

**REPORT**  
**on the Free Movement of Workers**  
**in Portugal in 2002-2003**

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## General remarks

1. In Portugal the free movement of persons (EU citizens) is fully guaranteed by the legal framework, which transposes the European Law on this matter.

Decree-Law 60/93 of 3 March, as amended by Decree-Law 250/98, sets out the conditions of entry and stay for citizens of the member-states of the European Union and their family members. This decree-law transposed into the Portuguese legal framework Directives 64/221/EEC (co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health); 68/360/EEC (abolition of restriction of movement and residence within the community for workers of the member states and their families); 72/194/EEC (extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of the Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health); 73/148/EEC (abolition of restrictions of movement and residence for the purposes of establishment and provision of services); 75/34/CEE and 75/35/EEC; in addition to Directives 90/364/CEE (right of residence), 90/365/EEC (right of residence of employees and self-employed persons who have ceased their occupational activity) and 93/96/EEC (right of residence for students), which grant residence rights to citizens of member-states, who were not entitled to such, under Community law. Many of the provisions of the community Directives are copied almost word-for-word by the said Act.

2. Administrative practice on entry, residence and deportation of Community citizens does not go beyond applying current legislation, since there are no circulars in this connection. In particular, the Portuguese authorities do not treat EU citizens as foreign citizens, as they do not exercise any special control over conditions entry and residence. Not even those EU citizens who are living in Portugal without a residence permit are subject to any penalties, since Portuguese legislation does not foresee any for their unlawfully staying in Portugal. Only the entry of a non-EU family member of an EU citizen is governed by the Immigration Act. The fact that they are subject to the general conditions of entry for foreign citizens, especially in terms of visa requirements could have an impact of the free movement of EU workers. This is because the authorities require not only documents proving the purpose of the stay; housing conditions and means of subsistence, but also not having been sentenced to more than six months' imprisonment and a medical certificate or health insurance, before issuing a visa. Furthermore, they systematically refuse to issue visas, whenever the person in question's name appears on the non-admission list of the Schengen Information System.

3. The free movement of workers has not aroused a great deal of interest amongst Portuguese writers. In 2002-2003, there were only a very few publications on the issue, most of which only touched upon the surface.

4. In Portugal, there is practically no case-law on the entry and residence of EU citizens. There have only been a reasonable number of court rulings on issuing residence permits to nationals of non-EU countries. The mere handful of decisions concerning EU citizens are connected to deportation orders handed down as part of drug trafficking convictions (generally, EU citizens who do not live in Portugal.)

In 2002-2003, there was only one Supreme Administrative Court ruling on the granting of a residence permit to an EU citizen (under the auspices of the right of establishment) which cancelled a decision taken by the BIS (Boarder and Immigration Service) to refuse a Spanish citizen a residence permit on the basis of his not having presented an identity document. The Court ruled that, in view of the citizen in question's residence rights and the fact that an identity document is no more than a declaration, the BIS had breached the law and that the identity document could be replaced by some other form of identification.

5. There was no public or political debate on the free movement of workers in the context of enlargement. This is due to the fact that migratory flows from the 10 new member-states are insignificant. In 2002-03, only 0.6% of the applicants for residence permits came from these states.

6. EU citizens' eligibility and access to public-sector employment, which is predominantly technical in nature or is not reserved for the Portuguese by the Constitution, such as access to the Armed Forces or the diplomatic corps, has been thoroughly safeguarded. On the one hand, any legal restriction on exercising the right to take up public-sector duties of a predominantly technical nature (protected by the Constitution), in addition to breaching Community Law, is also unconstitutional, pursuant to Constitutional Court case-law since it breaches the principle of equality enshrined in Article 15(1) of the Constitution. On the other hand, the recognition of qualifications obtained in another EU Member-State is thoroughly safeguarded.

## Chapter I Entry, Residence and Departure

### A. Entry

*1. Legislation in force: Decree-Law n.º 60/93, as amended by Decree-Law n.º 250/98.*

According to articles 3 (1) (a) and 4 (1) (a) of Decree-Law n.º 60/93, community workers (like all Union citizens) are allowed to enter Portuguese territory merely upon presentation of an identity card or a valid passport.

The entry can only be refused on grounds of public policy, national security or public health.<sup>1</sup>

Only the diseases or disabilities listed in article 12(2) of Decree-Law 60/93 may justify refusal of entry into a territory, such as tuberculosis, syphilis, drug addiction, psychotic disorders (also listed in the Annex of Directive 64/221).

The refusal of entry on grounds of public order or public security must be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions do not in themselves constitute grounds for automatically taking such a measure.<sup>2</sup>

*2. Draft legislation, circulars*

There is no legislation or circular being drafted which specifically refers to Community workers entering Portugal.

*3. Judicial practice*

Our examination of the case-law databases of the Supreme Administrative Court and the Central Administrative Court (2nd instance) revealed that there is no case-law pertaining to the entry or refusal of entry to Community workers.

*4. Administrative practices*

Administrative practices are limited to implementing current legislation on the entry of Community citizens. There is no special control of community workers when they enter the country, which accounts for there being no known case of refusal.

*5. Literature*

The entry of Community workers is not a subject which arouses a great deal of interest amongst Portuguese jurists. Hence, there is no legal literature specifically devoted to the entry of Community workers. Nevertheless, this subject is covered in general terms by some textbooks on Community Law and certain monographs, referred to in Chapter XI. Special attention should be drawn to the following work:

Fernandes, Francisco Liberal, *Liberdade de circulação dos trabalhadores na Comunidade Europeia* (Free Movement of Workers in the European Community), Coimbra Editora, 2002, 287 p.

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1 Article 12, (1) of Decree-Law 60/93.

2 Article 13, (1) and (2) of Decree-Law 60/93.

## B. Residence

*1. Legislation in force: Decree-Law n.º 60/93, as amended by Decree-Law n.º 250/98.*

On the issue of Residence Permits for community workers, we must distinguish between seasonal workers and others.

As far as *seasonal workers* are concerned, no residence document is required for the workers to lawfully stay in Portuguese territory. They merely need to hold a contract of employment registered at the General Labour Inspectorate and inform the Borders and Immigration Service of their presence in Portuguese territory within 10 days of entry.<sup>3</sup> Under the terms and effects of article 2 of Decree-Law 60/93, seasonal workers are defined as “workers hired to take up employment in Portuguese territory, in a sector of activity which depends on the changing seasons, for not more than 8 months”.

All other categories of workers must apply for a residence permit, which refers to their capacity as paid workers,<sup>4</sup> the category of which varies according to the duration of the employment relationship.

Article 15 (1) of Decree-Law 60/93 foresees three categories of residence permits which may be granted to community workers:

- Residence permit for a national of a Member State of the European Communities.
- Temporary residence permit;
- Residence permit.

A “residence permit for a national of a Member State of the European Communities” is issued to workers who are employed for:

- Over 1 year or indefinitely;<sup>5</sup>
- Less than 1 year, should renewal of the contract result in the total length of employment being 1 year or more.<sup>6</sup>

Such a residence permit must be requested by the worker within 3 months of entry,<sup>7</sup> although Portuguese legislation does not foresee any penalty for not fulfilling this requirement.

This permit is *valid for 5 years*, is renewable upon the holder’s request for further periods of 10 years.<sup>8</sup> Absence for up to 6 months or for the purposes of compulsory military service does not affect the validity of this residence permit issued to Community workers.<sup>9</sup>

Under the terms and effects of article 18 (1) (a) of Decree-Law 60/93, a residence permit cannot be withdrawn from a paid worker who is a citizen of an EU member-state when “temporarily, he does not hold a position of employment, on grounds of illness or accident, or through involuntary unemployment, duly ascertained, in accordance with the

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3 Article 19 (2) and (3) of Decree-Law 60/93.

