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# Country report

## Non-discrimination

Portugal  
2022  
including summary



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# **Country report**

## **Non-discrimination**

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

## **Portugal**

Dulce Lopes and Joana Vicente\*

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\* The author has gratefully built on the reports written until 2019 by the previous expert Ana Guerra Martins.

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## EXECUTIVE SUMMARY

### 1. Introduction

Portugal has a long tradition of contact with other cultures and peoples. Due to the experience of Portuguese emigration to Brazil (from the 16th to the early 19th century, Brazil was a colony and a part of the Portuguese Empire) and Latin America in general, as well as to other countries in Europe such as France and Germany in the 1960s, the Portuguese are used to tolerating difference,<sup>1</sup> at least in terms of ethnic diversity, race and religion.

Immigration movements to Portugal have played a role in Portuguese demographics for a long time. In 2019, there were 590 348 foreign citizens (both EU and non-EU nationals) with a valid residence permit, according to the Service of Foreigners and Borders *Report on Immigration, Borders and Asylum*. At that point, this was the highest number since 1976 (after the decolonisation of the former Portuguese colonies).<sup>2</sup> This number has slightly decreased and, according to the preliminary results of the 2021 census, there are 555 299 residents with foreign nationality, representing 5.4 % of the total of the Portuguese population, of whom 81.4 % are non-EU nationals.<sup>3</sup>

In Portugal, racist or fascist political parties are forbidden.<sup>4</sup> However, since the end of 2019 there was a representative of an extreme right-wing party – CHEGA – in Parliament. In the early legislative elections, held on January 2022, the party increased its share of the vote and became the third largest party in Parliament, winning 12 seats.

Given the increase in hate speech, Law 74/2020 of 19 November<sup>5</sup> establishes that a guiding principle to all communications operators will be to ensure, in their programmes and information, respect for a culture of tolerance, non-discrimination and inclusion, for instance by impeding, through the adoption of effective measures, the dissemination of hate speech (Article 34(2)(d)).

No conflicts have been reported between religious groups. However, as the majority of the population is Catholic, other religions face greater problems in practice, for example in ministering to people in hospitals and prisons. In addition, meals in public schools are still not completely adapted to meet the needs of other religions, in particular those of Islam.<sup>6</sup> Notwithstanding these factors, religious diversity remains a fairly non-controversial topic.

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<sup>1</sup> According to the OECD Social Cohesion Indicators on Tolerance, Portugal is positioned above the OECD average. See OECD (2014), 'Tolerance', in *Society at a Glance 2014: OECD Social Indicators*, available at: [https://doi.org/10.1787/soc\\_glance-2014-28-en](https://doi.org/10.1787/soc_glance-2014-28-en). However, in the study from Alice Ramos and Pedro C. Magalhães, 'Os Valores dos Portugueses – Resultados do European Values Study', *Gulbenkian Studies*, #1, 2021, it is shown that Roma are considered (along with toxicodependents and alcoholics) as a group that is not welcomed as neighbours (e-book available at <https://gulbenkian.pt/publication/os-valores-dos-portugueses/>).

<sup>2</sup> Report available at: <https://sefstat.sef.pt/Docs/Rifa2019.pdf>.

<sup>3</sup> See: <https://www.dn.pt/sociedade/censos2021-portugal-tem-10-344-802-habitantes-menos-21-que-ha-10-anos-14414607.html>.

<sup>4</sup> Portuguese Constitution, Article 46(4); Organic Law 2/2003, on political parties, 22 August 2003 (last amended by Organic Law 1/2018, 19 April 2018), Article 8, available at: [https://www.parlamento.pt/Legislacao/Documents/Legislacao\\_Anotada/LeiPartidosPoliticos\\_Anotado.pdf](https://www.parlamento.pt/Legislacao/Documents/Legislacao_Anotada/LeiPartidosPoliticos_Anotado.pdf).

<sup>5</sup> Law 74/2020, 19 November (Law that transposes into national law Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018, amending Law 27/2007 of 30 July, which approves the Law on Television and Audiovisual Services on Demand, and Law 55/2012 of 6 September, on the promotion, development and protection of the art of cinema and cinematographic and audiovisual activities), available at: <https://dre.pt/home/-/dre/148963298/details/maximized>.

<sup>6</sup> Since education has become mainly a municipal competence, some municipalities with a relevant immigrant community such as Odivelas have started to introduce halal meals in schools canteens (See: <https://odivelashoje.pt/2022/02/24/municipio-de-odivelas-pioneiro-na-entrega-de-refeicoes-halal-nas-escolas/>).

In terms of discrimination on the basis of ethnic origin, Portugal is undergoing alarming changes that have nonetheless been followed by a prompt reaction from the courts and public authorities. Recently, some judicial actions have been drawing attention to structural discrimination and stereotyping. This was the case with the Coxi family judicial actions against Chega (the far-right party in Portugal) and its leader André Ventura<sup>7</sup>, and the case introduced by SOS Racismo<sup>8</sup> (see legal developments in 2021). Also in 2021, seven security agents were preventatively suspended for having mistreated and assaulted immigrants from Bangladesh, Nepal and Pakistan;<sup>9</sup> a woman was convicted for injuries and defamation because she refused to have her daughter treated by a doctor of colour and insulted him;<sup>10</sup> and a man was convicted of homicide qualified by racial hatred.<sup>11</sup> However, in another case, Lisbon's criminal court acquitted the leader of Chega and overruled the decision of the Commission for Equality and Against Racial Discrimination (CEARD), which had applied a sanction of EUR 3 770 because of discriminatory posts in social media in which André Ventura associated – without evidence – Portugal's Roma minorities with the assailant of a nurse in the city of Beja. The decision was mainly based on André Ventura's freedom of speech and presumption of innocence.<sup>12</sup>

Portuguese society is not yet fully aware of the issues involved in the relatively new field of age discrimination and is only slowly becoming aware of their implications. However, individuals are beginning to invoke age discrimination before the courts<sup>13</sup> and before equality bodies.<sup>14</sup>

The Portuguese Insurance Institute created a framework for a whole-life risk insurance (*seguro vida inteira*) for older people, and some insurance companies have already created health insurance policies with no age limit. It is worth mentioning that Decree-Law 72/2008<sup>15</sup>, which establishes the legal framework for insurance contracts, prohibits discriminatory practices in concluding, executing and terminating insurance contracts that go against Article 13 of the Portuguese Constitution (see section 1 of this report). It also prohibits discriminatory practices in respect of disability and aggravated health risk which may entail less favourable treatment for a person in comparison with another who is in a similar situation (Article 15(1) and (2)). However, practices and techniques of evaluation,

<sup>7</sup> See Lisbon Court of Appeal, judgment of 14 September 2021, No. 8777/21.3T8LSB-7, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/0e71bdbb89eaa24a8025876000400276>.

<sup>8</sup> See Lisbon Court of Appeal, judgment of 6 July 2021, No. 5551/19.0T9LSB-5, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/53d43a27fb12dafc802587480047ae12>.

<sup>9</sup> See: <https://www.publico.pt/2022/01/07/sociedade/noticia/van-dunem-suspende-militares-suspeitos-agredir-imigrantes-odemira-1991121>.

<sup>10</sup> See: [https://www.publico.pt/2021/08/01/sociedade/noticia/medico-levou-tribunal-mae-recusou-atendida-negro-responsabilidade-social-1972319?fbclid=IwAR2XP5KERDPhDY\\_Li2la1xXXR3qSC8AlcdSJqIV0m2MCs0Rvzzn0kHmsdjg](https://www.publico.pt/2021/08/01/sociedade/noticia/medico-levou-tribunal-mae-recusou-atendida-negro-responsabilidade-social-1972319?fbclid=IwAR2XP5KERDPhDY_Li2la1xXXR3qSC8AlcdSJqIV0m2MCs0Rvzzn0kHmsdjg).

<sup>11</sup> See: <https://www.publico.pt/2021/06/28/sociedade/noticia/tribunal-condena-homicida-bruno-cande-22-anos-prisao-prova-motivacao-racista-1968208>.

<sup>12</sup> See: <https://www.dn.pt/politica/andre-ventura-absolvido-de-coima-de-3770-euros-por-opiniao-que-escreveu-no-facebook-14197839.html>. The reference for the judgment is not publicly accessible.

<sup>13</sup> See Court of Appeal of Porto, judgment of 3 November 2014, No. 1013/12.5TTMTS.P1, available at: [www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade](http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/54ec528e2080002980257d8f004e3510?OpenDocument&Highlight=0,discrimina%C3%A7%C3%A3o,em,fun%C3%A7%C3%A3o,da,idade). For a list of national cases relating to age discrimination, see Cristina Martins da Cruz, (2019), 'Discriminação em função da idade: os trabalhadores mais velhos', in *O Direito dos Mais Velhos*, Centro de Estudos Judiciários, Lisbon, p. 47 ff., available at:

<https://webcache.googleusercontent.com/search?q=cache:qYNEFDfMYr0J:https://www.ua.pt/file/48182+&cd=1&hl=en&ct=clnk&gl=pt&client=firefox-b-d>.

<sup>14</sup> The Portuguese Ombudsman has undertaken some activities in respect of age discrimination even beyond the labour sphere. See Catarina Ventura (Assessora do Provedor de Justiça) (2017), 'O Provedor de Justiça e os desafios da inclusão no ensino superior', available at: [https://www.provedor-jus.pt/site/public/archive/doc/12\\_10\\_2017\\_PJus\\_Inclusao\\_ESup\\_CatarinaSampaioVentura.pdf](https://www.provedor-jus.pt/site/public/archive/doc/12_10_2017_PJus_Inclusao_ESup_CatarinaSampaioVentura.pdf).

<sup>15</sup> Decree-Law 72/2008, 16 April 2006 (last amended by Law 147/2015, 9 September 2015), available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=2657&tabela=leis&so\\_miolo](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2657&tabela=leis&so_miolo).

Law 7/2019, 16 January 2019, approving the legal framework of insurances and reinsurances and implementing Directive (EU) 2016/97, includes in Annex I, Article 2(a) minimal requirements such as age, not prohibiting differentiation on this ground. Available at: <https://dre.pt/home/-/dre/117821873/details/maximized>.

selection and acceptance of risks as a result of objective reasoning based on rigorous and relevant data, according to the principles of insurance, were acceptable (Article 15(3)). Therefore, the Portuguese legislation required specific actuarial data and a requirement of reasonableness in order that a difference in treatment based on disability or age would not amount to discrimination.

Recently, Law 75/2021 of 18 November, which strengthens access to credit and insurance contracts for people who have overcome or mitigated situations of aggravated health risk or disability, prohibiting discriminatory practices and enshrining the right to be forgotten, amending Law 46/2006 of 28 August and the legal framework of the insurance contract (Decree-Law 72/2008),<sup>16</sup> has explicitly determined that, 'Discriminatory practices, on the grounds of disability or aggravated health risk, are considered to be wilful or negligent actions or omissions that violate the principle of equality, implying less favorable treatment for persons in that situation than that given to another person in a comparable situation, under the terms of Law 46/2006, of August 28' (Article 15(2) of Decree-Law 72/2008).

In this case, besides the demand that practices and techniques of evaluation, selection and acceptance of risks specific to the insurer for the purpose of conclusion, execution and termination of the insurance contract must be objectively justified, based on rigorous statistical and actuarial data considered relevant under the terms of the principles of insurance, they cannot go against the limits set out in a national agreement on access to credit and insurance – still to be developed – and are subject to supervision by the Portuguese Supervision Authority (Article 15(3)). Also, in the event of refusal to take out an insurance contract or increase of the respective premium on the grounds of disability or aggravated health risk, the insurer shall, on the basis of the data obtained in accordance with the preceding paragraph, provide the applicant, without any request to that effect, with information on the ratio between the specific risk factors and the risk factors of a person in a comparable situation but not affected by that disability or aggravated health risk' (Article 15(4)).

Regarding policy developments, in 2018 the Council of Ministers adopted a resolution<sup>17</sup> to approve the strategy *Portugal + Equal – National Strategy for Equality and Non-Discrimination 2018-2030*. The strategy includes three plans for action.<sup>18</sup> The third plan concerns the fight against discrimination on the grounds of sexual orientation, gender identity and expression and sexual characteristics.

In 2020, the Resolution of the Council of Ministers 71/2020 of 15 September approved the 8th generation of the Choices Programme (*Programa Escolhas*) for the period 2021 to 2022, with the mission of promoting social integration, equal opportunities in education and employment, combating social discrimination, promoting civic participation and strengthening social cohesion.<sup>19</sup>

Regarding specific anti-racism strategies, three strategies can be identified: 1) the National Plan to combat racism and discrimination 2021-2025, adopted by the Resolution of the Council of Ministers 101/2021, 28 July 2021;<sup>20</sup> 2) the *National Roma Communities Integration Strategy 2013-2020*, adopted by the Resolution of the Council of Ministers 25/2013, 17 April 2017<sup>21</sup> and prorogated by the Resolution of the Council of Ministers 154/2018, 29 November 2018 until 2022;<sup>22</sup> and 3) the Plan for the Prevention of

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<sup>16</sup> Available at: <https://dre.pt/dre/LinkELI?search=lei/75/2021/11/18/p/dre>.

<sup>17</sup> Council of Ministers, Resolution 61/2018, 8 March 2018, *Diário da República*, Série I-A, No. 97, 21 May 2018.

<sup>18</sup> The first two plans of action are the plan to promote equality and non-discrimination between men and women, and the plan to combat violence against women and domestic violence.

<sup>19</sup> Available at: <https://dre.pt/application/conteudo/142870337>.

<sup>20</sup> See: <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/101-2021-168475294>.

<sup>21</sup> See: <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/25-2013-260415>.

<sup>22</sup> See: <https://data.dre.pt/eli/resolconsmin/154/2018/11/29/p/dre/pt/html>.

Manifestations of Discrimination in the Security Forces, which has a broader scope but integrates a particular focus on racism.<sup>23</sup>

In a more general stance, the Portuguese Parliament has also approved Law 27/2021 of 17 May 2021<sup>24</sup>, which establishes the Portuguese Charter of Human Rights in the Digital Era, including the right to non-discrimination in the enjoyment of all rights recognised in the Charter.

## 2. Main legislation

The Portuguese Constitution<sup>25</sup> includes a specific general clause on the principle of equality.<sup>26</sup> Article 13(1) states that 'all citizens possess the same social dignity and are equal before the law', and Article 13(2) establishes a general anti-discrimination clause under which:

'No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.'

This enumeration is not exhaustive, and other grounds such as age and disability are protected, as will be seen in section 1 of this report.

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

Furthermore, Portugal has ratified several international human rights treaties such as the European Convention on Human Rights (ECHR); Protocol 12 of the ECHR; the International Convention on the Elimination of All Forms of Racial Discrimination; the revised European Social Charter; the UN Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, including the optional protocols on the right to individual and collective complaints; the International Labour Organization Convention 111 on Discrimination; and the UN Convention on the Rights of Persons with Disabilities. According to the Portuguese Constitution,

'the norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published and remain so for as long as they are internationally binding on the Portuguese state.'<sup>27</sup>

With regard to domestic legislation, the most recent general statute related to non-discrimination issues is Law 93/2017 of 23 August 2017,<sup>28</sup> which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin within the scope of social protection, including in social security and healthcare, social benefits, education, access to

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<sup>23</sup> This is an internal plan that was announced by the Minister of Internal Administration on 19 March 2021 but is available online at: <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBQAAAB%2bLCAAAAAABAAzNDQxsQQAXM%2b51QUAAAA%3d>.

<sup>24</sup> Law 27/2021, 17 May 2021 (Law approving the Portuguese Charter of Human Rights in the Digital Era), available at: <https://dre.pt/dre/legislacao-consolidada/lei/2021-164870244>.

<sup>25</sup> An English version of the Constitution can be consulted on the website of the Portuguese Parliament, available at: [www.parlamento.pt](http://www.parlamento.pt).

<sup>26</sup> Portuguese Constitution, Article 13.

<sup>27</sup> Portuguese Constitution, Article 8(2). Portuguese Courts refer at times to the Conventions, mostly as an interpretative tool. As regards the UN Convention on the Rights of Persons with Disabilities, some lower courts have started to use it directly, mostly Article 12, in civil proceedings. However, there is no publicly available record of those decisions.

<sup>28</sup> Law 93/2017, 23 August 2017, available at: <https://dre.pt/application/conteudo/108038372>.

and the supply of goods and services that are available to the public, including housing, and culture.

This Law extends the list of protected grounds regarding its predecessor (Law 134/99, 28 August 1999,<sup>29</sup> which only mentioned race, colour, nationality or ethnic origin), and gives a broader definition of discrimination, as well as modifying the composition and the powers of the Commission for Equality and Against Racial Discrimination (CEARD) (Comissão para a Igualdade e contra a Discriminação Racial – CICDR) and the legal regime of administrative sanctions. Lastly, it introduces a mediation process.

Law 38/2004 defines the general legal basis for the prevention of the causes of disability, and the training, rehabilitation and participation of persons with disabilities.<sup>30</sup> Law 46/2006<sup>31</sup> prohibits and punishes discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*).

Decree-Law 106/2013 of 30 July 2013<sup>32</sup> defines the statute for NGOs for persons with disabilities, or NGOPDs (*organizações não governamentais das pessoas com deficiência* – NGOPDs) as well as state support for those organisations. Article 5(2) of the Decree-Law provides that in cases of crimes against persons with disabilities that are perpetrated on the grounds of disability, NGOPDs are entitled to assist and support victims in criminal procedures.

With regard to employment, Law 7/2009 of 12 February 2009,<sup>33</sup> which approves the Labour Code, transposes, among many other directives, Directive 2000/43/EC (the Racial Equality Directive) and Directive 2000/78/EC (the Employment Equality Directive).

Article 24 of the Labour Code prohibits discrimination on the grounds of ancestry, age, sex, sexual orientation, gender identity, civil status, family situation, economic situation, education, origin or social condition, genetic heritage, reduced capacity for work, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological convictions and trade union affiliation.

Law 3/2011, which forbids any discrimination in access to and the exercise of self-employment, and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC, has clarified aspects of anti-discrimination legislation concerning self-employment and the rights of associations to intervene in labour, administrative and judicial procedures, and it changes the legal standing of NGOs and organisations that defend people against discrimination. It now guarantees the right of associations to intervene in cases that fall under their scope, if the victim gives their consent.<sup>34</sup>

Article 240 of the Criminal Code<sup>35</sup> covers discrimination based on race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability.

To sum up, the anti-discrimination directives are transposed by legislation adopted with the specific purpose of transposition. Beyond this legislation, discrimination is prohibited in various other statutes, as well as in codes such as the Labour and the Criminal Codes.

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<sup>29</sup> See: <https://dre.pt/dre/detalhe/lei/134-1999-532442>.

<sup>30</sup> Law 38/2004, 18 August 2004, available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

<sup>31</sup> Law 46/2006, 28 August 2006, available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

<sup>32</sup> Decree-Law 106/2013, 30 July 2013, available at: <https://dre.pt/application/conteudo/498708>.

<sup>33</sup> Law 7/2009, 12 February 2009, available at: [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1047&tabela=leis](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1047&tabela=leis).

<sup>34</sup> Law 3/2011, 20 February 2011, available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

<sup>35</sup> Criminal Code, approved by Decree-Law 48/95, available at: [www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=109&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis).

### 3. Main principles and definitions

The principle of equality and non-discrimination is a main principle of every state that upholds democracy and the rule of law; thus it applies in Portugal.

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

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

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

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

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

Since 2017, national law also prohibits discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a person with disabilities).<sup>36</sup>

Harassment is defined and prohibited by the Criminal Code, the Labour Code, and Law 3/2011. More recently, Law 93/2017<sup>37</sup> defines harassment as any form of unwanted conduct related to racial or ethnic origin with the purpose or effect of violating the dignity of a person or a group of persons and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

As regards housing, Law 12/2019<sup>38</sup> forbids and punishes harassment in lease contracts. Articles 13-A and 13-B state that harassment is forbidden in leases and subletting contracts; harassment being any illegitimate behaviour of the owner, their representative or a third person interested in the acquisition or commercialisation of the leased asset that, in order to provoke the vacancy of the asset, perturbs, constraints or affects the dignity of the tenant, subtenant or persons that, in a legitimate manner, reside with them, or subjects them to a intimidatory, hostile, degrading, dangerous, humiliating, unstable or offensive environment, or gravely impedes or prejudices access to or fruition of the leased object.

Instructions or orders to discriminate are dealt with as discrimination (Article 3(3) of Law 93/2017 and Article 5(1) of Law 46/2006).

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

Portuguese law does not define racial discrimination, which is probably due to the inherently controversial nature of the concept of race.

In contrast, it defines disability with particular care.

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<sup>36</sup> Law 93/2017, 23 August 2017, Articles 3(1)(d) and 4(1).

<sup>37</sup> Law 93/2017, 23 August 2017, Article 3(1)(f).

<sup>38</sup> Law 12/2019, 12 February, forbidding and punishing harassment in lease contracts, (fifth amendment to the New Urban Lease Regime), available at: <https://data.dre.pt/eli/lei/12/2019/02/12/p/dre/pt/html>.

A person with disabilities is defined as 'someone who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others'.<sup>39</sup> The definition of 'disability' in Portugal goes however beyond that strict concept of disability, as it also includes those with a pre-existing aggravated risk to their health (*risco agravado para a saúde*).<sup>40</sup>

The duty on employers to provide reasonable accommodation for persons with disabilities is included in the law, but is not defined. According to Article 86(2) of the Labour Code, the employer has an obligation to grant reasonable accommodation, if it does not require disproportionate expense.

Besides the general constitutional clause of anti-discrimination mentioned above, specific laws forbid discrimination on certain grounds.

The Labour Code prohibits:

Discrimination by employers against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, gender identity, civil status, family situation, economic situation, education, origin or social condition, genetic heritage, reduced capacity for work, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological convictions and trade union affiliation.

It thus sets out the grounds of discrimination without any limitation concerning the actual situation of the worker, and in such a broad way that discrimination by association or perception is covered.

Article 129(1)(a) of the Labour Code prohibits an employer from:

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

Article 331(1)(a)(d) states that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation to a complaint against working conditions or to the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee.

Article 2(1) of the Basic Law on Housing<sup>41</sup> established that all have a right to housing for themselves and their families regardless of ancestry or ethnic origin, sex, language, territory of origin, nationality, religion, belief, political or ideological convictions, education, economic situation, gender, sexual orientation, age, disability or health conditions.

#### **4. Material scope**

Anti-discrimination provisions cover all the fields listed in the directives, namely employment, social protection, social advantages, education, goods and services and housing. Discrimination on the grounds of racial or ethnic origin, nationality, religion or belief, age, disability and sexual orientation are also prohibited in employment and vocational training, including in prisons. Discrimination on the grounds of race or ethnic origin, colour, ancestry and nationality are also prohibited in relation to the exercise of any civil rights, liberties or social or cultural rights. With regard to employment, anti-discrimination provisions apply to both the public and private sectors.

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<sup>39</sup> Law 38/2004, 18 August 2004, Article 2.

<sup>40</sup> Law 46/2006, 28 August 2006, Article 1.

<sup>41</sup> Law 83/2019, 3 September 2019, available at: <https://dre.pt/home/-/dre/124392055/details/maximized>.

## 5. Enforcing the law

The most important Government agencies which enforce anti-discrimination law are:

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

the creation, implementation and evaluation of sectoral, cross-cutting and public policies concerned with the integration of immigrants and ethnic minorities, as well as to promote dialogue between the various cultures, ethnic groups and religions. This body is also responsible for instructing the administrative procedures for infractions of the non-discrimination provisions in Law 93/2017. The procedure defined in this legislation is complex: the president of CEARD is the competent body for opening an administrative procedure (by virtue of its position, the HCM is the president of CEARD); the HCM is the competent entity for the instruction of the procedure; and the decision to apply fines and other administrative sanctions is the competence of a permanent commission of CEARD, comprising its president (the HCM) and two elected members (Article 18 of Law 93/2017). The Authority for Working Conditions (Autoridade para as Condições do Trabalho – ACT). This body is responsible for promoting improved working conditions by ensuring compliance with labour regulations in the context of private labour relations, and for promoting occupational risk prevention policies. Its work in enforcing anti-discrimination law is very important. However, this body has competence only in employment. Associations are entitled to act on behalf of victims of discrimination. According to Article 12(1) of Law 93/2017, associations with the objective of combating discrimination based on the ground of race/ethnic origin, nationality, ancestry and place of origin have the right to engage in judicial procedures on behalf of the interested persons, with their consent.

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

NGOPDs are entitled to act on behalf of victims of discrimination according to Article 5(2) of Decree-Law 106/2013 of 30 July 2013,<sup>42</sup> which defines their statutory basis.

Law 46/2006 also provides, in Article 15(1), that NGOPDs and all organisations that defend and promote the interests of persons with disabilities have the right to intervene in support of the interested party.

The Basic Law on Housing explicitly refers to the right to public and popular action with regard to the level of conservation of the dwelling and the habitat it is inserted into; Article 60(2)(a) of Law 83/2019.

It is worth mentioning that Article 23 of Law 107/2009 of 14 September,<sup>43</sup> which approves the procedural rules for administrative offences in the areas of labour and social security, also grants trade unions legal standing to intervene in administrative proceedings in support of a worker.

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

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<sup>42</sup> Decree-Law 106/2013, 30 July 2013, available at: <https://dre.pt/home/-/dre/498708/details/maximized>.

<sup>43</sup> Law 107/2009, 14 September, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1154&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1154&tabela=leis).

Statistics, if available, can be used as evidence. They are considered as documents and can be subject to analysis by experts appointed by the parties or by the court. It is the responsibility of the court to evaluate the evidence resulting from the statistics. However, this is not widespread. There have been no cases in Portugal involving direct or indirect discrimination in which statistics have played a major role.<sup>44</sup>

The law is silent on the use of situation testing, and so far there has been no precedent for its use in Portugal.

Victims of discrimination may address their complaints to any police authority, CEARD or ACT. In the case of a crime, the Public Prosecution Service will conduct the case in the criminal courts.

## 6. Equality bodies

The High Commission for Migration (HCM), formerly the High Commission for Immigration and Intercultural Dialogue (Alto Comissariado para a Imigração e Diálogo Intercultural – ACIDI),<sup>45</sup> was created by Decree-Law 31/2014.<sup>46</sup> The HCM is responsible for the promotion of equality of treatment for everyone, without any discrimination on the grounds of racial or ethnic origin, and for the promotion of dialogue with, and the integration of, immigrants, ethnic minorities and religions in the country.

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

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

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

- to gather all information related to discriminatory acts and to apply the relevant sanctions;
- to recommend the adoption of legislative, regulatory or administrative measures that it deems adequate to prevent discrimination on the grounds of race, skin colour, nationality or ethnic origin;
- to promote and conduct surveys and research on racial discrimination;
- to write and publish an annual report on the situation in Portugal concerning equality of treatment and racial discrimination.

The HCM has been expanded and currently comprises the High Commissioner for Migration, who acts as the chair; one representative of each parliamentary group; one representative among the members of Government responsible for internal affairs, justice, equality and citizenship, education, science, technology and higher education, employment, solidarity and social security, health and culture; one representative of the regional government of

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<sup>44</sup> For probatory difficulties in Portugal, see de Carvalho, P.M, 'Ónus da prova em caso de discriminação', *Direito e Justiça*, Vol. Especial, No. 3 (2015), pp. 109-136, available at: <https://revistas.ucp.pt/index.php/direitoejustica/article/view/9959/9679>.

<sup>45</sup> The High Commission for Immigration and Intercultural Dialogue was regulated by Decree-Law 167/2007, 3 May 2007.

<sup>46</sup> Decree-Law 31/2014, 27 February 2014, repealing Decree-Law 167/2007 of 3 May 2007 and replacing the High Commission for Immigration and Intercultural Dialogue with the High Commission for Migration, available at: <https://dre.pt/application/file/572214>.

the Azores and Madeira; two representatives of migrants' associations, anti-racist associations, human rights associations, trade unions and employers' associations; and one representative of the Roma communities. It also includes three individuals of recognised merit, who are chosen by the other members. It does not have the power to bring any cases before the courts or to assist complainants in doing so.

The HCM has developed the use of cultural mediators to achieve greater integration of the Roma ethnic group.

The Commission for Citizenship and Gender Equality (Comissão para a Cidadania e a Igualdade de Género – CIG) was established by Decree-Law 164/2007 of 3 May 2007 and is now governed by Regulatory Decree 1/2012 of 6 January.<sup>47</sup> This institution aims to ensure the implementation of Government citizenship policies and to promote and defend gender equality by reaffirming women's rights and gender equality and combating gender based violence (in particular by undertaking actions to increase civic awareness regarding the identification of situations of discrimination, and of methods to eliminate such discrimination). The grounds of discrimination covered by the equality body are gender, gender identity and sexual orientation.

The National Institute for Rehabilitation (Instituto Nacional para a Reabilitação – INR) is, according to Law 46/2006 (Article 8(1)), the governmental office within the Ministry of Solidarity, Employment and Social Security responsible for policies and promotion of rights of persons with disabilities. Its mission is to ensure the planning, execution and coordination of national policies aimed at promoting the rights of persons with disabilities, and it also receives individual complaints and issues non binding opinions on enquiries and disciplinary procedures within the public administration. It is the main link between the Portuguese Government and the organisations for persons with disabilities. Within Decree-Law 125/2017, physical accessibility of buildings was also included in the INR scope of competences and a commission for the promotion of accessibility was created to report on the status of accessibility in Portugal.<sup>48</sup>

The Portuguese Ombudsman, in its capacity of national human rights institution, fully in line with the Paris Principles, receives complaints of alleged violence and discrimination. It has established a telephone contact line for persons with disabilities, children and older persons.

Each of these bodies has its own mandate; however, cooperation mechanisms are envisaged, mainly in regard to reporting. This might raise some difficulties in the appraisal of intersectional discrimination given the multiplication of different actors. However, HCM is generally the institution most fitted to file those claims.

## 7. Key issues

The most important point to highlight is that Portuguese legislation and practice is, generally speaking, in accordance with the directives. There have been not many reports of cases of discrimination on the grounds of religion, disability or sexual orientation. This does not mean, however, that the reported cases are always in line with practices and individual experiences, as highlighted in the 'Eurobarometer on Discrimination 2019: The social acceptance of LGBTI people in the EU' publication, which showed that wide social acceptance of LGBTQI people is still lacking in Portugal.<sup>49</sup>

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<sup>47</sup> Regulatory Decree 1/2012, 6 January, available at:

[http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1604&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1604&tabela=leis).

<sup>48</sup> The first report of 2020 is available at: <https://www.inr.pt/documents/11309/285392/Relatorio+FINAL+-+ComissaoPromocaoAcessibilidades.pdf/0800afb7-8e09-44eb-9110-44e9082678e1>.

<sup>49</sup> European Commission, 'Eurobarometer on Discrimination 2019: The social acceptance of LGBTI people in the EU', 23 September 2019, available at: [https://ec.europa.eu/info/sites/default/files/ebs\\_493\\_data\\_fact\\_lgbti\\_eu\\_en-1.pdf](https://ec.europa.eu/info/sites/default/files/ebs_493_data_fact_lgbti_eu_en-1.pdf).

