of the rules, the Constitutional anti-discrimination rules and the rules contained in the Labour Code and Law 99/2003 of 27 August 2003 adopting the Labour Code prevail over other rules mentioned above in a).

b) The only rule in force that is known to be contrary to the principle of equality is Article 175 of the Criminal Code, which punishes homosexual acts with a person of 14 to 16 years of age or the instigation of such acts. This offence can be met with imprisonment of up to two years or a daily fine for up to 240 days. Acts of the same type are not punishable when the person involved is of the opposite sex. Article 175 has

been considered unconstitutional but so far it has not been repealed. A conviction under this Article appears in the criminal record of the person concerned.

9. OVERVIEW

a) The biggest problem in Portugal is the gap between legislation and its practical implementation. It is necessary to ensure the effective application of existing legislation and improve the functioning of administrative and law enforcement bodies such as the High Commissariat for Immigration and Ethnic Minorities and the General Labour Inspectorate which deal with anti-discrimination matters (Article 7 of Directive 2000/43 and 8 of Directive 2000/78). The manner in which the Directives have been transposed is very problematic; it causes difficulties concerning procedures and raises many doubts regarding interpretation.

The main practical difficulties in enforcing legislation relate to the coordination between the Commission for Equality and Against Racial Discrimination, the High Commissioner and the General Inspectorates responsible for investigations as well as the offices of the Public Prosecutor. It is very difficult to obtain evidence on discriminatory acts and the procedures tend to be very protracted.

As can be seen in the table annexed, there is a multitude of laws and Decree-laws transposing the Directives 2000/43/CE and 2000/78/CE. This makes it hard for people who are affected by discrimination and even for lawyers and judges to understand which norm actually applies to the case in hand. There is little academic writing on non-discrimination laws in Portugal and very few court cases have been reported, which makes it even more probable that the existing laws are not known to all legal experts, lawyers and agencies which have responsibility for enforcing them.

b) We must bear in mind the difficulties in implementing positive action measures due to the budgetary situation of the Portuguese Government (Article 5 of Directive 2000/43 and Article 7 of Directive 2000/78).

c) In terms of racial and ethnic discrimination, the most vulnerable groups are Roma, immigrants and ethnic minorities even when they have Portuguese nationality. The Roma (“ciganos” as they are known and call themselves in Portugal) are still discriminated against in daily life. They face many problems in relation to housing, education, employment and health care. More positive action measures would facilitate the integration of the Roma. It is necessary to ensure that the culture of the Roma and of migrants’ home countries (and especially the Muslim religion) is reflected in school curricula and textbooks. The ACIME Report (2002-2005) refers to 13 incidents all involving the Roma community.

A recent survey (January 2007) sponsored by Banco Espírito Santo refers that almost 40% of the Portuguese children revealed that they are not interested in making acquaintance to children of other nationalities, mainly Roma children.

d) There are allegations of ill treatment, violence or excessive use of force by police officers (Reports of Amnesty International) concerning ethnic minorities and Roma (Articles 5 and 7 of Directive 2000/43).

Roma complain that they face discrimination in access to housing and public services and also by the police and courts. If proved, these behaviours will be treated according to what is provided for in Law 18/2004 of 11 May 2004 and Law 134/99 of 28 August 1999.

e) Disabled people are not normally prejudiced in the public opinion. We have not found case law dealing with litigation concerning disabled people. Only disabled people who continue in active duty in armed forces are practically prevented from being promoted to ranks above colonel.

One NGO has reported that in some banks blind people working as telephone receptionist had been the first employees invited to early retirement.

The rules on buildings and facilities are not respected and violations of these rules are rarely prosecuted (Article 5 of Directive 2000/78). The non-respect of rules on buildings and facilities is widespread: even court buildings still do not have adequate facilities for disabled people. The failure to use equipment specially designed for disabled people, the insufficient adaptation of buildings and the non-implementation of measures concerning vocational education and training may be considered a type of discrimination. NGOs representing disabled people have no right to intervene in judicial procedures and are seldom consulted in the formation of government policy.

f) Enforcement of the new provisions on equality and non-discrimination may also be hampered by the generally low level of awareness of discrimination issues among law-enforcers and the unwillingness of victims to take their cases to court (Article 9 – Defence of rights – Directive 2000/43).

g) The judiciary should be more aware of the need for active measures to counter racially motivated crime and incitement to racial discrimination and violence. The same can be said regarding other grounds of discrimination.