4 Article 15 (2) (a) of Decree-Law 60/93.

5 Article 16 (a) of Decree-Law 60/93

6 Article 16 (b) of Decree-Law 60/93

7 Article 23, (1) of Decree-Law 60/93.

8 Article 17, (1) (a) of Decree-Law 60/93

9 Article 17 (2) of Decree-Law 60/93

law, by the competent public authorities". However, when renewing the residence permit for the first time, the period of validity may be reduced, but never to less than 12 months, should the worker have been involuntarily unemployed for more than the previous 12 months.<sup>10</sup>

A temporary residence permit is issued to those workers who wish to hold a position, for not less than three months and not more than one year, in the employ of a Portuguese entity or a service provider.<sup>11</sup> This residence permit is valid for the expected period of employment,<sup>12</sup> and may be renewed for up to one year, should the community worker be in the employ of a Portuguese entity.<sup>13</sup>

A residence permit is issued to community workers who exercised their right to remain in Portuguese territory indefinitely.<sup>14</sup> Article 5 of the Decree-law 60/93 recognizes the right of any community worker to remain permanently in Portuguese territory:

- who, at the time of termination of his activity, has reached the age laid down by the law for entitlement to an old-age pension (60 years), and who has pursued his activity in Portugal for at least the previous twelve months and has resided there continuously for more than three years;<sup>15</sup> periods of activity completed in the territory of a member-state are considered as having been completed in Portugal, should the community worker keep his residence in Portugal, and return there at least once a week;<sup>16</sup> or
- who, having resided continuously in the Portuguese territory for more than two years, ceases to pursue his activity there as a result of permanent incapacity to work.<sup>17</sup> There is no requirement for minimum residence should incapacity result from a work accident or professional injury which entitles the worker to a full or partial state pension;<sup>18</sup> the periods of activity undertaken in the territory of a member-state are considered as having been completed in Portugal, should the community worker keep his residence in Portugal, and return there at least once a week (Article 5 (3) of Decree-Law 60/93); or
- who, after three years' continuous activity and residence in Portugal, pursues his activity in the territory of another Member State, while retaining his residence in the Portuguese territory, to which he returns, as a rule, each day or at least once a week.<sup>19</sup>

Breaks in residence not exceeding three months per year and absence on military service do not affect the residence conditions for the purposes of recognising permanent residence rights.<sup>20</sup>

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10 Article 18 (2) and (3) of Decree-Law 60/93.

11 Article 19 (1) (a) of Decree-Law 60/93.

12 Article 20 (1) (a) of Decree-Law 60/93.

13 Article 20 (2) of Decree-Law 60/93.

14 Article 21 of Decree-Law 60/93

15 Article 5.(1) (a) of Decree-Law 60/93.

16 Article 5 (3) of Decree-Law 60/93.

17 Article 5 (1) (b) of the Decree-Law 60/93.

18 Article 5, (2) of Decree-Law 60/93.

19 Article 5 (1) (c) of Decree-Law n. ° 60/93.

20 Article 7 (1) (a) of Decree-Law n.° 60/93.

For the purposes of establishing the continuous duration of an activity, the duly proven periods of involuntary unemployment, as well as periods of inactivity, as a result of accident or illness, are considered.<sup>21</sup>

Residence permits are valid for 5 years and are renewed automatically at the holder's request, for periods of 10 years.<sup>22</sup> Leaving Portuguese territory for periods of not more than 6 consecutive months or for compulsory military service does not affect the validity of the residence permit.<sup>23</sup>

Workers must apply for any of these three permits using the specific form which is provided free of charge by the Borders and Immigration Service.<sup>24</sup> The decision concerning the granting or refusal of the first residence permit must be made as swiftly as possible, and, in any case, within 6 months.<sup>25</sup> The applicant may stay in Portuguese territory until such a decision is taken.<sup>26</sup> Should there be grounds, information concerning the applicant's criminal record may be requested from other member-states.<sup>27</sup>

In any case, the formalities for obtaining a residence permit do not pose an obstacle to applicants immediately signing employment contracts.<sup>28</sup>

The only grounds for refusing to issue a residence permit are law and order, and public health.<sup>29</sup> Refusal to issue a first residence permit may be based on the applicant suffering from one of the illnesses or afflictions explicitly listed in Article 12 (2) of Decree-Law 60/93 (which are the same as those which can be the grounds for refusing entry). Nevertheless, their development after a first residence permit has been issued cannot justify refusal to renew or expulsion from Portuguese territory.<sup>30</sup>

Grounds of law and order must be based exclusively on the applicant's behaviour.<sup>31</sup> Criminal convictions are not sufficient grounds for automatic refusal to issue a residence permit.<sup>32</sup> According to the Supreme Administrative Court's case-law (see item 3 of this chapter), expiry of an identity card cannot be used as grounds for refusing to issue a Community citizen with a residence permit.

According to the provisions of Article 14 of Decree-Law 60/93, the interested party must be informed of the grounds for refusal to issue a residence permit, unless it goes against the interests of national security.

An appeal can be lodged with the administrative courts against the decision to refuse issue of a residence permit.<sup>33</sup> The appeal has suspensive effect, except in emergency cases.<sup>34</sup>

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21 Article 7 (2) (a) and (b) of Decree-Law 60/93.

22 Article 22 (1) of Decree-Law 60/93.

23 Article 22 (2) of Decree-Law 60/93.

24 Article 24 of Decree-Law 60/93.

25 Article 25 (1) of Decree-Law 60/93.

26 Article 25 (3) of Decree-Law 60/93.

27 Article 25 (2) of Decree-Law 60/93.

28 Article 30 of Decree-Law 60/93.

29 Article 12, (1) of Decree-Law 60/93.

30 Article 12, (3) of Decree-Law 60/93.

31 Article 13, (1) and (2) of Decree-Law 60/93.

32 Article 13, (1) and (2) of Decree-Law 60/93.

33 Article 28 (1) of Decree-Law 60/93.

34 Article 28 (2) of Decree-Law 60/93.



## *2. Draft legislation, circulars*

There is no legislation or circular being drafted on the specific matter of the residence of EU workers in Portugal.

## *3. Judicial practice*

As far as issuing residence permits to EU citizens is concerned, we must refer to the recent Legal Opinion of the Advisory Committee to the Public Prosecution Service no. 7/2002, and the ruling handed down by the Supreme Court of Justice on 5 February 2003, on the well-known *Tellechea Maya* case. The case can be summarised as follows: in 1995, Tellechea Maya was arrested on a provisional arrest warrant, with a view to future extradition, requested by Spain. The Court of Appeal subsequently ruled that he should be released; extradition was refused by the Supreme Court of Justice in 1997. In 1996, he had been convicted of the crime of forgery and sentenced to 7 months' imprisonment, which he served, and in the same year, he applied for political asylum, with his application having been turned down. In 2000, the Borders and Immigration Service (BIS) initiated judicial deportation proceedings against Tellechea Maya in the County Court of Sintra, but lost the case. Tellechea Maya applied for a residence permit, as an EU citizen and wishing to undertake business activities in Portuguese territory. His application was refused by the BIS, on the grounds that his EU citizenship had not been proven by presenting a valid passport or identity card. In fact, his identity card had expired, he did not hold a passport, although he did have a tax number, a social security card and was registered as a one-man business.

As for staying in Portugal illegally, the Advisory Committee to the Public Prosecution Service deemed administrative expulsion of this citizen to be inadmissible.