As shown already, the numbers of race or ethnic origin cases – at least those cases publicised in the media – are increasing.

In addition, the 2020 report of the Commission for Equality and Against Racial Discrimination on Equality and Non-Discrimination regarding racial and ethnic origin, colour, nationality, ancestry and territory of origin (the latest available data) shows that 'multiple protected grounds' complaints have increased, mostly relating to the combination of nationality/colour of skin/ethnic and racial origin and territory of origin.<sup>50</sup>

In Portugal, it is common to approve legislation that is completely appropriate to achieve the required goals, yet which, due to several factors – such as the weakness of the economic situation, and the burden on the public administration – does not function effectively and efficiently. To some extent, this applies to the implementation of anti-discrimination law.

Furthermore, in Portugal, the culture of taking judicial action in Courts, either judicial or administrative, against discriminatory practices is almost non-existent. There are therefore very few judicial decisions on such issues. There are three main reasons for this. First, for all judicial procedures, victims have to instruct a lawyer and advance some funds. Secondly, the length, complexity and difficulty of obtaining evidence may act as a disincentive to victims seeking redress. Thirdly, the involvement of NGOs and other forms of collective redress are not yet common practice in the Portuguese judicial system.

Administrative complaints to administrative authorities are more frequent. As they usually achieve the victim's objective of ending the discrimination and/or being compensated for damages – according to Portuguese law, damages can be ordered in administrative proceedings – they are often considered to provide a sufficient remedy.

In the 2020 report of the Commission for Equality and Against Racial Discrimination on Equality and Non-Discrimination regarding racial and ethnic origin, colour, nationality, ancestry and territory of origin, 655 complaints were received by CEARD, representing an increase of around 50.2 % compared with 2019, when there were 436 complaints.<sup>51</sup>

Regarding discrimination on the grounds of disability, it is worth noting that during 2019, the National Institute for Rehabilitation (INR) registered in its annual report 1 274 complaints, which represents a 30 % increase compared with the previous year.<sup>52</sup> No INR report for 2020 or 2021 is yet available.

In this context, the main problematic point in the transposition of the directives concerns the lack of independence of the equality bodies. Except for the Portuguese Ombudsman, they are either departments or services of the Government or depend on it, and they therefore lack the necessary legal independence to carry out their missions with full liberty. Moreover, some of these bodies continue to be virtually unknown to the public.

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<sup>50</sup> Report available at: <https://www.cicdr.pt/documents/57891/0/Relat%C3%B3rio+Anual+2020+-+CICDR.pdf/522f2ed5-9ca6-468e-b05d-f71e8711eb12>.

<sup>51</sup> Report available at: <https://www.cicdr.pt/documents/57891/0/Relat%C3%B3rio+Anual+2019+-+CICDR/4cce326c-2913-40c1-8104-5280d2a24281.%20>. The report 2021 is not yet available.

<sup>52</sup> Report available at: <https://www.inr.pt/documents/11309/380827/Relatório+-+Lei+da+Não+Discriminação+2019/2621a2dc-b704-4056-9e21-fa893284a4cb>.

## INTRODUCTION

### The national legal system

According to Article 1 of the Constitution of the Portuguese Republic of 1976, 'Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society.' That means that the human being is the first priority of the state, above the economic and political organisation of the state.

According to Article 2 of the Constitution,

'The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organisation, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy.'

The structure of the state is unitary with autonomous regions (Article 6(2)) and must respect the autonomous island system of self-government, the principles of subsidiarity, the autonomy of local authorities and the democratic decentralisation of the public administration (Article 6(1)).

The political system is founded on the separation of effective powers (positive and negative) between the President, Parliament and Government, all of which possess identical democratic legitimacy.

The President of the Republic exercises effective positive and negative political powers, such as the appointment of the prime minister, the right of veto, the removal of the Government and the dissolution of the Assembly.

The Assembly of the Republic (Parliament) exercises legislative and political control powers (Article 149(1) of the Constitution). Among the legislative powers, the Assembly of the Republic has powers:

- to amend the Constitution (Article 161(a) of the Constitution);
- to enact legislation on any subject other than those in the exclusive mandate of the Government under the Constitution (Article 161(c) of the Constitution);
- to delegate to the Government the power to legislate (Article 161(d) of the Constitution);
- to approve international conventions (Article 161(i) of the Constitution); and
- to propose to the President of the Republic that referenda be held in cases in which they are warranted by national interest (Article 161(j) of the Constitution).

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

The Government conducts the country's general policy and is the supreme authority in the public administration (Article 182 of the Constitution). It also enjoys legislative powers on matters that are not within the exclusive mandate of the Assembly of the Republic, and on matters that are within the exclusive power of the Assembly but which the Assembly delegates to it.

Jurisdictional function is assured by the courts, which exercise sovereignty with the competence to administer justice in the name of the people (Article 202 of the Constitution). The control of what is constitutional and legal is multifaceted, and all courts (including the Constitutional Court) must not apply rules that contravene the provisions of the Constitution or the principles enshrined therein (Article 204 of the Constitution).

The Portuguese Constitution also provides for an independent mediator body – the Ombudsman – to whom citizens may present complaints about actions, or the inaction, of public powers. The Ombudsman has no decision-making powers but may issue recommendations to the competent entities in order to prevent or repair any injustice (Article 23).

Pursuant to Article 267(3) of the Portuguese Constitution, independent administrative authorities may be created; however, this has not been the case with equality bodies in Portugal, since they are either departments or services of the Government or depend on it, and are therefore not independent of the Government.

### **List of main legislation transposing and implementing the directives**

- Law 93/2017,<sup>53</sup> which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin.<sup>54</sup>
- Law 38/2004, which defines the general legal basis for the prevention of the causes of disability and the training, rehabilitation and participation of persons with disabilities.<sup>55</sup>
- Law 46/2006, which prohibits and punishes all forms of discrimination based on disability and on a pre-existing risk to health (*risco agravado para a saúde*), including in work and professional training.<sup>56</sup> This law was further regulated by Decree-Law 34/2007.<sup>57</sup>
- Labour Code (Law 7/2009),<sup>58</sup> which transposes, among many other directives, Directive 2000/43/EC (the Racial Equality Directive) and Directive 2000/78/EC (the Employment Equality Directive), following the grounds and the material scope of the directives.<sup>59</sup>
- Law 3/2011, which forbids any discrimination in access to and the exercise of self-employment, and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC.<sup>60</sup>

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<sup>53</sup> Law 93/2017, 23 August 2017, available at: <https://dre.pt/web/quest/home/-/dre/108038372/details/maximized>.

<sup>54</sup> This amounts to place of birth.

<sup>55</sup> Law 38/2004, 18 August 2004, available at: <http://dre.pt/pdf1s/2004/08/194A00/52325236.pdf>.

<sup>56</sup> Law 46/2006, 28 August 2006, available at: <https://dre.pt/application/dir/pdf1sdip/2006/08/16500/62106213.pdf>.

<sup>57</sup> Decree-Law 34/2007, 15 February 2007, available at: <https://dre.pt/web/quest/pesquisa/-/search/518015/details/maximized>.

<sup>58</sup> Law 7/2009, 12 February 2009, available at: [http://www.dgaep.gov.pt/upload/Legis/2009\\_I\\_07\\_12\\_02.pdf](http://www.dgaep.gov.pt/upload/Legis/2009_I_07_12_02.pdf).

<sup>59</sup> Law 14/2018, 19 March 2018, available at: [http://cite.gov.pt/asstscite/downloads/legislacao/Lei\\_14\\_2018.pdf](http://cite.gov.pt/asstscite/downloads/legislacao/Lei_14_2018.pdf).

<sup>60</sup> Law 3/2011, 15 February 2011, available at: <https://dre.pt/application/dir/pdf1s/2011/02/03200/0080900811.pdf>.

## 1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Portugal includes the following general provisions dealing with non-discrimination:

- Article 13 is a general clause on the principle of equality. Paragraph 1 enshrines the principle of equal treatment before the law and paragraph 2 prohibits discrimination founded on a large and, according to the dominant doctrine in Portugal,<sup>61</sup> non-exhaustive list of protected grounds ('ancestry, gender, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation').
- Article 15 of the Constitution establishes a principle of equivalence of rights and duties between foreigners and stateless persons and Portuguese citizens. According to this provision, foreigners and stateless persons who are temporarily or habitually resident in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens. Exceptions to this general rule are political rights, the exercise of public functions that are not predominantly technical and the rights and duties which, according to the Constitution or the law, are restricted to Portuguese citizens.
- Article 26(1) enshrines the right to legal protection against any form of discrimination. The Constitution thereby guarantees legal remedies for violations of any forms of discrimination.

In addition to these general principles and provisions, the Constitution includes, in the chapter on workers' rights, freedoms and guarantees, a prohibition on dismissal without fair cause or for political or ideological reasons (see Article 53 on job security). In Title III on economic, social and cultural rights and duties, Article 59(1) of the Constitution forbids discrimination at work against any worker on grounds such as age, gender, race, citizenship, place of origin, religion, or political or ideological convictions. Paragraph (2)(a) of the same Article refers to the principle of equal pay for equal work. Article 59(2)(c) of the Constitution refers to special protection of the work done by minors, persons with disabilities and those whose occupations are particularly strenuous or are undertaken in unhealthy, toxic or dangerous conditions. Although Article 59(1) of the Constitution does not expressly refer to sexual orientation or to disability, it must be interpreted in connection with Article 13, which forbids discrimination on a non-exhaustive list of grounds.<sup>62</sup> This list can include the protection of other grounds, such as age and disability.

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

Furthermore, Article 69(1), on childhood, provides that, with a view to their integral development, children have the right to protection by society and the state, especially from all forms of abandonment, discrimination and oppression. Article 70 on youth establishes

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<sup>61</sup> See: Gomes Canotilho, M. (2007), *Constituição Da República Portuguesa Anotada*, I (Artigo 1.º a 107.º), p. 340.

<sup>62</sup> Supreme Court of Justice, judgment of 11 December 2011, No. 343/04.4TTBCL.P1.S1, available at: <http://www.dgsi.pt/JSTJ.NSF/954f0ce6ad9dd8b980256b5f003fa814/11aa12ab2447e05d80257935002d7e36?OpenDocument>.

that 'in order to ensure the effective fulfilment of their economic, social and cultural rights, young people shall enjoy special protection'.

Besides the general clause on non-discrimination enshrined in Article 13, the prohibition of discrimination on the ground of disability is explicitly provided for in Article 71(1) of the Constitution, which establishes that,

'citizens with physical or mental disabilities fully enjoy the rights and are subject to the duties enshrined in the Constitution, save for the exercise or fulfilment of those for which their condition renders them incapable.'

According to Article 71(2) of the Constitution, the state is obliged to have a national policy to prevent the causes of disability; to provide for the treatment, rehabilitation and integration of citizens with disabilities and to support their families; and to develop educational methods to raise society's awareness of the duty to respect and show solidarity towards citizens with disabilities. The state must assume responsibility for the effective exercise of the rights of those citizens, without prejudice to the rights and duties of their parents and guardians. Paragraph 3 of the same Article adds that 'the State shall provide assistance to organisations for citizens with disabilities'.

In addition, Article 72(1) and (2) of the Constitution, on the elderly, states that 'the elderly have the right to economic security and to conditions in terms of housing and family and community life that respect their personal autonomy and avoid and overcome isolation or social marginalisation', and that 'the policy for the elderly shall include measures of an economic, social and cultural nature that tend to provide elderly persons with opportunities for personal fulfilment by means of an active participation in community life.'

Article 73(1) of the Constitution provides that 'everyone has the right to education and culture'. Article 73(2) states:

'The state shall promote the democratisation of education and the other conditions needed for an education conducted at school and via other means of training to contribute to equal opportunities, [and] the overcoming of economic, social and cultural inequalities.'

With regard to access to education, Article 74 of the Constitution states that 'everyone has the right to education with a guarantee of the right to equal opportunities for access to and success in schooling'. In education policies, the state must promote and support the access of persons with disabilities to education and, where necessary, support special education (Article 74(2)(g)). This constitutional provision aims to compensate for the inherent disadvantages that may be suffered by persons with disabilities in order to guarantee real equality of opportunity.

All provisions on specific rights should be read together with Article 13 of the Constitution, which enshrines the general clause on the principle of equality.

According to Portuguese constitutional case law, differences in treatment are considered acceptable when they are based on an objective distinction of situations, have legitimate objectives in accordance with the principles of the Constitution and can be considered necessary, adequate and proportionate (see, among many others, Constitutional Court Judgment No. 232/2003).<sup>63</sup>

Some of these provisions are directly applicable, while others are not.

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<sup>63</sup> Constitutional Court, judgment of 13 May 2003, No. 232/2003, available at: [www.tribunalconstitucional.pt/tc/acordaos/](http://www.tribunalconstitucional.pt/tc/acordaos/).

In order to clarify this question, one needs to draw attention to the fact that the Constitution makes a formal division between rights, freedoms and guarantees (civil and political rights) and economic, social and cultural rights. This distinction has some substantive consequences, given that the legal regimes of both groups of fundamental rights are rather different.

Article 18(1) of the Constitution establishes the legal force of the provisions on rights, freedoms and guarantees. It concerns the direct applicability of the provisions that enshrine rights, freedoms and guarantees and their binding effect on public and private persons and bodies. That means that all political and civil rights have binding effect over all public and private entities.

In contrast, the real effects of the constitutional provisions on social rights have been disputed since the very beginning of the Constitution's entry into force. On the one hand, Article 18 of the Constitution does not directly apply to them, and they usually depend on the adoption of ordinary laws that develop their constitutional contents. Therefore, some authors argue that these fundamental rights are binding only when special conditions are met (for instance, when sufficient administrative and financial resources are provided by the Government). On the other hand, according to an alternative doctrinal approach, although Article 18 of the Constitution does not apply to the binding effect of social rights, they are supposed to be similar to the rights, freedoms and guarantees in that respect. As a consequence, these fundamental rights are binding on the legislator, the executive and the courts. For people who make the latter argument, the main difference resides in the direct applicability, and not in the effectiveness and binding effect of the social rights – in summary, all fundamental rights must be effective and must have a binding effect. In spite of these differences, there is a consensus in the case law and in academia that the Constitution establishes a duty to pursue the full implementation of social rights, with reasonable delays, depending on public choices and resources, and always in a non-discriminatory way.

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

The enforcement of non-discrimination provisions against private actors has been disputed in education, mainly with regard to gender and sexual orientation non-discrimination clauses. It is indeed debatable – although no specific case has so far been decided in the courts – whether private schools (which are mostly religious) are bound to apply non-discrimination legislation regarding gender identity and sexual orientation. The Constitutional Court decision No. 474/2021 of 23 July 2021 did not discuss the substance of this issue, and considered only that the norms contained in paragraphs 1 and 3 of Article 12 of Law 38/2018 of 7 August 2018 (Right to self-determination of gender identity and gender expression and protection of the sexual characteristics of each person) that imposed obligations to both public and private schools were vague and indeterminate and, therefore, unconstitutional.<sup>64</sup>

Article 2(f) and 2(l) of Law 60/2009,<sup>65</sup> which establishes a framework for sex education in schools, aim to promote education against discrimination on the grounds of sexual orientation, but this is limited to an obligation on schools to teach the prohibition of discrimination on such grounds. It applies to all public establishments at basic and secondary level, but not to universities. It also applies to the private and cooperative

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<sup>64</sup> See: <https://dre.pt/dre/detalhe/acordao-tribunal-constitucional/474-2021-168184700>.

<sup>65</sup> Law 60/2009, 6 August 2009, available at: <https://dre.pt/pesquisa/-/search/494016/details/maximized>.

establishments that have an association contract with the state and therefore receive financing and benefits from it.

Article 7 of Law 51/2012<sup>66</sup> (the statute governing students and school ethics) establishes that no student may be discriminated against by the school community for reasons related to their sexual orientation and gender identity. However, it applies only to all public establishments at basic and secondary level.

Nonetheless, according to the report of the Educational Project LGBTI 2019 by the Ex Aequo Network, 'About 79.2 % of young people have witnessed at least once, situations of mockery or discrimination based on sexual orientation, gender identity and or sexual characteristics, compared with 57 % of teachers'.<sup>67</sup>

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<sup>66</sup> Law 51/2012, 5 September 2012, available at: <https://dre.pt/pesquisa/-/search/174840/details/maximized>.

<sup>67</sup> Report available at: <https://www.cig.gov.pt/wp-content/uploads/2021/02/Relatorio-PE-LGBTI-2019.pdf>.

## **2 THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination explicitly covered**

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

Ancestry, gender, race, language, place of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation (Article 13 of the Constitution). The Labour Code adds age, gender identity, civil status, family situation, genetic heritage, reduced capacity to work, disability or chronic disease, nationality, ethnic origin, or membership of a trade union (Article 24(1)). Law 46/2006 covers disability and pre-existing risk to health (Article 1(1)). Law 3/2011 covers racial and ethnic origin, age, disability, sexual orientation and religion or belief (Article 1).

Article 2(1) of Law 83/2019 (Basic Law on Housing) establishes the right to housing regardless of ancestry or ethnic origin, gender, language, territory of origin, nationality, religion, belief, political or ideological convictions, education, economic situation, gender, sexual orientation, age, disability or health conditions.

Law 93/2017 establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin. Discrimination is prohibited in the fields of social protection, social advantages, education, access to goods and services and culture.

The Criminal Code imposes a penal sanction of imprisonment from six months to five years on anyone who, in a public meeting, in writing intended for dissemination or by any other means of social communication, provokes acts of violence against an individual or a group of individuals on the grounds of their race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability with the intention of inciting or encouraging discrimination (Article 240(2)).

#### **2.1.1 Definition of the grounds of unlawful discrimination within the directives**

National law provides definitions for some grounds of discrimination.

##### **a) Racial or ethnic origin**

There is no legal definition for the notion of 'race'. However, Article 4 of Law 93/2017 sets out a large number of discriminatory practices that are forbidden.

The definition of 'ethnic origin' is not provided for the legislation. However, the same provisions that refer to 'race' or 'racial origin' also mention ethnic origin.

In addition to ethnic origin or race, these provisions include nationality, place of origin and language as suspect classifications, because they are covered in Article 13 of the Portuguese Constitution.

However, in the author's view, the Portuguese courts would, if such a case was brought to court, decide in accordance with the definition of 'ethnicity' provided by the Court of Justice of the European Union (CJEU) in its *CHEZ* judgment (C-83/14, paragraph 46; ECLI:EU:C:2015:480).

b) Religion or belief

The term 'religion' is also not defined in national law. However, according to Law 16/2001 of 22 June<sup>68</sup> (Law on Religious Freedom), 'religious purposes' are defined as the purposes of the 'exercise of worship or rites, religious assistance, training of ministers of religion, missionary work and dissemination of the professed denomination and religious education' (Article 21(1)(a)).

Although there is no case law on this issue, the definition of religion provided by the CJEU in *Achbita* (C-157/15, paragraph 28) must be observed by Portuguese courts where it coincides with the definition followed by the European Court of Human Rights. In addition, in its jurisprudence,<sup>69</sup> the Constitutional Court has emphasised that the protection that the Constitution gives to the freedom of religion encompasses both the individual and the collective exercise of religion. The first dimension guarantees a space of individual autonomy — reserved, intimate, very personal — of beliefs. The externalised subjective aspect of religious freedom gives people both the right to act freely in accordance with the respective convictions and beliefs in their relations with public authorities and others, and the possibility of freely engaging in activities that constitute manifestations and expressions of the religion they profess.

c) Disability

In contrast, Law 38/2004 of 18 August,<sup>70</sup> which is not an anti-discrimination law, expressly defines a person with disabilities, in Article 2, as

'someone who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others.'

This definition is also relevant for the purposes of non-discrimination law, as, according to the rules and principles of legal interpretation, all provisions must be interpreted in systematic way. In fact, as there is no definition of disability in the Labour Code, some academic literature uses the definition of disability provided in Law 38/2004 for the purposes of determining who is protected from disability discrimination. The definition is also in accordance with the concept used in the CJEU's judgment of 11 April 2013 in *Ring and Skouboe Werge* (joined cases C-335/11 and C-337/11; ECLI:EU:C:2013:222). However, due to the lack of jurisprudence in this context, it is impossible to provide any evidence base for this. In 2021 there were no judgments dealing with discrimination on the grounds of disability.<sup>71</sup>

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 person with disabilities should benefit from all measures of positive action with the aim of ensuring the exercise of

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<sup>68</sup> Law 16/2001, 22 June, available at: [https://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?artigo\\_id=806A0067&nid=806&tabela=leis&pagina=1&ficha=1&so\\_miolo=&nversao](https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=806A0067&nid=806&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao).

<sup>69</sup> Constitutional Court, judgments No. 544/2014 and No. 545/2014, available at: <https://www.tribunalconstitucional.pt/tc/en/acordaos/20140544s.html>.

<sup>70</sup> Law 38/2004, 18 August, defining the general framework of the legal regime regarding disability prevention (Define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência), Diário da República, Série I-A, No. 194, 18 August 2004, available at: <https://dre.pt/application/file/480649>.

<sup>71</sup> The only case law the authors could trace on discrimination on the grounds of disability was decided on 23 February 2016, by the Court of Appeals of Oporto, in proc. 3376/09.0TBPRD.P2, regarding discriminatory practices in the insurance market (available at: <http://www.dgsi.pt/jtrp.nsf/-/552BB3D2080FF10C80257F93003127A7>).

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 persons with disabilities do not constitute a homogenous group and that specific measures must therefore be taken in order to meet their different needs.

Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, and complements Law 38/2004, must also be taken into consideration. This Law states that its provisions are binding on all individuals and legal entities, private or public, and goes beyond the directive in the sense that it protects not only persons with disabilities but also persons with an aggravated risk to their health (Article 3(b)). Although there is no definition of disability, Law 46/2006 contains a definition of 'persons with an aggravated risk to health'. According to Article 3(c) (amended by Law 75/2021, of 18 November), a person with an aggravated risk to health is 'any person or persons suffering from an illness or disease causing long-term organic, functional, progressive and potentially disabling health changes, and causing changes to the physical, mental, emotional, social or economic quality of life 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 of yet, but has a health problem that could develop in a way that might result in a disability in future.

Within Law 75/2021 of 18 November, applicable in the insurance area, the basic concepts for non-discrimination purposes are as follows: 'Persons who have overcome situations of aggravated health risk' (people who can be shown to have been in a situation of aggravated health risk and who are no longer in such a situation, after a therapeutic protocol has been carried out which has been shown to be capable of significantly and durably limiting its effects); 'Persons who have overcome their disability' (persons who can be shown to have been in a situation of disability of 60 % or more and who have recovered their psychological, intellectual, physiological or anatomical structures or functions, reducing their disability below this threshold); and 'persons who have mitigated aggravated health risks or disability' (persons who are undergoing treatment proven to limit significantly and durably the effects of their aggravated health risks or disability) (Article 2(a) to (c)).

It is worth noting that the Labour Code also prohibits discrimination on the ground of chronic illness. However, this concept is also not defined.

#### d) Age

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

There are no restrictions on the scope of 'age' as a protected ground. There is no minimum age below which anti-discrimination law does not apply. There is no maximum age above which anti-discrimination law does not apply, which is important in preventing arguments and decisions based on ageism.

On the other hand, age can be used as a defence:

- in criminal cases. Criminal liability starts at 16 years of age, and special legislation applies to persons between 16 and 21 years of age.
- in civil cases. Article 488(2) of the Civil Code establishes a presumption of non-existence of civil liability for minors aged less than seven years.

e) Sexual orientation

There is no legal definition of sexual orientation.

Some case law, although not defining directly what sexual orientation is, establishes some criteria for its establishment in concrete situations.

This is the case of the decision of the Constitutional Court that did not consider as unconstitutional the legislation that allowed same-sex marriages.<sup>72</sup> In this decision, the Court ascertained that 'it is not necessary to make the concept of "sexual orientation" explicit or specific, namely as a "suspect category" for the purposes of the prohibition contained in Article 13(2) of the Constitution. The sexual orientation that is relevant in the context of the norm in question is the inclination towards union with a person of the same biological or genetic sex. In the context of the normative option under consideration, the morphological, psychological and social component of sexual identity and the consequent legal determination of gender loses problematic relevance'.

This can also be seen in cases regarding asylum proceedings. In this instance, the Administrative South Central Court, in its decision of 19 April 2018 in proc. 2749/16.7BELSB,<sup>73</sup> decided that 'sexual orientation and/or gender identity should be considered as innate and unchangeable characteristics or at least as characteristics so fundamental to human dignity that a person should not be forced to abandon them, and it is not a valid reason for denying international protection to consider that the applicant may be able to avoid persecution by hiding or being discreet about his or her sexual orientation or gender identity, nor may the applicant be required to alter or conceal his or her identity, views or characteristics in order to avoid persecution'. It also adds that 'the authorities responsible for the procedure must obtain information on the situation in the applicant's country of origin with regard to the situation of homosexuals and their possible persecution by state and non-state agents'.

### 2.1.2 Multiple discrimination

In Portugal, multiple discrimination is prohibited in Law 93/2017 (Article 3(1)(e) and Article 4(1)).

According to these provisions, multiple discrimination is discrimination that results from a combination of two or more discriminatory grounds. However, Law 93/2017 does not establish more severe sanctions for multiple discrimination than for discrimination on individual grounds.

In Portugal, there is no case law dealing with multiple discrimination. However, according to the annual report produced by CEARD, during 2020 CEARD, through its Standing Committee, issued five condemnatory decisions, one of them dealing with multiple discrimination (nationality and territory of origin).<sup>74</sup>

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<sup>72</sup> Constitutional Court, judgment No. 121/2010, available at: <https://www.tribunalconstitucional.pt/tc/acordaos/20100121.html>.

<sup>73</sup> Available at: <http://www.dgsi.pt/jtca.nsf/-/BDE419A9CE9BDEC78025828900328342>.

<sup>74</sup> <https://www.cicdr.pt/documents/57891/0/Relat%C3%B3rio+Anual+2020+-+CICDR.pdf/522f2ed5-9ca6-468e-b05d-f71e8711eb12>. The authors, after looking at the list of decisions issued by CEARD and available at <https://www.cicdr.pt/decisooes>, could link this multiple discrimination situation to the case ACM238FE.2020.NL.RL, in particular to the post on a social network using pejorative terms to call for the departure of Chinese and Brazilian nationals, likely to create a humiliating and contemptuous environment towards people of that nationality or from those countries, constituting a discriminatory practice on the basis of nationality and territory of origin, in the form of harassment. The fine was of EUR 438,81, not higher than the usual awarded according to that available list.

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In Portugal, discrimination based on a perception or assumption of a person's characteristics is not expressly prohibited in national law. Law 93/2017 prohibits any form of discrimination, given the breadth of its definition: discrimination meaning 'any distinction, exclusion, restriction or preference on the basis of the factors set out in Article 1 which has the purpose or effect of denying or restricting the recognition, enjoyment or exercise, on an equal basis, of rights, freedoms and guarantees or social and cultural economic rights' (Article 3(1)(b)). However, although discrimination by assumption is not expressly prohibited or defined, it should be considered to be implicitly prohibited.

There is no case law dealing with discrimination by assumption.

#### b) Discrimination by association

In Portugal, discrimination based on association with persons with particular characteristics is prohibited by national law. Law 93/2017 explicitly prohibits discrimination based on association (Articles 3(1)(d) and 4(1)) with persons with particular characteristics such as race/ethnic origin and other grounds including nationality, ancestry and place of origin etc.

Portuguese law is in line with the CJEU's judgment of 17 July 2008 in *Coleman v. Attridge Law and Steve Law* (C-303/06; ECLI:EU:C:2008:415). Although this is a case concerning disability not covered by Law 93/2017, the constitutional clause on non-discrimination and also the duty to interpret national legislation according to the Directives should lead to the same results in respect of other grounds for discrimination.

In a case<sup>75</sup> involving the regulation of parental responsibility of a child with severe disability, the Court of Appeal of Lisbon took into consideration the risk of discrimination by association, deciding that both parents had the same duties vis-à-vis the child. The Court therefore ordered joint custody, even though the parents disagreed. The Court considered that in a situation where a minor has serious disabilities and is totally dependent on third parties for any act of daily life, an order for joint custody fulfils the very important goal of involving parents under conditions of strict equality concerning personal and professional sacrifices. Although the decision does not expressly concern discrimination by association in employment, this ground was weighed in the Court's decision to order joint custody of the minor, because the mother alleged that she was severely harmed in respect of her professional life and therefore would face harsher difficulties if she were to be the sole caretaker.

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

#### a) Prohibition and definition of direct discrimination

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

Article 3(1)(b) of Law 93/2017 considers direct discrimination to occur when, due to racial or ethnic origin or other grounds (nationality, ancestry and place of origin), a person or a group is subject to less favourable treatment than another is, has been or would be in a similar situation.

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<sup>75</sup> Court of Appeal of Lisbon, judgment of 28 November 2018, No. 2261/17.7T8PDL.L1-7, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/10988407e6d97c068025838d005c694e?OpenDocument&Highlight=0,defici%C3%Aancia,poder,paternal>.

Article 3(a) of Law 46/2006 states that

‘direct discrimination occurs when a person with disabilities is subject to less favourable treatment than another is, has been or would be in a similar situation.’

Article 4 gives some examples of direct discrimination: the refusal to provide or the impeding of the taking up of goods or services; an impediment to or limitation of access to and normal exercise of an economic activity; an impediment to or limitation of access to buildings and public spaces; or the adoption of measures which may limit access to new technologies.

Article 23(1)(a) of the Labour Code defines direct discrimination as

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

Article 5(2)(a) of Law 3/2011 defines direct discrimination as

‘when a person, due to one of the grounds of discrimination, is subject to less favourable treatment than another is, has been or would be in a similar situation.’

The definition included in Article 3(1)(b) of Law 93/2017 refers both to individuals and groups.

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

#### b) Justification for direct discrimination

The law permits direct discrimination to be justified in a very few areas that are covered by genuine occupational requirements.

The Labour Code states in Article 25(2) that

‘it does not constitute any discrimination when the behaviour based on a discrimination factor constitutes a justifiable and determining occupational requirement for the exercise of the profession, given the nature of the activity in question or the context of its implementation, where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate.’

The same reasoning is accepted by Article 3(b) *in fine* of Law 46/2006, and Article 5(4)(a) and (b) of Law 3/2011.

However, Law 93/2017 does not permit any justification when it relates to direct discrimination.

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

#### a) Prohibition and definition of indirect discrimination

In Portugal, indirect discrimination is prohibited and defined in national law. The definition of indirect discrimination in Portuguese law complies with the definitions given in the directives.

Law 93/2017 states in Article 3(1)(c) that

‘indirect discrimination occurs, due to racial or ethnic origin and other grounds (nationality, ancestry and place of origin), whenever an apparently neutral provision, criterion or practice places a person or a group in a less advantageous situation than other persons.’

Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, follows the same wording (Article 3(b)).

Article 23(1)(b) of the Labour Code uses similar wording.

