

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 February 2008

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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. The Constitution of the Portuguese Republic (CPR) is based upon the rule of law and the separation and interdependence of powers.

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 has the following legislative powers, among others:

- 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 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.

According to the Constitution (Article 227), as amended, the autonomous regions have the following relevant legislative powers to:

- a) legislate for the region in matters enumerated in the region’s political and administrative statute that are not reserved to the Portuguese organs of supreme authority;
- b) develop for the region the principles or the general rules contained in laws;
- c) make regulations for implementing national legislation;
- d) 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: marital 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 infringements (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 rests with the Portuguese Parliament and not the autonomous regions, although these have very important powers with regard to the local implementation of such rules.

Synopsis:

The Portuguese legal framework on discrimination is based mainly on:

- a) The Constitution of the Portuguese Republic of 02 April 1976,¹ (hereafter ‘the Constitution’): Article 1 – dignity of all persons; Article 8 – international law as an 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 people with disabilities, and Article 72 – rights of old people.
- b) Law 59/2007 of 04 September 2007, the Criminal Code² (hereafter ‘the Criminal Code’): Article 132 – homicide motivated by hatred based on race, religious or political beliefs, colour, ethnic origin or nationality, religion, gender or sexual orientation; Article 145 (1) and (2) – physical injuries; Article 239 – genocide, abrogated by Law 31/2004 of 22 July 2004 and now covered by Article 8; Article 240 – discrimination on grounds of race, religion or sexual orientation; Articles 251 and 252 – insults on grounds of religion; Article 253 – violence or threats against funeral processions or ceremonies, and Article 254 – profanation of a corpse or of a cemetery.
- c) Law 134/99 of 28 August 1999, which forbids discrimination in the exercise of rights based on race, colour, nationality or ethnic origin³ [...] refusal or making conditional of economic, social or cultural rights.
- d) Decree-law 111/2000 of 04 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.

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, Lei 59/2007 de 4 de Setembro* available at www.gnr.pt/portal/internet/legislacao/pdf/CP.pdf

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://www.cidadevirtual.pt/cpr/legis2.html>. See text of Decree-law 111/2000 at <http://www.cidadevirtual.pt/cpr/legis2.html>

- e) Law 18/2004 of 11 May 2004 (hereafter ‘Law 18/2004’), 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 origin.⁴ This law goes far beyond the Racial Equality Directive, as it prohibits discrimination based on nationality and skin 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, skin 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 is of greater benefit to those discriminated against.)
- f) Law 99/2003 of 27 August 2003 adopting the Labour Code (hereafter ‘the Labour Code’) implements Directives 2000/43 and 2000/78 in Article 2 (o) and (p).⁵ The Labour Code implements the Framework Employment Directive 2000/78, but it also prohibits discrimination on grounds not specified in this Directive. Article 23 of the Code deals with anti-discrimination and forbids the practice of any direct or indirect discrimination, based on [ancestry], age, sex, sexual orientation, civil status, family situation, genetic patrimony, impaired work capacity, disability or chronic disease, nationality, ethnic origin, religion, political or ideological persuasion and membership of a trade union.
- g) Law 35/2004 of 29 July 2004 (hereafter ‘Law 35/2004’), which regulates Law 99/2003 of the Labour Code and implements Directives 2000/43 and 2000/78.⁶ Directives 2000/43 and 2000/78 have been implemented by Law 18/2004, the Labour Code and Law 35/2004.
- h) Law 38/2004 of 18 August 2004 (hereafter ‘Law 38/2004’), defining the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of persons with disabilities.⁷ This law repealed Law 9/89 of 02 May 1989 (Article 51).
- i) Law 16/2001 of 22 June 2001 (hereafter ‘Law 16/2001’), the Law on Religious Freedom.⁸
- j) The prohibition of discrimination on the grounds of sexual orientation was added by Constitutional Law 1/2004 of 24 July 2004 (Sixth Constitutional Revision)⁹ (hereafter ‘Law 1/2004’) to Article 13, *in fine*, reflecting the principles stated in Directive 2000/78. The reference to sexual orientation in the Constitution has made it easier to implement this Directive.

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>

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

- k) Decree-law 251/2002 of 22 November 2002¹⁰ was amended by Decree-law 27/2005 of 04 February 2005,¹¹ creating the Office of the High Commissioner 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 02 May 2005,¹³ 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 establishing a legal framework to combat discrimination on the grounds of racial or ethnic origin.
- m) Decree-law 163/2006 of 08 August 2006,¹⁴ which approves the standards and rules governing physical access to buildings and public premises.
- n) Law 46/2006 of 28 August 2006,¹⁵ prohibiting and punishing discrimination based on disability and on the grounds that a person has a pre-existing aggravated health risk (*risco agravado para a saúde*). This law was made the subject of detailed regulations by Decree-law 34/2007 of 15 February 2007.

According to Article 3 (c) of this law ‘persons with an aggravated risk to health’ means any person or persons suffering from an illness or disease causing long-term organic, functional, progressive and potentially disabling health changes, with no prospect of complete remission and originating changes in the physical, mental, emotional, social or economic life quality of such persons, and that may be a cause of early-years disability or of significant reduction in life expectancy’. This covers situations in which the person has no disability as yet, but has a health situation that could change in a way that might 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.

The objectives of this law are (i) to prevent and forbid direct or indirect discrimination on grounds of all types of disability and on the grounds that a person has a pre-existing aggravated risk to their health and (ii) to sanction acts which may constitute a 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 type of disability. This law is applicable to the actions of all natural and legal persons, whether public or private, comprises all direct or indirect discrimination, and does not pose any obstacle to positive actions.

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

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

Fields covered by this law are access to employment, to health services, to economic activities, to goods and services, the rental or selling of landed property, and physical access to building and premises and to public transport and educational facilities, among others.

- o) Law 2/2006 of 17 April 2006 on nationality entered into force on 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 *Partido Nacional Renovador* (PNR), a far-right political party without any seats in Parliament, is fiercely opposed to this new law and considers it anti-national.
- p) Law 21/2007 of 12 June 2007,¹⁶ on the new system of mediation and compensation for victims in criminal cases has been recently adopted. The Portuguese Parliament adopted new legislation (Law No 21/2007 of 12 June 2007) to meet the requirements under Article 10 of the Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JAI). The law provides a system of mediation to deal with criminal proceedings arising from complaints. This system came into force on 23 January 2008 and makes it possible for victims to be awarded financial compensation.
- q) Decree-law 352/2007 of 23 October 2007¹⁷ of the Ministry of Labour and Social Solidarity, which approves the new National Table on Disabilities caused by Work Accidents or Occupational Diseases, repealed Decree-law 341/93 of 30 September 2003 and approved the Indicator Table for the Evaluation of Disability in matters of civil law.
- r) Decree-law 3/2008 of 7 January 2008,¹⁸ which defines specialised support to pre-school, basic and secondary level education in the public, private and cooperative sectors, with the purpose of creating adequate conditions to adapt the suitability of teaching methods to the special learning needs of students with significant limitations in their activity and participation levels in one or more domains of life.
- s) Decree-law 72/2008 of 16 April 2008,¹⁹ which approves the legal regime for insurance contracts.

Note: *Associação Portuguesa de Deficientes* (APD) [Portuguese Association of Persons with Disabilities] has:

¹⁶ Lei 21/2007, 12 Junho 2007, cria um regime de mediação penal, em execução do artigo 10.o da Decisão Quadro n.o 2001/220/JAI, do Conselho, de 15 de Março, relativa ao estatuto da vítima em processo penal, available at: www.presidenciaue.parlamento.pt/CJustica/leis/212007.pdf

¹⁷ Decreto-Lei 352/2007, D.R. n.º 204, Série I de 2007-10-23 Ministério do Trabalho e da Solidariedade Social Aprova a nova Tabela Nacional de Incapacidades por Acidentes de Trabalho e Doenças Profissionais, revogando o Decreto-Lei n.º 341/93, de 30 de Setembro, e aprova a Tabela Indicativa para a Avaliação da Incapacidade em Direito Civil. Text of law at <http://vlex.pt/vid/33045935>

¹⁸ Decreto-lei 3/2008, de 7 de Janeiro que define os apoios especializados a prestar na educação pré-escolar e nos ensinos básico e secundário dos sectores público, particular e cooperativo visando a criação de condições para a adequação do processo educativo às necessidades educativas especiais dos alunos com limitações significativas ao nível da actividade e da participação em um ou vários domínios da vida available at: <http://www.educare.pt/educare/Detail.aspx?contentid=434D15100AD16B07E04400144F16FAAE&opsel=5&channelid=0>

¹⁹ Decreto-Lei n.º 72/2008 de 16/04/2008 estabelece o regime jurídico do contrato de seguro, available at: <http://dre.pt/gratis/dd1s/20080416.asp>

- A) reported that it has received complaints based on Decree-law 352/2007 from persons with disabilities who were considered to have a degree of disability of 60 per cent or more, stating that with the new table, the evaluation of their degree of disability has been reduced and that they are no longer entitled to some benefits, such as tax exemptions.
- B) stated on the new legislation on insurance (Decree-law 72/2008) that such legislation is contrary to what was agreed by the UN Convention on the Rights of Persons with Disabilities (which entered into force on 03 May 2008, but has not yet been ratified by Portugal), specifically because the evaluation and acceptance of risks by insurance companies may be discriminatory to persons with disabilities.
- C) stated on special education (Decree-law 3/2008) that this has some positive aspects, namely the compulsory acceptance of students with disabilities in schools, the participation of parents in the educational process, and the inclusion of special projects in school. However, the creation of separate classes in special schools according to the disabilities of the students leads to the creation of a non-inclusive educational system, and sometimes forces students to move to different schools at considerable distances from their homes.

It was recently published a new Labour Code: Law no. 7/2009 of 12 February 2009²⁰ which approves the Labour Code revision.

In article 23 it deals with the notions of direct and indirect discrimination, equal labour and equal value of labour; articles 24, 25 and 26 guarantee equal access, prohibition of discrimination and application of the most favourable disposition.

Harassment is forbidden and punished in article 29. Action positive measures are expressly allowed.

These above mentioned dispositions correspond essentially to the doctrine foreseen in the previous Labour Code.

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 Commission sent formal requests on 27 June 2007 to 14 Member States, including Portugal, to fully implement EU rules banning discrimination on the grounds of race or ethnic origin (2000/43/CE).

²⁰ Law 7/2009 available at: http://www.dgap.gov.pt/upload/Legis/2009_1_07_12_02.pdf



The problems consist on:

- limitation of the right of interested parties to initiate proceedings to defend the victims of discrimination.
- protection against victimisation in the field of work too limited
- a similar clause to that regarding occupational requirements (allowed under Directive 200/43/EC for the field of work) is provided for in the field of goods and services, i.e. outside the field of work which is not allowed by the Directive.

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 matters related to discrimination.
- The Labour Code Procedure (approved by Decree-law 489/99 of 09 November 1999) stipulates in Article 5(5) 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 that intention in writing’.
- Only the 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 that positive measures, for instance those aiming to facilitate the recruitment of older workers through training and development of vocational skills have not so far been completely successful.
- 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 a duty on employers to display in appropriate places information related to workers’ rights and duties in accordance with 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 EUR 178 to EUR 1,335). Article 23(1) of the Labour Code grants protection against discrimination on grounds of race or ethnic origin.

The Council of Ministers' Resolution 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 the *Instituto Nacional para a Reabilitação* (INR) [National Rehabilitation Institute], formerly *Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência* (SNRIPD) [National Secretariat for the Rehabilitation and Integration of People with Disabilities], will be the body responsible for its implementation. At the end of each civil year, INR will have to deliver a report concerning the execution of the measures foreseen in this plan to the Government member with competence in the area of disability.

The promotion of accessibility to buildings and public premises, to transport services and to information and communications technologies are the main axes of this plan, which aims to increase competitiveness and employment, to reinforce social cohesion and to promote sustainable progress.

The social aim of this plan is to integrate people with disabilities 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.

Decree-law 324/2007 of 28 September 2007, which amends the Code of Civil Register, allows that marriages celebrated by other religions or ministers of a church or community established in Portugal ('*radicada em Portugal*' – Article 37 of Law on Religious Freedom (LRF), Law 16/2001 of 22 June 2001) may be recognised and will have the same effects and status as a Catholic marriage. According to the LRF, those religions which have been established in the country for 30 years are considered to be 'established' (*radicada*) in Portugal.

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)*

The Family and Minors Tribunal of Oporto

01 August 2006

Public prosecutor versus 13 minors

A trial of 13 minors (under the age of 15) accused by the Public Prosecutor of the attempted murder for homophobic reasons of a transsexual Brazilian immigrant of 46 years of age (Gisberto Salce Júnior, known as 'Gisberta') resulted in the conviction of the minors, who were sentenced to 15 months in custody at a special educational school. They were sentenced only for grievous bodily harm, attempted profanation of a corpse and omitting to help a person in danger.

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

Decision: The Court 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 Court did not consider that the sexual orientation of Gisberta or even her nationality were motives behind the killing, and convicted and sentenced the minors as follows:

- six were convicted of grievous bodily harm and attempted profanation of the corpse, and sentenced to 13 months detention in an educational institution;
- five were convicted of grievous bodily harm and sentenced to 12 months detention in an educational institution;
- two were convicted of omitting to help a person in danger and sentenced to 12 months probation with tutorial attendance.

‘Portugal gay’, a Portuguese gay association, had requested that the young people be charged with ‘hate crimes’. However, the initial charge of attempted murder was replaced by charges of crimes against physical integrity, corpse profanation and omitting to help. These sentences have, in general, been considered as too lenient.