The refusal to issue this citizen with a residence permit for a national of a Member-state of the European Communities, on the basis of his not having proven his nationality by presenting a valid identity card or passport was considered to be unlawful by the Supreme Administrative Court and overturned. In fact, whilst first and foremost, it was the responsibility of the interested party to prove his identity and EU nationality, when such proof is impossible to obtain, the Portuguese authorities, by dint of articles 87 and 91 of the Code of Administrative Procedure and article 24 (2) of Decree-Law 60/93, were bound to take all the ex-officio measures necessary to determine the subject's identity. In conclusion, according to Portuguese case-law, expiry of the EU citizen's identity card, on which he had entered national territory, is not sufficient grounds for refusing to issue a residence permit, for the authorities must identify him ex-officio by some other means.

## *4. Administrative practices*

There are no administrative practices concerning the issue of residence permits to EU citizens which diverge away from the legal norms. According to information obtained from the Borders and Immigration Services, no medical exams are carried out nor is a doctor's certificate required to possibly restrict the right of entry on the grounds of public health.

EU workers must apply for a residence permit using the appropriate form addressed to the Regional Directorate or Office of the BIS of his area of residence. Proof of identity, as well as the original and a photocopy of a statement of employment, referring to the beginning and end of his contract of employment, must be submitted. Issue of the residence permit is subject to payment of a fee of 2,54 Euros.

### 5. Literature

There is no recent legal literature devoted specifically to EU workers' residence. The following works, however, contain some references:

Duarte, Maria Luisa, *Direito de residência dos trabalhadores comunitários e medidas de excepção : reflexão sobre o significado do estatuto de trabalhador - cidadão na União Europeia* (EU workers' residence rights and extraordinary measures: reflections on the meaning of the working citizen status in the European Union), *Revista da Faculdade de Direito da Universidade de Lisboa*, Coimbra, v. 39 n. 2 (1998), p. 497-509.

Fernandes, Francisco Liberal, *Liberdade de circulação dos trabalhadores na Comunidade Europeia* (Free movement of workers in the European Community), Coimbra Editora, 2002, 287 p.

## C. Departure

### 1. Legislation in force: Decree-Law 60/93 as amended by Decree-Law 250/98.

Under the terms and effects of article 12 (1) of Decree-Law 60/93, restrictions placed on EU workers' right to reside in Portugal can only be justified on the grounds of law and order and public health. With regard to the latter, should the diseases listed in article 12 (2) appear at a latter date, this does not constitute grounds for the EU citizen to be expelled from Portugal.<sup>35</sup> Any restriction of the right of entry or residence that is motivated on grounds of public policy or public security should be based exclusively on the personal conduct of the individual concerned, and previous criminal convictions cannot in themselves constitute grounds for automatically taking such a measure.<sup>36</sup> Whatever the case, lapsing of the community citizen's Identity card or passport cannot justify him being deported from national territory.<sup>37</sup>

According to the provisions of Article 14 of Decree-Law 60/93, the interested party must be informed of and can appeal against the grounds of law and order or public health cited to justify restrictions.

Decree-Law 60/93 does not mention which entity is competent for determining expulsion of an EU citizen, but refers to general legislation on the entry, stay and departure of foreign citizens from national territory (Decree-Law 244/98, of 8 August, as amended by Decree-Law 34/2003 of 25 February). Under the terms and effects of these Acts, either a judicial or an administrative authority may determine deportation. Admin-

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35 Article 12 (3) of Decree-Law 60/93.

36 Article 13 (1) and (2) of Decree-Law 60/93.

37 Article 13 (3) of Decree-Law 60/93.

istrative deportation is only possible when the foreign citizen has entered and stayed in Portugal unlawfully. According to article 33 (2) of the Portuguese Constitution “Deportation of persons who have legally entered or are staying in the national territory, who have obtained a residence permit, or who have lodged an application for asylum that has not been refused, shall be determined by a judicial authority only.” On the same lines, article 111 (a) of Decree-Law 244/98 stipulates that deportation shall be determined by judicial authority when the foreign citizen in question has lawfully entered or stayed in Portuguese territory.

In view of the right to free movement of EU citizens, one can conclude that it is legally impossible to administratively deport them from Portuguese territory; their forced departure only being determined by a court of law.

On the subject of deportation of EU citizens, special attention should be drawn to Legal Opinion no.7/2002 of the Advisory Committee to the Public Prosecution Service, referred to above, which, in the wake of community case-law, concludes that expulsion of EU citizens from Portuguese territory is admissible “when their presence or behaviour, considered on an individual basis, pose a real and sufficiently serious threat to law and order. The measures adopted must be proportionate to this threat. Thus, merely possessing a criminal record or failing to complete administrative formalities is not sufficient grounds for deporting the person in question.” Thus, according to this legal opinion, the unlawful stay of an EU citizen – unlike the case of a non-EU citizen – does not lead to deportation. The right to free movement can only be jeopardised “when their presence or behaviour considered on an individual basis, pose a real and sufficiently serious threat to law and order.”

## 2. Draft legislation, circulars

There is no legislation or circular being drafted on the specific matter of the residence of EU workers in Portugal.

## 3. Judicial practice

Decree-Law 60/93 does not contain any specific provision on the deportation of EU citizens, which means that judicial practice, particularly the case-law of the Supreme Court of Justice has proved to be somewhat contradictory.<sup>38</sup> Thus, in some rulings, the Supreme Court of Justice, on the basis of Community Law and the case-law of the European Court of Justice, has defended that EU citizens convicted of a crime, should not be sentenced to the additional penalty of deportation, since it is incompatible with Community Law.<sup>39</sup> When seized on other occasions, the Supreme Court of Justice clearly admits the possibility of deporting EU citizens, provided the EU citizen in question poses a real and serious threat to law and order or public security.<sup>40</sup>

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38 Cf. Legal Opinion no.7/2002 of the Public Prosecution Service.

39 Ruling of the Supreme Court of Justice of 19 December 1991, published in the *Journal of the Ministry of Justice*, no.412 p.229, and in the Collection of Case-Law, year XVI, t.5, p.31; Ruling of the Supreme Court of Justice of 23 November 1995, published in the *Journal of the Ministry of Justice*, no.451, p.130. Rulings can be accessed via the site [www.dgsi.pt](http://www.dgsi.pt).

40 Ruling of the Supreme Court of Justice of 7 January 1993, published in the *Journal of the Ministry of Justice*, no.423 p.172, and in the Collection of Case-Law, *Rulings of the Supreme Court of Jus-*

#### 4. Administrative practices

The deportation of EU citizens can only be determined by a court of law. Nevertheless, the BIS statistical report for 2002, refers to the administrative deportation of an Italian citizen. In that particular year, 4 EU citizens were judicially deported after having been convicted of drug trafficking. In 2003, there were no administrative deportations and 9 judicial deportations of convicted EU citizens, mostly of drug trafficking.

#### 5. Literature

Various bibliographical databases show that there has been no recent legal literature on deportation of EU citizens, notably in 2002 and 2003. The most significant publications, though, are:

Duarte, Maria Luísa, *A liberdade de circulação de pessoas e a ordem pública no direito comunitário* (Freedom of Movement of People and law and order in the European Community) Coimbra, Coimbra Editora, 1993.

Duarte, Maria Luísa, Direito de residência dos trabalhadores comunitários e medidas de excepção: reflexão sobre o significado do estatuto de trabalhador-cidadão na União Europeia (EU workers' residence rights and exceptions: reflections on the status of working-citizen in the European Union), *Revista da Faculdade de Direito da Universidade de Lisboa*, Coimbra, v.39n.2 (1998), pp.497-509

Fernandes, Francisco Liberal, *Liberdade de circulação dos trabalhadores na Comunidade Europeia* (Free movement of workers in the European Community), Coimbra Editora, 2002, 287 p.

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*tice*, year I, t.1 p. 160. (note 25). Cf. Ruling of the Supreme Court of Justice of 10 July 1996, published in *Rulings of the Supreme Court of Justice*, year IV, t. 2, p. 229.