Article 5(2)(b) of Law 3/2011 defines indirect discrimination as

‘when an apparently neutral provision, criterion or practice would put a person with one of the grounds of discrimination in a less advantageous situation compared with other persons.’

b) Justification test for indirect discrimination

According to Article 3(1)(c) of Law 93/2017, indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Article 3(b) of Law 46/2006 follows the same wording.

Under Article 23(1)(b) of the Labour Code, indirect discrimination can be justified if the provision, criterion or practice deemed discriminatory is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The text of Article 2(2)(b)(i) of the directive is thus reproduced.

Article 5(4)(a)(b) of Law 3/2011 adopts the definition of the justification for indirect discrimination in the Labour Code, but clarifies that the assessment of the legitimate objectives should take into account the nature of the activity or the context of its exercise, and gives examples of some activities in relation to which this type of discrimination can be justified, such as fashion, publicity or show business.

This is the only rule defining legitimate aims. The courts would decide what constitutes appropriate and necessary means, based on general principles of law and on the circumstances, following the precedents of the CJEU and of the European Court of Human Rights. However, no such cases have come to court so far.

### **2.3.1 Statistical evidence**

a) Legal framework

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

The execution of the General Data Protection Regulation 2016/679 (GDPR) was ensured in Portugal by Law 58/2019, 8 August 2019<sup>76</sup> (Law on Personal Data Protection).

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<sup>76</sup> Law 58/2019, 8 August 2019, available at:

[http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?artigo\\_id=3118A0005&nid=3118&tabela=leis&pagina=1&ficha=1&so\\_miolo=&nversao=](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=3118A0005&nid=3118&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=).

This was accompanied by Law 59/2019, 8 August 2019, on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data, which ensures the implementation of the Law Enforcement Directive, available at: <https://dre.pt/home/-/dre/123815983/details/maximized>.

Although Regulation (EU) 2016/679 allows Member States to specify certain categories of personal data (sensitive data), this option was not provided by the Portuguese legislator in Law 58/2019. However, special rules can be found in relation to specific categories of data (for instance, regarding freedom of expression and information and genetic data).

Aside from the Law on Personal Data Protection, Article 17 and ff. of the Labour Code also covers the protection of personal data. In principle, employers cannot require job candidates or employees to provide information regarding their private lives, except when such information is strictly necessary and relevant in order to assess their capability to fulfil the labour contract and such grounds are supplied in writing. Employers cannot require information about an employee's state of health or state of pregnancy, except when particular circumstances inherent in the nature of the profession justify such a requirement and the grounds are supplied in writing to a doctor (Article 16 of the Labour Code). Employers are, in general, allowed to keep records of necessary personal data on their workers as long as they grant control rights to data subjects and, in cases of biometric data, only after notifying the Portuguese National Data Protection Authority (Comissão Nacional de Proteção de Dados – CNPD) (Article 18 of the Labour Code).

Article 9(2) of Law 16/2001, on religious freedom,<sup>77</sup> prohibits the requirement to indicate one's religion in all contexts.

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

Statistics, if available, can be used as evidence. They are considered as documents and can be subject to analysis by experts named by the parties or appointed by the court. It is up to the court to evaluate the evidence resulting from the statistics. They are admissible if they can be produced as documents (Articles 515 and 423-451 of the New Code of Civil Procedure of 2013).<sup>78</sup>

In Portugal, the use of statistical data is permitted by national law in order to design positive action measures (Article 8 of Law 22/2008 – the national statistics law).<sup>79</sup> These data are collected by Statistics Portugal (Instituto Nacional de Estatística – INE); the Ministry of Labour and Social Solidarity; and some publications on social issues.

Despite that, for many years there was no disaggregated data on ethnic communities in Portugal in various areas of society and the economy. This raised serious debate (and criticism from the Human Rights Committee of the United Nations in 2016) and a Working Group for the census of 2021, on the 'Ethnic-Racial' Questions, was created by Dispatch No. 7363/2018. One of the main conclusions of the final report of this Group was that a question having as its reference the concept of 'origin and/or ethnic-racial belonging' could be introduced into the census, with due cautions and safeguards.<sup>80</sup> However, the National Statistics Institute (Instituto Nacional da Estatística) considered that this was a very sensitive and non-consensual issue and, therefore, did not include it in the 2021 census. Some associations as SOS Racismo said that they were perplexed by this decision,<sup>81</sup> while Roma associations had never wanted such a question introduced in the first place.<sup>82</sup>

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<sup>77</sup> Law 16/2001, on religious freedom (*Lei da Liberdade Religiosa*), 22 June 2001, *Diário da República*, Série I-A, No. 143, p. 3666.

<sup>78</sup> Law 41/2013, on the new Civil Procedure Code (*Novo Código de Processo Civil*), 26 June 2013, *Diário da República*, Série I-A, No. 121.

<sup>79</sup> Law 22/2008, on national statistics (*Lei das estatísticas nacionais*), 13 May 2008, *Diário da República*, Série I-A, No. 92, pp. 2617-2622.

<sup>80</sup> See:

<https://www.acm.gov.pt/documents/10181/167771/Sumário+Trabalho+GT+Censos+2021+Questões+Étnico-raciais.pdf/6ba40214-9a39-4a88-96b4-5c2919da14d9>.

<sup>81</sup> See: <https://www.dn.pt/lusa/censos-2021-sos-racismo-diz-se-perplexo-por-ine-nao-incluir-pergunta-sobre-origem-etnico-racial-11020010.html>.

<sup>82</sup> See: <https://www.jn.pt/nacional/associacoes-ciganas-contradiscriminacao-nos-censos-2021-10765513.html>.

In civil, criminal and labour proceedings, claimants have the right to require through the court that data in the possession of the respondents or third parties that are required to determine a *prima facie* case of discrimination be put at the court's disposal, and if necessary, be subject to an expert evaluation. This is provided for in the New Civil Procedure Code: Article 413 (object of the evidence); Article 417 (duty of cooperation with the discovery of truth); Article 418 (the judge may, on deeming it appropriate, require the parties to produce confidential data); Article 429 (duty of the other parties to present to the court the documents deemed necessary); and Article 432 (documents belonging to third parties must also be surrendered to the court if they are considered necessary as evidence).

The court may also appoint experts to determine certain facts on the request of one of the parties or *ex officio* (Articles 480 and 483). These rules are applicable in all other types of procedures.

b) Practice

In Portugal, statistical evidence in order to establish indirect discrimination is not used in practice. As far as the authors of this report are aware, there have been no cases in Portugal involving direct or indirect discrimination in which statistics have played a major role.

However, in principle, there does not seem to be any reluctance to use statistical evidence in court on the basis of ethical or methodology issues. If provided, the courts will evaluate the evidence resulting from statistics depending on their own evaluation of the credibility of the institutions that have provided them and if it is relevant to the case at hand.

Although this is a case involving gender discrimination, the decision of the Supreme Court of Justice of 27 February 2008 (proc. 08S3900) considered that despite the fact that there could be evidence of a discriminatory policy of the company (at the director level there was a proportion of 70 % men and 30 % women, and overall the proportion is 51 % women and 49 % men), the Court concluded that a redimensioning of the company under which the author (a woman with children, who was divorced) was substituted with a man as a director of the marketing department, was not tantamount to direct discrimination, since what was at stake was not a matter of promotion but one of collective dismissal of workers.<sup>83</sup> In fact, the Court recognised the statistical evidence but considered that it would be relevant only if the question would have been one of promotion. Since it was an issue relating to the collective dismissal of workers, it was deemed irrelevant.

The evolution of practice in other countries influences Portuguese national law. It is quite common for Portugal's highest courts to quote legislation, court precedents and legal theory from other countries, as well as from European and international courts.<sup>84</sup>

## 2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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<sup>83</sup> Available at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/44d99d263a7b5bab80257409004bf957>.

<sup>84</sup> See, *inter alia*, Constitutional Court, judgment of 18 July 2007, No. 416/2007, which states that the Constitutional Court is bound by international sources of law, namely the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union. Available at: <https://www.tribunalconstitucional.pt/tc/acordaos/20070416.html>.

Articles 163(2) and 164(2) of the Criminal Code regarding sexual coercion and sexual abuse define 'harassment' as the 'abuse of authority resulting from a hierarchical, economic or employment relationship, by means of an order or threat'.

This definition is more restrictive than that contained in Article 29(1) of the Labour Code, in which harassment is defined as any form of unwanted behaviour, especially if it is based on a discriminatory factor, practised in the context of access to employment, self-employment, work or training, with the purpose or effect of upsetting or embarrassing the person, affecting her/his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 29(2) stresses that 'any unwanted verbal, non-verbal, or physical behaviour of a sexual nature, with the purpose or the effect described in the previous section', constitutes sexual harassment.

Under Article 129(1)(c) of the Labour Code, an employer may not exert any pressure on an employee in order to adversely influence him/her or his/her own or his/her co-workers' working conditions.

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

Article 3(1)(f) of Law 93/2017 defined harassment as any form of unwanted conduct related to racial or ethnic origin with the purpose or effect of violating the dignity of a person or a group of persons and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This means that Law 93/2017 extends the concept of harassment to include the dignity of groups.

In Portugal, harassment explicitly constitutes a form of discrimination (see Article 3(2) of Law 93/2017 and Article 29(1) of the Labour Code), and the concept of harassment in national law coincides with the notion of harassment that can be found in Article 2(3) of the directive.

The prohibition and definition of harassment in national law are confirmed by the case law of the Courts of Appeal.<sup>85</sup>

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

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<sup>85</sup> Court of Appeal of Porto, judgment of 7 May 2018, procedure No. 2326/16.2T8VNG.P1, available at: [http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7e394362a4d2ffb4802582c1002efa1a?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o](http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/7e394362a4d2ffb4802582c1002efa1a?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o;);  
Court of Appeal of Porto, judgment of 8 November 2018, procedure No. 1312/17.0T8VNG.P1, available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/4e1d5ab64d051c2b80258384003ee0d9?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>;  
Court of Appeal of Évora, judgment of 4 April 2018, procedure No. 903/16.0T8STC.E1, available at: <http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/bd0b9c871857dc0b8025827b002d2a41?OpenDocument&Highlight=0,n%C3%A3o,discrimina%C3%A7%C3%A3o>;  
Court of Appeal of Lisbon, judgment of 23 October 2019, procedure No. 12472/18.2T8SNT.L1-4, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/da6a83317d8ba1a0802584a2003f2a2c?OpenDocument&Highlight=0,assédio>.  
Court of Appeal of Lisbon, judgment of 8 September 2020, procedure No. 21426/18.8T8SNT.L1-4, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/930d57361db79d008025860700471604?OpenDocument&Highlight=0,ass%C3%A9dio>.

b) Scope of liability for harassment

Individual employees and employers can be held liable for harassment in the workplace.

A victim of work harassment is entitled to indemnification for any damages suffered, including for pain and suffering (Article 29(4) of the Labour Code).

The practice of harassment at work is considered to be a very serious administrative offence (*contra-ordenação muito grave*), besides any criminal responsibility that may exist as well (Article 29(5) of the Labour Code).

Under the Labour Code, an employer is responsible for their acts and those of their agents and employees with respect to harassment. The sources of employer liability are several.

Companies with seven or more employees are obliged to adopt a code of good practice to prevent and combat work harassment. The violation of this obligation by the employer is considered a serious administrative offence (Article 127(1)(k) and (7) of the Labour Code).

In addition, an employer is obliged to launch a disciplinary procedure whenever it becomes aware of the possibility that harassment is being conducted in the workplace. The violation of this obligation by the employer is considered a serious administrative offence (Article 127(1)(l) and (7) of the Labour Code).

The practice of harassment is expressly included in the list of behaviours adopted by the employer or other employees that may constitute a fair ground for termination of the employment contract by the employee, the latter being entitled to compensation (Article 394(2)(b)(f) and Article 396 of the Labour Code).

Finally, the employer is held responsible for repairing any damage resulting from professional hardship caused by work harassment. For this purpose, Social Security shall bear the costs for the damage repair, being entitled to claim reimbursement from the employer, plus interest (Article 283(8) and (9) of the Labour Code). The employer can also be entitled to reimbursement against the employee harasser under certain circumstances.

Trade unions or other trade/professional associations are liable for the actions of their directors, representatives and officers; (ii) they are liable for the actions of their members only if the actions occur in a situation in which the members represent these bodies, or they are acting in accordance with instructions given by a union or an association.

In the case of housing, besides any criminal, civil or administrative responsibility that might exist, the tenant may use a special notification process to cease being the victim of harassment. The tenant must notify the owner to adopt actions necessary to cease the production of noise above the legal limit, for instance, or ensure that there continues to be a connection to essential services such as water or electricity.

Within 30 days of receiving such a notification, the owner must demonstrate that the necessary measures have been adopted or justify why the necessary behaviours have not been implemented. As a consequence, the tenant might ask for an injunction against the landlord and a pecuniary sanction of EUR 20 per day until fulfilment of the notification or the issuing of an injunction.

Of particular relevance to this report, it should be noted that the sanction is increased by 50 % when the tenant is older than 65 or has a disability to a degree that is equal to or higher than 60 %. Indeed, since in such cases there is still strong legal protection for tenants against eviction, there is a fear that harassment practices are repeated and more serious.

## **2.5 Instructions to discriminate (Article 2(4))**

### **a) Prohibition of instructions to discriminate**

In Portugal, instructions to discriminate are prohibited in national law, not only in the field of employment but also in the access to and exercise of self-employment, social protection, social advantages, education and access to goods and services. The concept of instruction to discriminate is not defined as such, but several provisions allude to it and try to exemplify its meaning.

In Portugal, instructions explicitly constitute a form of discrimination.

Article 23(2) of the Labour Code expressly states that, 'a mere order or instruction with the purpose of disadvantaging any person by reason of a discriminatory factor' shall be deemed to constitute discrimination. Moreover, Article 5(1) of Law 46/2006 complements the articles laid down in the Labour Code. Under this article, in addition to the Labour Code, the adoption of procedures, measures or criteria directly by the employer or through instructions given to workers or job centres, which may make the recruitment of employees and the termination of work contracts conditional on factors of a physical, sensory or mental nature, are deemed to be discriminatory practices against persons with disabilities.

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

Incitement is included in Article 240(2) of the Criminal Code, which imposes penal sanctions on anyone who, in a public meeting, in writing intended for dissemination or by any other means of social communication, provokes acts of violence against an individual or group of individuals on the grounds of their race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability with the intention of inciting or encouraging racial or religious discrimination. Such persons will be punished by imprisonment of between six months and five years.

Article 3(3) of Law 93/2017 also provides that instructions to discriminate are deemed to constitute discrimination and are forbidden. In addition, Article 4(2)(j) of this Law establishes that 'the adoption of an act in which, publicly or with intent to disseminate widely, a statement is made or information is transmitted by virtue of which a person or group of persons is threatened, insulted or demeaned by reason of any of the factors set out in Article 1' is prohibited.

Article 5(1) of Law 46/2006 also inscribes that: '1 - In addition to the provisions of the Labour Code, the following are considered discriminatory practices against persons with disabilities: (a) The adoption of a procedure, measure or criterion, directly by the employer or through instructions given to its employees or to an employment agency, that subordinates to factors of a physical, sensory or mental nature the offer of employment, the termination of a work contract or the refusal to hire; b) The production or dissemination of job advertisements, or other forms of advertising related to pre-selection or recruitment, which contain, directly or indirectly, any specification or preference based on factors of discrimination on the basis of disability; (c) the adoption by an employer of a practice or measure which, in the context of the employment relationship, discriminates against an employee in his or her employ'.

### **b) Scope of liability for instructions to discriminate**

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

There are no specific rules about sharing liability. As a general matter under Portuguese law, joint and several liability is exceptional and is recognised only when a legal provision explicitly provides for this regime or when it is stipulated by the parties (Article 513 of the Civil Code). That is the case for liability under Law 93/2017, which is an example of tort liability. According to Article 497(1) of the Civil Code, in the event of tort liability, when several parties are responsible for the damages caused, their liability shall be joint and several.

Article 11 of the Criminal Code; Article 7 of the General Rules on Minor Offences (*Regime Geral das contra-ordenações*), adopted by Decree-Law 433/82 of 27 October 1982; and Article 551 of the Labour Code set out the liability of legal persons for such actions.

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

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

- a) Implementation of the duty to provide reasonable accommodation for persons with disabilities in the area of employment

In Portugal, the duty on employers to provide reasonable accommodation for persons with disabilities is included in the law, and is not defined.

This duty derives from Articles 85 to 88 of the Labour Code.

According to Article 85(1) of the Labour Code, persons with disabilities or chronic disease are guaranteed equal treatment. Under Article 85(3), the violation of this principle constitutes a serious offence.

Article 85(2) provides that the state will stimulate and support the actions of employers in employing workers with disabilities or chronic disease.

Article 86 is headed 'Positive measures in favour of the worker with disabilities and chronic disease'. The first paragraph deals with the question of reasonable accommodation, establishing that the employer has a duty to provide reasonable accommodation. That means that the employer must adopt appropriate measures to enable a person with a disability or a chronic disease to have access to and participate in work, to progress in his or her career and to undertake training, unless such measures would impose a disproportionate burden on the employer. The burden will not be considered disproportionate if it is sufficiently alleviated by legal measures that exist within the framework of national disability policy, or if it is compensated for by the state in terms to be provided for in special legislation.

According to Articles 87 and 88 of the Labour Code, several rights are guaranteed for workers with disabilities. These include: the right to be exempted from a specific number of working hours (Article 87), if it is medically proven that this would constitute a danger to their health or safety at work; the right not to perform overtime (Article 88); and the right not to work at night, if that would constitute a risk to their health or to the safety of the workplace (Article 87(1)(b)). The risk must be objectively evaluated (for instance, by a physician) and not solely by the employer (Article 87(2)).

Recently, Law 90/2019 of 4 September 2019 has extended these rights to employees with cancer.

In addition, Law 46/2006 establishes that the employer has an obligation to carry out the appropriate measures, according to the needs of a specific situation, so that the person with disabilities may have access to a job, or may progress in it, or so that he/she may be provided with training, except if these measures imply disproportionate costs for the employer' (Article 5(4)).

Neither Labour Code nor Law 46/2006 specify when the duty applies; nor do they state the criteria for assessing the extent of the duty; and there is no definition of 'reasonable' or 'disproportionate burden'. However, as part of that determination, the decision of the CJEU in *DW v. Nobel Plásticos Ibérica SA* (C-397/18; ECLI:EU:C:2019:703) must be considered.

According to Article 86(2) of the Labour Code, the competent national authorities<sup>86</sup> must advocate the adoption of reasonable accommodation by employers and create incentives for action in this field. In other words, the state has a duty to provide support to employers. In respect of this support, Decree-Law 290/2009 of 12 October 2009 established the employment and skills assistance programme for persons with disabilities (PEAQPDI) and approved the scheme providing technical and financial assistance for the development of employment and skills assistance policies for persons with disabilities. The measures include the adaptation of jobs and the elimination of architectural barriers. Specific protection measures may also be established by law or collective bargaining agreement for workers with disabilities or chronic illnesses (Article 86(4) of the Labour Code).

Article 5(5) of Law 46/2006 also establishes that the burden is not considered disproportionate when it is sufficiently compensated by measures promoted by the state for the professional integration of citizens with disabilities.

In summary, the employer has an obligation to grant reasonable accommodation, if it does not require disproportionate expenses. If there is state help available, then the burden is not considered disproportionate. If no state help is available, an analysis of the justification for the employer not to offer reasonable accommodation is in order. The INR should give an opinion on this matter, in accordance with Article 5(6) of Law 46/2006.

The Labour Code does not provide a list of appropriate measures to adapt the workplace to the disability, nor does it mention specifically/explicitly the obligation to adjust possible available jobs to those employees' condition. In fact, in the Portuguese legislation, this accommodation is clearly established only for employees who are injured as a result of a working accident or who are victims of a professional disease (Law 98/2009 of 4 September 2009, Articles 155 to 164). According to some authors,<sup>87</sup> this is the only situation where there is an obligation to reassign a worker to another position.<sup>88</sup> In contrast, other authors think that reassigning a worker with disabilities to another post in the company can be regarded as an accommodation measure, in which case it does not constitute a disproportionate burden on the employer.<sup>89</sup> According to those authors, the lack of a legal list may indicate that the concept should be interpreted broadly and there

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<sup>86</sup> Usually the Government and the Ministry of Employment.

<sup>87</sup> See, eg., Pedro Romano Martinez., *Direito do Trabalho*, 7.<sup>a</sup> ed., Almedina, Coimbra, 2015, p. 929; Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 5.<sup>a</sup> edição, Almedina, Coimbra, 2014, p. 870.

<sup>88</sup> In a decision of Lisbon Court of Appeal of 29 May 2007 (and of the Supreme Court of 24 September 2008), the Court reached the same conclusion. In this case, a cook was identified by the occupational physician as HIV-positive and his contract was considered expired by the employer, a position which ended being confirmed by the courts. The Courts ruled that being HIV-positive entailed an objective and absolute inability to perform job functions and that the employer was not obliged to reassign the employee.

<sup>89</sup> Milena Rouxinol, 'Notes on the principle of inclusion of employees suffering from disability', *Lex Social, Revista Jurídica de los Derechos Sociales*, 1/2017, p. 295.

is no reason to exclude extending the duty of reasonable accommodation to include the reassignment of a worker or at least a redistribution of tasks if that is a reasonable and proportionate measure. The point, however doubtful in Portuguese doctrine, should be read in accordance with the ECJ decision in *XXXX v. HR Rail SA*, of 10 February 2022, proc. C-485/20 (ECLI:EU:C:2022:85), according to which, 'Article 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the concept of "reasonable accommodation" for persons with disabilities, within the meaning of that article, requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer'.

b) Case law

The authors of this report have not found any recent case law on this matter published in the database of the Institute for Information Technologies in Justice Affairs (Instituto das Tecnologias de Informação na Justiça), nor is there any reference to the issue on the website of the Authority for Working Conditions (Autoridade para as Condições de Trabalho - ACT). Likewise, there are no references to this matter on the website of the National Institute for Rehabilitation (Instituto Nacional para a Reabilitação – INR).<sup>90</sup>

c) Definition of disability and non-discrimination protection

The definition of a disability<sup>91</sup> for the purposes of claiming reasonable accommodation is no different from the definition for claiming protection from discrimination in labour law. There is no definition of chronic illness.

Portuguese law protects not only persons with disabilities but also those with an aggravated risk to health (although Law 46/2006 does not define disability, it prohibits and punishes discrimination based on disability and on a pre-existing risk to health). Persons with an aggravated risk to health can also claim for reasonable accommodation.

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In Portugal, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is not explicitly recognised by law as a form of discrimination, but it is suggested.

<sup>90</sup> However, see Porto Court of Appeal, judgment of 24 February 2014, procedure No.º 361/12.9TTMTS.P1, available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/009f7692447ae11280257c92003f7ab4?OpenDocument>. In this case, the employee worked as an image technician ('manager') in a cinema on a rotating shift schedule. He had been diagnosed with a condition that prohibited him from working from 7pm and for more than five consecutive days. Due to this medical limitation, the employee asked for a schedule change (a fixed work schedule) but the employer refused his request, offering him a part-time position in the cinema box office. The employee refused the proposal and the employer communicated the expiration of the employment contract due to the supervening, absolute and definitive impossibility of providing the work. The termination of the contract was confirmed by the Court, which decided that the accommodation required by the employee would impose a disproportionate burden on the employer, and concluded that the employer 'had not to adapt its organisational structure and functioning to continue receiving the benefit of a worker who, meanwhile, was conditioned, for physical/medical reasons to perform the provision of the work in terms that he had been doing until then'.

<sup>91</sup> As mentioned above, the definition of 'disability' is included in Law 38/2004 of 18 August 2004, which is not an anti-discrimination law. According to Article 2, a person with disabilities is 'someone who, because of loss or irregularity, whether congenital or acquired, of bodily functions or structures, including psychological functions, has specific difficulties that are likely, in combination with environmental factors, to limit or hinder their activity and participation on equal terms with others.'

In fact, Law 46/2006 establishes that, in order to ascertain if a practice is discriminatory, 'the feasibility of the employer carrying out the appropriate measures, according to the needs of a specific situation, so that the person with disabilities may have access to a job or may progress in it, or so that he/she may be provided with training, shall be analysed, except if these measures imply disproportionate costs for the employer.'

Article 9(5) of Law 46/2006 states that any discriminatory act stipulated in Article 5 amounts to a very serious offence. Violation of these provisions is sanctioned with fines, with amounts depending on the business volume of the company and whether the offence was negligent or practised with intent (*dolus*), according to Article 554(4) of the Labour Code.

An individual to whom reasonable accommodation is denied can either complain to ACT, which must investigate the situation, or file a case in the labour courts.

The Labour Code also refers to the same obligations in Articles 85 and 86. Although the failure to provide reasonable accommodation is not explicitly typified as a discriminatory act (this is not even a concept used in those Articles), it should be considered so, through judicial interpretation, in harmony with the solution established in Law 46/2006.

In addition, as the duty to provide reasonable accommodation always implies a judgment of proportionality, it might be that the duty exists independently of the law detailing financial assistance to employers. It is worth noting that further clarification and judicial interpretation is needed on this point. It is certainly the case that reasonable accommodation that does not cost any money at all is an intrinsic right, and a refusal to provide it is discriminatory.

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

The adaptation of jobs and the elimination of architectural barriers are the responsibility of employers and may, in exceptional circumstances, be financed by the Institute of Employment and Professional Training (IEFP) under certain conditions (Article 32 of Decree-Law 290/2009). The IEFP part-finances enterprises to provide reasonable accommodation for employees with disabilities in their premises, in order to overcome functional difficulties and eliminate physical barriers that prevent or hinder access to the workplace. According to ACT, a violation of this provision may lead to a fine. Cases can be brought to either ACT or the labour courts.

The rules governing the shift of the burden of proof concerning the right to reasonable accommodation are the same as for other grounds of discrimination (direct or indirect) – Article 6(1) of Law 46/2006.

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

In Portugal, there is a duty to provide reasonable accommodation for persons with disabilities in the area of education, according to Decree-Law 54/2018 of 6 July, which repealed Decree-Law 3/2008 of 7 January, and establishes the legal framework for inclusive education. The new legal framework applies to school clusters and non-clustered schools, vocational schools and private, cooperative and solidarity pre-primary, basic and secondary education establishments.

According to Decree-Law 54/2018, each school should recognise the diversity of its students and identify ways of dealing with that, adapting the teaching processes to the characteristics and individual conditions of each student and mobilising the necessary

means to ensure access to the curriculum and to learning. Instead of categorising students with 'special educational needs', or creating a special legal framework based on diagnoses of learning difficulties, the legal framework for inclusive education aims to respond to students' different needs. It determines support measures for learning and inclusion, curriculum areas and specific resources to be used to meet all learners' educational needs throughout their schooling and the different education and training provision. – Article 6.

The different support measures for learning and inclusion represent an integrated continuum of action, and are divided into three levels: universal, selective and additional measures (v.g. curriculum adjustments, major and non-major curriculum adaptations, psycho-pedagogical support) – Article 7.

The measures are adopted according to the material and human resources available at the school. When the implementation of the measures implies the use of additional resources, the school director must request, on grounds, such resources from the competent service of the Ministry of Education (Articles 9(4)(5) and 10(7)(8)). Disproportionate cost is not a limit as with regard to employment.

In areas such as housing, there is no specific duty to provide reasonable accommodation besides what already emanates from legislation on accessibility in public and private grounds. However, in 2015, a ground-breaking judicial decision was issued by the Supreme Court of Justice, according to which, against the condominium's decision, tenants of a housing unit located in the third floor of a building were able, given their age and limited mobility conditions, to install, at their own expense, a mechanical chair on the staircase.<sup>92</sup> This was regarded by the Court as an admissible limitation of the rights of the landlord and of the condominium.

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

In Portugal, there are no rules regarding reasonable accommodation in respect of other grounds in the public sector or in the private sector. However, this does not mean that reasonable accommodation should not be possible, as it has happened with the provision of flexibility in the working week in order to ensure that workers can enjoy their fundamental religious rights.<sup>93</sup>

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<sup>92</sup> Supreme Court of Justice, judgment of 26 January 2015, procedure No. 778/11.6TVLSB.L1.S1, available at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/7551d0747921682380257df8005d76cc?OpenDocument>.

<sup>93</sup> Constitutional Court, judgment of 15 July 2014, No. 544/2014, available at: <https://dre.pt/pesquisa-avancada/-/asearch/57301957/details/maximized?emissor=Tribunal+Constitucional&perPage=100&types=JURISPRUDENCIA&search=Pesquisar>. In this decision, the Constitutional Court's interpretation was that the 'schedule flexibility' enshrined in Law 16/2001 of 22 June 2001 (Law on Religious Freedom) in Article 14(1)(a) should also apply to shift work. Along the same lines, see Lisbon Court of Appeal, judgment of 17 December 2014, procedure No. 449/10.0TTLS.L1-4, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c397d271e6180b1280257db700300b71?OpenDocument>.

### **3 PERSONAL AND MATERIAL SCOPE**

#### **3.1 Personal scope**

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

In Portugal, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. Everyone benefits from the protection of the anti-discrimination laws. That means that irregular migrants have the right not to be discriminated against. Furthermore, discrimination based on nationality is specifically prohibited in labour law (Article 24(1) of the Labour Code) and, in general, in Article 1 of Law 93/2017.

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

###### **a) Protection against discrimination**

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

According to Article 12(2) of the Constitution, legal persons have the rights and duties compatible with their nature, including personal rights.

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

The Portuguese Criminal Code also protects persons or 'groups of persons', therefore including the protection of such groups in the form of legal persons (Article 240).

Other legislation, given its nature, applies only to natural persons such as workers (Labour Code, Article 23) and persons with disability and aggravated health risk (Article 1 of Law 46/2006).

Recently, Law 75/2021, which strengthens access to credit and insurance contracts by people who have overcome or mitigated situations of aggravated health risk or disability, aims to protect only natural persons (Article 15 and 15-A of Law 72/2008 (through Article 5 and 6 of Law 75/2021, that amended Law 72/2008)).

The national provisions comply with the directives.

###### **b) Liability for discrimination**

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

Law 93/2017 provides that both natural and legal persons are liable in case of discrimination by action or omission (Article 15(1)). Similar reasoning applies to the prohibition on discrimination on the ground of disability contained in Law 46/2006 (Article 2(1)). However, Article 9 of Law 46/2006 establishes different sanctions for natural persons and for legal persons. Article 4(1) of Law 75/2021, which amended Law 46/2006, also maintains the same legal option.

The Labour Code prohibits 'employers' from discriminating. This applies to natural and legal persons for the purpose of liability for discrimination [Articles 554(1) and (2)(4)].

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

However, there are exceptions specified by law. One such exception is set out by Article 11(1) of the Criminal Code, which states that only natural persons are subject to criminal liability. However, even in criminal law, there are some exceptions to the exception. One example is the case of hate crime, which is a crime that involves discrimination on the grounds of race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability, as set out in Article 240(2) of the Criminal Code.