Court of First Instance – Vila Franca de Xira
20 September 2006
Public prosecutor versus 2 persons and a company

The Court of First Instance acquitted the 3 defendants on the grounds that it considered that it had not been proved that the refusal to sell the flat was due to their Roma (*ciganos*) ethnic origin.

Administrative Central Appeal Court (North)
February 2007
Bar Association versus applicant

A candidate to the *Ordem dos Advogados* [Bar Association] filed an appeal with the Court of First Instance against a decision of the Bar Association that denied her request to take the Bar examination on a date other than that fixed by the Association, because of her religion. The Association had set the date for the examination on 8 July, a Saturday. Since the Association refused to grant the candidate’s request, she filed an appeal to the Court of First Instance, claiming that the Association’s refusal was in violation of the right of religious freedom enshrined in articles 13 and 14 of the Portuguese Constitution. The Court of First Instance did not grant the candidate’s appeal, but the Court of Appeal subsequently abrogated the decision of the Court of the First Instance and ordered that the appellant be considered exempt from the examination on that day. The Court of Appeal also decided that the Bar Association should fix a new date for the candidate’s examination, not later than 10 days after the Court decision.

08 April 2008

Thirty-six persons are being tried at the Tribunal of Monsanto (Lisboa) accused of crimes of racial discrimination, aggressive acts, abduction, illegal possession of firearms, distribution of nazi propaganda, and others. They are accused of violent acts linked to the Portuguese Hammerskins group (a neo-Nazi skinhead group). Mário Machado, the group leader, was in custody but he has been released until a final sentence is passed; the decision is expected after the Court's summer recess. He had already been sentenced for the death of a Cape Verdean victim, beaten by a group of skinheads in 1995. The sentence is expected for October.

There are frequent criminal cases where Roma are tried, mainly for acts of aggression and physical assault offences, resisting the police, and crimes involving illegal drugs.

Roma frequently complain of ill-treatment by the police.

SOS Racismo has published reports on their website²¹ on police abuse of the Roma communities in the district of Beja (Alentejo), specifically by forcing Roma to sign a declaration accepting responsibility for any incidents that might occur when organising celebrations such as marriages. One can also find information about police violence against a Roma family in Porto (North Portugal).

According to information available to us, court decisions do not reveal any influence of elements of racism in the evaluation of evidence and the penalties imposed. However, complaints from the Roma on police behaviour have not given rise to criminal proceedings against the police officers concerned, and related disciplinary measures are rare. According to the Ministry of Internal Affairs (MAI) report, no such measures have been taken in the last year.

According to the ACIDI report 'Roma Communities: representation and dynamics of exclusion/integration'²² by Eduardo Costa Dias and others, when the Roma speak about justice they almost always have in mind their relationship with the police force. All the persons interviewed (21 in all) reported cases relating to police behaviour when dealing with Roma communities, as well as decisions taken by courts and judges in cases involving Roma people.

However, a Roma woman has been sentenced to five years in prison after she was found guilty of several crimes, specifically assault and battery of the female teacher of her two sons. She remains free, pending the decision on the appeal which has been lodged.

At first sight, the sentence seems to be as expected in normal circumstances; no connection seems to have been established between the severity of the penalty and her ethnic origin.

Roma frequently earn a living selling goods through street trading. They are often questioned by the authorities in relation to licences and authorisations, and subject to fines when operating in illegal situations. Roma claim they are the only people subject to fines for this reason, an accusation that is denied by the police force.

²¹ *SOS Racismo* website: <http://www.sosracismo.pt>

²² 'Comunidades Ciganas: Representações e dinâmicas de exclusão / integração'



Roma communities complain that they continue to be the object of racist remarks made by members of the local population or local authority representatives, but they do not wish to file any formal complaints because they do not expect any results.

There are generally tense relations between members of the Roma communities and the law enforcement agencies, and also allegations that the law enforcement agencies continue to discriminate against Roma, particularly when the latter attempt to engage in itinerant trading. There have been reports of arbitrary police raids on entire Roma camps. There have also been reports of racist violence, with Roma representatives explaining that the victims do not report such matters to the police as they have never heard of any cases where a police officer has been punished for such behaviour against Roma. ACIDI sometimes acts as a mediator in cases where Roma have reported discriminatory conduct on the part of the police, often with good results. Discriminatory actions by the police are lawful and therefore the Public Prosecutor's office has considered those actions lawful.



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 go beyond the Directives. They cover a greater number of grounds for discrimination than the Directives, covering ancestry²³, sex, race, language, territory of origin, religion, political or 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 (people with disabilities) 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 ranked 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.

²³ (in Portuguese: *ascendência*). Ancestry means ancestral lineage. It corresponds to ‘birth’ in Article 21(1) in the European Charter of Fundamental Rights.

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 against 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 people with disabilities 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 have physical or mental disabilities shall enjoy all the rights and be subject to all the duties contained in this Constitution, except to the extent that their disability renders them unfit to exercise or perform them’.

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 shall provide assistance to organisations for citizens with disabilities’.

With regard to access to education, Article 74 of the Constitution states that. ‘everyone has the right to education with the guarantee of the right to equal opportunities for access and success in schooling. In education policies, the State must promote and support the access of people with disabilities to education and where necessary, support special education (Article 74(2)(g)). This constitutional provision aims to compensate for inherent disadvantages that may be suffered by people with disabilities 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 are binding on all State institutions and bodies. The principle of equality is binding on the legislature, judiciary and administration.

Article 18(1) states that Constitutional provisions concerning rights, freedoms and guarantees are directly applicable and are binding on 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 principles of non-discrimination and equality 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) make it 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 or ideological convictions, 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 of people with disabilities.

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 health. Article 1(2) of this law states:

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

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 at 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'; or a 'disability', sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*
- 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 cultural rights'. This definition is also so broad that it covers discrimination based on association.

However, there are no legal definitions for the notions of 'race' and 'ethnic origin' in this law.

Law 38/2004 of 18 August 2004 expressly repeals Law 9/89 of 02 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 is intended to cover all limitations or hindrances to 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 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).

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 against persons with aggravated risk to their health. (*risco agravado para a sua saúde*).

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

b) As far as religion is concerned, the *Procuradoria Geral da República* [Office of the Attorney-General] 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 confession 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’.

These definitions have 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.

Law 46/2006 of 28 August 2006,²⁴ 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*), goes beyond simple disability.

²⁴ 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

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.

Sixty-five years of age is the normal age limit for old age benefits, retirement and pension applications; however, there have been changes in the law leading to an increase in the age of retirement. (Please see 4.7.4.)

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)?*
- c) *If so, how?*

a) Portuguese civil and administrative 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 prohibit ‘discrimination by employers 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 cultural 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 practices against people with disabilities occur through acts or omissions on grounds of disability, with intent or negligence, which 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 a 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? For what discrimination grounds is situation testing permitted? If all grounds are not included, what are the reasons given for this limitation?*
- 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: see Articles 619–645 of the Civil Procedure Code and Articles 340–349 of the Criminal Procedure Code.

There are no special rules governing situation testing. So far no court cases where situation testing has been used have been reported. It is the author’s opinion that situation testing will be given the same standing as evidence given by witnesses and be subject to the rules and procedures applicable to witnesses. Evaluation of the evidence will be treated by the judge as evidence given by witnesses and subject to its rules.

b) There is no reluctance on the basis of ethical or methodology issues to use situation testing as evidence in court. The courts will evaluate the evidence resulting from eventual situational tests according to their own evaluation of 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 situation testing has been used during a trial in a court of first instance, because first instance cases are not normally reported on court web sites.

d) So far, situation testing seems not to have been 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? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*
- c) *Is this compatible with the Directives?*
- d) *In relation to age discrimination, does the law specify how a comparison is to be made?*
- e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

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.

There are no specific rules concerning the definition of legitimate aims. Courts will decide based on general principles of law and on the circumstances, following the precedents of the Court of Justice and of the European Court of Human Rights; however, no court cases are available so far.

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 to decide on the basis of the facts of the case whether age discrimination exists. No judicial precedents have been found.

e) Differences in treatment based on language can be considered as indirect discrimination on the grounds of racial or ethnic origin if a connection between the two circumstances can be established; however, there are no court cases on the subject.

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. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

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 (Articles 515 and 523–552 of the *Código de Processo Civil* [Code of Civil Procedure]). The 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 be put at the Court's disposal, and if necessary, be subject to the appreciation of experts. This is provided for in the Code of Civil Procedure, Articles 513 (object of the evidence), 519 (duty of cooperation with 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 parties to present to the Court the documents deemed necessary), 531 (documents belonging to third parties must also be surrendered to the Court if they are considered necessary as evidence).

The Court may also appoint experts to determine certain facts upon request of one of the parties 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 on the basis of ethical or methodology issues to use statistical evidence in court. The courts will evaluate the evidence resulting from eventual situational tests according to their own evaluation of 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 significant 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), which state:

‘The processing of data may be permitted in cases of important public interest; when the individuals have given their consent; to protect the vital interest of the individual when the individual is unable through incapacity to give his/her consent; processing by a legal entity with no commercial interest (*sans but 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) [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 for 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.

Statistical data are used to design positive action measures. These data are collected by the *Instituto Nacional de Estatística* (INE) [Statistics Portugal], the Ministry of Labour and Social Solidarity, and some publications on social issues.

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 offensive²⁵ 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 ‘discrimination by employers 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 be either 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 the behaviour of workers 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 individual rights of employees 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 an employer may not exert any pressure on an employee in order to adversely influence him/her or his/her own or his/her co-workers’ working conditions.

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

²⁵ 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’.



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 people with disabilities: the adoption of procedures, measures or criteria directly by the employer or through instructions given to workers or job centres, which may make the recruitment of employees and the termination of the work contract conditional upon factors of a physical, sensorial or mental nature. 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 are also considered to be discriminatory practices.

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 people with disabilities? 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?*

Articles 73 and 74 of the Labour Code establish that the employer has a duty to provide reasonable accommodation for people with disabilities. The State has a duty to give support to the employers. The burden is not considered disproportionate when it is compensated for 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. 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 provision of 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 people with disabilities. Where 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 2005–2008 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.

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?

Article 73(1) of the Labour Code guarantees equality of treatment of people with disabilities. 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 for the same violation). An individual to whom reasonable accommodation is denied can either complain to the Inspectorate General for Labour, 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.

The refusal to provide reasonable accommodation will be considered as a discriminatory act, but as the law detailing financial assistance to be provided by the State has not yet been adopted, employers (particularly small and medium-sized enterprises with fewer than 50 employees) claim that they face a disproportionate burden. Provision of reasonable accommodation is considered a positive action, and only after financial assistance is provided by the State will it be possible to consider court actions based on Article 73 and Article 74. Benefits may be obtained from the IEFPP.

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

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

- d) *Does national law require services available to the public, 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?*

Portuguese law requires that services shall be available to the public and designed and built in an accessible manner so that people with disabilities may use them (Articles 2 and 9 of Law 163/2006).

Decree-law 163/2006 of 08 August 2006, which approves the accessibility regime for buildings and public premises, constitutes the regulation of the principles laid down in Law 38/2004 of 18 August 2004 defining the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of people with disabilities.

The 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 for access to 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.

So far, there are very few public premises which have already been adapted in accordance with this new legislation on accessibility. We must clearly stress that almost 60 per cent of Portuguese courts, for instance, still remain almost inaccessible to people with disabilities.

Legal entities (NGOs and associations) representing the interests of people with disabilities have legal standing in court to participate in cases on behalf of or in support of individuals.

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

- e) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Portuguese law makes provision for certain special rights for people with disabilities, specifically in regard to work:

Instituto Emprego e Formação Profissional (IEFP) [Institute of Employment and Vocational Training] – the largest training operator in Portugal – has special programmes for and gives support to people with disabilities, mainly in the field of employment, such as:

- sheltered work for people with disabilities in order to valorise their abilities and knowledge during their work activities;
- evaluation/professional orientation to support people with disabilities in their choice of vocational area (for people not less than 15 years of age);
- vocational training to give people with disabilities the necessary skills and knowledge to obtain professional qualifications;
- re-adaptation to work for those who became disabled during their working life, providing special conditions of work adapted to their disability;
- teleworking;
- support for integration in the labour market of people with disabilities;
- technical support;
- support for self-employment.

According to the National Action Plan for Employment (2005–2008) Follow-up Report 2007:²⁶

The Vocational Training and Employment for People with Disabilities Programme provided services for 24,700 people in 2005 and 2006, corresponding to a financial execution of EUR 125,000 (the accumulated target for 2008 is 46,000 people and EUR 216,000).

In addition, the Inclusive Labour Market Intervention Programme searches for individual solutions orientated towards insertion paths for those most distanced from the labour market. This is achieved by means of programmes and measures already available, as well as new solutions adapted to the needs of specific groups, promoting their active participation and ensuring close coordination with providers of complementary solutions and support for vocational training and job provision, namely at the level of health and social security.

Four protocols were signed for the creation of New Opportunities Centres specialising in solutions for people with certain types of disability. The objective of these protocols is to adapt and develop the terms of reference of Recognition, Validation and Certification Centres for secondary schools, modified for the characteristic requirements of people with disabilities.

The promotion of micro-credit for the creation of self-employment for people with special difficulties of insertion in the labour market, a measure receiving technical and financial support from the IEFP, has also received increased attention.

²⁶ The National Action Plan for Employment 2005-2008 – Follow-up Report 2007 is available at: www.dgeep.mtss.gov.pt/estudos/pne.php

The national strategy for social inclusion is particularly based on PNAI 2006–2008, and is characterised by the following political priorities: (i) to combat poverty among children and the elderly, through measures ensuring their basic citizenship rights; (ii) to correct disadvantages in education and training/qualification; and (iii) to overcome discrimination against immigrants and people with disabilities.