h) There is a lack of information or data on people's ethnic origin making it difficult to assess the frequency of acts of racist violence or discrimination.

i) Article 175 of the Criminal Code (mentioned above) discriminates against homosexuals. This article mentions “practice of homosexual acts of material relevance” (prática de actos homossexuais de relevo). However, these are not defined in law. This Article must be considered discriminatory as it only punishes homosexual, and not heterosexual, acts. This provision can affect those found guilty in their access to work or even be a ground for dismissal under Article 396 of the Labour Code. Discrimination on the basis of sexual orientation has also given rise to ideological discussions in Portuguese society about marriage, adoption, etc. for homosexual couples (Article 1 of the Directive 2000/78). The Constitutional Court has judged this Article unconstitutional but so far it has not been repealed.

j) The law prohibits disability and age discrimination in promotion, however the criteria defining promotion of employees (increase of salary, better conditions etc) are too vague and there is a great deal of room for discretion. Therefore in the present state of the law and practice, it is very easy to discriminate against older and disabled people in access to promotion, both in the private and in the public sectors (Articles 1 and 9 of

Directive 2000/78). However, it is not lawful to discriminate against older or disabled workers when it comes to dismissal and redundancy.

k) Associations should have greater rights to intervene in labour, administrative and judicial procedures (Article 7(2) of Directive 2000/43 and Article 9(2) of Directive 2000/78).

l) The Portuguese system, with several laws and decrees on discrimination, is not easily understandable and does not operate smoothly.

m) More needs to be done to raise public awareness of the fight against discrimination in the workplace.

As we have already mentioned, Law 35/2004 of 29 July 2004 imposes on the employer the duty to post in appropriate location information related to workers' rights and duties in accordance with the principles of equality and non-discrimination (Article 31). In practice this rule is not frequently respected. The violation of this disposition is considered as "contra-ordenação leve" (a minor offence) according to Article 473 of this law.

n) No significant positive action has been taken regarding age. The National Council for Elderly People (Conselho Nacional para a Política da Terceira Idade) has been abolished. There is no effective lobbying in matters related to age discrimination as there are no NGOs dealing with this issue at national level.

o) Discrimination in the area of independent professions is illegal under the general principles of Portuguese law. Consequently, acts of discrimination that affect independent workers are null and void. Independent professional victims of discrimination are entitled to civil damages according to the general rules laid down in the Civil Code. However, they are not explicitly referred to in law with exception of Article 13 of the Labour Code. NGO rights as concerns labour law are not set out in Portuguese law in an adequate manner. The protection of independent workers and the self-employed is not sufficiently granted.

p) Article 4 of Directive 2000/43/EC refers only to occupational requirements, however Article 3 (3) (c) of Law 18/2004 uses a wording not limited to occupational requirements, and consequently enlarges the exception in a way not foreseen in the Directive.

q) The author must stress out that with Decree-law 163/2006 of 8 August 2006 which approves the accessibility regime to buildings and public premises, Law 46/2006 of 28 August 2006 prohibiting and punishing discrimination based on disability and on aggravated risk to health, the Plan of Action for the Integration of People with Disabilities and the National Plan for the Promotion of Accessibility, the Government has taken an important step towards the protection of disabled people.

r) A referendum on "Interrupção Voluntária da Gravidez" (abortion) will take place on the 11 of February. Religious arguments are being used in the campaign by the opponents to the law and this issue is raising an important debate on ethics and religion.

The CNE – Comissão Nacional Eleições (National Electoral Commission), the body who supervises the fairness of the electoral procedure, has recommended to the local authorities that voting sites should not be placed where symbols other than those representing the Portuguese Republic are displayed. This recommendation is mainly to prevent the presence in those places of religious symbols.

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

There is no government department or other authority responsible for dealing with or coordinating issues regarding anti-discrimination as established by law.

The office of the ACIME is in charge of issues relating to immigration and ethnic minorities, and is under a duty to combat racism, but it is not in charge of coordinating other bodies working in this area.

The General Labour Inspectorate Services deal with some anti-discrimination issues but they are not responsible for coordination either.

Within the Ministry of Justice, the Cabinet of Legislative Policy and Planning⁴⁸ (Gabinete de Política Legislativa e Planeamento (GPLP)) is responsible for planning how directives and other community instruments are to be implemented.