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

#### **a) Protection against discrimination**

In Portugal, the personal scope of national anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

The equality and non-discrimination provisions of the Labour Code apply to all fields of private employment, (Articles 23-32 of the Labour Code), as well as to public sector employees (Article 4(1)(c), (d) and (e) of Law 35/2014). Article 11 of the Labour Code extends the protection against discrimination to economically dependent workers (self-employed workers who are economically dependent).

Anti-discrimination provisions on the grounds covered by the directives are also applicable to statutory offices (Articles 17(1) and 49 of Decree-Law 133/2013).<sup>94</sup>

In addition, criminal provisions (Article 240) and the provisions of Law 9/2017 (Article 2(1)) and Law 46/2006 (Article 1) apply to every person, regardless of the fact that they are employed or in any way linked to the private or public sectors.

The national provisions comply with the directives.

#### **b) Liability for discrimination**

In Portugal, the personal scope of anti-discrimination law covers both the private and public sectors, including public bodies, for the purpose of liability for discrimination.

Law 93/2017 is binding on all public or private persons (Article 2(1)), and Article 2(1) of Law 46/2006 states explicitly that it is binding on both public and private sectors.

Article 15 of Law 93/2017 refers further to the liability of the public and private sectors.

Article 9(1) of Law 46/2006 refers to the liability of the private sector, and Article 9(2) of Law 46/2006 also refers to the public sector. Law 75/2021, which strengthens access to credit and insurance contracts by people who have overcome or mitigated situations of aggravated health risk or disability, also potentially applies to both sectors, although no public credit and insurance companies now exist in Portugal.

The public sector is liable for equality and non-discrimination on the same terms as the private sector (Article 4(1)(c) and (e) of Law 35/2014, which approves the General Regime

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<sup>94</sup> Decree-Law 133/2013, 3 October 2013, *Diário da República*, Série I-A, No. 191, 3 October 2013, pp. 5998-6002.

for Contract Work for the Public Sector),<sup>95</sup> and the private sector is liable according to Articles 23 to 32 of the Labour Code.

Article 17(1) of the New Regime of the Public Business Sector of the State approved by Decree-law 133/2013 establishes that the legal regime of individual work contracts is applicable to the workers of public companies, extending to them the protection ensured by the Labour Code.

Finally, regarding criminal liability, Article 11(2) establishes that 'legal persons and similar entities, with the exception of the State, legal persons exercising prerogatives of public power, and organisations under public international law' are liable. Therefore public companies may be liable once they act in the civil and commercial realms.

### **3.2 Material scope**

#### **3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))**

In Portugal, national legislation prohibits discrimination in relation to: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both the private and public sectors, as described in the directives.

Article 24(1) of the Labour Code guarantees all workers the same opportunities and benefits from equal treatment in terms of access to employment and promotion. As such, neither applicants nor workers should be privileged or harmed on the grounds of ancestry, gender, race, colour, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition, gender identity and sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality or membership of a trade union.

Discrimination against migrants in employment is also prohibited in Portugal, due to the principle of equality that means that 'foreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens' (Article 15(1) of the Constitution).

According to Article 24(2) of the Labour Code, which also applies to the public sector, 'the right to equal opportunities and treatment in access to employment, vocational training, promotion and working conditions' encompasses:

- selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy;
- access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience;
- pay and other pecuniary payments, promotions to all hierarchical levels and the criteria used in the selection of employees to be dismissed; and
- membership of, or involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by it.

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<sup>95</sup> Law 35/2014, establishing the regime for employment relations in public services, 20 June 2014, entered into force on 1 August 2014 (last amended by Law 73/2017, 16 August 2017) available at: <https://dre.pt/application/conteudo/108001409>.

Articles 85 to 88 of the Labour Code refer to workers who have a disability or suffer from a chronic disease or cancer. With the aim of applying the principle of equal treatment, Article 85(1) states that such workers will enjoy all the same rights and be subject to all the same duties as other workers as regards access to employment and job promotion, except to the extent that their disability renders them unable to exercise these.

The law does not lay down criteria for determining when a person is unable to exercise such rights and duties. The decision is first to be taken by the employer, but it can be verified by the Authority for Working Conditions and by the labour courts, which can ultimately decide whether or not the person really is incapable. As far as positive action is concerned, Article 85(2) of the Labour Code stipulates that the Portuguese state will create incentives for hiring persons with disabilities or chronic diseases.

Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, forbids all discriminatory practices that prevent, or limit access to, the exercise of an economic activity (Article 4(b)). Article 5 of the Law complements the provisions of the Labour Code and states that the following constitute discriminatory practices against persons with disabilities:

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

Law 3/2011, of 15 February, which establishes the general framework for the protection of the self-employed as regards the prohibition of discrimination in access to and the development of independent work, forbids any discrimination in access to and the exercise of self-employment. The purpose of this statute is to lay down a general framework for combating discrimination on the grounds of race, ethnic origin, religion or belief, disability, age, sexual orientation and sex. The statute defines independent work in accordance with Directive 2010/41/EU, in Article 2(2), as a professional activity developed outside an employment contract or a legally equivalent situation. Article 5(1) of Law 3/2011 establishes that no one can be subjected to different treatment in access to and during the development of self-employment, due to a discriminatory ground. This protection includes direct and indirect discrimination and discriminatory harassment (Article 5(2), (3), (5) and (6)) and covers the access to self-employment (including advertisements, selection criteria and the affiliation of the worker with professional associations), and the development of independent work (including pay, access to vocational training and the conditions for the termination of the contract) – Article 3(2) and (3), and Article 4.

### **3.2.2 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

In Portugal, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment.

Protection against discrimination relating to working conditions is covered by Articles 23(1) and 24(1) of the Labour Code. The protection covers employment and working conditions, including pay and dismissal, and contractual conditions of employment, as well as the conditions in which work is, or is expected to be, carried out.

Articles 85 to 88 of the Labour Code refer to workers who have a disability or suffer from a chronic disease or cancer. With the aim of applying the principle of equal treatment,

Article 85(1) states that these workers will enjoy all the same rights and be subject to all the same duties as other workers as regards working conditions, except to the extent that their disability renders them unable to exercise these. The law does not lay down criteria for determining when a person is unable to exercise such rights and duties. The decision is first to be taken by the employer, but it can be verified by ACT and by the labour courts, which can ultimately decide whether or not the person really is incapable. As far as positive action is concerned, Article 85(2) of the Labour Code states that the Portuguese state will create incentives for hiring persons with disabilities or chronic diseases.

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

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

National law on discrimination includes access to vocational guidance and vocational training, advanced vocational training and retraining as defined and formulated in the directives.

Article 24(1) of the Labour Code guarantees that all workers are to have the same opportunities and benefit from equal treatment in terms of training.

Article 24(2)(b) of the Labour Code refers to the same rights in respect of 'guidance, training and vocational retraining at any level, including the acquisition of practical experience.'

Article 85 of the Labour Code grants equal treatment to workers with disabilities in vocational training, but no specific measures are provided for. Article 86 refers to positive measures on vocational training to benefit workers with disabilities.

Article 127(1)(d) of the Labour Code establishes that employers must provide vocational training to workers according to their qualifications, and Article 130(d) of the Code states that one of the objectives of vocational training must be to promote the vocational rehabilitation of persons with disabilities, especially those whose disability results from a work-related injury.

Furthermore, the state must support self-employment, teleworking, part-time work and working from home.

Article 6(2) of the Labour Code states:

'The state should guarantee, in particular, the access of citizens to vocational training and continual updating of knowledge and skills from when they start work and should also support the operation of the training system through public funds.'

These rules also apply to the public sector.

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

In Portugal, national legislation prohibits discrimination in relation to: membership of and involvement in workers' or employers' organisations as formulated in Directives 2000/43 and 2000/78 for all five grounds and for both private and public employment.

Trade unions are not allowed to discriminate against their own members or with regard to applications for membership (Article 441 of the Labour Code).

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

In Portugal, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

The Constitution grants protection against all grounds of discrimination in general, not only in Article 13 but also in Article 26(1).

Furthermore, the Constitution covers social security explicitly in Article 63(1) and (2), and healthcare in Article 64.

According to Article 63 on social security and solidarity, everyone has the right to social security, and the state is charged with organising, coordinating and subsidising a unified and decentralised social security system with the participation of the trade unions, other organisations that represent workers and associations that represent the other beneficiaries.

Article 64 on health states: 'everyone has the right to the protection of health and the duty to defend and promote health'. According to Article 64(2), the right to the protection of health will be fulfilled 'by means of a universal and general national health service which, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge'.

Law 93/2017 prohibits discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin within the scope of social protection, including in social security and healthcare (Articles 1 and 2(1)(a)).

The social security system must protect individuals in illness and old age and if they are widowed or orphaned or with disabilities, as well as if they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or the ability to work.

The Labour Code and the law in general do not contain any exceptions to the provisions regarding social protection. The principle is that discrimination is not allowed in these areas (Articles 13(2), 26(1) and 59(1) of the Constitution).

Law 4/2007<sup>96</sup> (the Basic Law on the Social Security System) establishes in Article 7 the principle of equal treatment that prohibits any kind of discrimination, although it only gives examples involving gender and nationality. Concerning nationality, it is admissible to impose conditions of residence and reciprocity.

Article 30 of Law 38/2004,<sup>97</sup> which defines the general framework of the legal regime with regard to the prevention of disability and the training, rehabilitation and participation of persons with disabilities, provides that the state will adopt the necessary and specific measures to ensure the social protection of persons with disabilities, through cash or benefits in kind, with the aim of achieving personal autonomy and adequate professional and social integration.

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<sup>96</sup> Law 4/2007, Basic Law on the Social Security System (*Aprova as bases gerais do sistema de segurança social*), 16 January 2007, available at: [www4.seg-social.pt/documents/10152/18664/LEI\\_4\\_2007](http://www4.seg-social.pt/documents/10152/18664/LEI_4_2007).

<sup>97</sup> Law 38/2004, defining the general framework of the legal regime regarding disability prevention (*Define as bases gerais do regime jurídico da prevenção, habilitação, reabilitação e participação da pessoa com deficiência*), available at: <https://dre.pt/application/file/480649>.

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

Portuguese national law goes beyond the directives, because there is a constitutional principle of equivalence of rights (Article 15 of the Constitution) between nationals and non-nationals.

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

In respect of social housing, the principle of non-discrimination derives explicitly from Article 2(1) of the Basic Law on Housing,<sup>98</sup> which applies to all forms of housing provision. Specifically, Law 81/2014 of 19 December 2014<sup>99</sup> (Law on Social Housing) does not provide a non-discrimination clause but points to administrative selection procedures in which the selection criteria should be non-discriminatory (cf. Article 6 of the Code of Administrative Procedure). However, Article 11 of Law 81/2014 defines as preferential criteria for social housing the following: single-parent families, minors, persons with disabilities, those aged 65 or over and victims of domestic violence.

a) Article 3(3) exception (Directive 2000/78)

National law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

### **3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)**

In Portugal, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive.

Discrimination is not permitted in relation to social advantages (see, first and foremost, Article 13 of the Constitution concerning the principle of equality, which also applies to social advantages, although judicial interpretation is required) in respect of the following grounds: ancestry, gender, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances and sexual orientation. The Basic Law on the Social Security System (Law 4/2007) sets out a system of citizen protection (Article 26 and subsequent articles), which includes social advantages.

Law 4/2007 establishes in Article 7 the principle of equal treatment in access to social security and social advantages in general, and forbids any kind of discrimination, including on the grounds of gender and the nationality of beneficiaries. Due to the general principle of non-discrimination included in Article 13(2) of the Constitution, the grounds of age, disability, religion or belief and sexual orientation, despite not being mentioned explicitly in Article 7 of Law 4/2007, are also implicitly covered.

Decree-Law 4/2015, which establishes the Code of Administrative Procedure,<sup>100</sup> includes in Article 6 the principle of equality forbidding any discrimination by reasons of ancestry, sex, race, territory of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation. Therefore, any social advantages of an administrative nature should also be non-discriminatory.

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<sup>98</sup> Law 83/2019, 3 September 2019, available at: <https://dre.pt/home/-/dre/124392055/details/maximized>.

<sup>99</sup> Law 81/2014, 19 December 2014 (last amended by Law 32/2016, 24 August 2016), available at <https://dre.pt/web/guest/pesquisa/-/search/75194221/details/maximized>.

<sup>100</sup> Decree-Law 4/2015, 7 January 2015, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?ficha=101&artigo\\_id=&nid=2248&pagina=2&tabela=leis&nversao=&so\\_miolo](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=101&artigo_id=&nid=2248&pagina=2&tabela=leis&nversao=&so_miolo).

Law 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin, expressly includes the field of social advantages (Article 2(1)(b)).

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

### **3.2.7 Education (Article 3(1)(g) Directive 2000/43)**

In Portugal, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive.

The general principles of equality and non-discrimination enshrined in Article 13 of the Constitution are applicable to education. Consequently, no-one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, gender, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.

In addition, the Constitution refers to the right to education in Chapter III on cultural rights and duties.

Article 74(1) of the Constitution states that everyone has the right to education, and that the right to equal opportunities and to access to and success in schooling will be guaranteed. Article 74(2) provides that

‘in implementing the education policy, the state shall be charged with:

- a) ensuring universal, compulsory and free basic education;
- b) creating a public, and developing the general, pre-school system;
- c) guaranteeing permanent education and eliminating illiteracy;
- d) in accordance with his capabilities, guaranteeing every citizen access to the highest levels of education, scientific research and artistic creation;
- e) progressively making all levels of education free of charge;
- f) inserting schools into the communities they serve and establishing links between education and economic, social and cultural activities.’

Furthermore, Article 2 of Law 46/86, (Basic Law on the Education System),<sup>101</sup> as amended by Law 115/97, Law 49/2005, and Law 85/2009, grants all individuals the right to education and culture in accordance with the Constitution. Anti-discrimination law is applicable to vocational training in technical schools and universities, and also covers life-long learning courses. Besides establishing a basic educational policy, Law 46/86 declares that education is universal, compulsory and free of charge for all children. Basic education lasts for nine years. Irregular migrant children do not have access to education on an equal footing with other migrants.

Concerning religion, Article 24 of Law 16/2001 (Law on Religious Freedom) provides the possibility and the conditions for religious teaching in public educational institutions. Although discrimination against students is not explicitly prohibited in this provision (only generally in Article 2), it should be considered to be implicitly included.

Regarding sexual orientation, Article 2(f) and 2(l) of Law 60/2009 (Regime for the implementation of sex education in schools)<sup>102</sup> aims to promote education against

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<sup>101</sup> Law 46/86 (Basic Law on the Education System) 14 October 1986. The consolidated version of this law, as amended by Law 115/97 of 19 September 1997, was republished as Law 49/2005 on 30 August 2005.

<sup>102</sup> Law 60/2009, establishing a framework for sex education in schools (*Estabelece o regime de aplicação da educação sexual em meio escolar*), available at: <https://dre.pt/pesquisa/-/search/494016/details/maximized>.

discrimination on the grounds of sexual orientation, but this is limited to the obligation for schools to teach the prohibition of discrimination on such grounds.

Article 7 of Law 51/2012<sup>103</sup> (Statute governing students and school ethics) establishes that no student may be discriminated against by the school community for reasons related to their sexual orientation and gender identity (and more generally, according to Article 2(1)(a) for reasons related to ethnic origin, health, sex, sexual orientation, age, gender identity, economic, cultural or social condition or political, ideological, philosophical or religious convictions). It applies to all public establishments at basic and secondary level.

More recently, Law 38/2018 of 7 August, which regulates the right to self-determination of gender identity and gender expression and protection of one's sexual characteristics, defined that schools, both public and private, should 'promote' the exercise of such rights (Article 12)<sup>104</sup>. This raised several discussions in Portugal on the potentially ideological programming of education and, *in fine*, the Constitutional Court ended up considering that that norm was unconstitutional, but only given its indeterminacy and violation of the legislative reserved competences of the Parliament, therefore the section of the law is ineffective and no law has been so far enacted to substitute for it.<sup>105</sup> Also as a consequence, Dispatch 7247/2019 – which established administrative measures to implement the aforementioned Article 12 – was cancelled.<sup>106</sup> Among those measures, which are now inapplicable, are the use of a self-attributed name and gender and the use of preferred clothing and toilets.

With regard to race or ethnic origin, Law 93/2017, which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin, also covers the field of education (Article 2 (1)(c)). According to Article 4(2)(f) and (g) of the statute, 'the denial or limitation of access to educational institutions, public or private', and 'the establishment of classes or the adoption of other internal organisational measures in institutions of public or private education, according to discriminatory criteria' are considered as discriminatory practices. Concerning pupils with disabilities, Articles 16, 17 and 18 of the Basic Law on the Education System refer to the right of persons with disabilities to special education, and Article 20 relates to the education of adults. Special conditions for access to education and special learning methods are stipulated for students with disabilities. Provisions cover both 'education' and 'vocational training'.

Article 5 (1) of Decree-Law 54/2018 of 6 July, which establishes the legal framework for inclusive education, states that each school should recognise the diversity of its students and identify ways of dealing with that, adapting the teaching processes to the characteristics and individual conditions of each student and promoting equality and non discrimination in access to the curriculum and to learning. Instead of categorising students with 'special educational needs', or creating a special legal framework based on diagnoses of learning difficulties, the Legal Framework for Inclusive Education aims to respond to students' different needs. It focuses on educational responses and mobilising health, employment, vocational training and social security resources, in complementary fashion and whenever considered necessary.

Finally, Article 4(h) and 4(i) of Law 46/2006 states that the denial or limitation of access to public or private educational institutions or to any means of compensation/appropriate support for the specific needs of students with disabilities constitutes a discriminatory practice; in addition, the establishment, according to discriminatory criteria, of classes or the adoption of other internal organisational measures in public or private educational

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<sup>103</sup> Law 51/2012, 5 September 2012, available at: <https://dre.pt/pesquisa/-/search/174840/details/maximized>.

<sup>104</sup> Available at: <https://dre.pt/dre/detalhe/lei/38-2018-115933863>.

<sup>105</sup> Decision No. 474/2021, available at: <https://files.dre.pt/1s/2021/07/14200/0002000050.pdf>.

<sup>106</sup> Available at: <https://dre.pt/dre/detalhe/despacho/7247-2019-123962165>.

institutions are deemed as discriminatory practices, unless they are justified under the objectives referred to in Article 2.

In Portugal, the general approach to education for pupils with disabilities gives rise to practical difficulties due to the lack of specialised teachers and the non-availability of rooms. However, as the Ministry of Education has not made available a database on pupils with disabilities, the extent of such difficulties cannot be fully confirmed.

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

a) Trends and patterns regarding Roma pupils

In Portugal, there are some societal patterns in education regarding Roma pupils. As regards education, differences remain between Roma and the general population; nonetheless, evolution has occurred in some respects.

The school drop-out rate among Roma children used to be very high. Very few Roma children pursued their studies beyond the first four years of school and there were few Roma students in higher education. Roma girls were particularly likely to leave school at a very early age because of cultural reasons and traditions.<sup>107</sup>

Until the start of the implementation of the *National Roma Communities Integration Strategy 2013-2020* it was reported that Roma students generally left school earlier than other pupils (between the ages of 10 and 12), and did not complete the nine-year period of compulsory education (up to ninth grade). Many Roma children left school because of academic failure and having to repeat school years. The majority of Roma children who dropped out were girls.

Some of the reasons for the high drop-out rate among Roma students were:

- absenteeism;
- lack of parental interest;
- failure of schools to adequately cope with Roma culture and the social needs and values of Roma children; and
- difficulties experienced by teachers in understanding the children's situation.<sup>108</sup>

Some problems have been encountered between teachers and Roma students in schools and, to address them, some initiatives have been taken to encourage school attendance by Roma children. One example is the creation of posts for socio-cultural mediators (some of Roma origin), who act as liaison points between families and schools. The Portuguese authorities have said that the school attendance rate for Roma children has risen since the creation of these posts. In 2018, there were 155 mediators.<sup>109</sup>

As the European Union has asked Member States to prepare national strategies for the integration of Roma communities, with a view to fighting exclusion and acting in

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<sup>107</sup> See Guedes, M., Magano, O. and Candeias, P. (2014), *Estudo Nacional sobre as Comunidades Ciganas (National Study on the Roma Communities)*, HCM, pp. 92 ff, 205 ff, available at: [www.acm.gov.pt/documents/10181/52642/estudonacionalComunidades.pdf/f4aa9b13-797d-40bb-a3b3-1c4011b05760](http://www.acm.gov.pt/documents/10181/52642/estudonacionalComunidades.pdf/f4aa9b13-797d-40bb-a3b3-1c4011b05760). According to this study, in which 1 599 people were surveyed, 1/3 of Roma respondents had never attended school or did not go beyond the 1st cycle of basic education, and only 2.8 % had a secondary and/or higher education diploma. In contrast, 19.2 % of the Portuguese population had secondary education and 16.5 % had higher education (Pordata, 2014).

<sup>108</sup> There is a variety of literature in Portuguese on this topic. For a more recent article that summarises such reasons, see Maria Manuela Mendes, Olga Magano e Ana Rita Costa, 'Ciganos portugueses: escola e mudança social', *Sociologia, Problemas e Práticas*, 93/2020, available at: <http://journals.openedition.org/spp/7754>.

<sup>109</sup> See HCM (2018), *Relatório de atividades 2018 (Activities Report 2018)*, available at: [https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018\\_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7](https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7).

accordance with European values and the economic model adopted in the European Union, the Portuguese Government approved the *National Roma Communities Integration Strategy 2013-2020*. The strategy, which was adopted by the Resolution of the Council of Ministers 25/2013 of 27 March 2013 (in force since 17 April 2013), supports the idea that 'Despite recent progresses [sic], additional efforts still need to be undertaken in what concerns Roma communities.'<sup>110</sup> Since the implementation of the strategy, the need to introduce changes, both to the strategy's definition – particularly in relation to the clarification and implementation of measures – and in the identification of priority intervention areas, especially gender equality, knowledge of Roma people and their participation in the implementation of the strategy, has been evident.

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

Therefore, after hearing from the municipalities, the associations of Roma communities and civil society in general, the Council of Ministers adopted Resolution 154/2018 of 8 November 2018,<sup>111</sup> which extends the strategy until the end of 2022.

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

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

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

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

As a consequence of the strategy, the situation of Roma education has improved. In 2019, the document *Promoting the Inclusion and Educational Success of Roma Communities – Guide for Schools*,<sup>112</sup> was adopted to provide guidance for the future.

In the academic year 2017-2018, the second edition of the Operational Programme for Promoting Education (OPRE) was implemented; it ended in September 2018. In this edition, 32 scholarships were awarded, and most of the programme fellows (25) were awarded high-level degrees (first degree or masters). Overall, 64 % of the fellows

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<sup>110</sup> Portugal (2013), *National Roma Communities Integration Strategy 2013-2020*, p. 3, available at: [https://www.acm.gov.pt/documents/10181/52642/ENICC\\_en.pdf/bc4d6288-1626-4fcd-baa0-9feb8da7860d](https://www.acm.gov.pt/documents/10181/52642/ENICC_en.pdf/bc4d6288-1626-4fcd-baa0-9feb8da7860d).

<sup>111</sup> Resolution 154/2018, 8 November 2018, *Diário da República*, Série I-A, No. 230, 29 November 2018.

<sup>112</sup> Direção-Geral da Educação (DGE), *Promoting the Inclusion and Educational Success of Roma Communities – Guide for Schools* (Promover a inclusão e o sucesso educativo das comunidades ciganas – Guião para as Escolas), April 2019, available at: [https://www.dge.mec.pt/sites/default/files/ECidadania/Educacao\\_Intercultural/documentos/guiao\\_comunidade\\_ciganas.pdf](https://www.dge.mec.pt/sites/default/files/ECidadania/Educacao_Intercultural/documentos/guiao_comunidade_ciganas.pdf).

concluded their studies successfully, and it is worth noting that the participation of women has increased to 12 %.<sup>113</sup>

In addition, the 'School Profile of Roma Communities', which presents data about the students from Roma communities enrolled in the 2018/2019 school year in Ministry of Education public schools, shows that there has been a remarkable evolution in this area, albeit that some regional asymmetries (most of the educational problems are located in the Lisbon region) should be noted.<sup>114</sup> In order to understand the scale of the change on-going, it helps to go back to 1997/98. In that academic year, there were 5 921 Roma children and young people attending primary and secondary education (there was no data on pre-school). The data that has been released points to an almost tripling of this number (22 556).<sup>115</sup>

In 2019, the Government's ROMA Educa programme distributed 100 scholarships for Roma students to many secondary schools, including a monthly grant and a mentorship programme. In 2020 it decided to renew the programme and to award 120 scholarships to Roma students. In addition, other, more local projects have been implemented over the years, with good results.<sup>116</sup>

Despite these advances, Roma children still, in some cases, face hostility from non-Roma parents, who have in the past pressured school officials not to enrol Roma children. In addition, Roma parents, given their education level and the fear that their children might be discriminated against, do not oppose school abandonment.<sup>117</sup>

Clashes between cultural tradition and school obligations still exist. In a case that was publicised in the press, a first-instance court decided in 2017 that a 15-year-old Roma girl did not necessarily need to conclude mandatory schooling, since she had acquired basic life competences and was not at all motivated to remain in school.<sup>118</sup> Some years earlier, the Lisbon Court of Appeal reversed a first-instance decision that had admitted the drop-out of a Roma girl, mainly due to cultural aspects (the girl had started menstruation and should, from then on, stay at home). The Court of Appeal considered that, in the case of a conflict of rights, the right to education should prevail over cultural arrangements, and it ordered, as a protective measure, that the parents should undergo pedagogical training.<sup>119</sup>

The COVID-19 pandemic has also shown that there is still a lot to be done, as it is reported that less than 50 % of Roma community members have access to the internet and computers.<sup>120</sup> The Digital School Programme intends to narrow this gap by loaning

<sup>113</sup> See HCM (2018), *Relatório de atividades 2018 (Activities Report 2018)*, available at: [https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018\\_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7](https://www.acm.gov.pt/documents/10181/43252/ACM+RA2018_Final+5.pdf/7291ff95-c51e-4d0a-819f-166e07ad1db7).

<sup>114</sup> Publication available at: <https://www.dgeec.mec.pt/np4/1136.html#>.

<sup>115</sup> See: <https://www.publico.pt/2020/07/12/sociedade/noticia/ha-25-mil-ciganos-escolas-resultados-estao-melhorar-1923509>.

<sup>116</sup> See: Maria da Conceição Tomé, Anabela Carvalho, José Sousa, Dinis Saraiva, António Domingues e Maria Fernanda Oliveira, 'O sucesso escolar dos alunos de etnia cigana: desafios emergentes. O caso dos alunos do Agrupamento de Escolas Infante D. Henrique', *Configurações* [Online], 18, 2016, DOI, 10.4000/configuracoes.3659 and <https://www.portugal.gov.pt/pt/qc22/comunicacao/noticia?i=governo-quer-replicar-programa-que-erradicou-abandono-escolar-entre-ciganos>.

<sup>117</sup> See: Ana Certã, 'Viver a Escola na Comunidade Cigana', Factsheet OBSIG, Observatório das Comunidades Ciganas, ACM, I.P. 2021, available at: <https://www.obciq.acm.gov.pt/documents/58622/1515680/ObCig+Fact+Sheets+1/01b020c9-9436-4186-a880-d0304c3ad997>.

<sup>118</sup> See: <https://www.publico.pt/2018/09/05/sociedade/noticia/tribunal-de-fronteira-aceita-abandono-escolar-de-rapariga-cigana-1842986>.

<sup>119</sup> Lisbon Court of Appeal, decision of 20 March 2012, proc. 783/11.2TBRR.L1-1, available at: <http://www.dgsi.pt/jtril.nsf/33182fc732316039802565fa00497eec/75074309b70e7a8c802579ce00464024>.

<sup>120</sup> See: <https://www.dn.pt/pais/ciganos-ensino-a-distancia-medidas-de-higiene-como-se-ate-a-comida-falta-12091140.html>.

computers to and ensuring internet access for students, with priority for those who do not own such technology. However, this programme only recently began to be implemented.<sup>121</sup>

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

In Portugal, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive.

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

The rules against discrimination based on disability are also applicable to access to buildings and public spaces and the supply of goods and services, and are contained in Decree-Law 163/2006 of 8 August 2006, which sets out access regulations for buildings and public spaces, and in Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (Article 4).

In particular, this Article establishes an open-ended list of types of services in which discrimination is prohibited. These are 'b) The impediment or limitation to the access and normal exercise of an economic activity; c) Refusal or conditioning of the sale, renting or subletting of real estate, as well as access to bank credit for the purchase of housing, and refusal or penalisation in the signing of insurance contracts; d) The refusal or impediment to the use and dissemination of sign language; e) Refusal or limitation of access to the built environment or to public places or places open to the public; (f) refusal or limitation of access to public transport, whether by air, land or sea; g) Refusal or limitation of access to health care provided in public or private health care facilities; h) Refusal or limitation of access to educational institutions, public or private, as well as to any means of compensation/support appropriate to the specific needs of pupils with disabilities; i) The constitution of classes or the adoption of other measures of internal organisation in public or private educational establishments according to criteria of discrimination on the grounds of disability, unless such criteria are justified by the objectives referred to in Article 2, number 2; j) The adoption of a practice or measure by any company, entity, body, service, official or agent of the direct or indirect administration of the State, the Autonomous Regions or the local authorities, which conditions or limits the exercise of any right; l) The adoption of an act in which, publicly or with the intention of wide dissemination, a natural or legal person, public or private, makes a statement or transmits information whereby a group of people are threatened, insulted or demeaned on the grounds of discrimination on the basis of disability; (m) the adoption of measures limiting access to new technologies'.

The other grounds of discrimination are not expressly mentioned in national law, but they should logically be covered due to the constitutional principle of equality and non-discrimination (although there is no case law to support this interpretation).

Decree-Law 4/2015, which establishes the Code of Administrative Procedure,<sup>122</sup> includes in Article 6 the principle of equality, forbidding any discrimination by reasons of ancestry, sex, race, territory of origin, religion, religious or ideological convictions, education, economic situation, social condition or sexual orientation. The Code applies only to public services.

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<sup>121</sup> See information available at: <https://escoladigital.agrupspc.pt/home-pt>.

<sup>122</sup> Decree-Law 4/2015, 7 January 2015, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?ficha=101&artigo\\_id=&nid=2248&pagina=2&tabela=leis&nversao=&so\\_miolo](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=101&artigo_id=&nid=2248&pagina=2&tabela=leis&nversao=&so_miolo).

a) Distinction between goods and services available publicly or privately

In Portugal, national law distinguishes between goods and services that are available to the public (e.g. in shops, restaurants and banks) and those that are available only privately (e.g. those restricted to members of a private association).

For instance, Law 93/2017 is applicable to all goods and services available to the public. Goods and services available through private associations are excluded under the principle of freedom of association.

According to Decree-Law 594/74, as amended by Decree-Law 71/77,<sup>123</sup> private associations have the right to restrict the supply of goods and services to their members. This means that distinctions can be made on the basis of membership. However, membership itself cannot be based on discriminatory criteria.

### **3.2.9 Housing (Article 3(1)(h) Directive 2000/43)**

In Portugal, national legislation prohibits discrimination in the areas of housing as formulated in the Racial Equality Directive.