People with disabilities are also exempt from income tax under certain circumstances, and benefit from preferential percentage rates in regard to tax deductions.

In respect of social security provision, people with disabilities receive special treatment under Portuguese law. There are several subsidies and allowances available, including invalidity pensions and family foster care subsidies for children and young people (up to the age of 24 years), complementary benefits for dependency, and subsidies for special education, among others.

In the field of education, students with disabilities have special regimes in basic and secondary-level schools; and in higher-level education, faculties have an admissions quota of two per cent of total intake reserved for students with disabilities.

In regard to housing for people with disabilities, bank loans for their acquisition of a residential property are subject to special conditions, provided that the property concerned is to be their permanent residence. There are also special loans available for the adaptation of houses for people with disabilities.

As far as health services are concerned, people with disabilities are exempt from any fees within the *Serviço Nacional de Saúde* (SNS) [national public health services], as long as they can provide proof of their incapacity.

In regard to transport, people with disabilities are entitled to the acquisition of certain special means of transport (cars, wheelchairs) at reduced taxation rates. The adaptation of cars for people with disabilities may be sponsored by the IEFP, where it is proved that a car is needed to enable a person with disabilities to carry out his/her work.

The Plan of Action for the Integration of People with Disabilities or Incapacity (PAIPDI) foresees 95 measures, and will be implemented between 2007 and 2009. This plan sets out a group of measures and actions which form a policy that is integrated and cross-sectoral, and aims to promote the rehabilitation, integration and participation of people with disabilities in Portuguese society. It contains a set of intervention key dimensions: accessibility, education, qualification and employment, social protection, and equipment and services.

Another objective of this plan is a 30 per cent increase in social housing, with the creation of residences where people with disabilities will have autonomy. ‘Our commitment is to create 20 autonomous residences before 2009, as well as to create an additional 555 places in homes’.

The first PAIPDI Annual Report has recently been presented.²⁷

²⁷ PAIPDI report available at Rede Solidária website: <http://redesolidaria.org.pt/noticias/paipdi>

This report is mainly focused on three axes of action, which have already been partially or completely implemented:

- Axis 1 – Accessibility and information, communication, culture, sports, awareness-raising
- Axis 2 – Education, qualification and labour inclusion promotion, employment, information and training of professionals
- Axis 3 – Ensure provision, adaptation and maintenance of living conditions of a reasonable standard, social solidarity and protection, prevention (which means to prevent deterioration of living and social conditions), rehabilitation, quality and innovation in services and institutions.

The increase in life expectancy and the need to overcome certain insufficiencies in regard to provision of health care and social support led to the development of the Integrated Continued Care Network (Decree-Law no 101/2006, of 06 June 2006), a partnership between the Ministries for Health and for Labour and Social Solidarity. This network consists of a set of projects, solutions, social and health equipment and services, whose objective is to provide social and health support, orientated to the specific needs of people and families, giving special attention to situations of social exclusion. In most cases, its activities are developed through a cooperation model between the state and civil society, and are essentially targeted at the following intervention areas: i) childhood and youth; ii) people with disabilities; iii) the older population; iv) family and community; v) drug addiction; vi) people infected with HIV/AIDS and their families; vii) other intervention areas (mental health, integrated social solutions).

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 workers with disabilities?*
- b) *Would such activities be considered to constitute employment under national law?*

a) Portuguese legislation makes provision for sheltered or semi-sheltered accommodation and employment for workers with disabilities in Decree-law 247/89 of 05 August 2008, with the amendments introduced by Decree-law 8/89 of 15 January 2001 in the Regime of Technical and Financial Support to Programmes of Professional Rehabilitation.

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 people with disabilities can work within a normal workplace, but with adapted conditions.²⁸

b) These activities can be carried out:

- (i) as a probationary (training) period of up to nine months which does not constitute an employment relationship.
- (ii) as employment constituting a normal employment relationship.

²⁸ For further information on sheltered accommodation or work please visit http://portal.iefp.pt/Medidas/medidas/entidades/entidades_5_c.htm



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 Code, all persons are 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 she or he breaches co-workers’ rights, repeatedly enters into conflict with co-workers, or she or 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 laws.²⁹ Furthermore, discrimination based on nationality is specifically prohibited in labour law, and in general, in Article 3 (2) of Law 18/2004, of 11 May 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 higher 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?

²⁹ See also Article 33(2)(a) of Law 35/2004 and Article 2(3) of Law 18/2004.

*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 where (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. 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 these are in a situation in which they represent these bodies, or they are acting in accordance with instructions given by a union or an association.

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 Law 18/2004 against discrimination on grounds of race or ethnic origin 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 01 December 2003, and through the adoption of supplementary provisions (Law 35/2004).

Articles 30–40 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 73–78 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 these. The law does not lay down 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 Inspectorate General for Labour 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 protection in cases similar to an employment relationship. However, taking into consideration the court decision mentioned in point 0.3 above, one can say that the Portuguese system in general grants protection against discrimination on the grounds referred to above in the fields of self-employment and occupation.

Law 46/2006, prohibiting and punishing discrimination based on disability and on aggravated risk to health, forbids all discriminatory practices, namely the prevention of, or limitation of access to, the exercise of an economic activity (Article 4(b)).

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 people with disabilities: the adoption of procedures, either directly by an employer or through instructions given to workers or job centres, of measures or criteria which may make the recruitment of employees and the termination of a work contract conditional upon factors of a physical, sensorial or mental nature; and the production or publication of job advertisements or any other kind of publicity connected to the pre-selection or recruitment of workers which may directly or indirectly contain any specification based on discriminatory factors on the basis of disability.



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 per cent for the employment of people with disabilities, and the private sector has a quota of 2 per cent, but these quotas have never been implemented in practice, due to difficulties (rise in unemployment) in the labour market.

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 also 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. However, the courts consider that discrimination in independent work is forbidden – see court case on admission to the Bar Association. (Please see point 0.3 above)

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 dismissal, and contractual conditions of employment, as well as the conditions in which work is, or is expected to be, carried out. An 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, specifically 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, or such as adult life-long learning courses?

Protection covers both ‘education’ and ‘vocational training’.

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

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

Article 124(e) establishes that one of the objectives of vocational training must be to promote professional rehabilitation of people with disabilities, especially for those whose disability results from a work-related 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 of people with disabilities to vocational guidance, vocational training, practical work experience and professional rehabilitation. Furthermore, the State must encourage self-employment, teleworking, part-time work and work from home.

Article 33(1)(b) of Law 35/2004 refers to ‘orientation, training and vocational retraining at any level, including the acquisition of practical experience’,³⁰ and Article 73 of the Labour Code guarantees vocational training to workers with disabilities. Article 74 of this Code refers to positive measures on vocational training to benefit workers with disabilities.

The principles of non-discrimination are applicable to education (Article 74 of the Constitution). Children with disabilities cannot be denied access to education on the grounds that they ‘cannot learn’. Children or adults with disabilities are to be placed in mainstream education whenever possible.

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),³¹ grants all Portuguese citizens the right to education and culture in accordance with the Portuguese Constitution. Articles 16, 17 and 18 of this law refer to the right of people with disabilities to special education.

³⁰ ‘orientação, formação e reconversão profissional de qualquer nível, incluindo a aquisição de experiência prática’.

³¹ Lei n.º 46/86 de 14 de Outubro, Lei de Bases do Sistema Educativo.

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 concerning 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, and covers life-long learning courses too.

Anti-discrimination law also applies to adult life-long learning courses.

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 or in access to membership.

Article 33(1)(d) of Law 35/2004 protects the right to equal opportunities and treatment and 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 the 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 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 the 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 **and/ or patterns** of segregation **and discrimination** in schools, affecting notably the Roma community. If these cases **and/ or patterns** exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

Access to education

The school drop-out rate among Roma children is very high, as shown by the figures provided by the Portuguese authorities. There are very few Roma children who pursue their studies beyond the first cycle. According to non-government sources, there are currently fewer than ten Roma students in higher education. Roma girls are particularly likely to leave school at a very early age, due to cultural reasons and sexist traditions. All these trends have been analysed in the study promoted by ACIME and the *Fundação para a Ciência e Tecnologia* (FCT) [Foundation for Science and Technology], entitled ‘*Olhares I: Pontes para outras Viagens – Escola e Comunidade cigana: Representações*’³² [‘Regards I – Bridges to other travels – School and the Roma community: Representations’] Housing difficulties facing certain Roma have an impact on their ability to attend school under appropriate conditions.

Roma children are occasionally faced with hostile reactions from parents of non-Roma children who do not wish Roma children to join their own children’s classes. Roma culture is not yet sufficiently taught and promoted, especially in schools attended by Roma, because attention has only recently been drawn to these questions.

Special conditions for access to education and special learning methods are foreseen for students with disabilities.

Provisions cover both ‘education’ and ‘vocational training’.

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

³² This study is available at the Ciga-nos website: <http://www.ciga-nos.pt/UserFiles/Files/ciganos1.pdf>

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 people with disabilities. Furthermore, the State must promote self-employment, teleworking, part-time work and work from home.

A disabled person may work those hours which he or she wishes to work, if there is no danger to his or her health.

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

The principles of non-discrimination are applicable to education (Article 74 of the Constitution). Children or adults with disabilities are placed in mainstream education whenever possible. No data are available on the percentage of children with disabilities 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 in accordance with the Portuguese Constitution. Articles 16, 17 and 18 of this law refer to the right of people with disabilities to special education.

This relates only to the right of people with disabilities to special and adapted education that may be included in the mainstream education. People with disabilities 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 arguments; 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 ACIME,³³ and according to ACIME’s 2002–2005 report, Roma children remained in the school.

Roma children attend schools in accordance with their parents’ declared place of residence. Schools in these areas are not of high standard, and difficulties related to the integration of Roma students are frequent. There has been clear progress as regards literacy.

³³ *Alto Comissariado para a Imigração e Minorias Étnicas (ACIME)* [High Commission for Immigration and Ethnic Minorities].

The present generation of Roma is clearly in a better situation than their parents' generation. However, this new generation still faces discrimination related to their level of education: they generally leave school earlier than other students, in the fourth grade (between the ages of 10 and 12 years), 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 the social needs and values of Roma children
- teachers' difficulty in understanding the children's situation.

Some problems between teachers and Roma students have been encountered in schools. 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 reported.³⁴ The older generations are predominantly illiterate, and among children, total illiteracy is still around 25 per cent, and predominantly affects girls.³⁵

Some initiatives have been taken to encourage school attendance by Roma children. One example is the creation of posts for socio-cultural mediators (some of Roma origin), who act as a liaison point between families and schools.

The Portuguese authorities have said that the school attendance rate of Roma children has recently risen since the creation of these mediator posts. The *Secretariado Intercultural* [Intercultural Secretariat] is designed to raise awareness of Roma culture among non-Roma teachers and pupils. A minority of Roma children whose parents have a nomadic or semi-nomadic lifestyle continue to benefit from the school network set up some time ago, which enables them to attend school throughout the year, wherever they may be in Portugal. There is no evaluation available of the concrete results of this scheme.

In a study published by ACIME,³⁶ no relationship is established between rehousing and segregation or absenteeism at school. However, this study confirms that absenteeism of Roma children is greater than that of other children.

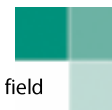
Another study³⁷ also published by ACIME concludes that absenteeism is due to the fact that school is not perceived as a factor in valorisation and professional training. No reference is made to a relationship between rehousing and absenteeism.

³⁴ Luíza Cortesão in *Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas*, 2005.

³⁵ Mendes, Cortesão et al., in *Pontes para outras viagens, Escola e comunidade cigana: representações recíprocas*, 2005.

³⁶ Luíza Cortesão in *Pontes para outras viagens – Escola e comunidade Cigana: representações recíprocas*, 2005.

³⁷ Maria Manuela F. Mendes in *Nós, os Ciganos e os outros*, 2005 (pp. 98–121).



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 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 07 November 1974, as amended by Decree-law 71/77 of 25 February 1977,³⁸ private associations have the right to restrict their supply of 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 access to buildings, public premises and to the supply of goods and services are contained in Decree-law 163/2006 of 08 August 2006, which approves the accessibility regime for 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? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups.

There's no knowledge about such cases.

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 the placing of 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 certain others.

The question of social housing in general makes it difficult to solve the problem of rehousing of Roma,³⁹ which means displacing Roma communities from encampments and shanty towns to social housing. Other inhabitants frequently complain about the rehousing of Roma in these buildings.

³⁸ 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.

³⁹ 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 Third Report on Portugal (2007), paragraph 104 refers to discrimination against Roma in access to housing.

Recently, the president of the Town Council of Amadora, where Cova da Moura shanty town is situated, stated that only by the demolition of a great number of these shanty houses can this quarter be rehabilitated. The *Moinho da Juventude* cultural association is against this demolition, and considers that rehabilitation should be achieved through the support of the inhabitants of the area.

Discrimination against Roma in regard to housing is prohibited. This applies to all aspects of housing. No exceptions are permitted.

It has been estimated that many Roma communities still live in shanty houses despite the PER re-housing programme set up by the national authorities, which has enabled many Roma families to leave the shanty towns where they lived in Lisbon and Porto and move to decent housing. Some Roma communities still live in the most basic of encampments on the outskirts of towns, sometimes without any access to essential services such as water and electricity. There are allegations of evictions and demolition of Roma housing without any alternative accommodation being offered.

SOS Racismo has published information about 16 Roma families in Porto evicted from shanty houses where they had been living for 20 years. They also report that when a Roma community asked the Town Hall of Porto to discuss the possibility of rehousing, the local authorities' answer was to send the police to search their houses. No dialogue could be established between the two sides.