## Chapter II Equality of Treatment

### *1. Legislation in force*

Equal treatment for Portuguese and EU citizens (as well as other foreign citizens in Portugal) is thoroughly ensured in the Portuguese legal order.

#### *a) Equality of treatment regarding work legal status*

Law 20/98 of 12 May<sup>41</sup> in particular, governs the work of foreign citizens in Portugal, which is applicable to EU citizens, too. However, the requirement of a written contract of employment (article 3 of Law 20/98), the obligation to lodge the contract of employment at the Institute for the Development and Inspection of Working Conditions, in addition to informing it of the signing and rescission of a contract of employment signed with a foreign worker (articles 4 and 5 of Law 20/98) are not applicable to contracts of employment signed with EU workers (articles 3 and 5 (4) of Law 20/98), since they would create a distinction between Portuguese and EU workers, which goes against the community principle of equal treatment.

Under the terms and effects of Law 20/98, EU workers (in addition to other foreign workers lawfully in Portugal) “in undertaking their professional activity, shall benefit from the same working conditions as workers of Portuguese nationality”.

The new Labour Code came into force on 1 December 2003,<sup>42</sup> ensuring equal treatment regarding access to employment, vocational training and promotion and working conditions, providing them with the right to non-discrimination on the grounds of nationality (article 22 of the Labour Code). Employers are expressly prohibited from any form of discrimination (article 23 of the Labour Code), and the worker or applicant who is the subject of a discriminatory act is entitled to compensation for material and moral damages (article 26 of the Labour Code).

The new Code foresees certain special clauses on the work of foreign citizens in Portugal, such as a contract in written form (article 88) or the obligation to inform the authorities of an employment contract signed with a foreign citizen (article 89 of the Labour Code). These provisions are not applicable to EU workers and they come into force in 2004.

#### *b) The constitutional principle of equality of treatment between aliens and nationals*

We should point out that when exercising their rights, EU citizens (like all other foreign citizens) enjoy the same status as the Portuguese, as laid down in the Constitution. According to article 15(1) of the Constitution of the Portuguese Republic (CPR), the principle of equality is established:

“Aliens and stateless persons temporarily or habitually resident in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens.”<sup>43</sup>

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41 *Official Journal*, I-Series A, n.º 109, 12th May, p. 2172.

42 Approved by Law 99/2003, *Diário da República* I – A- series, no.197 of 27 August, p. 5558.

43 Translation taken from the English version of the Portuguese constitution published on the site of the Assembleia da República, [www.parlamento.pt/ingles/cons\\_leg/crp\\_ing/index.html](http://www.parlamento.pt/ingles/cons_leg/crp_ing/index.html).

In principle, equality is valid for all rights, and not just those guaranteed by the Constitution (Basic Freedoms, Rights and Guarantees; constitutionally-guaranteed rights, such as basic entitlements, like the right to health, education, housing, workers' rights, etc.), but also those enshrined in ordinary legislation.

The principle of equality though is not absolute, since Article 15(2) of the CPR provides exceptions and allows the law to establish others:

“Paragraph 1 (equality principle) does not apply to political rights, to the performance of public functions that are not predominantly technical or to rights and duties that, under this Constitution or the law, are restricted to Portuguese citizens.”<sup>44</sup>

The first exception refers to political rights, which may be reserved for the Portuguese. Political rights are basically the right to political activity foreseen in article 48 and thereafter in the CPR: voting rights (including the rights to vote in a referendum – Article 240 of the CPR; taking part in public life (Article 48); holding public office (Article 50); the right to form a political party (Article 51); holding office in sovereign bodies or those of the Autonomous Regions (the right to be elected). Nevertheless, the CPR itself and the legislator have brought in exceptions to these exclusions, recognising the right of foreign citizens resident in Portugal to be politically active:

- Foreign citizens' right to petition to defend their rights and legally-protected interests (Article 4, law 43/90, with the amendments made by Laws 6/93 and 15/2003)
- The right to form associations to represent their interests (Law 115/99)
- Granting the citizens of Portuguese-speaking countries with permanent residence in Portugal all political rights, on a reciprocal basis, with the exception of holding the office of President, Speaker of the Parliament, Prime-Minister, President of the Supreme Courts, serving in the forces and diplomatic corps (Article 15(3) of the CPR);
- Granting foreign citizens resident in Portugal the right to vote and be elected in local elections, on a reciprocal basis (Article 15(4) of the CPR);
- Granting EU citizens the right to vote and be elected in local elections and to the European Parliament (Article 15(5) of the CPR);
- The right of foreign citizens from Portuguese-speaking countries resident for over 2 years and the EU to take part in a local referendum, on a reciprocal basis (Article 35, Framework Law 4/2000).

The second exception concerns *access to civil service positions which are not predominantly technical* (see Chapter III on this subject).

Lastly, Article 15(2) of the CPR foresees constitutional and legal restrictions to the principle of equality, in other words, the Constitution itself or the Law may exclude foreign citizens from enjoying certain rights, by reserving them for the Portuguese. The

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44 Translation taken from the English version of the Portuguese constitution published on the site of the Assembleia da República, [www.parlamento.pt/ingles/cons\\_leg/crp\\_ing/index.html](http://www.parlamento.pt/ingles/cons_leg/crp_ing/index.html).

Constitution exclusively reserves certain rights which are expressly mentioned as the domain of the “Portuguese” or “Portuguese citizens”, in particular:

- Holding the Presidency of the Republic (Article 121 (1) of the CPR); President of the Parliament (Article 122), Prime-Minister, President of a Supreme Court (Article 15 (2)).
- The right to serve in the armed forces (Article 275);
- Access to the diplomatic corps;
- Political duties: voting (Article 49(2)); registering on the electoral lists (113(2)); working with the electoral commission (113(4)); defending the Nation (Article 276(1)).

The Law can also exclude foreign citizens from enjoying certain rights and thus establish legal exceptions to the principle of equality. But such possibilities are limited:

- They can only be set by a formal law passed by Parliament (and not by Government despatch).
- They do not cover the rights which cannot be suspended even in a curfew or state of emergency: the right to life; physical well-being, and civil capacity (Article 19 of the CPR);
- Any legal clause which reserves a certain right for the Portuguese must be objectively justified by the safeguard of an interest or right which is constitutionally protected, and be necessary for such a purpose, otherwise it breaches the principle of equality.<sup>45</sup> Should it imply restricting rights, freedoms and guarantees, any restriction must be explicitly foreseen in the CPR and be limited to what is necessary for pursuing a constitutionally-relevant interest, leaving the basic nucleus of the right in question untouched;

This system of treating foreign citizens akin to Portuguese citizens favours EU citizens. There is clear concern that they should not be excluded from rights granted to Portuguese citizens or from access to a certain profession.

Therefore, whenever the legislation governing a particular profession does not restrict it to Portuguese nationals, EU citizens are guaranteed access by dint of Article 15(1) of the Constitution. One case in hand is that of private notaries, which according to Article 25 of Decree-Law 24/2004 is open to individuals, regardless of nationality, who hold a degree in Law or an equivalent qualification (for example, an equivalent qualification in legal studies in another EU member-state).

On occasions, acts governing certain professions explicitly state that they may be exercised by EU citizens. Private security is an example of access to particular professions. Under the terms and effects of Article 7 (1a) of Decree-Law 231/98,<sup>46</sup> one of the requirements for access to this profession is to hold Portuguese nationality or to be a na-

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45 In this sense jurisprudence of the Constitutional Court. See Order 72/2002, dated 20th February, 2002 (case n° 769/99), *Official Journal*, I Series-A, n° 62, dated 14th March, 2002, p. 2318 and jurisprudence quoted therein) of The Constitutional Court.