Discrimination related to access to housing is prohibited by Law 93/2017 (Article 2(1)(d)).

As for other grounds, Article 2(1) of the Basic Law on Housing<sup>124</sup> establishes that all have a right to housing for themselves and their families, regardless of ancestry or ethnic origin, sex, language, territory of origin, nationality, religion, belief, political or ideological convictions, education, economic situation, gender, sexual orientation, age, disability or health conditions.

Pursuant to Law 13/2019, a provision was inserted in the Portuguese Civil Code<sup>125</sup> (Article 1067-A) on non-discrimination in respect of access to a lease. According to that Article, no one can be discriminated against on the grounds of sex, ancestry or ethnic origin, language, territory of origin, nationality, religion, belief, political or ideological convictions, gender, sexual orientation, age or disability (1). It concluded that the announcement of a dwelling for lease cannot contain any restriction, specification or preference based on the discriminatory categories mentioned above (2). Therefore, it is illegal for a potential landlord to refuse to conclude a lease contract on the basis of the potential tenant's 'old age'.

With regard to housing for persons with disabilities, Law 38/2004 of 18 August,<sup>126</sup> which defines the general legal basis for the prevention of the causes of disability, and for the training, rehabilitation and participation of persons with disabilities, states that the state will adopt specific measures with the aim of ensuring the right to housing and access to private and public spaces for persons with disabilities (Article 32).

The main goal of this Law is to integrate persons with disabilities into society in order for them to be active in society and lead a normal life. As far as the built environment is concerned, it should be barrier-free and adapted to fulfil the needs of all people equally.

Article 4(c) of Law 46/2006 states that 'the refusal of or making conditional the sale, lease or sublease, as well as the access to bank loans for residential property purchases, and the

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<sup>123</sup> Decree-Law 594/74, 7 November 1974, available at: <http://pt.legislacao.org/download/pdf/decreto-lei-n-o-594-74-associacoes-associacao-constituicao-estatutos-38660>; Decree-Law 71/77, 27 September 1977, available at: <http://pt.legislacao.org/download/pdf/lei-n-o-71-77-autorizacao-ensino-duracao-assembleia-51022>.

<sup>124</sup> Law 83/2019, 3 September 2019, available at: <https://dre.pt/home/-/dre/124392055/details/maximized>.

<sup>125</sup> Decree-Law 47344/66 (Civil Code), 25 November 1966, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=775&tabela=leis&nversao=&so\\_miolo](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis&nversao=&so_miolo).

<sup>126</sup> Law 38/2004, 18 August, available at: <https://dre.pt/pesquisa/-/search/480708/details/maximized>.

refusal or penalty in the execution of insurance contracts' in relation to persons with disabilities will be considered as a discriminatory practice.

Mortgages are provided on special terms, provided that the property concerned is to be the permanent residence of the person with disabilities. There are also special loans available to adapt houses for persons with disabilities.

a) Trends and patterns regarding housing segregation for Roma

In Portugal, housing segregation and discrimination against the Roma exist, although it does not follow the same trends everywhere.

Social housing in Portugal is managed by the state, autonomous regions and municipalities. The state is responsible for setting housing budgets and defining regulations for the allocation of social dwellings, according to income-based criteria.

Given the universal right to housing programmes and the equality principle, which applies to all communities and ethnic groups, no specific measures have been proposed for Roma communities. Nevertheless, efforts have been undertaken in order to ensure that Roma communities benefit from housing policies.

The difficulties connected with social housing in general (social housing covers only 2 % to 3 % of the households in Portugal) make it difficult to solve the specific problem of rehousing Roma, thus requiring the displacement of Roma communities from encampments and shanty towns to social housing. Existing inhabitants frequently complain about the rehousing of Roma in the same area. There have been reports of discrimination, and the European Commission against Racism and Intolerance (ECRI) *Fourth Report on Portugal* (2013) referred to discrimination against the Roma in access to housing. In addition, on 30 June 2011, the European Committee of Social Rights of the Council of Europe, in *European Roma Rights Centre v. Portugal* (complaint No. 61/2020), considered that Portugal had violated Articles 16, 30 and 31 of the European Social Charter, interpreted in conjunction with Article E, since housing provision was not adequate and showed traits of segregation.<sup>127</sup>

It has been estimated that many Roma communities still live in shanty towns despite the Special Programme for Rehousing (Programa Especial de Realojamento), set up by the national authorities, which has enabled many Roma families to leave the shanty towns where they were living in Lisbon and Porto and move to decent housing. Nevertheless, in many cases, public housing programmes, whether they are national or municipal, have led to the concentration of Roma families and communities in the outskirts of urban areas, in neighbourhoods that are sometimes, in a clear exercise of territorial segregation, destined only or mainly for the Roma.

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. No general or municipal policies on infrastructure for itinerant camps exist.

There are allegations of evictions from, and demolition of, Roma housing without any alternative accommodation being offered, which could, if such a case reached the courts, entail an offence in breach of the European Convention on Human Rights. However, according to the Council of Europe, some progress has been made with regard to housing.<sup>128</sup>

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<sup>127</sup> Text available at: <https://www.escri-net.org/sites/default/files/ERRC%20v.%20Portugal%20%28decision%29.pdf>.

<sup>128</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, 'Fourth Opinion on Portugal', 28 June 2019, ACFC/OP/IV(2019)002, available at: <https://rm.coe.int/4th-op-portugal-en/1680998662>.

Despite the efforts undertaken to promote social integration, many Roma individuals continue to be affected by extreme poverty, social exclusion and poor housing conditions. In this sense, the Portuguese Government, in the above-mentioned *National Roma Communities Integration Strategy 2013-2022*, which has been reviewed, considers that it is essential to guarantee Roma individuals and families equal access to housing and that it is necessary to improve their housing conditions as well as combating spatial segregation. During the COVID pandemic, concerns were raised and debates were held about the high number of COVID-19 infections in Roma communities living in improvised housing and shanty towns, due to the lack of hygienic conditions.<sup>129</sup> This motivated the Government to assume the coordination of the response to the Roma population affected by COVID-19 in some areas (Moura and Beja).<sup>130</sup>

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<sup>129</sup> See: <https://www.publico.pt/2020/03/25/sociedade/noticia/sabao-nao-carro-preciso-agua-corrente-1909138>; <http://moraremlisboa.org/2020/06/05/debate-virtual-covid-19-comunidades-ciganas-e-exclusao-territorial/>.

<sup>130</sup> See: <https://www.portugal.gov.pt/pt/gc22/comunicacao/noticia?i=governo-coordena-resposta-a-populacoes-ciganas-afetadas-pela-pandemia-covid-19>.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In Portugal, national legislation provides for an exception for genuine and determining occupational requirements.

The legislation on equality and non-discrimination in the workplace allows for some differences in treatment. Article 25(1) of the Labour Code in effect prohibits all practices of discrimination by the employer on the grounds listed. According to the Code, a difference in treatment that is based on a characteristic related to any of the grounds listed will not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a justifiable and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (Article 25(2)). Article 25(3) adds that 'in particular, differences of treatment on grounds of age which are necessary and appropriate to the achievement of a legitimate aim, such as employment policy, labour market or vocational training, are permitted'.

The same reasoning is accepted by Law 3/2011 concerning the prohibition of discrimination in access to and the exercise of self-employment (Article 4(4)) and by Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health (Article 5(3)).

The authors consider that national law complies with the directives and that no discrepancies in interpretation will arise.

### **4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)**

In Portugal, national law does not explicitly provide for an exception for employers with an ethos based on religion or belief. However, this exception can be derived from a combination of several legal provisions and would, naturally, require judicial interpretation to be asserted.

First, the refusal to hire a person on the ground of his/her religion comes under the scope of the prohibition of discrimination laid down by Article 24 of the Labour Code, although Article 25(2) of the Code states:

'It does not constitute any discrimination when the behaviour based on a discrimination factor that constitutes a justifiable and determining occupational requirement for the exercise of the profession, given the nature of the activity in question or the context of its implementation, where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate.'

Religion or belief may be considered a justified discrimination factor, provided the employer has an ethos based on such religion or belief and that the activities undertaken by the employee or to be undertaken by an applicant are in strict connection with that ethos.

Secondly, Article 351 of the Labour Code considers just cause for dismissal in general, and provides for dismissal when the behaviour of the worker makes the continuation of the employment relationship impossible from a practical point of view. In this respect, the situation of the employer, the character of the relationship between the parties or between the worker and his/her co-workers and any other relevant circumstances must be taken into consideration. It can be deduced that conflicts between organisations with an ethos based on religion and belief and their employees would be solved on the basis of the same principle. Article 351 could also be applicable when there is an 'ideological' conflict between

the worker and the organisation (for instance, a trade union or a political party), but as it is an issue of just cause for dismissal, that would have to be the subject of a court ruling.

Finally, Article 3 of the Law on Religious Freedom (Law 16/2001) states that churches are free to organise themselves, exercise their functions and provide church services. The freedom of organisation may lead to not hiring a worker with a different religion or belief.

The same reasoning applies to other organisations with an 'ethos', such as political parties and philosophical organisations. A decision on the effect of a contradiction between the convictions of an individual and the ethos of an organisation on the loyalty of the individual has to be taken by the courts, but so far there have been no examples. The issue must be solved on a case-by-case basis.

So far, religious entities have in practice benefited from discretion in hiring or dismissing any worker who does not conform to their professed religion, stated beliefs or religious ethos in general, and the same applies to political parties.

The Catholic Church in Portugal can also select religious teachers in state schools to administer Catholic religious and moral education (*educação moral e religiosa católica*), which is an optional discipline.

The recruitment of and necessary qualifications for teachers of Catholic religious and moral education are covered by Decree-Law 70/2013.<sup>131</sup> It establishes the legal regime for the teaching and organisation of Catholic religious and moral education at state primary and secondary schools, under the terms of the 2004 Concordat between the Portuguese state and the Vatican, which was signed on 18 May 2004 and approved by the Resolution of the Assembly of the Republic 74/2004, of 16 November 2004.

According to Article 24(1) of Law 16/2001 (Law on Religious Freedom), churches and other religious communities (whether individually or in conjunction, if they profess a single confession or agree on a common programme) may demand from the competent Government ministry the opportunity to allow them to administer religious teaching in the state primary and secondary schools they indicate.

The Portuguese law and practice respects Article 4(2) of Directive 2000/78 and there is no relevant case law<sup>132</sup>.

#### **4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)**

In Portugal, national legislation does not provide for a specific exception for the armed forces in relation to age or disability discrimination (Article 3(4) of Directive 2000/78/EC), but the conditions for access inevitably limit employment on the basis of age and physical ability.

There are also 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.

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<sup>131</sup> Decree-Law 70/2013, 23 May 2013, amended by Decree-Law 210/2015, 25 September 2015, available at: <https://dre.pt/application/file/261022>.

<sup>132</sup> Also pointing to this absence, see: <https://www.in.pt/nacional/portugal-sem-casos-significativos-de-discriminacao-por-motivos-religiosos-13591612.html>, based on the 2021 report, *Religious Freedom in the World*.

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

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

Discrimination on the grounds of nationality is forbidden in Article 13 of the Constitution.

Article 1 of Law 93/2017 forbids discrimination on the grounds of nationality. Also in the housing field, Law 83/2019 includes nationality as an explicitly protected ground (Article 2).

The Labour Code explicitly states that discrimination on the grounds of nationality is forbidden in access to employment and work (Article 24(1)). This includes stateless status (Articles 4 and 24(3)(a)). Article 4 of the Code grants foreign workers and stateless individuals equal rights with Portuguese citizens, provided that they are legally permitted to work in the country. They must have a written contract of employment (Article 5(1) of the Labour Code) and produce documents proving that they have a work or residence permit (Article 5(1)(b) of the Code).

The framework law on housing also forbids any discrimination on the grounds of nationality (Article 2 of Law 83/2019).

Despite the constitutional principle of equivalence between Portuguese citizens and foreigners, stateless persons and EU citizens, national law still includes some exceptions relating to difference of treatment based on nationality.

Article 15 of the Constitution, on foreign nationals, stateless persons and European citizens, states that foreign nationals and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens.

However, political rights, the exercise of public functions that are not predominantly technical in nature and the rights and duties that the Constitution and the law reserve exclusively for Portuguese citizens are excepted from the provisions of the previous paragraph. This does not apply to citizens of Portuguese-speaking states who reside permanently in Portugal.

Appointment to the offices of President of the Republic, President of the Assembly of the Republic, Prime Minister and President of any of the supreme courts, and service in the armed forces and the diplomatic corps are, in principle, restricted to Portuguese citizens.

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

As regards citizenship, Organic Law 2/2020 of 10 November amended Law 37/81 of 3 October, the Portuguese Law on Nationality,<sup>133</sup> and introduced novel provisions in respect of access to Portuguese nationality, making it easier for children of foreigners to acquire it.

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<sup>133</sup> Law 37/81, 3 October, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=614&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=614&tabela=leis).

For instance, those who, at the moment of their birth in Portugal, had one of their parents legally residing in Portugal or having resided here, irrespective of the title, for at least one year, are now considered to be Portuguese citizens of origin.

b) Relationship between nationality and 'racial or ethnic origin'

There is no judicial case law concerning the relationship between nationality and race or ethnic origin, but discrimination on grounds of nationality may also constitute direct or indirect discrimination on grounds of ethnic origin, as has been the case with complaints of multiple discrimination within CEARD.

#### **4.5 Health and safety (Article 7(2) Directive 2000/78)**

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

An employer can exclude a person with disabilities on the grounds that the work will pose a risk to that person's health and safety. It is not for individuals with disabilities to decide for themselves that they wish to accept the health and safety risks, as the employer will not be excluded from liability if the person with disabilities suffers any harm in such circumstances (Articles 126 and 127 of the Labour Code). It is the employer who assesses what measures are needed to protect the health and safety of employees with disabilities.

The situation can be reviewed by ACT, the General Health Inspectorate (Inspecção de Saúde da Direcção Geral de Saúde) and the labour courts (a person with disabilities can challenge an employer's decision before the labour courts).

Law 38/2004 sets out the general legal basis for the prevention of the causes of disability and the training, rehabilitation and participation of persons with disabilities (Articles 4 to 15).

Articles 85-88 of the Labour Code contain provisions that seek to ensure the health and safety of persons with disabilities at work and to secure better integration and adaptation to enable them to work.

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

#### **4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)**

##### **4.6.1 Direct discrimination**

a) Exceptions to the prohibition of direct discrimination on grounds of age

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

b) Justification of direct discrimination on the ground of age

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

Article 25(3), in connection with Article 25(2) of the Labour Code, states that

'...differences of treatment on the grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

This corresponds to the exact wording of the directive.

Legal rules or collective agreements that fall within Article 25(3) must nevertheless be periodically evaluated and modified if they are no longer justifiable (Article 25(4)).

Portuguese law complies with the directive and with the jurisprudence of the CJEU, but it does not list potential legitimate aims (as in Article 6 of the Directive)

The authors of this report do not know of any Portuguese court case on this issue, except for the Portuguese Constitutional Court's decision No. 526/2016 of 4 October 2016. In this case, in which an instance of age discrimination was disputed, the Court stated – merely as an *obiter dictum* – that age does not figure among the causes that justify the application of Article 13(2) of the Constitution, but nonetheless used terms such as 'unfounded discrimination'. It established, however, that there is a consistent case-law line according to which, regarding age, differences in treatment should be justified rationally and objectively in reasonable terms, and there should be a sufficient substantial reason behind the measure that neutralises arbitrariness and eliminates unfounded discrimination.

Therefore, for the Constitutional Court, it seems that potential age discrimination will be appraised on the basis of a reasonableness test and not a strict proportionality test.

c) Permitted differences of treatment based on age

National law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC.

Article 25(2) and (3) of the Labour Code admits differences of treatment on the grounds of age if they are

'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

This corresponds to the exact wording of the Directive.

No list of permitted differences in treatment is explicitly mentioned in the Portuguese legislation.

d) Fixing of ages for admission occupational pension schemes

National law allows occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by Article 6(2) of the Directive.

In the case of occupational pension schemes, it is possible under Portuguese legislation to fix ages for admission to a scheme to benefits under it. Pension schemes must respect the principle of non-discrimination, but they can fix ages for admission if these can be justified under the conditions of the specific pension scheme. The most common fixed ages are 60, 62 and 65.

#### 4.6.2 Special conditions for younger or older workers

In Portugal, there are special conditions set by law for younger and older workers in order to promote their vocational integration. Over the years, Portugal has established initiatives and measures to reduce youth unemployment and/or early departure from the education and training systems.

In 2012, in response to the fast-growing unemployment rate among young people, the Portuguese Government approved a 'Strategic Plan of Initiatives for the Promotion of the Employability of Young People and the Support to SMEs ('Impulso Jovem').

The majority of measures included in this high-priority programme for the Government were later integrated in the Portuguese plan for the implementation of the youth guarantee. Implementation of this plan started in January 2014, targeting people aged under 30. The Portuguese youth guarantee plan includes an extensive list of measures to promote employment, education and training, traineeships, entrepreneurship and mobility, such as vocational guidance; job-search and career management training; the development of soft skills and individual counselling actions to match profiles; traineeships (in Portugal and abroad); direct placement in the labour market; hiring incentives; support for entrepreneurship and self-employment and the creation of small businesses; and support for transnational mobility. For instance, according to Decree-Law 72/2017 of 21 June 2017, employers may obtain an exemption from payment of social security if they hire young people (aged under 30) or unemployed persons (unemployed for more than 24 months) aged 45 or over.

In 2018, the Portuguese Government has approved the implementation of measures published in the 2018-2021 National Youth Plan<sup>134</sup>. Concerning employment, the priorities are to promote the realisation of the right to decent and inclusive employment; universalise faster and better access to a first job; and combat precarious employment, with a view to the sustainability of the emancipatory process and the creation of autonomy for young people.

In 2020, to face the economic and social impacts of the COVID-19 pandemic, the Government established as one of the priority axes of the Economic and Social Stabilisation Programme (*Programa de Estabilização Económica e Social*), approved by the Resolution of the Council of Ministers 41/2020 of 6 June, the maintenance of employment and the gradual recovery of economic activity. In this context, the measure 'ATIVAR.PT - Enhanced Support Programme to Employment and Vocational Training' was created. This Programme aims to ensure an adequate and rapid response with support programmes for hiring and internships, in combination with programmes for specific sectors and groups. It includes two policy measures: a) ATIVAR.PT Internships; b) ATIVAR.PT Incentive.

Ordinance 206/2020 of 27 August 2020 regulates the measure ATIVAR.PT Internships, which consists of supporting the insertion of young people (up to 29 years), older workers (aged 45 or over) and other specific groups into the labour market or the professional rehabilitation of these groups, through practical experience in a work context.

Ordinance 207/2021 of 27 August 2020 regulates the measure ATIVAR:PT Incentive, a financial support to employers who enter into open ended or fixed term work contracts with unemployed people – young people, people aged 45 and over and other specific groups - registered in the Instituto de Emprego e Formação Profissional, or IEFP (Institute for the Employment and Vocational Training). These contracts must have a minimum duration of 12 months and provide mandatory vocational training to the contracted workers.

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<sup>134</sup> Resolution of the Council of Ministers 114-A/2018, 4 September 2018, available at: <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/114-a-2018-116330692>.

More recently, in 2021, also in response to the fast-growing unemployment rate among young people during the COVID-19 pandemic, the Portuguese Government has approved the 'Sustainable Employment Commitment'<sup>135</sup>, a measure to reinforce the Portuguese plan for the implementation of the youth guarantee. The objectives of this investment are the creation of permanent and quality labour contracts under the Sustainable Employment Commitment programme, and the reduction of labour market segmentation among all groups, including youth. In order to speed up return to employment, employers are given temporary subsidies in exchange for offering open-ended contracts paying adequate wages. The employer receives a minimum of EUR 5 266 (12 times the social support index, which serves as reference for the calculation of various social security benefits) for each employment position created, which may be topped up by 25 % in two circumstances: hiring of workers younger than 35 years of age and jobs paying at least twice the minimum wage per month (EUR 665 in 2021). This measure is expected to support the creation of 30 000 permanent jobs and to last for one year, but it could be prolonged for an additional year. Given the need to secure participation of the private sector in the scheme, its implementation shall start at the time of economic recovery. The implementation of the investment shall be completed by 31 December 2023.

#### **4.6.3 Minimum and maximum age requirements**

In Portugal, there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training.

The normal minimum age for access to employment is 16 years (Article 68(2) of the Labour Code). According to Article 68(3) of the Code, minors under 16 years of age are allowed to work provided that they have already finished compulsory education and the tasks set are simple and will not damage their health and personal development. Compulsory education ends with completion of the ninth grade, and children begin school at the age of six (Article 6(1) and (2) of Law 46/86). Children normally end their basic education at 15 years of age. ACT must be informed of the employment of such persons (Articles 55(4) and 56(3) of the Labour Code). Article 72(3) of the Code prevents those under 18 years of age from undertaking activities 'which, by their nature or the circumstances in which they are provided, are harmful to the physical, mental and moral development of minors.'

For some types of public service, such as the army or the police, there is an age limit for access to employment. This is covered by Article 6 of the Directive. The normal minimum age requirement for public servants is 18.

For legal professions – judges, prosecutors, lawyers, notaries, bailiffs and judicial mediators or judicial referees, for example – there is no minimum requirement for the exercise of the profession. However, the length of the required academic training means that entrance into the exercise of the professions cannot occur below the ages of 22 to 25.

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

#### **4.6.4 Retirement**

##### **a) State pension age**

In Portugal, there is a state pension age at which individuals can begin to collect their state pension.

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<sup>135</sup> Resolution of the Council of Ministers 188/2021, 16 December 2021, available at: [https://portugal2020.pt/wp-content/uploads/rcm188\\_2021.pdf](https://portugal2020.pt/wp-content/uploads/rcm188_2021.pdf).

For private and public sector workers, the state pension age in 2021 was 66 years and six months (Ordinance 30/2020, 31 January).

It is envisaged that the pension age will increase in 2022 to 66 years and seven months (in line with Law 4/2007, which approves the general basis of the social security system, and Decree-Law 187/2007, which establishes and regulates the legal protection system for disability and retirement in the general social security system).<sup>136</sup> However,, it is expected that the retirement age will decrease for the first time in 2023, to only 66 years and four months, as a result of the increase in the number of deaths in the context of the COVID-19 pandemic.

In accordance with Decree-Law 119/2018, a flexibility rule was introduced, according to which a beneficiary who has fulfilled the guarantee period and is at least 60 years of age and who, while at that age, has 40 or more years of remuneration record relevant for the calculation of the pension, shall be entitled to start receiving the age pension.

If an individual wishes to work beyond the state pension age, the pension can be deferred.

In the public sector, deriving from Decree-Law 6/2019,<sup>137</sup> an individual can collect a pension and still work, if extension of the work relationship is permitted. In the private sector, there is no prohibition on simultaneous collection of pensions and salaries.

#### b) Occupational pension schemes

In Portugal, occupational social security schemes are rare due to the universal scope of the general public social security system. The Portuguese legislation regarding occupational social security systems is Decree-Law 12/2006.<sup>138</sup>

In Portugal, there is no normal age at which people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

In the private sector, if an individual wish to work for longer, payments from such occupational pension schemes can be deferred.

An individual can collect a pension and still work, subject to agreement between the parties. The normal age range to start receiving payments from occupational pension schemes is between 60 and 65 years of age.

#### c) State imposed mandatory retirement ages

In Portugal, there is a state-imposed mandatory retirement age for public employees.

The mandatory retirement age is 70 years (Article 292 of the General Regime for Contract Work for the Public Sector). Recently, Decree-Law 6/2019<sup>139</sup> has permitted the extension of the work relationship in the public sector whenever there is a justified public interest. The new provision (Article 294-A) of the General Regime for Contract Work for the Public

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<sup>136</sup> See *Diário da República* Série I, No. 90, 10 May 2007, available at: <https://dre.pt/pesquisa/-/search/520669/details/maximized>.

<sup>137</sup> Decree-Law 6/2019, 14 January 2019, available at: <https://dre.pt/home/-/dre/117754017/details/maximized>.

<sup>138</sup> Decree-Law 12/2006, 20 January 2006, amended by Decree-Law 180/2007, 9 May, Decree-Law 357-A/2007, 31 October, Decree-Law 18/2013, 6 February, Decree-Law 124/2015, 7 July, Law 147/2015, 9 September and Decree-Law 127/2017, 9 October. available at: <https://dre.pt/application/file/538934>. This Law regulates the establishment and functioning of pension funds and pension fund managers and transposes into law Directive 2003/41/EC of the European Parliament and of the Council of 3 June regarding activities and the supervision of institutions for occupational retirement provision.

<sup>139</sup> Decree-Law 6/2019, 14 January 2019, available at: <https://dre.pt/home/-/dre/117754017/details/maximized>.

Sector states that the relationship can be continued as a fixed-term employment contract (or limited executive tenure), upon request by the employee, if it is in the public interest. The fixed-term contract may be concluded for a period of not less than six months, renewable up to a maximum overall period of five years.

For private employees, there is no mandatory retirement age. However, special statutes exist. For instance, the retirement age for lawyers is 65. Even if lawyers are retired, they may be allowed to continue practising by the Bar Association.

d) Retirement ages imposed by employers

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

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers, even if they remain in employment after attaining pensionable age or any other age.

However, Article 348 of the Labour Code states that when an employee reaches the age of 70, his permanent work contract is turned into a fixed-term contract. The duration of his/her employment contract shall be six months on a renewable basis, subject to termination with 60 days' notice (Article 348(2)(c)). The majority of the doctrine and judicial decisions consider that the conversion of an employment contract into a fixed-term contract after the age of 70, provided for in Article 348 of the Labour Code, applies only to the employees who remain employed by the same employer.

f) Compliance of national law with CJEU case law

In Portugal, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

There have been cases concerning Article 348 of the Labour Code,<sup>140</sup> but they have not ascertained its compliance with the directive and with CJEU case law<sup>141</sup>. Indeed, the decisions of the Portuguese Constitutional Court on this issue date back to 1995;<sup>142</sup> the issue of discrimination was solved easily back then, once the requirement for those aged 70 years or more was generally applicable to all persons of that age.

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<sup>140</sup> Supreme Court of Justice, judgment of 21 of September 2017, procedure No. 31971/15.1T8LSB.L1.S1, available at: <http://www.dgsi.pt/jsti.nsf/954f0ce6ad9dd8b980256b5f003fa814/f3a262ab2476bd93802581a300347941?OpenDocument>.

<sup>141</sup> See CJEU, *Palacios de la Villa*, Case C-411/05 (ECLI:EU:C:2007:604) and *Hörnfeldt v. Posten Meddelande AB*, Case C-141/11 (ECLI:EU:C:2012:421).

<sup>142</sup> Constitutional Court, judgment of 31 October 1995, No. 581/95, available at: <https://www.tribunalconstitucional.pt/tc/acordaos/19950581.html>; Constitutional Court, judgment of 14 December 1995, No. 747/95, available at: <https://www.tribunalconstitucional.pt/tc/acordaos/19950747.html>.

#### 4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Portugal, national law permits seniority to be taken into account in selecting workers for redundancy. Extinction of a job position is applicable when the company lacks grounds to proceed with a collective dismissal because an insufficient number of employees are involved (i.e., the company has more than 50 employees and the closing of the section affects only three employees) in a redundancy caused by market, structural or technological motives (Article 367 of the Labour Code).

In practical terms, age is not taken into account, but seniority is. In fact, if there are at least two similar work positions that may be extinct, the employer must comply with a sequence of non-discriminative legal criteria in order to select which employees will be affected by the extinction: a) Worst performance evaluation, according to an appraisal system and criteria previously known to all the affected employees; b) Bigger burden in terms of costs for the company; c) Less experience in the job; d) Less seniority in the firm (Article 368 of the Labour Code).

a) Age taken into account for redundancy compensation

In Portugal, national law provides compensation for redundancy. Such compensation is not affected by the age of the worker. As has been mentioned, what counts is seniority.

Employees subject to collective dismissal, dismissal resulting from job extinction or failure to adapt to the job position are entitled to 12 days' basic remuneration and seniority payments for each full year's work. In the case of part of a year, the amount is calculated proportionately (Article 366 of the Labour Code).

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

In Portugal, national law implicitly includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

The laws implementing the directives do not include any specific exceptions concerning public security, public order, prevention of criminal offences, protection of health or protection of the rights and freedoms of others, but these exceptions seem to be implicit.

Generally speaking, such exceptions can be considered as restrictions to fundamental rights. Therefore, Article 18 of the Constitution may be invoked. The law may restrict rights, freedoms and guarantees only in cases provided for in the Constitution, but the restrictions must be limited to what is necessary to safeguard other rights or interests that are protected by the Constitution. Limitations to the main fundamental rights on the basis of public security, public order or similar are accepted by constitutional law experts, but they differ with regard to the extent of the limitations.

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

Over the years, there was a very active debate regarding the possibility for homosexual men to donate blood, since, in the absence of a very specific provision in law, several practices, sometimes contradictory, ensued.<sup>143</sup> This situation ended in 2021, when Law 85/2021 of 15 December<sup>144</sup> was adopted. It changes the Statute of Blood Donors and

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<sup>143</sup> See: <https://www.publico.pt/2021/01/31/politica/noticia/homossexuais-impedidos-doar-sangue-apesar-lei-permitir-nesse-dia-deixei-salvar-vida-1948617>.

<sup>144</sup> Available at: <https://dre.pt/dre/detalhe/lei/85-2021-175923953>.

determines that anyone who meets the eligibility criteria defined by a decree of the Ministry of Health may donate blood, and that this eligibility criteria shall not discriminate against blood donors on the basis of their sexual orientation, gender identity and expression or sexual characteristics.

#### **4.8 Any other exceptions**

In Portugal, there are no other exceptions to the prohibition on discrimination (on any ground covered by this report) provided in national law.

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

### **a) Scope for positive action measures**

In Portugal, positive action is permitted, although it is not compulsory, in national law in respect of racial or ethnic origin, religion or belief, disability, age, disability and sexual orientation.

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

Articles 69 to 72 of the Constitution provide for positive actions on the grounds of age (childhood, youth and old age) and disability.

Article 2(3) of Law 93/2017 allows for positive action measures based on the following grounds: race or ethnic origin, nationality, ancestry and place of origin.

Article 27 of the Labour Code states that positive action measures are not discriminatory. According to this provision, legislative measures shall not be considered discrimination if they are of a specifically defined temporary nature and benefit certain disadvantaged groups, including groups defined by reference to gender, reduced working capacity, disability or chronic illness, nationality or ethnic origin, and if they are enacted with the aim of guaranteeing the exercise, in conditions of equality, of the rights provided for in the Code and of correcting a situation of factual inequality that persists in society.

The law does not set any requirements that must be met in order for positive action to be implemented, e.g. necessity/proportionality.

Article 3(b) of Decree-Law 46/2006 on disability uses the term 'positive discrimination'; but Law 38/2004, on the same ground, establishes that persons with disability should have access to positive action measures, in order to correct a factual inequality situation that persists in social life (Article 6(2)).