Cases of discrimination in access to housing have been reported and complaints have been presented to ACIDI (the former ACIME), which has imposed fines on those refusing to sell or rent houses to Roma. However, these fines have been subject to appeal and the courts have acquitted the accused persons.

On the other hand, newspapers have reported that Roma managed to rent or buy houses by concealing their origin, and have subsequently bargained for payments to leave such accommodation, and have obtained payment in compensation for damages and losses.

Several projects have been implemented, namely:

The Municipality of Coimbra created the *Coimbra, Cidade de Todos* [Coimbra, City for All] project and established the *Parque Nómada* [Nomads' Park], which is used as a sort of transitional stage to prepare Roma families for rehousing. The *Instituto da Habitação e Reabilitação Urbana* [Institute of Housing and Urban Renewal] promoted the *Velhos Guetos, Novas Centralidades* project, covering all of Northern Portugal.

The Integrated Model of Action with the Roma Population is the product of the housing methods and strategies for Roma families implemented on an experimental basis in the *Parque Nómada* [Nomads' Park], as part of the *Coimbra, Cidade de Todos* [Coimbra, City for All] project, funded by the EU EQUAL Initiative.



It describes the housing experiment at the *Centro de Estágio Habitacional* [Housing Studies Centre] as a widely participative process and presents the *Acção de Formação para a População Cigana* [Training Action for the Roma Population] in an empowerment perspective, carried out in conjunction with the training of insertion experts who recognise the need to develop personal and professional skills that are important for interaction and dialogue with Roma families.

This model stresses the importance of partnership work whenever a group of bodies or institutions undertakes the social and professional insertion of families as a ‘common cause’. It includes a number of experience-based and other recommendations of a general nature that may prove useful to those willing to ‘experiment’.

Action 3 of the *Coimbra, Cidade de Todos* project requires that the Model of Action be brought to the attention of and be explained to all interested parties and people – particularly local government authorities, IPSSs (private social solidarity institutions) and organisations representative of the Roma population – in order to ensure that other bodies or institutions and all social actors have access to the Integrated Model of Action with the Roma Population, and to innovative practices to solve the problem of social integration of the Roma population.

4. EXCEPTIONS

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 this 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 the 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 issue of just cause for dismissal this will have to be the subject of a court ruling.

Even if Article 396 of the Labour Code only concerns 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 provisions of the Labour Code on equality and non-discrimination with the guarantee of freedom of religion in the Constitution, 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 effect of a contradiction between the convictions of an individual and the ethos of an organisation on the loyalty of the individual has 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, stated beliefs, or religious ethos in general. The same applies to 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 knowledge of any evidence or facts that lead to the conclusion that those practices are not in conformity with the Directive, as these cases have apparently been solved by mutual agreement.

There is no rule allowing discrimination on ideological or religious grounds which is specifically forbidden by Article 23 of the Labour Code. Some years ago, a case was reported where a journalist on a daily newspaper connected with a political party was forced to leave the newspaper after he had left the political party. The dispute was resolved by mutual agreement.

If factual proof were given that any worker was hired or dismissed because he or she professed to or did not conform to a religion, this would exceed the difference of treatment permitted by the Directive, and this practice would be a violation not only of the Directives but also of Portuguese law.

In regard to church ministers and their status and functions, in Case 04S276 of 16 June 2004 the *Supremo Tribunal de Justiça* [Supreme Court] considered that the relationship between the minister and the church is not governed by the Labour Code.

The legal basis for this 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)?*

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

There are no provisions or exceptions relating to employment in the police, prison or emergency services. However the physical ability required may limit access to such employment.

c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity or in an entity financed by the State (example: the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

On the basis of the *Concordata*, the Catholic Church in Portugal has the power to select teachers of religion in public schools.

Article 19 (4) of the new *Concordata* of 2004 states that teachers of religion are to be chosen both by the Church and by the State. This means that both parties have to agree on this matter. As far as the state sector is concerned, this means that a teacher of religion can only be recruited with the agreement of the Church, and may be dismissed from the job under similar conditions. There are no reports of incidents or court cases related to this matter.

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? Does this include stateless status? What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination? Is there overlap in case-law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well) ?*
- 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.

The Labour Code explicitly states that discrimination on the grounds of nationality is forbidden (Article 23(1)). In addition, Article 22(2) refers to equal treatment in the access to employment and work. This includes stateless status (Article 90).

There is no case-law, but in the author's opinion discrimination on grounds of nationality may also constitute discrimination on grounds of 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*’⁴⁰ (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 to 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 applies 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) 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 also applicable here.

If the benefits referred to 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 relationship of the couple is considered a ‘*de facto union*’ under the said law.

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 health and safety risks. 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.

⁴⁰ 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>

This can be reviewed by the Labour Inspectorate and the General Health Inspectorate⁴¹ and by the Labour Courts (a disabled person can challenge an employer's decision before the Labour Courts).

Law 38/2004 of 18 August 2004 sets out the general legal basis in regard to the prevention of the causes of disability, and the rehabilitation and participation of people with a disability.

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

There are no exceptions related to health and safety law in relation to 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 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’. This 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.

⁴¹ *Inspecção de Saúde da Direcção Geral de Saúde*

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 it necessary to examine the implications of Article 13 (equality of treatment), but referred it as an *obiter dictum*.

c) In the case of occupational pension schemes, it is possible under Portuguese legislation to fix ages for admission to a scheme or entitlement to benefits under it.

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

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

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 53–70 of the Labour Code and Articles 114–146 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). This means that employers cannot ask them to work more than the normal agreed hours.

They may benefit from 10 days unpaid leave in addition to the normal holiday allowance.

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

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

The *Instituto de Emprego e Formação Profissional* (IEFP) [Institute for Employment and Vocational Training]⁴² has a duty to supervise the implementation of these measures through a *Comissão de Acompanhamento* [Monitoring Commission] on which the social partner members of the *Comissão Permanente de Concertação Social* [Permanent Commission for Social Dialogue]⁴³ are represented.

There are no specific provisions for older workers.

⁴² *Instituto de Emprego e Formação Profissional* (IEFP): www.iefp.pt/

⁴³ *Comissão Permanente de Concertação Social*



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 to feed 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, 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 certain circumstances.

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) 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 and will not damage their health and personal development. Compulsory education corresponds to completion of ninth grade, and children begin school at the age of six (Article 6(1) and (2) of Law 46/86 of 14 October 1986, Basic Law on the Educational System). Children normally end their basic education at 15 years of age. The General Labour Inspectorate must be informed of the employment of such persons (Articles 55 (4) and 56(3) of the Labour Code). Articles 116–119 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-voltage electrical power or preparing dangerous chemical products. Articles 122–126 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 of 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 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 in the public sector, 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 the *Caixa Nacional de Pensões* (CNP) and can still work if she or he is authorised by the Ministry, but in this case she or he will receive only one third of the normal remuneration.

(iii) Private employees have no mandatory retirement age. They can receive a pension and work at the same time, but in this case their contracts must be changed in accordance with 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 normal legal 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, subject to agreement between the parties.

(ii) The normal age range 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 continue to 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 example, 65 years of age, this has to be justified as if it were a dismissal. *See below, e)(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 an employee is 70 years of age or over, the duration of his/her labour contract shall be six months on a renewable basis, subject to termination with 60 days notice.

The retirement age is the same for women and men.

According to Article 42 of the Framework Law of Social Security, Law 32/2002 of 20 December 2002, on flexible retirement age, the law makes provision for measures for a flexible legal retirement age through mechanisms to reduce or increase pensions according to whether the age of the beneficiary is under or over that established in general terms. Due to the financial difficulties of the social security system, the period of contribution has been increased; this has led to an increase in the retirement age.

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 selection 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?

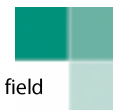
The laws implementing the Directives do not include any specific exceptions concerning public security, public order or similar, but we must consider that these exceptions are implicit. In a case of conflicting rights, Article 335 of the Civil Code states that the right which is considered to be of higher 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 no 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? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored.*
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 people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.

a) Article 8 of Law 18/2004 and Article 2 of Decree-law 251/2002 of 22 November 2002, establishing the *Alto Comissariado para a Imigração e Minorias Étnicas* (ACIME) [High Commission for Immigration and Ethnic Minorities]⁴⁴ 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) The Roma community.

Positive actions have been developed by ACIME, namely in:

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

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 urban districts dominated by shanty or social housing. Many of the Roma are still living in ‘*bairros de barracas*’ or ‘*acampamentos*’ [shantytowns and illegal encampments]. They have been integrated with other groups such as immigrants, both legal and illegal, to Portugal. Some municipalities⁴⁵ 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.

⁴⁴ *Decreto-lei 251/2002 de 22 de Novembro de 2002 cria o Alto Comissariado para a Imigração e Minorias Étnicas.*

⁴⁵ *Imigrantes e Mudanças Sócio-Urbanísticas nos Bairros das áreas Metropolitanas, Gabinete do Parlamento Europeu, 2005.*

Newspapers sometimes publish reports of 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 the courts and police are concerned, ‘both institutions are relatively discriminatory’.⁴⁶

Cultural mediators recruited from among the Roma community have been introduced, with the aim of establishing bridges between children, families and schools (Law 105/2001 of 31 August 2001, introducing social and cultural mediators).⁴⁷ The functions of these 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 of their service-users and the confidentiality of all information they receive.

Associations working in the areas of migration and cultural diversity can apply to the *Alto Comissariado para a Imigração e Diálogo Intercultural* (ACIDI) [High Commission for Immigration and Intercultural Dialogue] (formerly ACIME) to subsidise intercultural mediator posts. If the required conditions are met, ACIDI will subsidise the recruitment and employment of a cultural mediator. ACIDI does not allocate a specific budget for cultural mediators (there are 71 mediators in Lisbon and 22 in Porto). So far we have not obtained figures about the employment of cultural mediators in other regions.

In 2005, ACIME promoted a Week of Cultural Diversity to disseminate good practice in intercultural education. Studies and surveys have influenced the general policy of ACIME. For instance, a structure called the *Gabinete de Educação e Formação* [Office for Education and Training] was set up within ACIME, to deal with apprenticeships and training in schools.

The Roma community is represented on the Commission for Equality and Against Racial Discrimination. No specific measures have been taken apart from those mentioned above. Some progress has been registered, namely through the participation of the Ministry for Labour and Social Solidarity (MTSS) and of the European Anti-Poverty Network (EAPN) – Portugal in the transnational project ‘Promotion of More Active Policies for the Social Inclusion of the Roma and Traveller Minorities’, financed by the European Commission within the Action Programme to Combat Social Exclusion.

It should be also mentioned that in the Portuguese National Action Plan for Inclusion (PNAI) 2003/2005 the Roma communities were among the transversal target groups provided for in most of the social inclusion measures. In parallel, some specific instruments were created specifically directed towards the Roma Communities (Annex III of the PNAI), namely scholar certification and qualification of Roma young people (between 13 and 21 years of age) and advice centres within residential areas where Roma live in order to promote Roma social inclusion.

⁴⁶ Mendes, Maria Manuela Ferreira in *Nós, os ciganos e os outros*, 2005, SOS Racismo, *Saúde e Liberdade, ciganos, números abordagens e realidades*, 2001.

⁴⁷ *Lei n.º 105/2001 de 31 de Agosto, que estabelece o estatuto legal do mediador sócio-cultural.*

Roma benefit from broad social policy measures such as unemployment benefits, Minimum Income Revenue (RMI) subsidy (social integration income), and special education when needed. There are general schemes from which Roma may also receive benefits.

There are no special quotas for Roma, but in regard to social housing the situation of Roma living in municipalities is specifically taken into consideration.

ACIDI and certain local bodies have taken initiatives relating specifically to Roma. For example, ACIDI has set up a working group on equality and integration of Roma, and recently published a series of studies on Roma in Portugal. Within the framework of the European Union EQUAL programme, the Ministry of Labour and Social Solidarity participates in the transnational project 'Promotion of More Active Policies for the Social Inclusion of Roma and Traveller Communities'. The National Action Plan for Inclusion 2006–2008 contains specific measures for the inclusion of Roma.

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

With the support of ACIDI, projects aimed at young people, educational programmes, and programmes promoting social inclusion of Roma families and students operate throughout the country.

These programmes providing support and facilities for young people, education, social inclusion of Roma families and students include:

- Northern Portugal – *'Asas para o Futuro'*, *'Vivências Multiculturais'*, *'Dar mais que Falar'*, *'Escolhas mais Jovem'*;
- Central Portugal – *'Trampolim'*, *'Renovar as Origens'*;
- Lisbon area – *'A Rodar'*, *'Interligar'*, *'No Trilho do Desafio'*, *'Nómada 1'*, *'Nómada 2'*, *'CLP das Manteigadas'*, *'Novos Desafios'*;
- Alentejo – *'Inclusão pela Arte'*, *'Mus-E'*, *'Encontros'*, *'Escola Intercool'*.

The aims of all the above-mentioned projects, specially conceived for young Roma living in problematic areas, and operating throughout Portugal are:

- to promote the educational and social integration of Roma students in schools and in society through measures of protection and promotion against discrimination of the most vulnerable persons,
- to dignify Roma culture and build partnerships in civil society to encourage tolerant and positive intercultural attitudes and practices,
- to minimise the risks of school drop-out among Roma students, through support for the special needs of children and young people,
- to increase personal, social and professional skills within the local community to enable better access to employment.

Information on these projects is available on the *Ciga-nos* website:

<http://www.ciga-nos.pt/Default.aspx?tabindex=3&tabid=10>

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 grounds of disability.

Articles 73–78 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 disabilities, 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 such people retain their employment when developing a strategy for managing disability in the workplace.