Annex

1. Table of key national anti-discrimination legislation

2. Table of international instruments

⁴⁸ Gabinete de Política Legislativa e Planeamento (GPLP) www.governo.pt

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATIONName of Country **Portugal**

Date 30 January 2007

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Constitution Articles 1,8,13,15,17,58,59,69,70,71,72 http://www.cidadevirtual.pt/cpr/legis2.html	April 1976	All forms of discrimination	Constitutional	Principle of equality and social rights	Principles of equality and non-discrimination
Criminal Code Articles 132,146,239,240,251,252 http://cidadevirtual.pt/cpr/legis2.html	September 1982	Discrimination on the basis of race and religion. Harassment.	Criminal	Sanctions for the crimes of genocide, and racial and religious discrimination	Genocide; discrimination; sexual harassment
Law 134/99 on discrimination http://cidadevirtual.pt/cpr/legis2.html	August 1999	Race, colour, nationality, ethnic origin	Administrative	All areas, both public and private sectors. Defines discriminatory	Prohibition of direct and indirect discrimination and creation of a

				practices.	specialised body
Decree-law 111/2000 repealed by the entry in force of Law 35/2004 of 29 July 2004 under Article 21(2)(q) of Law 99/2003 of 27 August 2003 approving the Labour Code http://cidadevirtual.pt/cpr/legis2.html	July 2000	Regulates Law 134/99	Administrative	All areas, both public and private sectors	Prohibition of direct and indirect indiscrimination and creation of a specialised body
Decree-law 251/2002 http://www.iapmei.pt/iapmei-leg-03.php?lei=1346	November 2002	Creates the ACIME	Administrative	All areas, both public and private sectors	Creation of a specialised body
Law 18/2004 http://www.adm.ua.pt/legua/pessoal/L18_2004.htm	May 2004	Race, colour, nationality, ethnic origin	Administrative	All areas, both public and private sectors	Prohibition of direct and indirect discrimination
Labour Code 99/2003 http://www.nae.uevora.pt/pdf/Lei_99-2003(extr).pdf	August 2003	Ancestry, age, sex, sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, religion, political or ideological convictions and membership of a trade union.	Private and administrative law	Public/private sectors. Covers all grounds for discrimination	Prohibition of direct and indirect discrimination at work and sanctions

Law 35/2004 http://www.portaldocidadao.pt/NR/rdonlyres/C017D4EB-37BC-4A20-8B41-FAC2BC21B997/0/Lein3520041.pdf	July 2004	This law goes beyond the discriminatory factors set out in Article 23(1) of the Labour Code and also lists the country of origin, language, race, education, economic status or social condition as factors leading to discrimination.	Private and administrative	Public/private sectors. Covers all grounds for discrimination.	Prohibition of direct and indirect discrimination at work and sanctions
Law 127/99 http://www.lerparaver.com/legislacao/di-versa_associacoes.html	August 1999	Rights of Disabled People's Associations	Administrative	Disability	Prohibition of discrimination and positive measures
Law 38/2004 http://www.adm.ua.pt/legua/LegAdmPublica/Lei_38_2004.htm	August 2004	On disability	Administrative	Not yet regulated	Anti-discrimination; positive measures
Law 16/2001 http://www.adm.ua.pt/legua/pessoal/Lei_16_2001.htm	June 2001	On religious freedom	Administrative	Creation of Commission for Religious Freedom	Anti-discrimination; equal treatment of religions and beliefs
Decree-law 27/2005 http://www.acime.gov.pt/docs/Legislacao/LPortuguesa/ACIME/DL27-2005.pdf	February 2005	High Commissariat for Immigration and Ethnic Minorities	Administrative	Establishes the High Commissariat for Immigration for Ethnic Minorities	Creation of a specialised body
Decree-law 86/2005	May 2005	On racial and ethnic origin. Provides legal framework for combating discrimination	Administrative	Anti-discrimination	Anti-discrimination measures and implementation of Directive 2000/43/EC

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTSName of country **Portugal**

Date: January 2007

Instrument	Signed (yes/no)	Ratified (yes/no)	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)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	Yes	No	No	No	No
Revised European Social Charter	Yes	Yes	No	Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	Yes	Yes	No	No	Yes
Framework Convention for the Protection of National Minorities	Yes	Yes			Yes
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes		No	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No	No	Yes
Convention on the Rights of the Child	Yes	Yes			Yes