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

Articles 85 to 88 of the Labour Code refer to workers who have a disability or a chronic disease or cancer. With regard to promoting employment opportunities for persons with disabilities, Article 85(2) provides that the state will create incentives for hiring persons with disabilities or chronic diseases. According to Article 85(2) and Article 86(2), the state will also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies will give employers incentives to include measures to help such people to retain their employment in the context of developing a strategy for managing disability in the workplace. As regards this support, Decree-Law 290/2009 of 12 October 2009 established the employment and skills assistance programme for persons with disabilities (PEAQPDI) and approved the scheme providing technical and financial assistance for the development of employment and skills assistance policies for persons with disabilities. The measures include assistance in relation to skills, aid schemes for integration, retention and reintegration in the labour market and subsidised employment,

Indeed, this programme provides several measures, and specific guidance, to support persons with disabilities who experience difficulties in beginning and making progress in their careers.<sup>145</sup>

More recently, the programme entitled 'ATIVAR.PT – Enhanced Support Programme to Employment and Vocational Training', created in 2020, has aimed to ensure an adequate and rapid response through support programmes for hiring and internships, in combination with programmes for specific sectors and groups. Ordinance 206/2020 of 27 August 2020 regulates the measure for ATIVAR.PT internships. This measure is addressed at assisting all unemployed persons. However, specific conditions apply to some groups, including those with disabilities or impairments (Article 3(1)(d)); for instance, the promoter entity that integrates trainees with disability or impairment will see the internship duration extended for more three months, from nine to 12 months (Article 8); every trainee with disability or impairment is entitled to: a monthly internship grant, meal or meal allowance, transportation between his/her residence and the location where the internship will take place or transportation allowance, and insurance against accidents at work (Article 11).

Ordinance 207/2021 of 27 August 2020 regulates the ATIVAR:PT incentive measure, which includes an increase of 33 % in the support to be granted to companies that sign employment contracts with unemployed people registered with the IEFP. Financial support is increased by 10 % in the case of hiring unemployed persons with disability (Article 11).

Legislation on tenancy rights traditionally included specific protection for tenants aged 65 years and over and with a degree of incapacity higher than 65 % (today, this protection is being phased out, and applies only to previously agreed contracts). The option to include such positive actions – for instance, making it impossible for landlords to unilaterally terminate rental contracts – was disputed, but the Portuguese Constitutional Court, in its decision of 11 October 2000, found that the distinction established by the provision in question was not arbitrary. For the court, it seemed reasonable to resolve the conflict in favor of tenants, since they need more protection from the law.<sup>146</sup>

Article 3(5)(b) of Law 83/2019 (Basic Law on Housing) explicitly states that housing policy should be conducted according to equality of opportunities and territorial cohesion principles 'with positive discrimination measures, whenever necessary'.

Some plans in respect of non-discrimination on the basis of ethnic origin also provide for some measures that may be qualified as positive action. The 'National plan to combat racism and discrimination (PNCRD) 2021 - 2025 – Portugal Against Racism' includes some positive action measures, such as:<sup>147</sup>

- under number 2.1.: promoting the participation and representation of persons belonging to discriminated groups in the culture field under a 'blind' recruitment procedure for the Symphonic Orchestra, the National Theatre of Saint Charles and the Body of Artistic Production.
- under number 3.1.: In access to higher education, the Government commits itself, for 2022, to ensure 500 vacancies for students of schools of the Educational Territories of Priority Intervention (TEIP) - vacancies that will grow to 1 000 in 2023, 1 500 in 2024 and 2 000 in 2025. The access to professional technical courses will also have a special quota for students from TEIP schools, but this will start only in 2023 (with 150 vacancies, 300 in 2024 and 500 in 2025).

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<sup>145</sup> Ordinance 8376-B/2015, 26 June, available at: <https://dre.pt/application/file/69906402>; with the changes introduced by Ordinance 9251/2016, 20 July, available at: <https://dre.pt/application/file/74996991>.

<sup>146</sup> Constitutional Court, judgment of 11 October 2000, No. 420/2000, available at: <https://dre.pt/pesquisa-avancada/-/asearch/3317294/details/maximized?emissor=Tribunal+Constitucional&perPage=100&types=JURISPRUDENCIA&search=Pesquisar>.

<sup>147</sup> The *National Roma Communities Integration Strategy* also establishes some positive measures such as ensuring 40 OPRE Scholarships for 2021 (number 5.2.).

- under number 3.8.: Promoting access, frequency and conclusion through the Operational Programme of Education Programme (OPRE Programme) and the ROMA Educa Programme, with 40 OPRE scholarships for higher education in 2021, rising to 60 scholarships in 2025; and 500 ROMA Educa Scholarships for secondary schools for 2021, rising to 1 200 scholarships in 2025.

b) Quotas in employment for persons with disabilities

In Portugal, national law provides quotas for the employment of persons with disabilities.

Article 28 of Law 38/2004 establishes quotas for the employment of persons with disabilities of up to 2 % for private enterprises and up to 5 % for the public sector.

The system of employment quotas for persons with disabilities in public administration (central, regional, autonomous and local public administration bodies) is regulated by Decree-Law 29/2001.<sup>148</sup> Only individuals affected with a degree of incapacity of 60 % or more – according to a national disability classification table – qualify as a employee/worker with disabilities for the purposes of assessing quota compliance. No sanctions are specified in cases in which an employer fails to comply with the quota, and there are no statistics on the number of persons with disabilities employed under the quota. As a consequence, one cannot know whether or not the practice on quotas is complied with.

Other quotas have been applicable to private employers (as well as public employers that are not covered by Decree-Law 29/2001) since the entry into force of Law 4/2019. This Law applies to medium-sized and large enterprises, and regulates a system of quotas for the employment of persons with disabilities with a degree of incapacity of 60 % or more. Medium-sized enterprises with a workforce of more than 75 employees must employ employees with disabilities as at least 1 % of their staff, while large enterprises with more than 250 employees are required to reach a level of at least 2 %. Employers who do not meet their quota obligation are obliged to pay a fine (of up to EUR 9.690.00) given this is a serious offence, which goes to the Authority for Working Conditions (ACT) and to the National Institute for Rehabilitation (Instituto Nacional para a Reabilitação - INR).

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

The Labour Code states in Article 86(4) that laws or collective agreements may introduce provisions that are more favourable to the protection of workers with disabilities or chronic diseases than to the employer, while bearing in mind the interests of both.

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<sup>148</sup> Decree-Law 29/2001, 3 February 2001, available at: <https://dre.pt/pesquisa/-/search/315563/details/maximized>.

## 6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In Portugal, the following procedures exist for enforcing the principle of equal treatment:

#### Control of constitutionality procedure

Every court has jurisdiction to apply the principle of equality. Furthermore, the courts may not apply norms that contravene this principle (Article 204 of the Constitution). The refusal to apply any norm on the grounds of its unconstitutionality or the application of a norm whose unconstitutionality has been raised during the proceedings may be the subject of an appeal to the Constitutional Court against court decisions (Article 280(1) of the Constitution).

#### Labour courts procedures (for private sector)

Specialised labour courts (*Tribunais do Trabalho*) deal with discrimination in employment in the private sector. They are part of the general judicial system but deal only with labour law cases concerning employment relationships, work-related accidents and illness, appeals against fines and disputes concerning social security rights. They deal with all questions arising from the drafting, execution and termination of employment contracts. These courts also deal with appeals regarding sanctions imposed by administrative agencies for non-compliance with employment laws.

#### Alternative disputes resolution in labour law (private sector)

No specific procedures for mediation in relation to discrimination are provided for in the Labour Code. However, the rules for the labour courts make it mandatory for the judge presiding over a case to hold at least one conciliation conference between the parties before trial, and require the courts to try to mediate in any labour dispute coming under their jurisdiction (Articles 32(2), 36(2), 51(1), 51(2), 55(2) and 70(1) of the Labour Procedure Code – the code containing the rules of procedure for labour issues in accordance with Decree-Law 480/99 of 9 November 1999 (as amended by Decree-Law 323/2001 of 17 December 2001, Decree-Law 38/2003 of 8 March 2003, Decree-Law 259/2009 of 13 October 2009 and Law 63/2013 of 27 August 2013).<sup>149</sup>

Article 492(2)(f) of the Labour Code also states that collective agreements should include mechanisms for conciliation (Articles 523 *et seq.*), mediation (Articles 526 *et seq.*) and arbitration (Articles 529 and 506 to 511) in labour disputes.

In addition, according to Article 526(2) and (3) of the Labour Code,

‘in the absence of conventional regulation, mediation may take place: a) by agreement of all parties, at any time during the conciliation; or b) at the initiative of one of the parties, one month after the beginning of conciliation, through communication in writing to the other party.’

There is also a public system of mediation in labour law, established under the Protocol of 5 May 2006 between the Ministry of Justice and the main workers’ confederations.

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<sup>149</sup> Labour Procedure Code (*Código de Processo do Trabalho*), available at: [www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=487&tabela=leis&so\\_miolo](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=487&tabela=leis&so_miolo).

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

#### Administrative procedures and administrative courts (for the public sector)

For public employees, the law provides a system of internal (mostly hierarchical) administrative appeals that, once exhausted (if this exhaustion is established in law), allows public employees to challenge final decisions taken by public bodies before the administrative courts (Article 4(3)(b) of Law 13/2002 of 19 February 2002 (Law on the Statute of Administrative and Tax Courts)).

Both arbitration and mediation constitute options for dispute resolution for public employees (Article 180(1)(d) and Article 87-C of Law 15/2002 of 22 February, Law on Procedure in Administrative Courts). There is a institutional Centre for Administrative Arbitration (Article 187 of Law 15/2002), which has mediation and arbitration powers in this field, if the parties wish to take that route.<sup>150</sup>

#### Criminal law procedures

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

Procedures for mediation in criminal law are currently implemented by the Ministry of Justice under a public system, established in Law 21/2007 of 12 June.

#### Civil law procedures

If questions of non contractual and contractual responsibility arise from discriminatory behaviour, the competent action for damages will be directed to the judicial courts. Suspension of the instance is possible in the case of mediation, according to Article 273 of the Civil Procedure Code; this is, however, not frequent in Portuguese judicial courts.

#### Administrative procedures (for the private sector)

ACT<sup>151</sup> is responsible for monitoring the enforcement of Labour Code provisions on equality and non-discrimination, investigating any complaints arising from infringement of these provisions and imposing administrative sanctions for such violations as set out in the code.

It should be stressed that ACT has played a useful role in combating discrimination on the grounds of nationality and, in some cases, disability.

In the event that ACT decisions are challenged, court proceedings are initiated. In this case, information in Braille should be provided, as well as sign language interpreting if necessary. There are no specific rules for the courts and ACT on dealing with individuals with learning disabilities.

In specific areas where independent administrative authorities have been established, they have the competence to regulate the market and therefore also to prevent and to pursue

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<sup>150</sup> See Centre for Administrative Arbitration (Centro de Arbitragem Administrativa) website, available at: <https://www.caad.org.pt/administrativo>.

<sup>151</sup> Decree-Law 167-E/2013, 31 December 2013, entered into force on 1 January 2014, available at: [www.act.gov.pt/\(pt-PT\)/SobreACT/QuemSomos/Missao/Documents/Decreto-Lei\\_167\\_c\\_2013.pdf](http://www.act.gov.pt/(pt-PT)/SobreACT/QuemSomos/Missao/Documents/Decreto-Lei_167_c_2013.pdf). See also Implementing Decree 47/2012, 31 July 2012, available at: <https://dre.pt/application/dir/pdf1sdip/2012/07/14700/0395903962.pdf>.

instances of discrimination or discriminatory practices. This is the case with the Health Regulation Authority (Autoridade Reguladora da Saúde) according to Decree-Law 126/2014, 22 August, Article 12(b).

#### Mediation in areas outside employment

In the areas covered by Law 93/2017, Article 11 governs the possibility of mediation, at the request of the parties or initiated by CEARD, with the consent of the offender and the victim (Article 11 of Law 93/2017). However, mediation is never mandatory in Portugal (according to Article 4 of Law 29/2013 of 19 April)<sup>152</sup> and CEARD may only refer the parties to mediation and not assign to itself, or to some of its members, the role of mediator (Article 8(2)(c) of Law 93/2017).

According to these rules, the mediator shall be an independent and impartial third person whose main function is the facilitation of communication, chosen by agreement between the parties and qualified by a mediation course in the criminal area taught by an entity certified by the Ministry of Justice, and the mediation procedure must be fast and involve the minimum number of sessions possible.

In Portugal, mediation covers all aspects of social life and law, so it is also open to all discrimination grounds (naturally as long as the request does not entail concluding an agreement that affects 'non-transactionable' personal interests (Article 11 of Law 29/2013 of 19 April).

In addition, since mediation is explicitly provided for in Law 93/2017 of 23 August, it is naturally applicable to all the grounds it covers: race or ethnic origin, colour, nationality, ancestry and place of origin.

However, there is no data on mediation on discrimination issues, for two reasons: 1) the confidentiality of the procedure itself; 2) and the fact that CEARD does not provide any information on the number of discrimination claims that it has referred to mediation.

On a related note, there is, however, some qualitative and quantitative information on intercultural mediation (mostly with Roma communities and in an educational context)<sup>153</sup>.

In addition, in the biggest Portuguese towns, there are Courts of the Peace (*Julgados de Paz*), which can also work in mediation.

Within the Court of the Peace, voluntary mediation is one of the steps in the procedure. Once a case is started, a pre-mediation session takes place, conducted by a specialised mediator. This session aims to explain the mediation process to the parties and check the parties' availability for resolving their dispute by mediation (Article 49 and 50 of Law 78/2001 of 13 July). In this session, parties will decide if they want to try to solve their cause by Mediation or if they will assign the dispute to the Judge of the Peace. In the event of parties quitting the mediation procedure (or not accepting the use of mediation), the dispute will be decided by the Judge of the Peace (Article 56 of Law 78/2001). This decision has the same validity as the decisions of every other national court (Article 61 of Law 78/2001 of 13 July).

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<sup>152</sup> Law that establishes the general principles applicable to mediation in Portugal, as well as the legal regimes for civil and commercial mediation, mediators and public mediation, available at: <https://dre.pt/dre/detalhe/lei/29-2013-260394>.

<sup>153</sup> See, for instance, the constitution of 12 teams of intercultural mediators: (<https://www.acm.gov.pt/-/-a-mediacao-intercultural-e-uma-ferramenta-fundamental->).

### Ombudsman

According to Article 23(1) of the Constitution, citizens may submit complaints against actions or omissions by the public authorities to the Ombudsman (Provedor de Justiça), who will assess them without the power to take decisions and will send the competent entities and bodies the recommendations needed to prevent or make good any injustices. The Ombudsman's work is independent of any non-judicial or judicial remedies provided for in the Constitution or the law. The entities, bodies and agents of the public administration must cooperate with the Ombudsman in the fulfilment of its mission.

The Ombudsman has paid special attention to discrimination cases, but has no decision-making powers in the event of a dispute nor any powers to impose fines. However, its institutional role, its power to issue recommendations and its particular link to the Portuguese Parliament make it a valuable tool in promoting equality.

### Action by the Commission for Equality and Against Racial Discrimination

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

For offences committed under Law 93/2017, the President of CEARD has the authority to initiate an administrative procedure. The decision, including the application of penalties and the level of the fine, is the responsibility of the Permanent Commission of CEARD.

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

#### b) Barriers and other deterrents faced by litigants seeking redress

For all the judicial procedures mentioned above, the victims must instruct a lawyer and advance some funds. They are, however, entitled to legal assistance (*apoio judiciário*) if they do not have sufficient financial means to cover a lawyer's fees and litigation costs. This also applies to foreign nationals. However, the length and complexity of the procedure may act as a deterrent to those seeking redress.

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

In criminal cases, there is no time limit for mediation procedures to start if the agent and victim agree in resorting to this mechanism – Article 3(2) of Law 21/2007 (there is only the stipulation that the case must be concluded within three months under Article 5(1) of Law 21/2007 of 12 June 2007, which establishes the penal mediation process).

Cases can be brought within a period of up to one year after the employment relationship has ended (Article 337(1) of the Labour Code).

In procedures to impose fines, the case must have been initiated, according to Decree-Law 433/82 on General Rules on Minor Offences (Article 27), within a period of one, three or five years from the date that the offence occurred, depending on the seriousness of the offence.

As mentioned above, employees may benefit without cost from the support of the Public Prosecutor and Authority for Working Conditions (ACT), and they may also benefit from legal aid.

The most common factor acting as a deterrent is the length of the procedure and the difficulty of obtaining evidence.

Mediation can therefore be used as a means to overcome the barriers presented by judicial and administrative procedures. Besides private mediation, there are several centres for mediation and arbitration in consumer law and housing administration disputes. In addition, there are mediation services within the ambit of the Justices of the Peace that provide a institutionalised form of community justice, which aims to allow for the civic participation of those concerned and to encourage the fair resolution of disputes by agreement of the parties.

Nonetheless, the use of these mechanisms is still very scarce in Portugal, since they are not widely known and trusted.

c) Number of discrimination cases brought to justice

In Portugal, there are no available statistics on the number of cases related to discrimination that are brought to justice. However, under Article 8 of Law 93/2017, it is CEARD's duty to prepare and publicise an annual report on the situation of equality and discrimination on the ground of race or ethnic origin in Portugal. The report gathers statistical and administrative data related to racial and ethnic discrimination, including administrative procedures.

The latest available report of the Commission for Equality and Against Racial Discrimination on Equality and Non-Discrimination regarding racial and ethnic origin, colour, nationality, ancestry and territory of origin is from 2020 and will be discussed later on in this report.<sup>154</sup>

d) Registration of national court decisions on discrimination cases

In Portugal, discrimination cases are not registered as such by national courts. Nonetheless, Article 15(4) of Law 93/2017 establishes that civil liability condemnatory decisions should, after they become *res judicata*, be published on the website of the HCM for a period of five years, including, as a minimum, the identification of the legal persons convicted, information about the type and nature of the discriminatory practice and the compensation fixed. In addition, Decree-Law 46/2006 establishes that civil liability condemnatory decisions, after becoming final and binding, will be mandatorily published at the expense of those responsible in one of the daily periodicals with the greatest circulation in the country, by means of an extract from which only the facts evidencing the discriminatory practice on the grounds of disability, the identity of the offended and of those convicted, and the compensation fixed, shall be stated. The inclusion of the identity of the offenders will depend on their consent (Article 7(3)(4)).

Since seldom judicial cases exist, instances of such registration and publicity are so far non-existent.

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

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Portugal, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

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<sup>154</sup> Available at: <https://www.cicdr.pt/documents/57891/0/Relat%C3%B3rio+Anual+2019+-+CICDR/4cce326c-2913-40c1-8104-5280d2a24281>.

## Associations

According to Article 12(1) of Law 93/2017, associations with the objective of combating discrimination based on the ground of race or ethnic origin, nationality, ancestry and place of origin have the right to engage in judicial procedures on behalf of the interested persons, with their approval.

Under national law, associations have to be incorporated, with specific aims listed in their by-laws. They must aim to protect people against discrimination or protect fundamental rights in general. There are no membership or permanency requirements. 'Legitimate interest' is proven by the aims of the associations as contained in their by-laws.

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

The victim's authorisation must be given in writing. In the case of minors or persons under guardianship, the authorisation of their parents or guardian is required.

Action by all associations is discretionary. They decide what to do and in which cases to intervene.

In addition, Article 15(1) of Law 46/2006 stipulates that associations for persons with disabilities and other similar organisations defending the rights and interests of persons with disabilities have the right to intervene in support or on behalf of a complainant in his or her respective legal proceedings. Such organisations have the right to monitor administrative procedures that may culminate in a fine for any discriminatory act referred to in Law 46/2006. Where a crime has been committed against a person with disabilities, these organisations have the right to assist in subsequent criminal proceedings. The application of this law is monitored by the INR.

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

In cases of minor offences, these organisations have the right to denounce the discriminator and file a complaint with CEARD and the HCM. Individual complainants need be identified only if this is necessary to substantiate the complaint.

## Trade unions

Trade unions are entitled under national law (Article 5 of the Labour Procedure Code, Decree-Law 480/99 and Articles 5 and 8 of Law 3/2011) to act on behalf of victims of discrimination.

It is also possible for trade unions to engage in some cases on behalf of victims of discrimination in judicial or administrative procedures under the Labour Code and the Labour Procedure Code.

Article 5(2)(c) of the Labour Procedure Code (*Código de Processo do Trabalho*) states that trade unions may file actions to represent members who authorise them to do so in cases related to a general violation of individual rights of an identical nature. Article 5(3) states that authorisation is presumed if the member does not demonstrate any opposition after being informed by the trade union of its intention to file the action.

Within companies, trade unions represent only their members, but in practice they are often accepted as competent to represent any worker.

Members of trade unions are entitled to free access to legal representation. The Public Prosecution Service represents all workers in cases before the labour courts.

Article 9(2) of the Employment Equality Directive is covered by Article 477(d) of the Labour Code, but only trade unions have the right to intervene in defence and protection of their members.

Furthermore, Article 443(1)(d) of the Labour Code grants legal standing to trade unions in administrative proceedings, imposing fines in cases of violation of the anti-discrimination rules of the Code, with the right to file an appeal or to answer an appeal by the person found guilty. Article 5 of the Labour Procedure Code allows the intervention of trade unions in employment cases. Although membership is a necessary condition for trade union standing, this is not monitored, which means that a trade union may also intervene in cases in which the worker is not a member of the union.

#### NGOs

NGOs working in the anti-discrimination field focus on the area or areas of discrimination in which they have expertise at national, regional or local level – for example, race, religion, sexual orientation or age – and are entitled to act on behalf of the victims of discrimination (Article 7 of Law 3/2011). Some NGOs that deal with immigrants or specific groups focus on their own communities. There is a wide range of NGOs in Portugal, with some of them being active in ethnic issues in particular or in working with certain communities (such as the Romani community).

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

Article 8 of Law 3/2011 states the following:

‘Legal standing: organisations whose purpose is the defence or promotion of the rights and interests of individuals against discrimination regarding access to employment, training or to the conditions for the provision of self-employment or employment, have legal standing to intervene on behalf of the person concerned, provided that:

- a) the associations explicitly include protection of the specific interests in their assignments or by-law objectives; and
- b) there is express authorisation from the person represented.’

Article 55(1)(f), in connection with Article 9(2) of the Code of Procedure in Administrative Courts, grants legal persons, including NGOs whose aim is to protect a certain general interest, the option of intervening in administrative procedures and subsequently the right to appeal to the administrative courts if they consider it necessary. However, there do not appear to be many opportunities to use this provision in cases related to discrimination, as it is intended to cover interventions in areas such as public health, the environment, town and country planning, quality of life, cultural heritage and the property of the state, the autonomous regions and local authorities, and also to promote the enforcement of relevant court decisions.

According to Article 68(1)(2) of the Criminal Procedure Code, any person may bring proceedings in the case of crimes of discrimination, as set out in Article 240 of the Criminal Code. This provision covers both associations and natural persons.

There are no special rules on shifting the burden of proof.

- b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Portugal, associations, organisations and trade unions are also entitled to act in support of victims of discrimination.

Associations are entitled to act in support of victims of discrimination under Article 12(1) of Law 93/2017.

Trade unions are entitled to act in support of victims of discrimination (Article 5 of the Labour Procedure Code, Decree-Law 480/99 and Articles 5 and 8 of Law 3/2011).

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

The NGOPDs (Non-Governmental Organisations for Persons with Disability) and all organisations defending and promoting the interests of persons with disabilities have legitimacy to intervene in support of the interested party (Article 15(1) of Law 46/2006).

More specifically, NGOs that deal with persons with disabilities (NGOPDs) are entitled to act in support of victims of discrimination, according to Article 5(2) of Decree-Law 106/2013, which defines the statute for NGOPDs.

Article 5(2) of this Decree-Law provides that, where crimes have been committed against persons with disabilities, perpetrated on the ground of disability, NGOPDs are entitled to assist and support victims in criminal procedures.

- c) *Actio popularis*

In Portugal, national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

According to Article 52(3) of the Constitution and Law 83/95,<sup>155</sup> *actio popularis* in both administrative and judicial procedures is admissible in Portugal in respect of diffuse interests. The wording of those Articles seems to be narrow (Article 1(2) of Law 83/95 refers to public health, environment, quality of life, consumer protection, cultural heritage and public property, merely as exemplification. However, the remit has been amplified by legal doctrine to cover other grounds, such as non-discrimination, that require collective action.

Under Article 12(1) of Law 93/2017, associations may act in support of rights and collective interests. This Article stipulates: 'Associations and non-governmental organisations whose statutory object is essentially aimed at preventing and combating discrimination on the grounds referred to in Article 1 shall be legitimately entitled to propose and intervene, either in representation or in support of the person concerned and with his or her consent, or in defence of collective rights and interests.'

Under Article 31 of the new Civil Procedure Code, they can act in *actiones populares* when their aim is to protect unspecified persons or interests against discrimination or to protect fundamental rights. Article 31 also allows all citizens, associations and foundations, as well as the Public Prosecution Service, to have standing to intervene and initiate actions in order to protect general interests.

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<sup>155</sup> Law 83/95 (Law on Procedural Participation and Popular Action), 31 August 1995, available at: [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=722&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=722&tabela=leis).

*Actio popularis* in civil cases is permitted for NGOs only if their by-laws state the protection of the concerned interest as an objective.

The prosecution of hate crimes by NGOs is considered an *actio popularis* if no specific victim exists.

In labour law, under Article 5(1) of the Labour Procedure Code, trade unions can intervene to protect individual rights in general without there being an identified victim. They may use all types of proceedings available in the code and the types of remedies specified by the Labour Procedure Code.

In housing, Law 83/2019 introduced the possibility of using *actio popularis* (Article 60(2)(a)).

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

There are no rules with regard to shifting the burden of proof.

d) Class action

In Portugal, national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

The laws distinguish between *actio popularis*, where no specific victim exists, and class actions, where there are a number of complainants, and establish different conditions for each of them.

Class actions are possible in civil, administrative and labour procedures.

In labour law, under Article 5(2) of the Labour Procedure Code only trade unions can intervene to protect individual rights in class actions. They may bring class actions under Article 5(2) of the Procedure Code, which states:

‘Legitimacy of trade unions and employers’ associations

1. Trade unions and employers’ associations have standing as claimants in proceedings concerning rights relating to collective interests they represent.
2. Trade unions can also exercise the right of class action on behalf of workers and replacement as authorised:
  - a) In proceedings relating to measures taken by the employer against employees who belong to the governing bodies of the trade union or any office in this exercise;
  - b) In proceedings relating to measures taken by the employer against its members who were elected as workers’ representatives;
  - c) In class actions for the violation as a matter of generality, individual rights of a similar nature of their associated workers.’

Trade unions may use all types of proceedings available and the types of remedies provided by the Labour Procedure Code.

There are no specific rules concerning the shifting of the burden of proof for class actions.

Trade unions and NGOs also have the right to act on behalf of one or more complainants. Class actions, in the sense of collective actions (actions with several complainants, functioning on the opt-in model), are possible in civil and administrative law.

- Law 83/95 of 31 August 1995 (People's Civil Action – *Acção Popular Civil*) covers some kinds of class action;
- Article 55(1)(f) and 9(2) of the Code of Procedure in Administrative Courts grants 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)**

In Portugal, national law requires a shift in the burden of proof from the complainant to the respondent.

According to Article 25(5) of the Labour Code, it is for the person who considers himself or herself to be discriminated against to substantiate the occurrence of the alleged discrimination, only by naming the worker or workers he or she feels are, have been or would be treated more favourably. It is for the employer to prove that differences in treatment are not due to any of the prohibited grounds of discrimination. This therefore leads to an inversion of the burden of proof, since the employer has a duty to prove that the differences are not based on any of the factors referred to in Article 24(1).

This provision applies to all the grounds of discrimination mentioned in Article 24(1) of the Labour Code.

A presumption of discrimination is made once the employee can demonstrate the existence of a discriminatory factor and of facts that allow for such a presumption to be established. It is then up to the employer to prove that his or her actions are not to be considered discriminatory.

The law has a restrictive requirement in that the rule on the shifting of the burden of proof may benefit the worker only when, besides invoking an unfavourable difference of treatment, they also invoke and show elements related to the ground of discrimination that they consider to be the origin of the different treatment.

The worker must indicate in their claim which ground is related to the difference of treatment that they have suffered and must argue: a) a ground of discrimination, giving *prima facie* elements and b) a difference of treatment based on this ground. An example might be the argument: a) because he is of Roma origin, b) he has a lower wage than other colleagues.

If the complainant does not invoke a specific ground (according to Article 23 of the Labour Code) as the cause of the discrimination, the burden of proof is not shifted.

The complainant must establish a correlation between the ground of discrimination and the difference in treatment.

If no facts that can be integrated into one of these categories of discriminatory acts are claimed, the rule regarding the shifting of the burden of proof will not be applicable.

In the Porto Court of Appeal's decision of 23 November 2007, it reached the conclusion that the claimant (a blind person) did not demonstrate, with sufficient factual backing, that he had been discriminated against by a condominium administrator, therefore denying the possibility that the latter should be responsible for damages. Although the Court considered that it might have been desirable to have a more diligent administrator (one who would himself have corresponded by email with the claimant as the latter had requested, and not in writing), it decided that this carelessness in communicating with and providing

information to the claimant was not tantamount to discriminatory behaviour.<sup>156</sup> More recently, the Lisbon Court of Appeal, in its decision of 15 November 2020, asserted that if the different treatment is not based on a discriminatory factor, there is no burden of proof on the employer.<sup>157</sup> Indeed, no ground for discrimination existed in the case and, therefore, there was no reason to shift the burden of proof.

Indeed, the question of the *onus probandi* is almost uniformly addressed in the Portuguese case law. As indicated in the decision of the Supreme Court of Justice of 12 October 2011 (proc. 343/04.4TTBCL.P1.S1),<sup>158</sup> 'this Supreme Court when called upon to settle disputes in which none of the characteristic factors of discrimination (e.g., sex, age race, etc.), has uniformly held that in order to conclude that there is pay discrimination between workers that is an offence to the constitutional principles of equality/equal pay for equal work, it is necessary to prove that the various workers who are paid differently perform work that is the same in terms of nature (difficulty, arduousness and danger), quality (responsibility, exigency, technique, knowledge, ability, practice, experience, etc.) and quantity (duration and intensity)'. In addition, it is indicated that 'only if one of these (discriminatory) factors is alleged and demonstrated does the Law presume that the differentiated treatment resulted from it, in which case the burden of proof to the contrary falls on the employer, i.e. proof that the difference in treatment was not due to the factor indicated, but to legitimate reasons, among which are those related to the nature, quality and quantity of the work performed by the employees'. In this case, no discriminatory factor was alleged.

National law also requires a shift of the burden of proof from the complainant to the respondent in Law 93/2017 (Article 14(1)). That means that the victim of discrimination must present facts from which the occurrence of such discrimination may be inferred. It is up to the respondent to prove that the differences in treatment are not the result of any of the factors mentioned in the Law. The victim must demonstrate the act of discrimination and present facts to substantiate it. The defendant must show in turn that the differential treatment had no basis in race or ethnic origin, nationality, ancestry or place of origin.