Several rights are guaranteed to workers with disabilities: the right to be exempted from a specific number of working hours (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 Labour 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 teleworking (Articles 233–243), which is considered in Portugal as a positive action (Article 26(2) of Law 38/2004). This new method of working may benefit people with disabilities, since many of the tasks that were previously carried out in factories or 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 Labour Code, teleworkers 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 workers with disabilities 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 people with disabilities of up to 2 per cent for private enterprises and up to 5 per cent 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 people with disabilities (places in buses and trains are reserved for people with disabilities),
- reservation of parking places (parking places are reserved by municipalities for people with disabilities 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 people with disabilities),
- support in setting up their own small businesses.

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

Other recently implemented actions which deserve mention are detailed below.

Certain buses which provide transport links between hospitals and institutions for the support of people with disabilities 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 people with disabilities.

(iii) According to APD accessibility provisions should include not only buildings, but also footpaths and obstacles that block the flow of pedestrian traffic.

Transport is also a vital component of independent living, and like others in society people with disabilities also rely on transport facilities, and in many instances, means of transport are inaccessible to people with disabilities because either they cannot use them in the first instance (e.g. inaccessible buses, train stations).

Immediate steps should be taken to ensure that people with disabilities using public transport are not at a disadvantage compared to others. Measures could include ensuring that bus and train drivers make regular announcements at stops to inform individuals where they are, allowing the transportation of service animals, and providing signage in Braille.

The newspaper *Terras do Cante*, published by the *Associação Terras Dentro* in the Alentejo, has recently published '*Ciganos portugueses, nosso povo*', which focuses on the fact that Roma have the same rights as Portuguese citizens living in the country.

ACAPO, the Portuguese association for the blind, recently promoted a '*jantar às escuras*' [dinner in the dark] where invited guests (politicians and employers) had to eat dinner over a two-hour period without any light, just as if they were blind. This action took place in a shopping centre and aimed to raise awareness of the difficulties blind people face in daily life.

As far as racial minorities are concerned, immigrants, especially newcomers, have competitive disadvantages or specific vulnerabilities which demand positive actions to enable effective equality. To achieve such objectives, programmes and actions that allow immigrants to be well received are being developed, such as the National Immigrant Support System, with initiatives such as the National Immigrant Support Centres. These support centres combine the presence of the public bodies with which immigrants have to deal with a diversified set of support offices (dealing with family reunion, employment and legal support, etc.), which speeds up access to fundamental rights. Furthermore, the National Network of Information for the Immigrant provides useful and practical information to facilitate immigrant integration, available in a variety of languages and in different formats from a number of sources (paper, websites, media, telephone and information centres). In this area, the teaching of Portuguese activated by the *Portugal Acolhe* [Portugal Welcomes] programme is also extremely important. The majority of these programmes are promoted by ACIDI and the *Serviço de Estrangeiros e Fronteiras* (SEF) [Aliens and Borders Service].



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)? Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

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 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 representations from the parties and the Permanent Commission of the Commission on Equality (CEARD), decides whether a fine should be imposed and how much that fine should be. The respondent has the right to appeal to the courts against the fines imposed by the ACIME. Neither the victim nor associations have the right to appeal or to intervene in the appeal procedure. 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 and 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 concerned the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of civil law (i.e. Articles 483, 496, 799 and 800 (1) of the Civil Code).

There are no statutory limits for pecuniary or non-pecuniary (moral) damages. 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, include interest or take into consideration the devaluation of money, in particular where the passage of time is a consideration.

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

The victims have to instruct a lawyer and advance some funds. They are, however, entitled to *apoio judiciário* [legal assistance] if they do not have sufficient financial means to cover fees for a lawyer and the litigation costs. This is also valid for foreigners. We should point out that the length and complexity of 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 *Tribunais do Trabalho* [Labour Courts]. They are part of the common jurisdiction but deal only with labour law cases concerning employment relationships, accidents and work-related illness, appeals against fines, and disputes concerning social security rights. They deal with all questions arising from the drafting, execution and termination of employment contracts. 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. Issues 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 to 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 *Inspecção Geral do Trabalho* [Inspectorate General for Labour], which will check the facts that have been reported by the victims or any other person.

The *Autoridade para as Condições no Trabalho* (ACT) [Authority for Labour Conditions] (formerly General Labour Inspectorate) is responsible for monitoring the enforcement of the Labour Code 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 the 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 a *contra-ordenação* [administrative offence], for which a *coima* [administrative fine] can be imposed. The Labour Code classifies these administrative offences according to their degree of gravity as *leves* [minor], *graves* [serious] or *muito graves* [very serious] offences. A violation of the provisions on equality and non-discrimination is considered a very serious offence. Other offences related to the application of Directive 2000/78/EC may be considered as minor or serious offences.

Violations may affect people with disabilities 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 *Ministério Público* [Public Prosecutor], or bring a civil case.

Many court buildings have not been adapted to facilitate access for people with disabilities, 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 of up to eight years (Article 23) for their removal.

The Portuguese Disability Association⁴⁸ has repeatedly stated that Decree-law 123/97⁴⁹ of 22 May 1997 abrogated by Decree-law 163/2006 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 people with disabilities, but in practice many of the buildings, including the Labour Courts themselves, have not yet been adapted.

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

Mediation is not foreseen for dispute resolution for *funcionários públicos* [public servants]. They are required 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.

⁴⁸ Associação Portuguesa de Deficientes.

⁴⁹ Decreto-lei 163/2006 acessibilidade de espaços públicos, equipamentos colectivos e edifícios públicos e habitacionais
<http://www.euroacessibilidade.com/legis01.htm>

Procedures for mediation in criminal law are being implemented by the Ministry of Justice, and the *Julgados de Paz* (Justices of the peace) will be granted this competency at a later date.

c) Cases can be brought within a period of one year after the employment relationship has ended (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.

In Portugal it is not easy to obtain statistical data on cases of discrimination, as there are three institutions in Portugal which may receive complaints: the Ministry of Justice, ACT (General Inspectorate for Labour) and ACIDI. ACIDI cooperates with the two other institutions on procedures on discrimination, but in practice the other institutions do not always inform ACIDI.

According to the European Commission against Racism and Intolerance (ECRI) Third Report on Portugal (February 2007),⁵⁰ the dispositions laid down in Article 240 of the Criminal Code were only applied in two cases, once in 2001 and once in 2005.

According to the same report, based on data given by the Ministry of Justice, four cases related to racial discrimination were reported in Portugal in 2002, three cases in 2003, and four cases in 2004.

According to *Unidade de Apoio à Vítima Imigrante e de Discriminação Racial e Étnica* (UAVIDRE) [Unit for the Support of Immigrant Victims and Victims of Racial and Ethnic Discrimination] which was established by *Associação Portuguesa de Apoio à Vítima* (APAV) [Portuguese Association for Victim Support – an NGO] with the financial support of ACIDI, thirteen cases of discrimination were reported in 2005, eleven cases in 2006, - and fifteen cases in 2007.

According to UAVIDRE, most of the victims came from Angola or Cape Verde (former Portuguese colonies in Africa).

In addition, the Portuguese Ombudsman stated that he had only received nine complaints on racial grounds up to 2007, and that there was no evidence of discrimination in any of these cases.

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).*

⁵⁰ ECRI Third Report on Portugal, available at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/Portugal/Portugal_eng_CBC_3.asp#TopOfPage

a) (i) Article 7(2) of Directive 2000/43/EC is covered by Article 5 of Law 18/2004, which 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:

‘Those 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’.

In addition, Law 46/2006, in Article 15(1), foresees to associations for people with disabilities and other similar organisations defending the rights and interests of people with disabilities, the right to intervene in support or on behalf of a complainant in his/her respective legal proceedings. Those entities have the right to follow the administrative procedure aiming to impose fines on the grounds of the practice of any discriminatory act referred to in this law. In cases of crime committed against a disabled person, these entities have the right to assist in subsequent criminal proceedings.

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

Decree-law 163/2006 on accessibility for people with disabilities also foresees that legal entities (NGOs and associations) representing people with disabilities have legal standing in court to assist or act on behalf of disabled individuals in court cases in which they are involved.

(ii) However, in cases of *contra-ordenações* [minor offences], these entities only have the right to make an accusation and to file a complaint with the *Comissão para a Igualdade e Contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination] and the *Alto-Comissariado para a Imigração e Minorias Étnicas* [High Commission 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 respond to the appeal of a person found guilty against a decision imposing a fine, as the law on the appeal procedure in case of *contra-ordenações* [minor offences] only grants the right of appeal to the person found guilty or the Public Prosecutor.

Article 53(1) of *Código de Procedimento Administrativo* (Code of Administrative Procedure) grants to NGOs whose aim is to protect a certain general interest the option of intervening in administrative procedure and subsequently the right to appeal to the 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 environmental 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 proceedings imposing fines in cases of violation of the anti-discrimination rules of this Code, with the right to file an appeal or to answer an appeal by the person found guilty. Article 5 of the *Código de Processo do Trabalho* [Code of Labour Procedure] 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 complainants are possible in civil, criminal and labour procedures under Article 5(2)(c) of the Code of Labour Procedure (the code containing rules of procedure for labour actions in accordance with Decree-law 480/99 of 09 November 1999), which 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 kinds of class action does not seem to be applicable in the areas discussed here.
- Article 53(1) of the *Código do Procedimento Administrativo* [Code of Administrative Procedure] 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, vocational 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 must establish the facts from which discrimination may be presumed. Once these 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 basis in racial or ethnic origin.

This principle does not apply to criminal procedure, nor to actions where according to the law it is up to the court or other jurisdiction to carry out the investigation.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

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 an employer from ‘opposing, in any way whatsoever, the exercise by a worker of his or her rights, as well as from dismissing an employee, or imposing any sanctions on him or her, or subjecting him or her to any adverse treatment because of that same exercise’.

Article 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 for a complaint against working conditions or for the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee. 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 out in Articles 396(1)(2) and 429(c) of the Labour Code), any kind of victimisation is considered illegal under labour law. **Victimisation is clearly prohibited outside of employment and is foreseen in Article 7 of Law 18/2004.**

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

Article 7 of Law 18/2004 states 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 *contra-ordenação* [summary administrative offence]. 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, and consequently these articles must be considered to be still in force.

Fines may vary from EUR 400 to EUR 2,000 for individuals 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 ACIDI may apply the following ancillary sanctions:

- publication of the decision,
- public censure (admonition) of the perpetrators of discriminatory practices,
- confiscation of property,
- prohibition of the exercise of a profession or activity which involves a public capacity or depends on authorisation or official approval by public authorities,
- removal of the right to 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.

In regard to labour discrimination at work, the Labour Code does not consider discrimination a crime, but only a *contra-ordenação* [summary administrative offence]. Article 620 of the Labour Code expressly states that such offences are also punishable in the case of negligence.

Administrative fines are defined by reference to the degree of gravity of the offence, 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 offences referred in Article 31 of Law 35/2004 (dissemination of information) 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 EUR 500,000, fines can vary from EUR 1,780 to EUR 3,560 in the case of negligence, and from EUR 4,005 to EUR 8,455 in the case of intent (*dolus*);
- b) when committed by an employer whose turnover is equal to or higher than EUR 500,000 but less than EUR 2,500,000, fines can vary from EUR 2,848 to EUR 7,120 in the case of negligence, and from EUR 7,565 to EUR 16,910 in the case of intent (*dolus*);
- c) when committed by an employer whose turnover is equal to or higher than EUR 2,500,000 but less than EUR 5,000,000, fines can vary from EUR 3,738 to EUR 10,680 in the case of negligence, and from EUR 10,680 to EUR 24,920 in the case of intent (*dolus*);
- d) when committed by an employer whose turnover is equal to or higher than EUR 5,000,000 but less than EUR 10,000,000, fines can vary from EUR 4,895 to EUR 12,460 in the case of negligence, and from EUR 12,950 to EUR 35,600 in the case of intent (*dolus*);
- e) when committed by an employer whose turnover is equal to or higher than EUR 10,000,000, fines can vary from EUR 8,010 to EUR 26,700 in the case of negligence, and from EUR 26,700 to EUR 53,400 in the case of intent (*dolus*).

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

If discriminatory treatment occurs during a 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 provisions of the Labour Code 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 provisions of the Labour Code on equality and non-discrimination can also be published (Article 627(2)), in the manner ordered by Article 642(2).

In regard to sanctions for the violation of disability anti-discrimination provisions, the Labour Code specifies in Articles 641–648 which offences are considered as very serious or serious in cases related to discrimination. It should be noted that the criteria which distinguish very serious, serious and minor offences are not clear or necessarily logical. For instance, the Labour Code considers in Article 646 (1) that the violation of Article 73(1), which forbids discrimination against people with disabilities, is a ‘very serious offence’. However, in Article 646(2), a violation of Article 77, which exempts workers with disabilities 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 a person is found guilty of discriminatory acts more than once (recidivism), he or she may be liable to ancillary penalties in addition to a fine, which may include the temporary withdrawal of a public authorisation to carry out activities in an enterprise, a ban on competing for public contracts and/or the publication of the decision.

Any discriminatory provisions included in an employment contract are, under Articles 294 of the Civil Code and 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 a disabled person the right to compensation for moral damages/injury to feelings. Furthermore, the law foresees a pecuniary sanction of approx. EUR 2,000–4,000.

Penal sanctions

The Criminal Code has been recently amended and Article 240 now covers discrimination based on almost every ground. Paragraph 1 of this article makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

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, ethnic origin or nationality, religion, gender or sexual orientation 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, ethnic origin or nationality, religion, gender and sexual orientation. Those who incite or encourage racial, religious or sexual discrimination will be subject to a term of imprisonment from six months to up to five years.