46 *Official Journal*, Series I-A, n° 167, dated 22nd July, 1998, p. 3515-3522.

tional of one of the EU member-states or the European economic area, or, on a reciprocal basis, of a Portuguese-speaking country.

The same applies to being a solicitor. According to Article 75(1) of Decree-Law 88/2003, enrolment in the Chamber of Solicitors is compulsory for exercising this profession. Not only Portuguese citizens, but also EU citizens may apply to enrol, in accordance with article 77 (1)(a).

#### *The legal framework on the fight against discrimination*

Penalties have been in force in Portugal since 1999 for anyone (individual or entity) who discriminates (through action or inaction) against any other on the basis of race; colour; family background; nationality, or ethnic origin. In fact, Law 134/99 bans and punishes (with fines) discriminatory practices, such as refusing to hire a worker solely for reasons of race or nationality, or refusing or restricting access or exercising basic rights and economic and social rights (access to housing, health, education) on this basis. This Act from 1999 was strengthened by Law 18/2004, which transposes Directive CEE/2000/43 into the Portuguese legal framework.

#### *2. Draft legislation, circulars*

There is no legislation or circular being drafted which specifically refers to Community workers.

#### *3. Judicial practice*

Our examination of case-law databases and collections revealed that there is no case-law pertaining specifically to equal treatment of Community workers. See the case-law referred to in Chapter III for the general principle of equality between foreign and Portuguese citizens.

#### *4. Administrative practices*

Administrative practice follows equal treatment of EU citizens.

#### *5. Literature*

No legal literature specifically regarding equal treatment of EU workers was published in 2002 or 2003.



## Chapter III

### Employment in the Public Sector

#### *1. Legislation in force*

In accordance with article 1(2) of Law 20/98, of 12 May, “foreign citizens’ holding of public-sector employment is governed by the specifically applicable legal and constitutional acts”.

Pursuant to Article 47 (2) of the Constitution of the Portuguese Republic

“All citizens have the right, equally and without restriction, to become a public official, by means of general public competition.”

EU workers’ access to public-sector employment is restricted by dint of Article 15 (2) to predominantly technical positions, and the law can also impose restrictions. In fact, Article 15(2) of the CPR reserves non-technical positions for Portuguese citizens, in other words, positions of “authority”, such as a judge or magistrate,<sup>47</sup> the police force, etc.

*A contrario*, the Constitution foresees foreign citizens (EU citizens or others) taking up technical positions (e.g. teaching, health professions, etc.) in which they enjoy all inherent privileges (social security system, pensions, etc.)

Although, pursuant to Article 15(2) of the CPR, the legislator may set restrictions on such access, any legal act entailing general, arbitrary, unnecessary and disproportionate exclusion of foreign citizens from predominantly technical public-sector employment is unconstitutional. This is the view taken by the Constitutional Court’s case-law concerning access to the teaching profession (see point 3 of this report, below), as well as the Public Prosecution Service’s Legal Opinion no. 22/1990, of 29 May 1991.<sup>48</sup> In this Opinion, the Public Prosecution Service, with reference to the case-law of the European Court of Justice concerning Article 48(4) of the Treaty of Rome (current Article 39(4) of the TEC), interpreted Article 15(2) of the CPR, in that positions in which public authority is the dominant feature are the only ones which are reserved for Portuguese citizens. This means that EU (and other foreign) citizens should be allowed access to predominantly technical public-sector posts, by dint of the principle of equality enshrined by Article 15(1) of the CPR, with specific reference to the sectors listed by the European Commission in its declaration of 5 January 1988, concerning “Activities affected in the public services”.<sup>49</sup>

Access to public-sector employment is via open competition. Without prejudice to some special acts concerning recruitment to special civil service corps or careers governed by special legislation, Article 29(2) of Decree-Law 204/98 sets out general requirements for admission to open competitions and recruitment to public-sector posts, such as: the legally-required qualifications for the post (the recognition of diplomas and

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47 See Law n° 16/98, amended by Law n° 13/2000, dated 20th March, which establishes as a general condition that, for one to access to judicature, one must be the bearer of Portuguese nationality (article 33).

48 *Official Journal*, II Series, n° 70, dated 14th March, 1992.

49 OJ EC no. C 72/3, 18th March, 1988.

professional qualifications obtained in the member states is guaranteed by the legal framework that transposes the EU Directives on this matter); minimum age of 18; completion of military or civic service, when compulsory, physical fitness and absence of any impediment or ban from carrying out such an activity, and, in addition, requires Portuguese nationality of the applicants, *except in those cases exempted by specific legislation or international covenant*.

If we interpret this act in the light of article 39 of the EU Treaty and article 15 (1) and (2) of the CPR, we can conclude that the Portuguese legislator does not exclude EU workers from mainly technical positions. Only those public-sector positions which are not largely technical or which imply exercising public authority are removed from the non-Portuguese. This is the case, for example of the magistrature, which is restricted to the Portuguese (article 33 of Law 16/98, as amended by Law 3/2000)

Thus, whenever legislation does not make a reference to the nationality of applicants, by virtue of Article 15(1) of the Constitution, the competition for a civil service vacancy is open to both Portuguese and foreign nationals. The law governing access to certain public-sector careers or announcements of open competitions for certain posts frequently mention that applicants may be nationals of a member-state of the EU. This is the case, for example, of Article 22(1a) of Decree-Law 139A/90 (Career Statutes for Kindergarten (nursery school) teachers and for primary and secondary school levels), which expressly foresees EU citizens' access to the teaching profession in state schools.

As a general rule, Portuguese legislation only excludes EU citizens from access to public-sector employment, which is not mainly technical in nature, or the diplomatic corps and the armed forces, which are reserved by articles 15(1) and (2) of the Constitution for the Portuguese. Thus, for example, article 33 of Law n° 16/98, as amended by Law 3/2003, only allows Portuguese citizens to become judges or to work for the public prosecutor's office. According to the provisions of Article 10(1) of Decree-Law 40-A/98, only Portuguese nationals have access to a career in the diplomatic corps. And according to article 11 of Despach 122/2000, only Portuguese nationals may apply for employment with the Police Force.

As far as the recognition of the legally required qualifications for performing these professions, this is comprehensively enshrined in Portuguese legislation (see Chapter VI)

## *2. Draft legislation, circulars*

There is no legislation or circular being drafted which specifically refers to Community workers' access to the civil service. No specific circulars on this subject have come to light.

## *3. Judicial practice*

In its ruling no.345/02 of 11 July 2002, the Constitutional Court declared Article 22 (1a) of Decree-Law 139-A/90 (Career Statutes for Infant, Primary and Secondary School Teachers) to be unconstitutional, because it breaches Article 15 (1) and (2) of the CPR, by restricting access to the teaching profession in state schools to Portuguese nationals, the nationals of a member-state, or foreign citizens, who through an international cove-

nant or special law, have access to public-sector employment in Portugal. The Constitutional Court referred to the case-law of the European Court of Justice concerning article 39(4) of the EU treaty and considered teaching as: a predominantly technical function, in which the technical character overrides the authority component, which means that we cannot even classify this as an exception under the auspices of article 15(2), on the subject of public functions devoid of a mainly technical nature; whilst it is true that the ordinary legislator, pursuant to the last part of article 15(2) may intervene to restrict the equality of rights between Portuguese nationals and foreigners, it is no less true that the right of access to public-sector employment, as one of the “rights, freedoms and guarantees” enjoys the specific protection arrangements contained in article 18(2) of the Constitution; since there is no reasonable basis for justifying different treatment for Portuguese nationals from foreigners, but rather it would be “discriminatory”, we are faced with an unjustified case of inequality, contrary to the principle enshrined in article 13 of the Constitution.