Article 6(1) of Law 46/2006, which prohibits and punishes discrimination based on disability and on a pre-existing risk to health, provides that the victim of discrimination must present facts from which the occurrence of discrimination on the grounds of disability may be inferred. It is up to the respondent to gather means of proof that the differences of treatment are not based on any factors mentioned in Articles 4 and 5 (discrimination on the grounds of disability in work and in access to employment, in the access to and supply of goods and services, housing, education, sign language and transport).

By contrast, this principle does not apply to criminal procedures or to actions where, according to the law, it is up to the court or other jurisdiction to carry out the investigation.

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

In Portugal, there are legal measures for protection against victimisation.

Article 331(1)(a) to (d) of the Labour Code states that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation for a complaint against working conditions or for the (present) exercise, the past exercise or

<sup>156</sup> Porto Court of Appeal, judgment of 23 November 2007, procedure No. 2645/15.5T8GDM.P1, available at: <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/d599c71c6843caf0802581f40059c0c5?OpenDocument>.

<sup>157</sup> Lisbon Court of Appeal, judgment of 15 November 2020, procedure No. 11459/19.2T8LSB.L1-4, available at: <http://www.gde.mj.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2ef1e9322e49ddb68025863e005061e7>.

<sup>158</sup> Available at: <https://www.direitoemdia.pt/search/show/7d35bde971c449bf1a019c75d7444f22e6e19f8bd4bff304cd1dede48ee2ef29>.

the intention to exercise or invoke rights and guarantees on the part of the employee or if it is in retaliation for a complaint/testimony of harassment.

Based on these provisions (and also on the provisions set out in Articles 351(1)(3) and 381(b) of the Labour Code), any kind of victimisation is considered illegal under labour law.

Victimisation is clearly prohibited outside of employment for the grounds of race or ethnic origin. This is covered by Article 13 of Law 93/2017, which states that acts of retaliation are null and void. It does not expressly mention witnesses, but they must be considered to be protected.

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

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

a) Applicable sanctions in cases of discrimination – in law and in practice

### Administrative offences (*contraordenações*)

Racial discrimination in general leads to a summary administrative offence (*contra-ordenação*). Law 93/2017 states that discrimination is a summary offence punishable by a fine, without prejudice to civil liability or the application of other established sanctions.

According to Article 16(1) and (2) of Law 93/2017, fines may vary between one and 10 times the monthly value of the index of social support for individuals and between four and 20 times the same monthly value for legal persons.

If the offence results from the omission of a duty, the application of the sanction does not prevent the offender from carrying out this duty if it is still possible (Article 16(5) of Law 93/2017).

In the field of employment, according to Article 548 of the Labour Code, any violation of its provisions amounts to an administrative offence (*contra-ordenação*), for which an administrative fine (*coima*) can be imposed. Although these are administrative and not criminal sanctions, any dispute of their validity goes to civil rather than administrative courts.

The Labour Code classifies these administrative offences according to their degree of gravity as minor (*leves*), serious (*graves*) or very serious (*muito graves*) offences. A violation of the provisions on equality and non-discrimination is classified as a very serious offence. Other offences related to the application of the Employment Equality Directive may be classified as minor or serious offences.

Article 554 of the Labour Code establishes the maximum and minimum value of the fines, including for offences based on discrimination, which depends on the company's business volume, the offender's degree of guilt and the degree of seriousness of the infraction.

Article 24(1) of the Labour Code refers only to employers, but it is fair to assume that under Article 548 of the Code, everyone (not only employers) is liable to administrative sanctions if they violate the Code's provisions on equality and non-discrimination, as Article 548 refers to 'any person'.

The Labour Code specifically states that legal persons are liable to administrative sanctions. Employers are also responsible for the payment of administrative sanctions imposed on their subcontractors if they cannot show that they acted with proper care (Article 551(4)). A decision imposing an administrative fine for a violation of the provisions of the Labour Code on equality and non-discrimination can also be published (Article 562(3) and (4)).

With regard to sanctions for the violation of disability anti-discrimination provisions, the Labour Code specifies in Articles 548 to 555 offences that are considered to be very serious or serious in cases related to discrimination. It should be noted that the criteria that distinguish very serious, serious and minor offences are not clear or necessarily logical.

For instance, the Labour Code states in Article 85(3) that the violation of Article 85(1), which forbids discrimination against persons with disabilities, is a 'very serious offence'. However, in Articles 224(7) and 225(7), a violation of Articles 224(2)(4) and 225, which exempts workers with disabilities from night work, is a 'serious offence'.

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

Any discriminatory provisions included in an employment contract are, under Article 294 of the Civil Code and Article 121(1) of the Labour Code, considered null and void and can be declared so by the labour courts.

The sanctions provided by law are effective, proportionate and dissuasive.

#### Criminal sanctions

The Criminal Code covers discrimination based on almost every ground.

Article 240(1) imposes a punishment of imprisonment from one to eight years on anyone who establishes organisations or engages in organised propaganda activities that incite or encourage discrimination on the grounds of race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability.

Article 240(2) imposes a penal sanction of imprisonment from six months to five years on anyone who, in a public meeting, in writing intended for dissemination or by any other means of social communication, provokes acts of violence against an individual or a group of individuals on the grounds of their race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability.

Article 240(2) also imposes penal sanctions on anyone, in a public meeting, in writing intended for dissemination or by any other means of social communication, defames or insults an individual or a group of individuals on the grounds of their race, colour, ethnic or national origin, ancestry, religion, gender, sexual orientation, gender identity and physical or mental disability.

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

Under Article 132(2)(f) of the Criminal Code on homicide, motives based on hatred on the grounds of race, religious or political convictions, colour, ethnic origin or nationality, religion, gender, sexual orientation or gender identity 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 145(2) of the Criminal Code. There is no general rule stipulating that such motives constitute aggravating circumstances for all offences. This means that, for other offences, it is for the courts to

decide, on a case-by-case basis, whether racist motives constitute a circumstance that should be taken into account when sentencing the offender.

Articles 251 and 252 state that outrage (affronts and insults) and trouble and disorder affecting the normal provision of religious services are crimes punishable with imprisonment of up to one year, or with a daily fine up to 120 days. 'Daily fines' are fines of between EUR 5 and EUR 500, calculated on the basis of the income of the guilty party, as laid down in Article 47(2) of the Criminal Code. If they are not paid, these fines can be converted into prison sentences.

Article 253 criminalises violence or threats against funeral processions or ceremonies (*cortejo ou cerimónia fúnebre*), punishable with imprisonment of up to one year or a fine up to 120 days. This Article protects the religious ceremonies involved. Article 254 criminalises the desecration of any cemetery, which is punishable by up to two years' imprisonment or a daily fine of up to 240 days.

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

#### Civil sanctions

Civil damages can be awarded for all types of discrimination under the general principles of Articles 483, 484 and 496 of the Civil Code.

In labour law, it should be noted that Article 28 of the Labour Code expressly states that the occurrence of any discriminatory act gives the worker or job applicant concerned the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of civil law (i.e. Articles 483, 496, 799 and 800(1) of the Civil Code). Under Article 500 of the Civil Code (joint and several liability), in some cases the employer (if the perpetrator is not the employer) may also be sued for damages, together with the person who is held to be legally responsible for the discrimination.

Article 15 of Law 93/2017 also establishes that the discriminatory practice, by action or omission, shall confer on the aggrieved party the right to compensation for material and non-material damage, as a matter of extra-contractual civil liability. It adds that when establishing the compensation for non-material damage, the court shall take into account the degree of violation of the interests in question, the economic power of the person causing the damage and the conditions of the injured party. In contracts that contain discriminatory clauses, these shall be considered null and void and the aggrieved party shall have the right to alter the contract, without prejudice to compensation for extra-contractual civil responsibility. Liability is also encompassed in Article 7 of Law 46/2006.

There are no statutory limits for pecuniary or non-pecuniary (moral) damages.

In multiple discrimination cases, the damages could be higher, taking the aggravated conduct of the perpetrator into account. As far as the authors of this report are aware, there is no case law applying this increase in damages.

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

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

b) Compensation – maximum and average amounts

There is no ceiling on the amount of compensation that can be awarded as civil damages. No information is available regarding the average amounts of compensation awarded to victims of discrimination.

c) Assessment of the sanctions

There is no information available on the amount of compensation awarded to victims. No court cases on this issue have been reported in the jurisprudence websites or in legal books.

In conflicts governed by the Labour Code, compensation is awarded – for example, in the case of dismissal. Payments normally correspond to the amount normally paid for unjustified dismissal.

The authors have not found any court case indicating the amount of compensation awarded, and there are no studies nor information available on the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive.

In theory, sanctions should be effective, dissuasive and proportionate. In practice, they continue to be seldom sought or applied.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The specialised body for the promotion of equal treatment with regard to racial and ethnic discrimination is the High Commission for Migration (HCM) assisted by the Commission for Equality and Against Racial Discrimination (CEARD). CEARD is an organ within the HCM but it has its own competencies under the law.

It should be mentioned that the mandate of the HCM seems to be broader than that of CEARD, since Article 3 of Decree-Law 31/2014 refers also to religion, a criterion that is absent from Law 93/2017.

Indeed, according to Decree-Law 31/2014, which approves the organic of the HCM, its mission and attributions are as follows: 'collaborate in the definition, execution and evaluation of public, transversal and sectorial policies regarding migration, relevant for the attraction of migrants in the national, international and Portuguese-speaking contexts, for the integration of immigrants and ethnic groups, in particular the Roma communities, and for the management and valorisation of diversity among cultures, ethnicities and religions' (Article 3).

The HCM is a public institution integrated into the Presidency of the Council of Ministers, with administrative and financial autonomy and its own assets.

The HCM carries out the duties assigned to it by the Presidency of the Council of Ministers under the supervision and authority of the Prime Minister or another member of the Government working within the Presidency of the Council of Ministers (Article 1(2) of Law 31/2014).

It is composed of several specialist organs such as the Council for Migration, the Consultative Council for the Integration of Roma Communities, and the Commission for Equality and Against Racial Discrimination (CEARD), as well as observatories (for Roma communities and for migration).<sup>159</sup>

The HCM is therefore assisted by CEARD (among other organs), which is a consultative organ within the HCM, but which also has its own competences in accordance with Law 93/2017.

CEARD underwent a restructuring in accordance with Law 93/2017.<sup>160</sup> The Law, which entered into force on 1 September 2017, establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, nationality, ancestry<sup>161</sup> and place of origin<sup>162</sup> (Article 29).

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

CEARD promotes equality and non-discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin (Articles 1 and 8(1) of Law 93/2017), covering all

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<sup>159</sup> See more information at: <https://www.acm.gov.pt/acm/o-acm>.

<sup>160</sup> Law 93/2017, 23 August 2017, available at: <https://dre.pt/application/conteudo/108038372>.

<sup>161</sup> 'Ancestry' means family origin.

<sup>162</sup> 'Place of origin' means place of birth.

the areas that fall under the scope of the Racial Equality Directive and work at national level.

The competences referred to in Article 13(2) of the Racial Equality Directive are therefore currently exercised by the HCM, assisted by CEARD. This means that the public institution broadly responsible for these competences is HCM, but most of them, according to Law 93/2017, are exercised through its organ: CEARD.

Specifically on the competences of the HCM, these are laid down in Decree-Law 31/2014. Under Article 3 on the purpose and powers of the High Commission, its competences are as follows:

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

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

It has commissioned academic experts to conduct surveys on discrimination and related issues and has set up the Observatory for Immigration (Observatório da Imigração),<sup>163</sup> which is composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

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

- to coordinate and chair CEARD and its Permanent Commission;
- to represent the High Commission;
- to supervise all HCM departments;
- to give full technical and administrative support to the installations and functioning of CEARD.

CEARD, on the other hand, has its composition (Article 7) and competencies (Article 8) defined in Law 93/2017, as follows:

'1 - The Commission shall promote equality and non-discrimination on the basis of the factors listed in Article 1.

2 - For the purposes of the preceding paragraph, it is incumbent upon the Commission, namely

- (a) Approve its rules of procedure, which shall be approved by the member of the Government responsible for the area of citizenship and equality;
- b) Collect all information concerning discriminatory practices and the application of the respective sanctions
- c) Make public, through all means at its reach, the cases of effective violation of this law and in the terms defined herein
- d) Recommend the adoption of the legislative, regulatory and administrative measures it considers appropriate to prevent, prohibit and combat

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<sup>163</sup> See Observatory for Immigration (Observatório da Imigração) website, available at: <https://www.om.acm.gov.pt/>.

- discrimination on the basis of the factors indicated in Article 1 and make recommendations to the Government on any related matters
- (e) propose measures to abolish laws, regulations and administrative provisions which are contrary to the principle of equality and non-discrimination
  - (f) promoting studies and research on discrimination on the grounds referred to in Article 1
  - (g) providing victims of discrimination with the information necessary to defend their rights
  - (h) refer the parties, with their consent, to mediation processes, without prejudice to any extra-judicial means of conflict resolution which are compulsory by law
  - i) Receive complaints and open the respective administrative infraction proceedings;
  - j) Request information and opinions, as well as to carry out the evidentiary procedures it deems necessary, from the police authorities or other organs or services of the direct or indirect administration of the state, the autonomous regions or the local authorities, for the purposes of conducting administrative infraction proceedings
  - k) Decide and apply fines and accessory penalties in the context of administrative offence proceedings;
  - l) Articulate with the competent bodies in the area of non-discrimination on the basis of factors other than those indicated in Article 1 in cases of multiple discrimination;
  - m) Drawing up statistical information on a periodic basis;
  - n) Promoting education, training, and awareness-raising on human rights and the prevention and combating of discrimination on grounds other than those listed in Article 1
  - o) Promoting the development of codes of good practice in the fight against discrimination on the grounds mentioned in Article 1

3 - Without prejudice to the provisions of the Commission's internal regulations, the Standing Commission shall have the powers laid down in sub-paragraphs h), i), j), k) and l) of the preceding paragraph, in accordance with this law.

4 - It is also incumbent upon the Commission to prepare an annual report on the situation of equality and non-discrimination on the basis of the factors indicated in Article 1, including information gathered on discriminatory practices and sanctions applied, as well as the assessment of the impact of measures taken on men and women, for this purpose in conjunction with the Commission for Citizenship and Gender Equality and the Commission for Equality in Labour and Employment.

5 - The report referred to in the previous number shall be submitted to the Assembly of the Republic and to the member of the Government responsible for the area of citizenship and equality by the end of the first quarter of each year, and then published on the website of the HCM, I. P.'

According to Article 23(1) of the Constitution, citizens may also submit complaints against actions or omissions by the public authorities to the Ombudsman, which will assess them without the power to take decisions and will provide the competent entities and bodies with recommendations for measures needed to prevent or make good any injustices. The Ombudsman's work is independent of any non-judicial or judicial remedies provided for in the Constitution or the law. Government entities, bodies and agencies must cooperate with the Ombudsman in the fulfilment of its mission.

The Ombudsman has paid special attention to certain discrimination cases. The issue of racial discrimination is accorded specific attention in the Ombudsman's inspections, such as those carried out in prisons, police stations and detention centres for foreign nationals not admitted into the country. To date, no particular areas giving cause for concern have been identified.

The Ombudsman has addressed a number of cases of racism, in particular against non-nationals and the Roma community, and has made recommendations to public authorities.

The National Institute for Rehabilitation (INR) is, according to Law 46/2006 (Article 8(1)), the governmental office, within the Ministry of Solidarity, Employment and Social Security, responsible for policies for, and the promotion of the rights of, persons with disabilities. Its mission is to ensure the planning, execution and coordination of national policies aimed at promoting the rights of persons with disabilities.

Decree-Law 34/2007 of 15 February, which regulates Law 46/2006, states that any natural or legal person who is aware of a situation that could be considered discriminatory practice on the ground of disability (or aggravated health risk) shall report it to one of the entities provided for (Article 5(1)), in which the National Institute for Rehabilitation is included. The complaints shall be sent to the competent authorities which proceed with the administrative procedures (Article 5(2)). When the handling of administrative procedures is finished, the competent authorities inform the National Institute for Rehabilitation of the decisions on complaints (Article 3(2)) and it produces an annual report on acts of discrimination on the grounds of disability or aggravated health risk. However, it has no sanctioning powers.

Under the terms of Article 15 of Decree-Law 164/2007 and Article 2(1) of Regulatory Decree 1/2012, the Commission for Citizenship and Gender Equality (Comissão para a Cidadania e a Igualdade de Género – CIG) is mandated to promote equality between men and women and also to promote gender equality more broadly. It took over this role from the former Commission for Equality and Rights of Women (Comissão para a Igualdade e para os Direitos das Mulheres), and it has also taken on the functions of the Commission for Equality in Employment and Labour (Comissão para Igualdade no Trabalho e Emprego – CITE) in respect of the promotion of equality.

b) Political, economic and social context of the designated bodies

Since Portugal has overcome its financial and public debt crises, there is more political support for the designated bodies (the HCM and CEARD). The current Government, due to its own political left-wing tendency is much more attentive to equality and non-discrimination issues in general and to the equality bodies in particular. However, the role of the equality bodies has not increased significantly in the past years.

To the knowledge of the authors of this report, there has been no political interference in the governance of the bodies, but this may be a result of the fact that these bodies have little relevance in the context of the promotion of equality and non-discrimination. However, legally ensuring the independence of the equality bodies might be a way to promote their visibility and their active role in social and political life. So far they are not independent bodies.<sup>164</sup>

During the years of the financial and public debt crises, all public bodies suffered budget cutbacks, and the HCM was no exception. However, there is no evidence that it experienced a disproportionate effect in comparison with other public bodies. In the general budget for 2020, the budget of the HCM increased by around 6 %, <sup>165</sup> up to the maximum limit of EUR 2 925 000 (Dispatch 5421/2020, 12 May 2020). For 2021, Dispatch 1171/2021 of 29 January maintained the budget at EUR 2 925 000.

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<sup>164</sup> See section 7(d)(ii) of this report.

<sup>165</sup> Dírca Lopes, 'Governo reforça em 6% orçamento do Alto Comissariado para as Migrações e viabiliza projetos sociais pro-imigrantes', *Jornale Agora*, 10 February 2020, available at: <https://jornaleagora.pt/governo-reforca-em-6-orcamento-do-alto-comissariado-para-as-migracoes-e-viabiliza-projetos-sociais-pro-imigrantes/>.

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

In contrast, there is rather less public debate about the equality bodies, due to their low profile. In practical terms, there is no support for nor hostility towards the equality bodies. Most people still do not know who they are or what they do; the complexity that characterises the bodies that promote equality and non-discrimination is no stranger to the Portuguese system.

When issues arise relating to equality and non-discrimination on the grounds of race or ethnic origin, it is the member of Government responsible for equality and citizenship or the members of Parliament who are more concerned with them. The equality bodies participate in this type of debate – when it exists – only as an accessory entity.

c) Institutional architecture

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

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

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

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

The fact that the designation, mandates and institutional framework of the equality bodies in Portugal have changed rapidly over the years also contributes to the lack of stability and general knowledge in respect of their existence and functions.

d) Status of the designated bodies – general independence

i) Status of the bodies

As a public institution, according to Article 4(1) of the Framework Law on Public Institutions (Law 3/2004),<sup>166</sup> the HCM is a public law legal person and has organs and its own assets. One of its organs is CEARD, as previously stated.

As in all public institutions, the governing body is designated by a joint ordinance (*portaria*) of the Prime Minister and the responsible member of the Government, following a proposal from the latter (Article 19(3) of Law 3/2004). Therefore, the High Commissioner is not elected.

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

The High Commission, assisted by CEARD (whose budget comes from the HCM), has no specific budget, as it is not an independent body.

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<sup>166</sup> Law 3/2004, 15 January 2004, available at: <http://data.dre.pt/eli/lei/3/2004/01/15/p/dre/pt/html>.

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

According to the Framework Law on Public Institutions (Article 34 of Law 3/2004) and the HCM statutes, included in the Administrative Rule (*Portaria*) 227/2015,<sup>167</sup> the HCM has the power to recruit and manage staff, which may be based on the Labour Code or on the General Regime for Contract Work for the Public Sector, as approved by Law 35/2014<sup>168</sup> (Article 34(1) of Law 3/2004). In both cases, under the terms of Article 34(3) of Law 3/2004, staff recruitment shall respect the following principles:

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

The HCM is under the direct authority of the Prime Minister or the responsible member of the Government. This means that the Commissioner is in direct contact with Government authorities and is in a position to monitor their activities closely and to influence them. The same applies to CEARD.

The governance structure of the HCM comprises a Directive Council, a Single Tax Supervisor and a Council on Migration (Article 4 of Decree-Law 31/2014). The Directive Council comprises the High Commissioner, who presides, and another member (Article 5 of Decree-Law 31/2014). The Single Tax Supervisor is the body responsible for monitoring the legality, regularity and financial and patrimonial management of the HCM (Article 7 of Decree-Law 31/2014 and Article 26 of the Law 3/2004 – the Framework Law on Public Institutions). The Council on Migration is the body that provides consultation and support and participates in the definition of the general lines of action of the HCM and the decision-making of the Directive Council, ensuring the participation and collaboration of public and private entities in the definition and implementation of migration policies (Article 8(1) of Decree-Law 31/2014).

CEARD, which specialises in equality and non-discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin, may function with an enlarged composition (with all members) or as a permanente or standing commission (Article 7(1) of Law 93/2017), composed of the President and two members designated by the commission (Article 7(3) of Law 93/2017).

CEARD is composed of the High Commissioner for Migration, who presides; one representative of each parliamentary group; one representative from the members of the Government responsible for internal affairs, justice, equality and citizenship, education, science, technology and higher education, employment, solidarity and social security, health and culture, as well as one representative of the regional government of the Azores and Madeira; two representatives of migrants' associations, anti-racist associations, human rights associations, trade unions and employers' associations; and one representative of Roma communities. Finally, it also includes three individuals of recognised merit, who are chosen by the other members (Article 7 of Law 93/2017).

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

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<sup>167</sup> Administrative Rule 227/2015 (Portaria 227/2015), 3 August 2015, available at: <http://data.dre.pt/eli/port/227/2015/08/03/p/dre/pt/html>.

<sup>168</sup> Law 35/2014, establishing the regime for employment relations in public services, 20 June 2014, entered into force on 1 August 2014, (last amended by Law 84/2015, 7 August 2015), available at: <https://dre.pt/web/guest/pesquisa-avancada/-/asearch/25676932/details/maximized?search=Pesquisar&sortOrder=ASC&tipo=%22Lei%22&types=SERIEI&numero=35%2F2014>.

Ordinarily, CEARD meets once quarterly, and extraordinarily whenever it is convened by the High Commissioner on the recommendation of the Permanent Commission. The HCM is responsible for ensuring the provision of technical support and administrative facilities, as well as other functioning facilities (Article 9 of Law 93/2017).

ii) Independence of the bodies

The independence of the equality body is not stipulated in law, since it is not an independent administrative entity. The HCM's powers are set out in Decree-Law 31/2014, and there is no guarantee of its independence from the Government. It must be emphasised that, from a legal point of view, the equality bodies are not independent, except for the Ombudsman, although they have a broad degree of autonomy in exercising their legal competences.

The High Commissioner and CEARD work under the authority of the Prime Minister. In practical terms, interference by political powers may be slight (or even non-existent, since the authors of this report could not find any reports on such influence), but it cannot be said that the bodies work independently of the Government.

In the opinion of the authors, the HCM (and naturally its organs) is not an independent body.

e) Grounds covered by the designated bodies

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

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

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

CEARD is the specialised body for equality and non-discrimination on the grounds of race or ethnic origin, nationality, ancestry and place of origin, according to its mandate as defined in Law 93/2017.

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

i) Independent assistance to victims

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

According to Article 8(2) of Law 93/2017, these competences are exercised by CEARD.

Although not much information is available on how the equality bodies exercise these competences, the Authors assume that they are exercised, both by the HCM and CEARD, in an autonomous way, without concrete interference from the Government.

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

## ii) Independent surveys and reports

In Portugal, according to the law, the HCM can generally carry out surveys and publish reports in issues relating to migration (in particular under Article 3(2)(i)(n) of Decree-Law 31/2014).

The HCM has previously commissioned academic experts to conduct surveys on discrimination and related issues and set up the Observatory for Immigration<sup>169</sup> and the Observatory for Roma Communities<sup>170</sup> which are composed of representatives of academic institutions and guarantees the scientific standards of the surveys.

With particular relevance to the scope of this report, CEARD also has competences to promote studies and research on discrimination based on the factors listed in Law 93/2017 (Article 8(2)(f)) and also to produce statistical information on a periodical basis (Article 8(2)(m)).

In addition, it is up to CEARD to prepare an annual report on the situation of equality and non-discrimination on the basis of the factors listed in Article 1, including information collected on discriminatory practices and sanctions applied, as well as the assessment of the impact of measures taken on men and women, for this purpose liaising with the Commission for Citizenship and Gender Equality and the Commission for Equality in Labour and Employment (Article 8(4)). The latest report is from 2020 and will be detailed in this report.

## iii) Recommendations

The HCM may generally combat all forms of discrimination based on colour, nationality, ethnic origin or religion, regardless of the environment in which they occur, through public awareness actions, campaigns or events (Article 3(2)(l) of Decree-Law 31/2014).

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

In 2019, CEARD made a public recommendation concerning the rise of xenophobic discourse in the media.<sup>171</sup> Other recommendations and communications are available online,<sup>172</sup> but it is fair to say that CEARD does not use these competences in a broad manner.

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<sup>169</sup> See Observatory for Immigration website, available at: [www.oi.acidi.gov.pt/](http://www.oi.acidi.gov.pt/).

<sup>170</sup> See Observatory for Roma Communities website, available at: <https://www.obciq.acm.gov.pt/>.

<sup>171</sup> Lusa, 'Comissão para Igualdade chama televisões e jornalistas face a aumento de discurso xenófobo', *Público Online*, 25 January 2019, available at: <https://www.publico.pt/2019/01/25/sociedade/noticia/comissao-igualdade-chama-televisoes-jornalistas-face-aumento-discurso-xenofobo-1859427>. Other recommendations and social interactions are available at: <https://www.cicdr.pt/-/outros>.

<sup>172</sup> See: <https://www.cicdr.pt/-/comunicados-cicdr>.

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

iv) Other competences

CEARD also has other competences, according to article 8 of Law 93/2017, for instance:

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

g) Legal standing of the designated bodies

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

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

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

Only associations and NGOs have legal standing to bring discrimination complaints on behalf of identified victims or non-identified victims and to intervene in legal cases concerning discrimination (Article 12 of Law 93/2017).

h) Quasi-judicial competences

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

The HCM and CEARD are not quasi-judicial institutions. They are public institutions with powers to conduct procedures in order to impose administrative fines, but this does not make them quasi-judicial institutions, since the term is used only for independent administrative entities (such as regulatory entities), which is not the case with the HCM and CEARD.

The decisions of CEARD's permanent commission are binding, and it has the power to impose fines and other administrative sanctions. Its decisions may be appealed in the courts. If they are not, they must be complied with, and execution procedures may ensue. The number of sanctions that has been imposed is nonetheless not very high, and in less serious cases a fine can be substituted by an admonition, which raises concerns regarding the effectiveness of such sanctions.

Some decisions from 2018 onwards are available online, as Article 8(2)(b) and (c), Article 15(4) and Article 24 of Law 93/2017 define that the HCM should maintain a record

of discriminatory acts and sanctions applied, in order to raise awareness among the public of matters of equality and non-discrimination and the prevention of discrimination. This record, maintained for a period of five years, should include at least the identity of the convicted person (if a natural or a legal person); information on the type and nature of the discriminatory practice; and the fines and ancillary sanctions imposed.

So far 28 cases have been reported, many of them related to acts of racism in sports and discriminatory slurs in other contexts (political, professional, neighbourhood). One of the cases concerned the organisation of classes in an educational facility according to discriminatory criteria, and another involved the placing of a ceramic frog at the entrance of a children toy's store (because this behaviour is widely understood in Portuguese society as a way of keeping Roma people out of an establishment).<sup>173</sup>

i) Registration by the bodies of complaints and decisions

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

According to the 2020 report of the Commission for Equality and Against Racial Discrimination on Equality and Non-Discrimination regarding racial and ethnic origin, colour, nationality, ancestry and territory of origin (the latest one available),<sup>174</sup> 655 complaints were received by CEARD, representing an increase of around 50.2 % compared with 2019, when there were 436 complaints. Of those complaints, 47.2 % concern situations directed at specific and determined persons, while 44.9 % concern discriminatory practices allegedly directed at communities or social groups. As far as the areas of discrimination are concerned, situations on the internet or social media are the areas with the highest number of complaints (48,7 %), followed by situations relating to the provision of goods and services. Of the 655 complaints received by CEARD, the vast majority were between private persons (67.3 %). Complaints against the public sector are less significant, at 7.9 %. Among the complaints received by CEARD in 2020, the expression that stood out as a basis for discrimination was 'Brazilian nationality' (21.5 %), followed closely by the expressions 'black/black skin colour' (15.3 %) and 'Roma ethnicity' (13 %). Of the set of complaints registered by CEARD, 18.2 % gave rise to administrative offence proceedings, and a significant number of complaints received (68.2 %) were subsequently forwarded to other entities due to their specific competence in the matter. During 2020, CEARD, through its Standing Committee, issued five condemnatory decisions; four resulted in the imposition of a fine and one in a mere admonition. It is also reported that three condemnatory decisions (five fines and two admonitions) were issued by the Prevention and Fight against Violence in Sports Authority (APCVD) in relation to the practice of racially or ethnically based discriminatory acts.<sup>175</sup>

j) Roma and Travellers

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

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

<sup>173</sup> See: <https://www.cicdr.pt/decisooes>.

<sup>174</sup> Available at: <https://www.cicdr.pt/documents/57891/0/Relat%C3%B3rio+Anual+2019+-+CICDR/4cce326c-2913-40c1-8104-5280d2a24281>.

<sup>175</sup> The 2021 report is not yet available.

For this purpose a Consultive Commission for the Integration of Roma Communities and an Observatory for Roma Communities was established.

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

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

## **8 IMPLEMENTATION ISSUES**

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

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

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

In respect of labour matters, Article 24(4) of the Labour Code imposes on employers a duty to display on their premises information on the rights and duties of workers in relation to equality and non-discrimination. However, the dissemination of information against discrimination in workplaces has not been very visible so far. The law does not specifically require employers to provide information in a form that is accessible to all persons with disabilities. Trade unions provide information in an accessible way.

The Directorate General of Employment and Labour Relations (Direcção Geral do Emprego e das Relações de Trabalho) provides information on its website ([www.dgert.msess.pt/](http://www.dgert.msess.pt/)) on national policy measures in this field, as well as on European Union actions to combat discrimination. It also makes the relevant documents available.

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

Several Government agencies and the HCM are engaged in dialogue with NGOs in order to promote the principle of equal treatment. Some NGOs – for instance, SOS Racismo, Solidariedade Imigrante and Associação Portuguesa de Deficientes – receive funds in order to develop activities in this area. NGOs are represented in several commissions.