Under Article 132(2)(4) of the Criminal Code on homicide, motives based on hatred on grounds of race, religious or political convictions, or colour, ethnic origin or nationality, religion, gender or sexual orientation are regarded as aggravating circumstances, resulting in a more severe penalty. Such aggravating circumstances may also apply in cases of assault causing bodily harm under Article 146 of the Criminal Code. There is no general rule stipulating that such motives constitute aggravating circumstances for all offences. This means that, for other offences, it is left to the courts to decide, on a case by case basis, whether racial motives constitute an aggravating circumstance.

The fact that victims are especially vulnerable due to age and disability is also considered to be an aggravating circumstance in such crimes.

Articles 251 and 252 deal with outrage (affronts and insults) and trouble and disorder affecting the normal provision of religious services as crimes punishable with imprisonment of up to one year, or with a daily fine up to 120 days. Daily fines means a fine calculated on the basis of the income of a guilty party between a certain amount laid down in Article 47(2) of the Criminal Code which may vary from 1,00 Euro up to 498,80 Euros and with a minimum of 10 days and a maximum of 120 days. If not paid these fines will be converted in imprisonment.

Article 253 - Violence or threat against funerals or burial ceremonies (*cortejo ou cerimónia fúnebre*) is punished with imprisonment of up to one year. This article protects the religious ceremonies involved.

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

Genocide is covered by Article 8 of Law 31/2004 of 22 July 2004.

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 in accordance with the general rules on (civil) liability (Articles 483 *et seq.* of the Civil Code). Under Article 500 of the Civil Code (joint and several liability), in some cases the employer (if the perpetrator is not the employer him/herself) may also be sued for damages, together with the person who is held legally responsible for the discrimination complained of.

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



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

In the context of education, victims could also apply for such injunctive relief but it would be more practical to apply to the *Inspecção Geral da Educação* [Inspectorate General of Education of the Ministry of Education].

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 amount of compensation available to victims. No court cases on this issue have been reported.

7. SPECIALISED BODIES

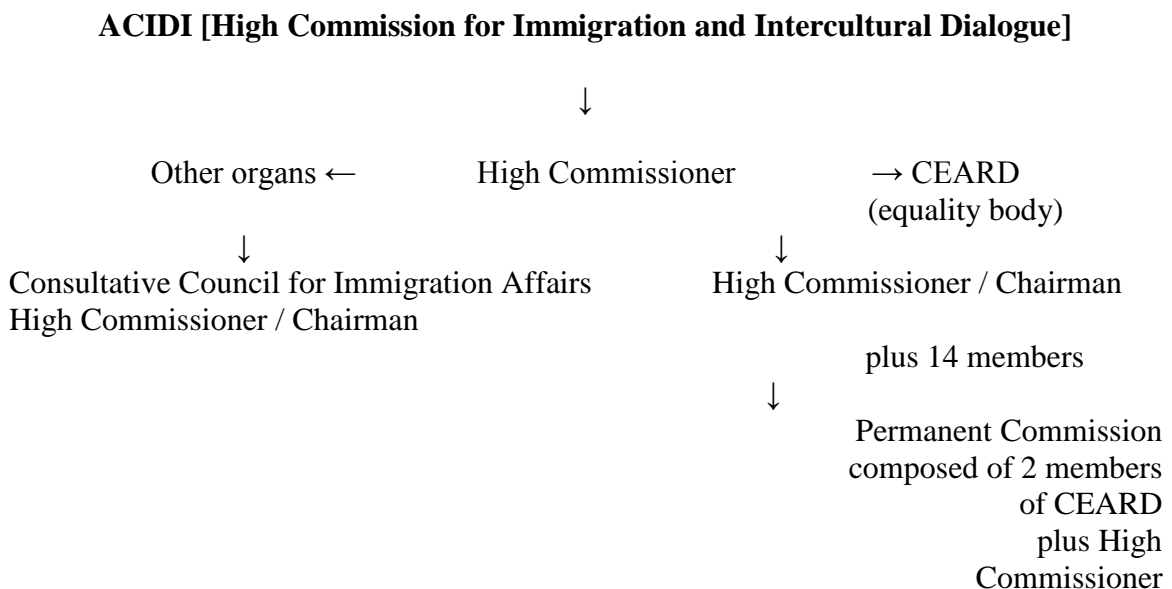
Body for the promotion of equal treatment (Article 13 Directive 2000/43)

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?*

The specialised body for the promotion of equal treatment in regard to racial and ethnic discrimination is the *Alto Comissariado para a Imigração e Diálogo Intercultural, I.P.* (ACIDI)⁵¹ [High Commission for Immigration and Intercultural Dialogue], formerly ACIME [High Commission for Immigration and Ethnic Minorities]. ACIDI is governed by Decree-law 167/2007 of 03 May 2007,⁵² which approves the establishment and organisational structure of ACIDI I.P., which is now a public institution or legal person.

The structure of **ACIDI** is shown in the following organigram:



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 now the responsibility of ACIDI to promote equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin, and to promote dialogue with and the integration of immigrants, ethnic minorities and religions.

⁵¹ ACIDI website: <http://www.acidi.gov.pt/>

⁵² Decree-law 167/2007 available at: www.acime.gov.pt/modules.php?name=Downloads&d_op=getit&lid=291

In particular, it is also part of the competence of the High Commission to coordinate the ‘*Programa Escolhas*’ [‘Choices Programme’] and the *Estrutura de Missão para o Diálogo com as Religiões* [Structure for the Promotion of Religious Dialogue], as well the *Secretariado Interculturais* [Intercultural Secretariat].

According to Article 8(2) of this law, ACIDI has powers:

‘to propose, through the *Comissão para a Igualdade e Contra a Discriminação Racial* - Commission for Equality and Against Racial Discrimination (CEARD), statutory measures aiming to abrogate any norms or rules contrary to the principle of equality of treatment.’

‘to provide the assistance necessary to victims of discrimination to enable them to defend their rights.’

For the purposes of Directive 2000/43/EC the relevant bodies which are included in the structure of ACIDI [the High Commission] are:

a) *Alto Comissário* [High Commissioner]:

The main functions of the High Commissioner are:

1. to represent ACIDI,
2. to supervise all services of ACIDI [the High Commission],
3. to chair the Commission for Equality (CEARD) and its Permanent Commission,
4. to issue binding decisions concerning fines.

The High Commissioner is also Portugal’s CERD representative (Notice 95/2001 of the Foreign Office of 24 August 2001)⁵³.

According to Article 5(2) of Decree-law 167/2007, the High Commissioner is appointed for a three-year period and can be removed from office by the Prime Minister.

b) *Comissão para a Igualdade e Contra a Discriminação Racial* – [Commission for Equality and Against Racial Discrimination] (CEARD)

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

CEARD is chaired by the High Commissioner and is composed of the following members:

- two members elected by the Portuguese Parliament,
- one member appointed by the Ministry of Labour and Social Solidarity,
- one member appointed by the Ministry of Education,
- two members from immigrant associations,
- two members from anti-racist associations,
- two members from trade unions,

⁵³ *Aviso n.º 95/2001 do Ministério dos Negócios Estrangeiros, 24 de Agosto de 2001*



- two members from employers' associations,
- two members from associations for the defence of human rights and
- three persons to be designated by the other members.

The members of the Commission for Equality (CEARD) are appointed for three years.

The members of the Commission appointed by the Ministers can be dismissed by them. Other members cease their functions when they no longer represent the associations which delegated them.

A Permanent Commission of three persons exists within the Commission for Equality (CEARD). The Permanent Commission is chaired by the High Commissioner, and its two further members are chosen from among the members of the Commission. The Permanent Commission gives advice on fines to be imposed. This advice is not binding.

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.

According to Article 8 of Law 18/2004, these bodies cover all the areas that fall under the scope of the Racial Equality Directive (Article 3) and work at national level. Both entities (the High Commissioner and the Commission for Equality) deal with discrimination not only on the grounds of race, ethnic origin but also on the grounds of nationality.

The Commission for Equality (CEARD) and the High Commissioner have no specific budgets. Their expenses are paid from the budget of ACIDI [High Commission] which is detailed as follows:

2004 – EUR 4,674,194
 2005 – EUR 4,754,413
 2006 – EUR 5,824,570
 2007 – EUR 5,075,520
 2008 – EUR 5,497,526

This money comes from the National Annual (fiscal) Budget and from the budget of the Ministry for Social Solidarity and from other government departments. The High Commission (which includes both bodies) is accountable to the *Tribunal de Contas* [Court of Auditors] for the way in which it spends the budget and for expenses incurred.

The High Commission receives an annual transfer of around EUR 3,750,000 from the budget of the Institute for Employment and Vocational Training, which is a body of the Ministry for Labour and Social Solidarity. This transfer is included in the figures quoted above. Decree-law 167/2007 refers to finance in Article 11, but the rules remain the same as before.

The ACIDI [High Commission] budget has no allotment for assistance to victims; however, lawyers employed by the High Commission give legal assistance to victims and there is an agreement with APAV (see d) below).

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

Only a few members of the High Commission are civil servants. All the other members have better employment conditions than civil servants, but they can be dismissed more easily.

The ECRI report notes that ACIME (now ACIDI) is under the direct authority of the Prime Minister. It therefore has the advantage of being in direct contact with government authorities and is in a position to monitor their activities closely and to influence them. However, ACIME is not an independent body; this can create problems with some of the functions assigned to it, in particular when imposing penalties in racial discrimination cases.

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.*

The competences of ACIDI [High Commission], as represented by the High Commissioner, are laid down in Decree-law 167/2007 of 03 May 2007. Under Article 3 (Purpose and powers of the High Commission) its competences are as follows:

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

In addition, ACIDI [High Commission] carries out surveys and publishes reports and recommendations, although there is no specific budget for these tasks. It has commissioned academic experts to conduct surveys on discrimination and related problems and set up the *Observatório da Imigração* [Observatory for Immigration],⁵⁴ which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

The regulation of CEARD is contained in Article 5(2) of Law 134/99 of 28 August 1999, which establishes the competences of this commission:

- to gather all information related to discriminatory acts and to apply the relevant sanctions,

⁵⁴ *Observatório da Imigração* website www.oi.acime.gov.pt

- to recommend the adoption of legislative, statutory or administrative measures that it deems adequate to prevent discrimination on the grounds of race, skin colour, nationality or ethnic origin,
 - to promote and conduct surveys and research on racial discrimination,
 - to write and publish an annual report on the situation in Portugal concerning equality of treatment and racial discrimination.
- d) *Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*

On 17 November 2004 ACIDI [High Commission] and *Associação Portuguesa de Apoio à Vítima* (APAV) [Portuguese Association for Victim Support – an NGO] signed a protocol to create the *Unidade de Apoio à Vítima Imigrante e de Discriminação Racial ou Étnica* (UAVIDRE) [Unit for Support of Immigrant Victims and Victims of Racial and Ethnic Discrimination] established by APAV (an NGO) with the financial support of ACIDI. This unit gives assistance to immigrants facing discrimination and to the victims of racial or ethnic discrimination. This protocol was effective for a period of one year, but has been renewed. The protocol gives financial support in the amount of EUR 38,000 to the unit, and became effective in May 2005.

From May 2005 to March 2006, UAVIDRE received 374 complaints, most of these on domestic violence (80.7 per cent), and mainly on the ill-treatment of women, especially those in the age range 26–35. There were few complaints on racial or ethnic discrimination: between January and September 2006 only eight complaints were received. 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 Commission have at least five specially qualified and trained members to assist the victims of discrimination; among these are two lawyers, one psychologist, one social assistant and one generalist.

The High Commission also has staff trained to assist victims.

The assistance consists in:

- providing information on anti-discrimination legislation and possible legal action against discrimination,
- helping victims to file an official complaint when necessary or to initiate court proceedings,
- providing opportunities to reach an amicable settlement (mediation) between the victim and the (alleged) perpetrator.

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



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

In regard to the legal standing of both bodies, the situation is as follows.

Article 12 of Law 18/2004 states:

Competence

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

- a member of the Government whose responsibilities include the area of equality;
- the *Alto-Comissário para a Imigração e Diálogo Intercultural* [High Commissioner for Immigration and Intercultural Dialogue];
- The *Comissão para a Igualdade e contra a Discriminação Racial* [Commission for Equality and Against Racial Discrimination];
- The Inspectorate General with competence relevant to the matter (Decree-law 276/2007 of 31 July 2007 on the legal regime of inspection, audit and control of the direct and indirect State administration services).

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

According to Article 13(2) of Law 18/2004, a binding decision (imposing a penalty) is within the competence and responsibility of the High Commissioner after having heard the opinion of the *Comissão Permanente* [Permanent Commission] of CEARD, as provided for in Article 7(2) of Law 134/99 of 28 August 1999.

The members of staff of the High Commission have the power to mediate, and they frequently act as mediators between complainants and those accused. They do not have the power to refer a case to a court of law if mediation is unsuccessful. The claimant has to seek judicial redress him/herself, for instance in employment cases.

Where a case of discrimination may be considered a crime under the relevant provisions of the Criminal Code, the file is sent to the office of the Public Prosecutor, who is the competent authority to bring criminal proceedings in a court of law.

When a case of discrimination involves a crime, both bodies are in formal and regular contact with the judicial system through the Office of the Public Prosecutor.

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 only authorised to receive complaints and must send files for investigation to the Inspectorate General responsible for the area in question.

Cases are frequently referred to the *Autoridade para as Condições do Trabalho* (ACT)⁵⁵ [Authority for Labour Conditions], formerly the *Inspecção do Trabalho* [Labour Inspectorate], the *Inspecção Geral da Administração do Território* (IGAT) [Inspectorate General of the Administration of the Territory] and the *Inspecção Geral da Administração Local* [Inspectorate General of Local Administration].