In other words, limited access to public-sector employment involving technical functions may be reserved by law for Portuguese nationals, thereby excluding foreign citizens, but such a restriction must comply with the requirements set out in article 18 of the Constitution. Such a restriction, in any case, must not be general (it must be limited to certain functions), must be set out in a formal law by the National Assembly (it cannot be decided by the administrative authorities). The legal restriction of access to such functions to Portuguese nationals only, is acceptable only when a constitutionally-relevant interest is at stake, and it is necessary and proportional.

#### *4. Administrative practices*

Administrative practice has fostered large-scale admission of EU citizens to mainly technical posts in the public sector, easily seen in the large number of Spanish doctors and nurses working in the hospital and health centres of the National Health Service.

#### *5. Literature*

There is no specific literature on the access of EU citizens to public-sector employment.

## Chapter IV Family Members

### 1. Legislation in force

Decree-Law no. 60/93, as amended by Decree-Law no. 250/98 and Decree-Law 244/98, as amended most recently by Decree-Law 34/2003, of 25 February (family members, foreign citizens).

The worker's following family members have the right to reside in the Portuguese territory, irrespective of their nationality:

- Spouse, descendants under the age of 21 or over 21 but dependent;<sup>50</sup>
- Dependent parents/grandparents of the worker or his/her spouse;<sup>51</sup>
- Any other member of the worker's or his/her spouse family who is dependent on him or lives with him in the country of origin.<sup>52</sup>

As for the entry of the EU worker's family members, we are forced to make a distinction on grounds of nationality:

- If they are Union citizens, they are allowed to enter Portuguese territory merely on production of an identity card or passport.<sup>53</sup>
- The members of the family who do not have the nationality of a Member State are allowed to enter Portuguese territory according to the general rules on entry and residence of aliens, but they enjoy every facility for obtaining a residence visa, that will be issued free-of charge.<sup>54</sup> Thus, the provisions of Decree-Law 244/98 are applicable, as amended most recently by Decree-Law no. 34/2003, of 25 February, which sets the conditions for entry, stay, exit and deportation of foreign citizens from Portuguese territory (Immigration Act).<sup>55</sup> Thus, those family members, who do not hold an EU passport, must apply for a residence visa in a Portuguese consulate for the purposes of family reunification, in order to enter Portuguese territory. They must prove their means of subsistence and living conditions for this purpose. Such a visa can only be issued after consulting the BIS, which will turn down the application, whenever the applicant has been convicted to 6 months' imprisonment or longer. This opinion must be issued within 30 days, or the application shall be tacitly approved.<sup>56</sup> A visa will also be refused, whenever the SIS advises non-admission.<sup>57</sup> Once allowed to enter Portugal, the family members of the EU worker must apply to the BIS for a residence permit.

The legislator once again makes a distinction between EU nationals and others, regarding the type of residence permit to be issued.

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50 Article 3 (f) of Decree-Law 60/93.

51 Article 3 (i) of Decree-Law 60/93.

52 Article 3 (j) of Decree-Law 60/93.

53 Article 4 (1) (b) of the Decree-Law n.º 60/93.

54 Article 4 (2) of Decree-Law n.º 60/93.

55 A Consolidated version of this law was published in *Diário da República*, I Series-A, no. 47, of 25 February 2003, p. 1338.

56 Article 51-A of Decree-Law no. 244/98.

57 Article 25 (1) of Decree-Law no. 244/98.

An equivalent residence permit is always issued to the family members who hold EU nationality:

- a residence permit for a national of a Member State of the European Communities, if the worker has a contract of one or year or more or a permanent contract.<sup>58</sup> This residence permit is valid for 5 years from date of issue, and will be automatically renewed upon request, for further periods of ten years.<sup>59</sup>
- a temporary residence permit, if the worker has an employment contract lasting less than one year.<sup>60</sup> This residence permit is valid for the foreseeable period of employment.<sup>61</sup>

Family members who do not hold EU nationality will be issued with a temporary residence permit, even if the worker holds a residence permit for a national of a Member State of the European Communities,<sup>62</sup> although it has the same period of validity as the residence permit issued to the worker.<sup>63</sup>

Whenever the worker has obtained definitive residence rights (see Chapter I, B), family members living with him on Portuguese territory enjoy the same right.<sup>64</sup> This right is represented by a residence permit issued to the family members of an EU worker with permanent residence rights, regardless of nationality. The death of the EU worker does not lead to annulment of the permanent residence rights of family members.<sup>65</sup>

Should the worker die during his working life, but before obtaining permanent residence rights, family members may still obtain this right in one of the following situations:

- The worker had lived for two consecutive years in Portugal, immediately prior to death;<sup>66</sup> or
- The worker dies in a work accident or due to professional illness, in which case a minimum period of residence is not required.<sup>67</sup>

Restrictions on family members' residence rights are the same as those applied to the EU worker (see Chapter I).

## *2. Draft legislation, circulars*

There is no draft legislation or circulars dealing specifically with family reunification of EU workers in Portugal.

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58 Article 16 (e) of Decree-Law 60/93.

59 Article 17 (1) (a) of Decree-Law 60/93.

60 Article 19 (1) (c) of Decree-Law 60/93.

61 Article 20 (1) (b) of Decree-Law 60/93.

62 Article 19 (1) (d) of Decree-Law 60/93.

63 Article 20 (1) (b) of Decree-Law 60/93.

64 Article 6(1) of Decree-Law 60/93.

65 Article 6(2) of Decree-Law 60/93.

66 Article 6 (3) (a) of Decree-Law 60/93.

67 Article 6 (3) (b) of Decree-Law 60/93.

### *3. Judicial practice*

We are unaware of any judicial decisions pertaining to family reunification of EU workers in Portugal.

### *4. Administrative practices*

The family members of an EU worker who wish to reside with him in Portugal must address an application for a residence permit to their local Regional Directorate or Office of the Borders and Immigration Service, and provide documentary proof of their family tie (e.g. marriage certificate issued within the last year), as well as a document guaranteeing medical assistance in Portugal (health insurance or Social Security beneficiary card). I believe that it is unlawful for BIS to request the latter as a condition for granting a residence permit to the family members of an EU worker, since Decree-Law 60/93 does not subject the issue of a residence permit to having health insurance.

The family member of an EU worker who do not hold an EU passport must have a residence visa issued by the Portuguese consulate in their country of origin. This visa is issued free of charge and it depends on the opinion of the Borders and Immigration Services, which is normally announced within 30 days of the application. The granting of this visa also depends on the worker's family member not being registered in the Schengen Information System as a non-admissible person, as the Portuguese authorities systematically consult the System for such persons.

### *5. Literature*

There is no legal literature which focuses on the family reunification of EU workers.

## **Chapter V**

### **Relevance/Influence/ Follow-up of Recent Court of Justice Judgments**

Courts normally follow the case-law of the European Court of Justice on the subject of free movement of EU workers. Thus, the Supreme Administrative Court's decision for example to annul a BIS' decision to refuse a residence permit to an EU citizen because he did not hold either a valid identity card or passport, respects the case-law of the Court of Justice, in particular, the ruling handed down in the Giagounidis case of 5 March 1991.

Portuguese legislation also enshrined the principle of national treatment of Community workers with regard to access to employment, working conditions and residence.

In administrative practices, EU citizens are no longer to be treated as "aliens", but like citizens.

## Chapter VI

### Policies of a General Nature with Repercussions on the Free Movement of Union Citizens

#### *1. Immigration Policy*

Portuguese immigration legislation, particularly Decree-Law no. 244/98, of 8 August, as amended most recently by Decree-Law no.34/2003, of 25 February, which contains the general arrangements for entry, stay and deportation of foreign citizens from national territory, is applicable by definition to EU citizens and their family members as a general law.<sup>68</sup> Article 1(3) of Decree-Law 244/98, of 8 August excludes the category of member-state nationals from its scope of application, by referring their entry, stay and deportation to special legislation.