The HCM promotes and engages in dialogue with NGOs that work with the Roma and with several Roma associations. This means that it is acquainted with the major problems that the Roma community still faces in Portugal.

Above all, the HCM's activities take the form of encouragement, in the sense of promoting the work of association leaders and making them responsible for the work carried out; increasing the level of dynamism of associations and their membership levels; and promoting adherence to what their communities require of associations, as well as acknowledging the difficulties experienced by the community in general. For instance, the HCM has established the CLAIM network (a local network for providing proximity support to immigrants) with 154 offices and a mobile CLAIM unit working in close association with municipal entities and associations.

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

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

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

- Commission for Religious Freedom (Comissão da Liberdade Religiosa - CLR). (Article 52 ff. of Law 16/2001, amended by Law 91/2009 – Law on Freedom of Religion);
- National Institute for Rehabilitation (Instituto Nacional para a Reabilitação – INR)<sup>176</sup> (Decree-Law 217/2007);
- National Council for the Rehabilitation and Integration of Persons with Disabilities (Conselho Nacional para a Reabilitação e Integração das Pessoas com Deficiências – CNRIPD) (Article 1 of Decree-Law 225/97);
- Permanent Council for Social Dialogue (Conselho Permanente de Concertação Social – CPCS) (Decree-Law 74/84);
- Economic and Social Council (Conselho Económico e Social – CES) (Article 92 of the Constitution).

The workers' commissions (*Comissões de Trabalhadores*), their coordinating commissions (*Comissões Coordenadoras*), trade unions and employers' organisations may advise on proposed legislation that affects the rights and duties of employers and employees, before it is approved (Article 470 of the Labour Code).

According to Article 471 of the Labour Code, the Permanent Commission for Social Dialogue, which is composed of representatives of trade unions, employers' organisations and the state, and is part of the Economic and Social Council, may also give advice on proposed legislation. These procedures are in accordance with Article 11 of Directive 2002/14/EC, which covers social dialogue.

#### d) Addressing the situation of Roma and Travellers

There is no specific body or organ appointed at a national level to address Roma issues. Nonetheless, within the national Roma communities strategy, an Observatory for Roma Communities was created under the scope of the HCM in order to further investigation, publications, events and partnerships in the field.

A number of Roma and non-Roma associations are attempting to build bridges between the majority in society and Roma communities, and they are actively looking for solutions to the main problems encountered by their communities all over the country. A Roma monitoring group (Consultive Council for the Integration of Roma Communities) was created, sponsored by the HCM, with the objective of running a cooperation and coordination platform to protect and support the Roma population as a whole, with information programmes to prevent children working as beggars.

Initiatives have been taken by NGOs and the IEFPP to train Roma – particularly younger members of the community – for employment. Racist prejudices still persist among certain employers, which mean that the Roma suffer racial discrimination in recruitment as well as in other spheres of social life. The ongoing programmes and initiatives tend to narrow this gap between the rest of the population and the Roma communities.

## **8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

#### a) Compliance of national legislation (Articles 14(a) and 16(a))

Portugal has taken the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

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<sup>176</sup> See: National Institute for Rehabilitation (Instituto Nacional para a Reabilitação) website, available at: [www.inr.pt/](http://www.inr.pt/).

This is especially true in the area of employment, but also in other fields of social and economic life such as housing, education and access to social advantages.

Alongside the fact that most of the framework legislation adopted over the past decade makes explicit reference to the principle of non-discrimination, Article 13 of the Portuguese Constitution provides the structural base for a full and all-encompassing legal framework against discriminatory behaviour.

According to Article 204 of the Constitution, all courts and tribunals must refuse to enforce any rules deemed to be unconstitutional. Therefore, all judicial organs may analyse the conformity of all kinds of behaviour with the non-discrimination principle.

It should be noted that Law 93/2017 adopted by the Portuguese Parliament was subject to a legislative procedure in which a technical note was produced (22 March 2017)<sup>177</sup> that assessed the need to comply with the EU's enforcement requirements. However, no thorough assessment of compliance with the Directives was done.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

All contracts, collective agreements and other rules that conflict with the principle of equal treatment can be declared null and void by the courts. Any discriminatory clause in such contracts that contravenes the provisions of the Labour Code is to be considered invalid.

Moreover, Article 7(2) of the Labour Code states that provisions contained in collective agreements that are already in force and contrary to the provisions set out in the Labour Code have to be replaced within one year of the enactment of the statute or be considered null and void.

Other provisions that may be included in future contracts, collective agreements, internal rules of undertakings, rules governing independent occupations and professions (if applicable) and rules governing workers' and employers' organisations, to the extent to which they may breach the equality and non-discrimination provisions of the Labour Code, will of course also be invalid. They are to be so deemed by those bound by them and can be so declared by any court, as provided for either by the general rules of contract law (e.g. Articles 285 *et seq.* of the Civil Code) or by the provisions of the Labour Code itself (under Article 478(1)(a) of the code, collective agreements cannot go against 'imperative legal provisions').

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<sup>177</sup> See: <http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a53556c4d5a5763765130394e4c7a464451554e45544563765247396a6457316c626e527663306c7561574e7059585270646d46446232317063334e68627938344d5463785a6d5a6c597930345a5751324c545268597a51744f4451794d4331694d4441344e5463304d5449784f4467756347526d&fich=8171ffec-8ed6-4ac4-8420-b00857412188.pdf&Inline=true>.

## 9 COORDINATION AT NATIONAL LEVEL

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

The Authority for Working Conditions, formerly the General Labour Inspectorate, deals with some anti-discrimination issues, but it does not have responsibility for coordination either. The same can be said for the National Institute for Rehabilitation.

Within the Ministry of Justice, the Legislative Policy and Planning Office (Gabinete de Política Legislativa e Planeamento – GPLP) is responsible for planning the implementation of directives and other EU instruments, but at a formal rather than substantive level. The Ombudsman, as an autonomous authority independent from Government, cannot exert any coordination over Government-based bodies

There are several municipal anti-racism and anti-discrimination plans in Portugal, which means that municipalities, at a local level, also have some competencies, albeit limited, with regard to non-discrimination.

Therefore, a variety of entities with somewhat fragmented responsibilities in the areas of equality and non-discrimination exist, and the coordination of their activities is not as clear as would be desirable, which runs contrary to the transversal and global nature of anti-discrimination policy.

Indeed, Portugal traditionally adopts a 'unitary' perspective – not intersectional – according to which each discriminatory factor is regulated by totally different entities, laws and policies.<sup>178</sup> It is mainly through obligations for sharing of data and information, as well by adopting plans that are under the same 'strategic umbrella', that coordination is achieved – at least to an acceptable level – in Portugal.

Concerning plans relevant to the scope of this Report, in 2018, the Council of Ministers adopted a resolution<sup>179</sup> to approve the strategy *Portugal + Equal – National Strategy for Equality and Non-Discrimination 2018-2030*, which is the main strategic instrument regarding equality and non-discrimination in Portugal. This strategy includes three plans for action.<sup>180</sup> The third plan concerns the fight against discrimination on the grounds of sexual orientation, identity, gender expression and sexual characteristics.

In 2020, the Resolution of the Council of Ministers 71/2020 of 15 September approved the 8th generation of the Choices Programme (*Programa Escolhas*) for the period 2021 to 2022, with the mission of promoting social integration, equal opportunities in education and employment, combating social discrimination, promoting civic participation and strengthening social cohesion. The programme is aimed at all children and young people, in particular those from backgrounds of socioeconomic vulnerability.<sup>181</sup>

Regarding specific anti-racism strategies, three strategies are now in place: 1) the National Plan to combat racism and discrimination 2021-2025; 2) the *National Roma Communities Integration Strategy 2013-2020*, and 3) the Plan for the Prevention of Manifestations of Discrimination in the Security Forces, which has a broader scope but integrates a particular focus on racism.

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<sup>178</sup> See Alba A., 'A introdução da interseccionalidade em Portugal: Repensar as políticas de igualdade(s)', *Revista Crítica de Ciências Sociais* [Online], 90, 2010, DOI : 10.4000/rccs.1760.

<sup>179</sup> Council of Ministers, Resolution 61/2018, 8 March 2018, *Diário da República*, Série I-A, No. 97, 21 May 2018.

<sup>180</sup> The first two plans of action are the plan to promote equality and non-discrimination between men and women, and the plan to combat violence against women and domestic violence.

<sup>181</sup> Available at: <https://dre.pt/application/conteudo/142870337>.

The 'National plan to combat racism and discrimination (PNCRD) 2021 - 2025 – Portugal Against Racism', was published by the Resolution of the Council of Ministers 101/2021 of 28 July 2021.<sup>182</sup> The resolution acknowledges the work of various civil society agencies on this important issue, and the contributions and recommendations of the Working Group for the Prevention and Combating of Racism and Discrimination (coordinated by ACM, the High Commission for Migration) and a related public consultation process. This is the first national plan on racism and discrimination, and was the result of intensive inter-sectoral collaboration. The document is organised around four transversal principles: deconstruction of stereotypes; coordination, integrated governance and territorialisation; integrated intervention in the fight against inequalities; and intersectionality. These principles cover 10 areas of intervention: governance, information and knowledge; education and culture; higher education; work and employment; housing; health and social action; justice, security and rights; participation and representation; sports; and media and digital.

The *National Roma Communities Integration Strategy 2013-2020* was prorogated by the Resolution of the Council of Ministers 154/2018 of 29 November 2018<sup>183</sup> and it is now applicable until 2022. This strategy is based on the guiding principles of interculturality, non-discrimination, cooperation and participation, territorialisation and equality between women and men and aims to strengthen knowledge about Roma people; promote inclusive citizenship and non-discrimination; reinforce intervention in intercultural mediation; promote equality between women and men in Roma integration measures; guarantee effective conditions of access to education, educational success and lifelong learning for Roma people; guarantee the conditions for full and equal participation of Roma people in the labour market and professional activity; ensure the conditions for effective equal access to adequate housing for Romani and Traveller people and guarantee effective conditions for health.

The 'Plan for the Prevention of Manifestations of Discrimination in the Security Force' is an internal plan that was announced by the Minister of Internal Administration on 19 March 2021 and is available online.<sup>184</sup> The plan was prepared by the General Inspection of Internal Affairs (IGAI), with participation from the National Republican Guard (GNR), the Public Security Police (PSP) and the Foreigners and Borders Office (SEF). According to the plan, a human rights officer will now be appointed in each of these police forces. The plan defines five strategic intervention areas: recruitment process; training; social networks; image of security forces; prevention and monitoring. In terms of recruitment processes, the plan reinforces communication strategies so that a greater diversity of candidates is recruited, in terms of both gender and ethnic-racial origin. The plan also defines 'good practices in the use of social networks by members of the security forces, related to the prevention of manifestations of discrimination'. Thus, police officers' social network profiles will be monitored to avoid 'hostile statements that incite hatred or discrimination against people or groups', and "offensive comments, in particular against people, groups, religions, political beliefs, including offensive comments based on in gender, sexual orientation, ethnic-racial origin, nationality or country of origin'.

Concerning disability, in April 2021, the Portuguese Government approved the *National Strategy for the Inclusion of Persons with Disabilities (2021-2025)*.<sup>185</sup> The Strategy reflects the commitments of the United Nations Convention on the Rights of Persons with Disabilities and shall allow for the launch of a set of measures, such as: the reformulation of the current regulatory framework whenever necessary; the reformulation of the disability assessment and certification system; a comprehensive diagnosis of persons with

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<sup>182</sup> See: <https://dre.pt/dre/detalhe/resolucao-conselho-ministros/101-2021-168475294>.

<sup>183</sup> See: <https://data.dre.pt/eli/resolconsmin/154/2018/11/29/p/dre/pt/html>.

<sup>184</sup> See: <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3dBOAAAB%2bLCAAAAAABAAzNDQxsQQAXM%2b51QUAAAA%3d>.

<sup>185</sup> Resolution of the Council of Ministers 119/2021, available at: <https://www.inr.pt/documents/11309/284924/ENIPD.pdf>.

disabilities through the development of systems for data collection and for monitoring indicators to support decision-making; interventions in public spaces to facilitate access for persons with disabilities; the adjustment of the training, employment and qualification systems for persons with disabilities; the development of innovative social services and community-based approaches; the participation of persons with disabilities in sport, culture and leisure activities; and the extension of the Support Model for Independent Living, which provides personal assistance to persons with disabilities.

## 10 CURRENT BEST PRACTICES

In the field of education, pupils with disabilities follow special programmes in basic and secondary-level schools that support mainstream education. In higher education, faculties have an admissions quota of 2 % of their total intake reserved for students with disabilities. In addition, scholarships for Roma students were established and reinforced in 2021.

Persons with disabilities are exempt from any fees in the national public health service (Serviço Nacional de Saúde – SNS), as long as they can provide proof of their disability. They are entitled to buy certain special means of transport (cars, wheelchairs) at reduced rates of tax. The Institute for Employment and Vocational Training may sponsor the adaptation of cars for persons with disabilities if they can prove that they need a car to carry out their work.

Generic NGOPDs (NGOs that represent persons with disabilities) are entitled to financial support through the INR.<sup>186</sup> The INR is a public institution, and funding therefore comes from the state budget according to the criteria for equality and equity set out in cooperation protocols adopted by the NGOPDs and the INR. After approval, the criteria are published on the INR website, and funding is subsequently awarded.

As far as minority ethnic groups are concerned, immigrants, especially newcomers, face competitive disadvantages or specific vulnerabilities that require effective positive action measures in order to achieve equality. To achieve such objectives, programmes and actions that allow immigrants to be properly received are being developed, such as the National Immigrant Support System, with initiatives such as the national immigrant support centres. These support centres combine the presence of the public bodies with which immigrants have to engage with a diversified set of support offices (dealing with family reunification, employment, legal support, and so on), which speeds up their access to fundamental rights. During the COVID-19 pandemic, support for immigrants, even those in irregular situations, was a priority of the Government, which decided to treat migrants as residents during the coronavirus crisis.<sup>187</sup>

The High Commission for Migration (HCM) also created a programme – the Support Programme for Immigrant Associations – which gives technical and financial support to immigrant associations, and has been running for several years.<sup>188</sup> The support to immigrant associations is assigned by agreements signed between the associations and the High Commissioner for Migration, based on projects submitted under the Programme of Support for Immigrant Associations (PAAI).

Regarding the potential for artificial intelligence and algorithms to lead to discrimination and alongside Law 27/2021 of 17 May 2021, which approves the Portuguese Charter of Human Rights in the Digital Era, a document produced by the Portuguese Administrative Modernisation Agency (AMA) was put out for consultation in December 2020, with a view to establishing a Guide for Ethical, Transparent and Responsible Artificial Intelligence.<sup>189</sup> This document resulted in the Resolution of the Council of Ministers 131/2021 of 10 September, which approves the *Digital Transformation Strategy for the Public Administration 2021-2026* and consequent Transversal Action Plan, in alignment with the execution calendar for the Recovery and Resilience Plan (PRR), which, in the second strategic line on data valorisation, requires that data have the necessary quality in order not to create, exclude or discriminate against fringes of the population.

<sup>186</sup> See Decree-Law 31/2012, approving the structure of the National Institute for Rehabilitation (*Lei orgânica do Instituto Nacional para a Reabilitação*), 9 February 2012, repealing Decree-Law 217/2007 of 29 May 2007, available at: <https://dre.pt/pesquisa/-/search/543729/details/maximized>.

<sup>187</sup> See: <https://www.acm.gov.pt/pt/-/covid-19-governo-regulariza-imigrantes-e-requerentes-de-asilo>.

<sup>188</sup> For 2021, see: <https://www.acm.gov.pt/-/programa-de-apoio-ao-associativismo-imigrante-2021-candidaturas-de-1-de-dezembro-a-4-de-janeiro-de-2021>.

<sup>189</sup> See: <https://tic.gov.pt/pt/web/tic/guia>.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives at the national level**

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

Portuguese legislation complies with the directives and sometimes goes beyond their scope.

### **11.2 Other issues of concern**

Other key issues of concern with regard to the implementation and practical application of the anti-discrimination directives at national level are:

- Age is an area in which it seems that the Portuguese legislator and the courts have not paid much attention to the novel CJEU case law that has brought the issue of age discrimination to light. In legislative terms, any explicit reference to age is absent from most of the anti-discrimination clauses in Portuguese law. The justification test used in courts in age discrimination cases equates to a mere reasonableness test, and does not therefore fulfil the need to control potentially discriminatory measures according to a structured analysis of legitimacy and proportionality.
- The difference between the written law and its practical effect. In Portugal, it is rather common to approve legislation that would be completely appropriate to achieve certain goals, but which, due to the country's financial and economic weakness, for instance, does not function properly. This applies in particular to the implementation of social rights. Nevertheless, in the past few years, there has been a considerable effort to render non-discrimination rights effective in both the public and private spheres.
- There are still barriers to access to justice that need to be overcome. The length of the procedures and the costs involved are two disincentives to accessing justice. Attempts should be made to turn the situation around – for instance, by involving NGOs and other associations in discrimination procedures and by resorting to more expeditious and equitable mechanisms such as mediation.
- The independence of the specialist bodies that deal with racial and ethnic discrimination has not been completely ensured. Nevertheless, the Law 93/2017 makes significant efforts to ensure that the specialist bodies conform to the powers envisaged in Article 13 of the directive and are therefore more active and visible to the public.
- Although instances of administrative and judicial vindication of discrimination claims are still scarce in Portugal, the tide seems to be turning, mostly with regard to administrative fines. This points to an increasing awareness of equality and non-discrimination rights, and to greater knowledge and functioning of the legal system in this area.
- A particular sign of change comes from recent judicial cases on discrimination on ethnic origin grounds. They show that ethnic tension is starting to be discussed more in legal fora and is not continuing to be as hidden as before, and also that courts are well-equipped to solve those cases.
- So far, no concrete issues of concern have been identified regarding the use of artificial intelligence in relation to the implementation of national legislation transposing the directives. However the fear that this may happen (and the desire that it should be avoided) is voiced in the Resolution of the Council of Ministers 131/2021 of 10 September, which approves the *Digital Transformation Strategy for the Public Administration 2021-2026*.

## 12 LATEST DEVELOPMENTS IN 2021

### 12.1 Legislative amendments

Law 27/2021 of 17 May 2021, which approves the Portuguese Charter of Human Rights in the Digital Era, is the first law of its kind. It regulates several matters related to the digital environment and includes several provisions that guarantee the right to non-discrimination in internet access, use and governance.

Law 75/2021 of 18 November 2021 strengthens access to credit and insurance contracts for people who have overcome or mitigated situations of aggravated health risk or disability. It prohibits discriminatory practices and enshrines the right to be forgotten, amending Law 46/2006 of 28 August 2006 and the legal framework for insurance contracts. Law 75/2021 has explicitly determined, among many innovations, that practices that discriminate between physical and mental or psychological health are forbidden in the conclusion, execution and termination of insurance contracts.

Law 85/2021 of 15 December 2021 prohibits discrimination regarding the eligibility to donate blood on the basis of gender identity, sexual orientation, gender expression and sex characteristics, and it promotes blood donation among young people by amending Law 37/2012 of 27 August 2012, which approves the Blood Donor Statute.

The Labour Code and the Criminal Code have also been amended several times over the years. The most recent amendment of the Labour Code, Law 1/2022 of 3 January 2022, follows two previous amendments in 2021. The Criminal Code was updated three times in 2021, most recently by Law 94/2021 of 21 December 2021.

### 12.2 Case law

There was some relevant case law in 2021 related to the grounds covered by this report, namely race or ethnic origin.

**Relevant discrimination grounds:** colour of skin, racial and ethnic origin, economic situation or social condition

**Name of the court:** Lisbon Court of Appeal

**Date of decision:** 14 September 2021

**Name of the parties:** *AZ, FC, HC, IC, JL (the Coxi family) v. André Ventura and the Chega Party*

**Reference number:** proc. N.º 8777/21.3T8LSB-7

**Link:** <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/0e71bdbb89eaa24a8025876000400276>

**Brief summary:** During a televised debate with Marcelo Rebelo de Sousa for the presidential elections in January 2021, the leader of Chega, André Ventura, showed a photograph in which the President of the Republic was accompanied by a group of Afro-descendent inhabitants of the Jamaica district of Seixal. During the debate, André Ventura said that Marcelo Rebelo de Sousa had preferred to go to that neighbourhood to socialise with 'bandits' instead of visiting police officers who had been attacked days before in the same area. Mr Ventura accused those groups of having come to Portugal 'to live on the welfare state'.

The Coxi family, which appeared in the photograph, filed a civil action against André Ventura and his party, asking the court to recognise the offences in relation to the right to honour and the right to image (as well as their discriminatory nature based on the colour of their skin and their socioeconomic situation) and to compel André Ventura and Chega to issue a public retraction, under penalty of EUR 750 per day. In addition, the family asked the Court to order Ventura to pay for the publication of the judicial decision in the media and to be fined EUR 5 000 for each time he makes any such statements in the future.

The Judicial Court of the District of Lisbon, in its judgment of 24 May 2021 in proc. 8777/21.3T8LSB, recognised 'the unlawfulness of offences to the right to honour and the right to image' of the Coxi family and ordered the defendants to make a 'written or oral' apology of 'public retraction' regarding the facts committed, which should be published by the media where the 'offensive publications of personality rights' were 'originally disseminated' and also on the Chega Twitter account. If they failed to do so within 30 days of the sentence becoming final, Ventura and the party would have to pay a penalty of EUR 500 per day of delay. In the decision, the judge also ordered André Ventura not to make 'statements or publications, written or oral, offensive to the good name' of members of the Coxi family in the future, under penalty of having to pay EUR 5 000 for each infraction.

However, the judicial decision did not specifically address the discriminatory nature of the statements – an issue raised by the complainants – since it considered that this was not the most relevant aspect of the case, nor did it appear clear from the process that such discrimination was necessarily determined by the skin colour or socio-economic status of the persons targeted.

Chega and André Ventura appealed the judicial decision, and the Lisbon Court of Appeal – while considering that the decision of the court of first instance was not null because the discussion on whether there had been discrimination based on skin colour and socio-economic status was not procedurally necessary to the decision taken – went on to state that it accepted the option assumed by the court *a quo* in so far as the imputed, and recognised, offences to the honour and the right to image of the claimants 'absorb the discriminatory aspect based on the colour of the skin and the socioeconomic situation of the claimants'.

The Court of Appeal continued by saying that 'The defendants used the photograph as a weapon of social segregation while the claimants, by consenting to its capture, aimed to give expression to an event (the visit of the President of the Republic) that would foster the social inclusion of the claimants and other inhabitants of the neighbourhood (see facts 1 to 3, 12, 14). It is worth remembering again that Portugal is a sovereign republic based on the dignity of the human person, with all citizens having the same social dignity and not being discriminated against because of their race, economic situation or social condition (see Articles 1 and 13, nos. 1 and 2 of the Constitution)'.

The Supreme Court of Justice confirmed this decision on 6 December 2021 and it became final. Ventura publicly stated that he would resort to the European Court on Human Rights.<sup>190</sup> No evidence of this complaint is yet to be found, however.

**Relevant discrimination grounds:** Ethnic origin, colour of skin, national origin

**Name of the court:** Lisbon Court of Appeal

**Date of decision:** 6 July 2021

**Name of the parties:** *SOS Racismo v. M. Fátima Bonifácio*

**Reference number:** proc. 5551/19.0T9LSB-5

**Link:** <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/53d43a27fb12dafc802587480047ae12>

**Brief summary:** In this case, SOS Racismo asked for the reopening of the instruction phase of a criminal procedure (an interlocutory decision) regarding an article published in the journal *Público* in 2017. Unlike what happened initially – in which the lower court decided to archive the inquiry – the Lisbon Court of Appeal decided to reopen the instruction phase with the reasoning that 'the statements made by the defendant, because they were made in a generalising manner, are directed at groups identified by ethnicity, skin colour or national origin – 'Africans' and 'gypsies' – and the characteristics ascribed to

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<sup>190</sup> See: <https://www.dn.pt/politica/ventura-recorre-para-o-tribunal-europeu-dos-direitos-do-homem--14388659.html>.

them translate into value judgments, such as and especially, 'they are not part of a thousand-year-old civilisational and cultural entity "which goes by the name of Christianity"'; they 'do not descend from the "Universal Rights of Man decreed by the Great French Revolution of 1789"'; 'gypsies are "unassimilable"', 'have a "dysfunctional way" of "behaving in supermarkets"', which "disrespects the most elementary rules of civility that preside over living in social housing estates and in public space in general"'; 'Africans and Afro-descendants also exclude themselves, possibly in a less aggressive way, from the national community. They hate gypsies. They constitute irreconcilable ethnic groups'; 'Africans are openly racist: they hate whites outright; and they hate each other when they come from rival tribes or "nationalities"'. From this the Court concluded that these generalisations revealed a manifestation of supposed inferiority of these groups in relation to another group that is supposedly more civilised, intellectually developed and with higher moral values. Therefore, the Court could not but 'conclude that this assessment is explicitly and unequivocally discriminatory and offensive to those groups identified as "gypsies" and "Africans", damaging to their right to equality, honour, and consideration'.

## ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

**Country: Portugal**

**Date: 1 January 2022**

### **Title of the law: Law 7/2009**

Abbreviation: Labour Code

Date of adoption: 12 February 2009

Entry into force: 1 May 2009

Latest relevant amendments: Law 1/2022, of 3 January 2022

Web link:

[http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1047&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1047&tabela=leis)

Grounds covered: ancestry, age, sex, sexual orientation, gender identity, civil status, family situation, economic situation, education, origin or social condition, genetic heritage, reduced capacity for work, disability, chronic illness, nationality, ethnic origin or race, territory of origin, language, religion, political or ideological convictions and trade union affiliation.

Labour law

Material scope: private employment

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate

### **Title of the law: Law 93/2017**

Abbreviation: establishing the legal regime of prevention, prohibition and combatting of discrimination on the ground of race/ethnic origin, nationality, ancestry and territory of origin

Date of adoption: 23 of August 2017

Entry into force: 1 September 2017

Latest relevant amendments: N/A

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

Grounds covered: race/ethnic origin, nationality, ancestry and territory of origin

Administrative law

Material scope: Social protection, social assistance, education, access to and supply of goods and services, housing, health and culture

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate, discrimination by association, and multiple discrimination and legal regime of administrative sanctions

### **Title of the law: Law 46/2006**

Abbreviation: N/A

Date of adoption: 28 August 2006

Entry into force: 29 August 2006, except the provisions that have budgetary implications

Latest relevant amendments: Law 75/2021, of 18 November 2021

Web link: <https://dre.pt/application/file/540732>

Grounds covered: disability

Civil/administrative/criminal law

Material scope: prohibits and punishes discrimination based on disability and on a pre-existing risk to health

Principal content: prohibition of direct and indirect discrimination, harassment, instruction to discriminate, discrimination in employment, sanctions

### **Title of the law: Law 38/2004**

Abbreviation: N/A

Date of adoption: 18 August 2004

Entry into force: 23 August 2004

Latest relevant amendments: N/A

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

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Grounds covered: disability</p> <p>Administrative law</p> <p>Material scope: general legal basis for prevention of the causes of disability, and the training, rehabilitation and participation of persons with disabilities</p> <p>Principal content: fundamental principles, intervention of public and private entities; public policies</p>                                                                                                                                                                                                                                                                                       |
| <p><b>Title of the law: Law 3/2011</b></p> <p>Abbreviation: N/A</p> <p>Date of adoption: 15 February 2011</p> <p>Entry into force: 20 February 2011</p> <p>Latest relevant amendments: N/A</p> <p>Web link: <a href="https://dre.pt/application/file/279688">https://dre.pt/application/file/279688</a></p> <p>Grounds covered: any ground of discrimination</p> <p>Civil/Labour/Procedural law</p> <p>Material scope: forbids any discrimination in access to and exercise of self-employment and transposes into national law Directives 2000/43/EC, 2000/78/EC and Directive 2006/54/EC</p> <p>Principal content: self-employment</p> |
| <p><b>Title of the law: Decree-law 31/2014</b></p> <p>Abbreviation: HCM</p> <p>Date of adoption: 27 February 2014</p> <p>Entry into force: 5 March 2014</p> <p>Latest relevant amendments: N/A</p> <p>Web link: <a href="https://dre.pt/application/file/572214">https://dre.pt/application/file/572214</a></p> <p>Grounds covered: race or ethnic origin; nationality</p> <p>Administrative law</p> <p>Material scope: creates the High Commissioner for Migration, which replaces the High Commissioner for Immigration and Intercultural Dialogue</p> <p>Principal content: Mission, structure, budget</p>                            |

**ANNEX 2: INTERNATIONAL INSTRUMENTS****Country: Portugal****Date: 1 January 2022**

| <b>Instrument</b>                                                   | <b>Date of signature</b> | <b>Date of ratification</b> | <b>Derogations / reservations relevant to equality and non-discrimination</b> | <b>Right of individual petition accepted?</b>   | <b>Can this instrument be directly relied upon in domestic courts by individuals?</b> |
|---------------------------------------------------------------------|--------------------------|-----------------------------|-------------------------------------------------------------------------------|-------------------------------------------------|---------------------------------------------------------------------------------------|
| European Convention on Human Rights (ECHR)                          | 22.09.1976               | 09.11.1978                  | Articles 5 and 7                                                              | Yes                                             | Yes                                                                                   |
| Protocol 12, ECHR                                                   | 04.11.2000               | 25.11.2016                  | No, derogations/reservations                                                  | Yes                                             | Yes                                                                                   |
| Revised European Social Charter                                     | 03.05.1996               | 30.05.2002                  | No                                                                            | Ratified collective complaints protocol?<br>Yes | Yes                                                                                   |
| International Covenant on Civil and Political Rights                | 07.10.1976               | 31.07.1978                  | No                                                                            | Yes                                             | Yes                                                                                   |
| Framework Convention for the Protection of National Minorities      | 01.02.1995               | 07.05.2002                  | No                                                                            | N/A                                             | No                                                                                    |
| International Covenant on Economic, Social and Cultural Rights      | 07.10.1976               | 31.07.1978                  | No                                                                            | Yes                                             | Yes                                                                                   |
| Convention on the Elimination of All Forms of Racial Discrimination | 29.04.1982               | 24.08.1982                  | No                                                                            | No                                              | Yes                                                                                   |
| ILO Convention No. 111 on Discrimination                            | 15.06.1958               | 19.11.1959                  | No                                                                            | No                                              | Yes                                                                                   |

| <b>Instrument</b>                                     | <b>Date of signature</b> | <b>Date of ratification</b> | <b>Derogations / reservations relevant to equality and non-discrimination</b> | <b>Right of individual petition accepted?</b> | <b>Can this instrument be directly relied upon in domestic courts by individuals?</b> |
|-------------------------------------------------------|--------------------------|-----------------------------|-------------------------------------------------------------------------------|-----------------------------------------------|---------------------------------------------------------------------------------------|
| Convention on the Rights of the Child                 | 26.11.1990               | 21.09.1990                  | No                                                                            | Yes                                           | Yes                                                                                   |
| Convention on the Rights of Persons with Disabilities | 30.03.2007               | 23.09.2009                  | No                                                                            | No                                            | Yes                                                                                   |

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