The Inspectorates General 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 these Inspectorates General (the Labour Inspectorate, the Inspectorate General for Territorial Administration, the Health Inspectorate, the Economic Activities Inspectorate and the Local Administration Inspectorate).

They have regular formal and informal contact with the NGOs and employees' organisations which are represented on the Commission for Equality and Against Racial Discrimination, as well as formal and informal contacts with APAV (see above) and the *Ordem dos Advogados* [Bar Association].

Provedor de Justiça [Ombudsman]

We consider it of interest to refer briefly here to the activities of the Ombudsman.

The existence for many years of an Ombudsman who also acts in cases of discrimination on any grounds contributes to the effectiveness and independence of the system. The *Provedor de Justiça* [Ombudsman] is an independent official 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, and has made recommendations to public authorities.

Complaints

Complaints can be filed with both bodies by individual citizens, NGOs, employees' organisations, etc. Complainants benefit from the support of the staff of ACIDI [High Commission], who receive their complaints and pass the files on either to the Commission for Equality (CEARD) or to the High Commissioner. They provide assistance to the victims. Practical assistance is provided by UAAVIDRE.

Complaints procedure:

1. A complaint arriving at ACIDI is presented to CEARD, which decides if the complaint will be followed up.
2. If so, the case is sent to the competent general inspectorate.

⁵⁵ *Autoridade para as Condições do Trabalho* (ACT) – website: www.act.gov.pt

3. After investigation, the general inspectorate concerned sends the case back to the High Commission.
4. The High Commissioner renders a decision after taking advice from the Permanent Commission.
5. Violations of the Labour Directive (2000/78/EC) are directly decided by the Labour Inspectorate.

According to CEARD, 190 complaints have been received by this Commission over the last six years. Complaints were submitted both by individuals and by NGOs. Most of the complaints concerned discrimination in work conditions and access to work, as well as the discriminatory way in which people were treated when attending hospitals or schools.

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

Difficulties involved concern obtaining evidence of discriminatory attitudes, and the length of time taken by investigations.

Updated data on the total of complaints received by CEARD in 2007:

Number of complaints: 81

Situations involving direct knowledge by ACIDI / CICDR: 3

TOTAL 84

The 84 complaints, including 3 situations of which ACIDI / CEARD had direct knowledge, resulted in the following developments and data.

Matters outside the jurisdiction of CEARD:

5 labour matters were referred to the *Autoridade para as Condições de Trabalho* [Authority for Labour Conditions].

2 criminal matters are still open pending consideration by the criminal prosecution authorities.

Administrative penalty proceedings:

31 administrative penalty proceedings are still open pending a final decision.

Mediation:

3 successfully concluded cases

4 cases with mediation still in progress

1 case where mediation subsequently proved unnecessary

Gender of alleged victims:

Women – 39

Men – 29

Various – 16 cases where the gender was not specified

Complaints presented to UAVIDRE:

Between May 2006 and April 2007 UAVIDRE dealt directly with 232 cases; APAV's local support network dealt with 23 cases related to discriminatory situations.

UAVIDRE received 72 cases of complaints of racial discrimination during 2007, which accounted for 0.4 per cent of all the complaints presented to this unit, which is a subsidiary organisation of APAV (an NGO).

Complaints on discrimination based on disability:

According to an official report by the *Instituto Nacional para a Reabilitação* (INR) [National Institute for Rehabilitation] on implementation of Law 46/2006 of 28 August 2006, which prohibits and punishes discrimination based on disability and on the grounds that a person has a pre-existing aggravated risk to health, during its first year in force (2007) more than one hundred complaints based on discriminatory practices on grounds of disability or of aggravated risk to health were filed. These complaints were mainly related to selling of real estate and insurance contracts.

The final conclusions of this report indicate that the large number of complaints demonstrate that insurance, accessibility and employment are the core sectors that present the greatest difficulties and obstacles faced by people with disabilities in daily life.

Thirty-seven complaints were presented to the INR, and eighty-two complaints were directly addressed to the entities competent to deal with such cases.

Most of the complaints presented to the INR were related to the refusal or restriction of access to rental or selling of real estate, to bank loans and to conclude insurance contracts. Sixteen per cent of these complaints referred to access to public or private educational establishments.

Of the 82 complaints filed with other entities, namely with the Portuguese Ombudsman, the Portuguese Insurance Institute and the Inspectorates General for Health, Education, Justice and Internal Affairs, half of the complaints were related to the area of insurance, 27 per cent to accessibility, 7 per cent to health, 5 per cent to education and 4 per cent to transport and labour.

According to this report, the number of complaints indicates lack of awareness on the part of public and private entities, as well as the number of people with disabilities who are still not aware of how to present a complaint against discriminatory practices.

f) Is the work undertaken independently?

The Commission for Equality and Against Racial Discrimination (CEARD) and the High Commissioner work independently.

As already mentioned, the High Commissioner is appointed and dismissed by the Prime Minister. He/she is independent in his/her functions, but the appointment involves a political decision.

Conclusions

We must stress that from the legal point of view, the situation in Portugal with regard to equality bodies is too complex.

The result is that there are several practical limitations in fulfilling responsibilities related to the implementation of the Directive.

For example, the procedure for hearing and investigating cases is too complex, as detailed below.

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

After a preliminary examination the complaint is sent to the Inspectorate General deemed to be competent. Sometimes conflicts of competence arise between two Inspectorates General and have to be resolved by the Minister for the 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 then is a binding decision issued by the High Commissioner, imposing a fine if that is considered appropriate.

g) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

The specialised body in Portugal, *Alto-Comissariado para a Imigração e Diálogo Intercultural I.P.* (ACIDI I.P.) [High Commission for Immigration and Intercultural Dialogue] considers Roma as a priority issue. It has set up a new website on Roma interests, '*Ciga-nos*'⁵⁶ (a play on the word Portuguese word for Roma, 'ciganos', which also sounds like the words for 'follow us' in Portuguese), where useful information about this community is available.

ACIDI tries to stimulate the interest and participation of Roma citizens in legislation relative to street trading, the experience of other countries in this matter, the amounts of fines, the training needs of the Roma, the creation of specific places for street trading, the need for support from the social services for the integration of Roma families in society, measures for positive discrimination, the awareness of town councils of street trading issues, the difficulties members of the Roma community experience with insertion in the Portuguese labour market, amongst other matters.

ACIDI also intends to rely on the use of intercultural mediators to achieve greater integration of this ethnic group. ACIDI has also set up a working group to look at the issue of itinerant trading as the most widespread means of subsistence among Roma communities.

⁵⁶ *Ciga-nos* website: <http://www.ciga-nos.pt/>



A Roma communities support office, *Gabinete de Apoio às Comunidades Ciganas* (GACI) was also established within ACIDI: GACI published '*Guia para o associativismo nas Comunidades Ciganas*' ['Guide for associative practices within the Roma Communities'] as part of the ROMA EDEM Project.

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)*
- d) *to specifically address Roma and Travellers*

a) As regards discrimination in general, the **former** ACIME (now ACIDI) 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 '*Livro Amarelo*' [Yellow Book], in which any complainant may register his/her complaint against any discrimination by the public services. ACIDI 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 on to the rights and duties of workers in relation to equality and non-discrimination. However, the dissemination of information against discrimination in workplaces has so far not been very visible. The law does not specifically require employers to provide information in a form which is accessible to all people with disabilities. Trade unions have done some work in relation to this matter.

The *Direcção Geral do Emprego e das Relações de Trabalho* [Directorate General of Employment and Labour Relations] provides on its website (www.dgert.msst.gov.pt) information on national policy measures in this field and on 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:

*Comissão para a Igualdade no Trabalho e no Emprego (CITE)*⁵⁷ [Commission for Equality in Labour and Employment]
(Article 494 ff. of Law 35/2004)

⁵⁷ You can access CITE at: www.cite.gov.pt/

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 competent in the areas of equality and non-discrimination between women and men in labour, in employment and in vocational training and also for receiving complaints and issuing legal opinions concerning equality and non-discrimination in labour and employment. It cooperates with the Inspectorate General of Labour (IGT) in the application of legislation on equality and non-discrimination in labour, employment and vocational training, registers all legal decisions delivered by the courts concerning equality and non-discrimination between men and women, and promotes studies and research and disseminates legislation and legal opinions concerning equality and non-discrimination in labour, employment and vocational training. Women may require the support of CITE if they feel discriminated against on any grounds in employment, and in such cases, if the complaint is considered reasonable, CITE may ask for the intervention of the IGT.

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

Comissão para a Cidadania e Igualdade de Género (CIG) [Commission for Citizenship and Equality of Gender], formerly [*Comissão para a Igualdade e para os Direitos das Mulheres*](#) (CIDM) [Commission for Equality and Women's Rights] (Decree-law 164/2007 of 03 May 2007)

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

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

Instituto Nacional para a Reabilitação (INR)⁵⁸ [National Institute for Rehabilitation] formerly Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência (SNRIPD) [National Secretariat for the Rehabilitation and Integration of People with Disabilities] (Decree-law 217/2007 of 29 May 2007)

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

Conselho Permanente de Concertação Social (CPCS) [Permanent Council for Social Dialogue] (Decree-law 74/84 of 02 March 1984)

⁵⁸ Instituto Nacional para a Reabilitação (INR) website: <http://www.inr-pt/>

Under Article 4 of Law 115/99 of 03 August 1999 on immigrants' associations,⁵⁹ these associations have the right to be heard concerning immigration policy and legislation.

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

Social dialogue:

The *Comissões de Trabalhadores* [Workers' Commissions], their *Comissões Coordenadoras* [Coordinating Commissions], the trade unions and the employers' organisations 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 Labour Code, the *Comissão Permanente de Concertação Social* [Permanent Commission for Social Dialogue], which is composed of representatives from trade unions, employers' organisations and the State, and is part of the 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 494–496 of Law 35/2004 of 29 July 2004 regulate the composition and competences of the *Comissão para a Igualdade no Trabalho e no Emprego* [Commission for Equality in Employment in the Workplace], with the objective (among others) of promoting equality and non-discrimination between men and women at work.

d) ACIDI promotes and engages in dialogue with several Roma associations, namely *Associação Cristã de Apoio à Juventude Cigana (ACAJUCI)*, *Associação das Mulheres e Crianças Ciganas Portuguesas (AMUCIP)*, *Associação para o Desenvolvimento da Etnia Cigana (APODEC)*, *Associação Social Recreativa e Cultural Cigana de Coimbra*, *Associação Cigana de Leiria (CIGLEI)*, *Federação Calhim Portuguesa (FECALP)*, and *Associação União Romani Portuguesa (União Romani)*, which allows them to become acquainted with the major problems the Roma community still faces in Portugal.

The Roma community is represented on the *Comissão para a Igualdade e Contra a Discriminação Racial (CICDR)* [Commission for Equality and Against Racial Discrimination] by the mayor of Torres Vedras, who is of Roma origin. This Commission has a new website on racism, where several pieces of relevant legislation can be accessed.⁶⁰

ACIDI has been trying to forge closer links with Roma associations, some of which have a long history since they were first established, but for the most part they greatly lack organisational, technical and human resources. Above all, ACIDI's activities take the form of encouragement, in the sense of promoting the work of association leaders and making them responsible for the work carried out, increasing the level of dynamism of associations and their membership levels, and promoting correspondence with what their communities require of associations, as well as acknowledging the difficulties experienced by the community in general.

⁵⁹ Lei n.º 115/9959 de 3 de Agosto de 1999 regime jurídico das associações de imigrantes

⁶⁰ Comissão para a Igualdade e Contra a Discriminação Racial (CICDR) website:

http://www.cicdr.pt/component/option.com_frontend/Itemid.1/

There are a number of Roma and non-Roma associations which are attempting to build bridges between the majority in society and Roma communities, and which are actively looking for solutions to the main problems encountered by their communities all over the country.

A Romany Gypsy Accompaniment Group, promoted by ACIDI, was created with the objective of implementing a cooperation and coordination platform for of the protection and support in general of the Romany Gypsies, and information programmes to prevent children working as beggars. Considering the evaluation report of the PNAI 2003/2005, the targets of this group were accomplished, that is to say that progress began to be made in the social inclusion and integration of less-favoured groups in some areas of Portugal, namely through the elaboration of plans (in the fields of education and employment) specially focused on certain areas of the country. The PNAI did not give further details on the actions taken to attain their targets.

Certain local authorities are attempting to improve relations between Roma and the majority population. For example, the Portuguese authorities have indicated that the municipality of Lisbon has opened the *Casa de Cultura da Ameixoeira* [Cultural Centre of Ameixoeira] which is available for Roma to use for cultural activities. This centre is also open to non-Roma, thus giving others an opportunity to learn about Roma culture.

Initiatives have been taken by NGOs and the Employment and Vocational Training Institute (IEFP) to train Roma, particularly younger members of the community, for employment. Racist prejudices still persist among certain employers, which means that Roma suffer racial discrimination in recruitment. This often ends up discouraging young Roma job-seekers.

An international seminar entitled *Ciganos: territórios e habitat* [Roma: territories and habitat] recently took place in Lisbon (08–09 April 2008). At this seminar issues concerning the adaptation of the Roma community in Portugal were raised, including housing, education, employment and discrimination. It was estimated during this seminar that there are 40,000 Portuguese Roma, of whom 6,500 to 7,000 are still living in shanty houses.