In other words, notwithstanding the arrangements for the entry of a family member who does not hold an EU passport, the Immigration Act does not govern the free movement of EU citizens. Nevertheless, some of the arrangements for granting residence visas to family members of EU workers who do not hold an EU passport, may have negative effects on the freedom of movement. In fact, the amendments made to the Immigration Act by Decree-Law 34/2003 resulted in greater restrictions on the entry of foreign citizens in Portugal, which could affect the entry of these family members. In particular, article 40(4), of Decree-Law 244/98, which is the result of an amendment made by 34/2003, obliges the BIS to refuse the residence visa they need to enter Portugal lawfully and apply for a residence permit here, should they have been sentenced to more than 6 months' imprisonment, even if the sentence was suspended. This means that a mechanism of automatic refusal has been introduced, even if the offence was a minor offence and the person in question does not pose a threat to Portuguese law and order.

These family members will also be refused entry if their names appear on the SIS non-admission list.<sup>69</sup>

It appears that the systematic refusal of entry of family members of an EU worker, as a result of the automatic application of these provisions may constitute a restriction on the free movement of EU workers and go against European jurisprudence, by breaching article 10 of Regulation 1612/86 and Directive 64/221/EEC.

Preferential access of EU workers to employment in Portugal is guaranteed by article 41(1) of Decree-Law 244/98, of 8 August. According to this provision, the granting of work visas or residence permits to foreign workers is subject to first option having been given to EU workers. In other words, only when a given vacancy is not filled by an EU worker, will the Portuguese authorities authorise that it be filled by a non-EU national.

#### *2. Recognition of Diploma*

The recognition of a diploma which is legally necessary to gain access to certain jobs is comprehensively guaranteed. In this regard, one should point out that the general Direc-

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<sup>68</sup> Article 31 of Decree-Law 60/93.

<sup>69</sup> Article 25(1) of Decree-Law 244/98.



tives on mutual recognition of diplomas and professional qualifications (Directives 89/48/CEE, 92/51/CEE e 1999/42/CE) are transposed into the Portuguese legal order through Decree-Laws 289/91, 242/96, 48/2003 and 71/2003, respectively.

Sectorial directives concerning the recognition of professional qualifications for certain professions (nurse; dentist; veterinarian; doctor; midwife; pharmacist; architect, barrister) are also transposed into the Portuguese legal order. For example, the Directive on recognition of Diplomas for medical professions, as amended most recently by Directive 2001/19/CE is transposed by Decree-Law 177/2003, amending Decree Law n.º 326/87 (amended by Decree-Laws nos. 35/92, 186/93, 48/2000 and 18/2001).

Therefore, enrolment in the professional order, which is a requirement for performing regulated professions in both the public and private sectors, for example, the medical, nursing and architect's professions, depends on obtaining the corresponding diploma. Thus, EU nationals do not need to go through formal recognition or equivalence of diplomas. Hence, for example, article 6(4) of Decree-Law 104/98 states that EU nationals may enrol in the Order of Nurses, for the purposes of working in the nursing profession in Portugal, and that the academic and vocational qualifications required are those which are legally required for working in the profession in their country of origin.

Article 2 of Decree-law 326/87 states that diplomas awarded in any EU member-state to EU citizens have the same validity in Portugal as Portuguese diplomas providing access to the medical profession.

Working as a lawyer/barrister in Portugal also depends on enrolling beforehand in the Order of Lawyers/Barristers. EU national who wish to set up their own law practice in Portugal with only their qualification from their country of origin, must register with the Order, submitting a certificate which would enable them to practice as a lawyer in their country of origin. Should they wish to practice using the title of "advogado" or "advocate", a Portuguese title, then in accordance with article 2 of the Regulation for the enrolment and registration of lawyers from other EU member-states, they must sit an oral and written aptitude test – these exams must be answered in Portuguese.

Regarding the architect's profession, Decree-Law 14/90 establishes ex-lege recognition of diplomas awarded in other EU member-states, and gives them the same value as Portuguese qualifications. According to article 5(2) of the Statutes (approved by Decree-Law 176/98), EU citizens may enrol in the Order, for the purposes of practising as an architect, provided they have obtained the academic and vocational requirements for entry to the profession in their own country.

Engineers must enrol in the Order of Engineers. According to article 4 of Decree-Law 289/91, EU citizens may enrol, provided they hold qualifications required for entry to the profession in their own country.

Furthermore, in a bid to facilitate the free movement of EU workers, the Portuguese legislator has set up a system for automatic recognition of doctorates awarded by an EU university. In fact, according to Decree-Law 216/97, a doctorate awarded by a university in another EU member-state is recognised by merely registering it at a Portuguese university, with there being no need to assess equivalence.

## **Chapter VII**

### **EU Enlargement**

This Chapter is to be developed in the 2004-2006 Reports.

The entry and residence of workers from the accession States are regulated under the Aliens Law (Immigration Act – Decree-Law n° 244/98, dated 8th August), that establishes the legal framework on entry and residence of aliens. Nevertheless, after accession, preferential access for community citizens to subordinate work activities in the Portuguese territory is assured by article 41(1) of the Immigration Act. According to this provision, the concession of work permits or residence visas to non-EU workers is subject to preference having been given to EU citizens *vis-à-vis* job vacancies. This means that, only if a certain job vacancy is not filled by an EU citizen, will the Portuguese authorities allow it to be taken by a third State national.

In Portugal the free movement of workers from the accession States was not a point of debate in public discussions on Enlargement. This is probably due to the fact, that Portugal is not a popular country of destination for nationals of these countries. In fact, according to statistical data supplied by the Borders and Immigration Service, in 2002 only 92 citizens of the 10 accession countries applied for a residence permit in Portugal, and in 2003 only 25 asked for a residence permit. About 0.6 % of the total number of applications for residence permits in Portugal are made by nationals of the 10 accession countries

## Chapter VIII Statistics

All statistics presented in this chapter were supplied by the BIS. Data for 2002 was taken from the 2002 Statistical Report, available online at [www.sef.pt](http://www.sef.pt), although this data does not always tally with data published by the BIS and some figures are still provisional. Little data is available for 2003, notably concerning the spread of the foreign population across age brackets and qualifications.

### 1. Flux of Community citizens

#### *Flux of Community citizens in comparison to third country nationals*

	2001	2002	2003
Community Citizens	61.732	66.002	69.805
Third Country nationals	288.771	347.302	364.983
Total	350.503	413.304	434.548

Source: Borders and Immigration Services (Serviço de Estrangeiros e Fronteiras, [www.sef.pt](http://www.sef.pt))

### 2. Main nationalities of communities' citizens residing in Portugal

	2002	2003
United Kingdom	15.899	16.737
Spain	14.587	15.263
Germany	11.871	12.483
France	8.364	8.802
Netherlands	4.803	5.075
Italy	3.762	4.176
Belgium	2.435	2.538

#### *Repartition of Community citizens by sex*

	2002	2003
Male	35.030	36.878
Female	30.972	32.687

#### *Repartition by region*

	2002	2003
Braga	1.301	1.019
Porto	5.174	5.333
Aveiro	1.560	1.681
Coimbra	2.972	3.463
Leiria	1.216	1.291
Lisboa	25.415	26.448
Setúbal	2.834	2.987
Faro	18.176	19.118
Madeira	1.535	1.636
Other	5.819	6.589

In 2001, EU citizens accounted for 18% of the legally-resident foreign population in Portugal, with the figure falling in 2002 and 2003 to approximately 16%.

The BIS statistical reports, available on-line at [www.sef.pt](http://www.sef.pt) do not allow us to draw a distinction between EU workers and EU citizens who are living in Portugal for reasons other than employment (family reunification; right to settle; studies, etc.).