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, of course, also 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, as regards the hierarchy of the rules, the anti-discrimination rules in the Constitution 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 is punishable with imprisonment of up to two years, or a daily fine up to 240 days (please see page 67) . 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 Commission for Immigration and Intercultural Dialogue and the General Labour Inspectorate, which deal with anti-discrimination matters (Article 7 of Directive 2000/43 and Article 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 coordination between the Commission for Equality and Against Racial Discrimination, the High Commissioner and the Inspectorates General 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 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 shows that almost 40 per cent of Portuguese children questioned revealed that they are not interested in getting to know children of other nationalities, mainly Roma children.

d) There are allegations of ill treatment, violence or excessive use of force by police officers (reports by 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 the provisions in Law 18/2004 of 11 May 2004 and Law 134/99 of 28 August 1999.

e) People with disabilities are not normally the target of prejudice in public opinion. We have not found case-law dealing with litigation concerning people with disabilities. Only people with disabilities who continue in active duty in the armed forces are prevented in practice from being promoted to ranks above colonel.

One NGO has reported that in some banks blind people working as telephone receptionists have been the first employees to be invited to take early retirement.

In general, people with disabilities are not the target of unfavourable stereotypes or prejudices; on the contrary the civil society mentality is one of solidarity, acceptance and understanding towards their disabilities.

The sources and grounds for this conclusion are articles published in social magazines, reports on the social situation in Portugal, and content from newspapers and other media. There are no judicial statistics available to indicate that individuals with disabilities have complained of discrimination, and this topic is rarely referred to in the media.

The rules on buildings and facilities are not respected, but 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 people with disabilities. The failure to make available equipment specially designed for people with disabilities, insufficient adaptation of buildings and non-implementation of measures concerning vocational education and training may be considered types of discrimination. NGOs representing people with disabilities have no right to intervene in judicial procedures, and are seldom consulted in the formation of government policy; when they are consulted, their opinions are rarely taken into consideration.

The *Código da Estrada* [Traffic Code] lays down specific rules on the transport of children up to 12 years of age but does not foresee specific/special rules for children with disabilities, who travel almost all the time inside vehicles without any safety measures suited to their requirements.

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 in regard to other grounds of discrimination.

h) There is a lack of information or data on the ethnic origins of people, 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 '*prática de actos homossexuais de relevo*' [practice of homosexual acts of material relevance]. 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, but 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 in practice, it is very easy to discriminate against older people and people with disabilities in access to promotion, in both the private and public sectors (Articles 1 and 9 of Directive 2000/78). However, it is not lawful to discriminate against older people or workers with disabilities 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 employers the duty to post in appropriate locations 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 a *contra-ordenação leve* [a minor offence] according to Article 473 of this law.

n) No significant positive action has been taken regarding age discrimination. The *Conselho Nacional para a Política da Terceira Idade* [National Council for Third Age Policy (policy for elderly people)] 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.

In addition, old people infected by HIV who were living in residential care homes sponsored by the State, or who apply for such accommodation are being rejected due to their illness. The Social Security Institute has already received several complaints on this matter.

The Portuguese government has recently implemented measures to reduce fees in public hospitals for older people (of 65 years of age or more) to half of the standard amount. This measure will be of benefit to poor older citizens.

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. The rights of NGOs in so far as they concern labour law are not set out in an adequate manner in Portuguese law. The protection of independent workers and the self-employed is not sufficiently guaranteed.

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

q) The author must stress that with Decree-law 163/2006 of 08 August 2006, which approves the regime for accessibility 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 measures which represent an important step towards the protection of people with disabilities.

r) A referendum on *Interrupção Voluntária da Gravidez* [voluntary interruption of pregnancy (abortion)] took place on 11 February 2007. Law 16/2007 of 17 April 2007 on voluntary interruption of pregnancy was issued, but its implementation still faces practical difficulties, mainly on religious grounds.

s) A recent study by João Filipe Marques, *Do Não Racismo Português aos Dois Racismos dos Portugueses*, states that racism towards Roma, the disrespected and ignored 'minority', and also towards coloured immigrants from the former colonial empire clearly exists in Portugal. Racism is grounded on the colour of the skin.

t) *Observatório da Imigração (OI)* has recently published a study entitled *Media, Imigração e Minorias Étnicas – 2005/2006* [Media, Immigration and Ethnic Minorities – 2005/2006], which concludes, using a factual, reasonable and neutral approach, that there has been a change in attitude, in the sense that immigration and minorities are no longer associated with crime.

u) According to the *Centro de Reabilitação Profissional de Gaia* and the *Instituto Superior de Ciências do Trabalho e da Empresa (ISCTE)* people with disabilities make up 8.2 per cent of the population of Portugal, and most of these can be categorised as older women or poor people. The same study points out the following:

- more than 30 per cent of people with disabilities and incapacities require support and adequate services from the rehabilitation service;
- 46 per cent of people with disabilities were workers or farmers;
- the rate of unemployment in this group is 2.5 per cent higher than the national average;
- illiteracy among those with disabilities is 9 per cent higher than in the rest of the population;

- 21 per cent of children with disabilities have not completed basic-level education and only 2 per cent have completed a medium-level or higher course;

This report proposes 72 strategic actions, including:

- support in education until the 12th grade of school, and education until 18 years of age;
- building of new houses designed for people with disabilities;
- reduction of housing rents;
- support for town councils in provision of housing and accessibility;
- regular campaigns raising awareness of the difficulties these people face in daily life;
- adaptation of existing housing for the needs of people with disabilities.

v) In regard to sexual orientation, according to the ILGA Portugal Report (16 May 2008) by Paulo Côrte-Real, *'Aqui e Agora: ser LGBT em Portugal em 2008'*, Portugal was the first European country, and the third country worldwide, to explicitly forbid in its Constitution discrimination on the grounds of sexual orientation, with the unanimous support of all parties represented in the Assembly of the Republic.

Parenthood and marriage are fundamental issues where homophobic practices can still be perceived in Portugal.

In regard to same-sex marriage in Portugal, two women appealed to the Constitutional Court in 2007 against the decision to refuse them a marriage licence.

Portuguese law also forbids adoption by same-sex couples under the terms of the Law on *de facto* unions (Law 7/2001 of 11 May 2001), reinforced by the Law on Adoption (Law 31/2003 of 22 August 2003).

In regard to medical assistance for conception, the law currently in force is discriminatory towards same-sex partners. Assisted methods of conception are only permitted for women under the 'tutelage' of their husbands or male partners, and are explicitly excluded for single women or lesbian couples.

According to ILGA Portugal despite the rules laid down by Instituto Português do Sangue (IPS) which state that "nobody can be discriminated on the grounds of her/his sexual orientation", in practice male homosexuality is still considered as a risk factor and an impediment to blood donation in Portugal.

The non-existence of a law on gender identity avoids the issue of the right of a transsexual to change name and sex under the civil register. The requirements of Portuguese jurisprudence for changes of registration are particularly problematic: for instance, changes of name and sex are not permitted to persons who are married, or who have children.

ILGA Portugal has recently presented its *'Proposta de Boas Práticas para o Relacionamento entre as Forças e Serviços de Segurança Portugueses e as Cidadãs e os Cidadãos LGBT'* [Proposal for Good Practices in Relations between the Portuguese Security Forces and Services and LGBT Citizens]. The Minister of Internal Affairs showed that he was receptive to this proposal.

In summary and on the basis of this ILGA Portugal report, a legal 'ghetto' is maintained in matters relating to access for same-sex couples to marriage and parenthood and a social 'ghetto' is retained in relation to sexual orientation and gender identity.

w) The *Conselho Municipal Minorias Étnicas* [Municipal Council of Ethnic Minorities], a consultative organ created through Deliberation 455/AM/93 of 22 March 1993 of the Lisbon Town Hall, is functioning again.

Several anti-racism NGOs, including *SOS Racismo*, *Olho Vivo* and *Solidariedade Imigrante* belong to this council, as does the first High Commissioner for Immigration and Ethnic Minorities. The task of this organ is to evaluate the situation of ethnic minorities in Lisbon and the problems they face in relation to racism and xenophobia, and to promote intercultural dialogue and active participation of immigrant communities and ethnic minorities in political decisions which aim to promote their integration in society.

x) According to Amnesty International Portugal⁶¹, the most significant forms of discrimination that occur in the Portuguese society are on the following grounds: sexual orientation (67 per cent), ethnic origin (61 per cent), disability (60 per cent), age (48 per cent), gender (47 per cent) and religion or belief (39 per cent).

y) The *Plano para a Integração dos Imigrantes* (PII) [Plan for the Integration of Immigrants], approved by the Council of Ministers in Resolution 63-A/2007 of 03 May 2007, foresees several measures for prevention and combat of discrimination.

z) *Comissão para a Cidadania e Igualdade de Género* (CIG) [Commission for Citizenship and Equality of Gender], formerly CIDM [Commission for Equality and Women's Rights], has as its main objectives to contribute to equal opportunities and rights for men and women, and to ensure their effective implementation in employment and social and cultural matters, as well as to promote citizenship and gender equality. The Third National Plan for Equality, Citizenship and Gender (2007–2010) is being implemented by this commission.

⁶¹ Data available at Amnistia Internacional Portugal website
http://www.amnistia-internacional.pt/index.php?option=com_content&task=view&id=129&Itemid=98



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 ACIDI has responsibility for issues relating to immigration and ethnic minorities, and is under a duty to combat racism, but it has no responsibility for coordinating other bodies working in this area.

The ACT (formerly General Labour Inspectorate Services) deals with some anti-discrimination issues, but they too have no responsibility for coordination.

Within the Ministry of Justice, the *Gabinete de Política Legislativa e Planeamento* (GPLP) [Cabinet of Legislative Policy and Planning]⁶² is responsible for planning the implementation of directives and other community instruments.

⁶² *Gabinete de Política Legislativa e Planeamento (GPLP)* www.governo.pt



Annex

1. Table of key national anti-discrimination legislation
2. Table of international instruments



ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Portugal

Date 23 May 08

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

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 practices.	Prohibition of direct and indirect discrimination and creation of a specialised body
Decree-law 111/2000, repealed by the entry into 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

<p>Labour Code 99/2003</p> <p>http://www.nae.uevora.pt/pdf/Lei_99-2003(extr).pdf</p>	<p>August 2003</p>	<p>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.</p>	<p>Private and administrative law</p>	<p>Public/private sectors. Covers all grounds for discrimination</p>	<p>Prohibition of direct and indirect discrimination at work and sanctions</p>
<p>Law 35/2004</p> <p>http://www.portaldocidadao.pt/NR/ronlyres/C017D4EB-37BC-4A20-8B41-FAC2BC21B997/0/Lein3520041.pdf</p>	<p>July 2004</p>	<p>This law goes beyond the discriminatory factors set out in Article 23(1) of the Labour Code and also lists country of origin, language, race, education, economic status or social condition as factors leading to discrimination.</p>	<p>Private and administrative</p>	<p>Public/private sectors. Covers all grounds for discrimination.</p>	<p>Prohibition of direct and indirect discrimination at work and sanctions</p>

Law 127/99 http://www.lerparaver.com/legislacao/diversa_associacoes.html	August 1999	People with Disabilities Rights 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 Commission for Immigration and Ethnic Minorities	Administrative	Establishes the High Commission 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

Decree-law 167/2007 of 3 May 2007 www.acime.gov.pt/modules.php?name=Downloads&d_op=getit&id=291	May 2007	High Commission for Immigration and Intercultural Dialogue	Administrative	Establishes the High Commission for Immigration and Intercultural Dialogue	Replacement of the former ACIME
Decree-law 217/2007 of 29 May 2007 http://www.ajudas.com/notVer.asp?id=1511	May 2007	INR – National Institute for Rehabilitation	Administrative	Establishes the INR – National Institute for Rehabilitation	Replacement of the former SNRIPD
Decree-law 276/2007 of 31 July 2007 http://www.min-financas.pt/download.asp?num_links=0&link=legislacao/DL276_07.pdf	July 2007	All grounds	Administrative	All areas of public service	Juridical regime for inspection, audit and control of direct and indirect State administration services

Criminal Code Law 59/2007 of 04 September 2007 – articles 132, 145 (1) and (2), 240, 251, 252, 253 and 254 see also on genocide Law 31/2004 of 22 July 2004 article 8 http://www.cicdr.pt/content/view/7/13/	September 2007	Discrimination on the basis of race, religious or political convictions, colour, ethnic origin or nationality, religion, gender, sexual orientation, age and disability.	Criminal	Sanctions for crimes of discrimination on grounds of racial, religious or sexual orientation	Discrimination on grounds of race, religion, and sexual orientation.
Decree-law 324/2007 of 28 September 2007 which amends the Code of Civil Register www.dgci.min-financas.pt/NR/rdonlyres/0D2D1124-25B6-43EB-B0F8-1E65253C610D/0/Decreto-Lei_324-2007.pdf	September 2007	Marriages performed in accordance with confessions or religions other than the Catholic Church	Administrative	Religious marriages	Religious anti-discrimination measure
Decree-law 352/2007 of 23 October 2007 http://vlex.pt/vid/33045935	October 2007	Abrogates Decree-law 341/93 of 30 September 2003	Administrative	Approves the new National Table on Incapacities due to Accidents at Work or Occupational	Disability – positive measures



				Diseases, and approves the Indicator Table for the Evaluation of Incapacity in Civil Law	
Decree-law 3/2008 of 07 January 2008 http://www.educare.pt/educare/Detail.aspx?contentid=434D15100AD16B07E04400144F16FAAE&opse1=5&channelid=0	January 2008	On education for students with disabilities	Administrative	Defines specialised support at pre-school, basic and secondary levels of education in the public, private and cooperative sectors	Disability – positive measures

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Portugal

Date: 23 May 2008

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
Convention on the Rights of People with Disabilities	Yes	No	No	No	No