There is no accurate data on the flow of EU workers and their respective family members either, which would allow us to draw a comparison to non-EU citizens.

Taking the data from the 2002 Statistical Report on the number of residence permits applied for, divided into professional categories, as a basis, together with the number of stay permits (which allow non-EU workers to stay in Portugal lawfully), we can conclude that in 2002, the number of EU workers applying for residence in Portugal (1,389) represented only a small proportion of the total, when compared to non-EU workers applying for residence permits (2,679) or were issued with stay permits (47,567). In other words, around 3% of foreign workers in Portugal are EU citizens.

BIS data also reveal that 301 EU citizens applied for residence in order to set up their own business and 58 for other purposes.

BIS data does not tell us a great deal about the flow of community workers and their families, in terms of the age brackets they come under. EU citizens applied for 4,442 residence permits in 2002. 834 were aged under 19 (probably children of EU workers and those with the right to settle, who are covered by family reunification rules). 633 were aged between 20 and 24 (probably children covered by family reunification and students). 2,597 were aged between 25 and 59 (this figure may include EU workers, those with the right to settle, students, spouses with an EU nationality, dependent parents, etc.) 378 were over 60 (this figure may include dependent parents or non-workers with the right to settle). The 2002 Statistical Report does not allow us to draw any conclusions about family members of EU workers who do not hold an EU passport, as they are covered by the rules governing permits issued to non-EU citizens.

### 3. Repartition by skills-qualifications/branch

#### *Residence permits requested in 2002 and 2003*

	2002	2003
Senior Officials	264	235
Scientists / Intellectuals	735	501
Technicians and Associate Professionals	271	257
Administrative Personnel	90	70
Service Workers	189	159
Agricultural and Fishery workers	26	20
Crafts and related trades workers	90	76
Qualified Workers (Installation)	27	23
Unqualified Workers	56	62

Source: 2002 Statistics Report, SEF; Provisional data regarding 2003.

The 2002 Statistical Report also reveals that EU citizens account for 75% and 72% respectively of foreign senior managers and skilled workers living in Portugal. They account for only 11% of unskilled foreign workers, compared to 66% who are African and 14% Asian.

Most EU citizens settle in major cities and along the coast, that is to say, in the most-densely populated and developed regions.

#### *4. Trends*

The flow of EU citizens to Portugal over recent years shows a constant rise, which coincides with an increase in migratory flows in general. Although the BIS statistics do not enable us to discover the legal basis for settling here, we can state that the majority do so under the auspices of free movement of workers. This is backed up by the fact that in 2002, 1,389 of the 1,748 EU citizens who applied for residence permits, did so as workers, 301 on the basis of the right to settle and 58 for other purposes (studies or general residence rights). Furthermore, the fact that the majority chose to settle along the Northern coastal areas, the Western midlands and in Greater Lisbon, that is to say, the most economically-developed regions also bears this out. The large number of citizens who settle in the South (the Algarve), in particular, British citizens (almost 46%) and Germans (approximately 20%) is explained by the fact that this is a favourite retirement spot.

## Chapter IX Social Security

In the field of social security, Article 8 of Law 32/2002 (Framework Law of Social Security)<sup>70</sup> establishes the principle of non-discrimination on the grounds of nationality of the beneficiaries of the systems of social protection, subject to residence and reciprocity requirements.

### *1. Relationship between Regulation 1408/71 and Regulation 1612/68*

EU workers residing in Portugal have the same social security rights as Portuguese citizens. The public social security system covers the benefits of the contributory and non-contributory schemes.

EU nationals working and living in Portugal are entitled to the following contributory scheme benefits:

- Sickness;
- Maternity, paternity and adoption;
- Unemployment;
- Accidents at work and occupational diseases;
- Invalidity;
- Old-age;
- Death.

The granting of those benefits depends on the affiliation of workers to the Social Security system and on completing a minimum period of contributions. This period may be completed by cumulating periods of contribution registered in another Member State.

EU citizens residing in Portugal are also entitled to the benefits of the non-contributory scheme which covers solidarity benefits and family benefits.

*Solidarity benefits* aim at preventing and eradicating poverty and exclusion situations. They cover the following contingencies:

- Lack or inadequacy of economic resources of the persons or of their households for the fulfilment of their basic needs and for the promotion of their progressive social and occupational insertion;
- Invalidity;
- etc.

*Family benefits* aim to compensate for increased family burdens. They cover namely the following contingencies:

- Burdens due to handicaps;
- Burdens due to dependence.

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70 *Diário da República*, Series I-A, no. 294, 20 December 2002, p. 7954-7968

## *2. Supplementary pension schemes*

Law 32/2002 establishes the complementary social security system, subject to specific implementation. This system covers the following schemes:

- The legal supplementary scheme aims to cover contingencies or the provision of benefits in conjunction with the public social security scheme;<sup>71</sup>
- The contractual supplementary scheme aims to provide supplementary social insurance benefits for the area not covered by the former, namely the part of the salary on which compulsory contributions shall not be levied, as established in law, as well as protection against contingencies not covered by the compulsory scheme;<sup>72</sup>
- The optional supplementary schemes aim to strengthen voluntary self-protection of the persons concerned. They may take the shape of a pension plan, life insurance, insurance funds and mutual modalities, among others.<sup>73</sup>

The supplementary schemes (legal and contractual) may be the initiative of the State; companies; , trade unions, employers, and occupational associations,<sup>74</sup> and may be administered by public, co-operative, mutual or private institutions legally created for that purpose.<sup>75</sup>

## *3. National reports, legal literature*

Despite the consultation of several data bases, we were unable to find any specific literature or reports on social security regarding community workers in the years 2002-2003, only up to 2001.

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71 Article 94 (2) Law 32/2002.

72 Article 94 (3) Law 32/2002.

73 Articles 94 (4) and 98 Law 32/2002.

74 Article 94 (5) Law 32/2002.

75 Article 101 Law 32/2002.

## Chapter X Establishment, Provision of Services, Students

### *1. Establishment*

All nationals of a Member State who are entitled to the right of establishment are allowed to enter and reside in Portugal.<sup>76</sup> The following family members of EU citizens who are established or who wish to have the same rights, irrespective of their nationality: spouse, descendants under the age of 21 or over 21 but dependent;<sup>77</sup> dependent parents or grandparents;<sup>78</sup> any other member of the family who is dependent on him or lives with him in the country of origin.<sup>79</sup>

A residence permit for a national of a Member State of the European Communities is granted to the nationals of a Member State, who are entitled to the right of establishment, or to the members of his family who are nationals of a Member State.<sup>80</sup> It is valid for the period of 5 years counting for a period of not less than 5 years from the date of issue and shall be automatically renewable, at the request of the interested party.<sup>81</sup> A temporary residence document is issued to the members of the family who are not nationals of a Member State. It has the same period of validity as that issued to the holder of the right to establishment.<sup>82</sup>

The holder of the right to establishment should apply for a residence permit to the Head Office or Regional Delegation of the Borders and Immigration Services and, apart from presenting his identification document, a document that proves he has established himself or set up a company or that he has a holding in an undertaking or, a statement attesting to the beginning of his activity, as well as a document that proves that he has medical care in Portugal (voluntary medical insurance or that he has a Social Security card).

The same regime that is applicable to communities workers, regarding restriction to the right of entry and residence in Portugal also applies to the holders of the right to establishment and of the members of their family.

### *2. Provision of services*

EU citizens who wish to provide services in Portugal are allowed to enter and are granted the temporary right to reside in Portugal.<sup>83</sup> The same applies to the following family members of the EU citizen, irrespective of their nationality: spouse, descendants under the age of 21 or over 21 but dependent;<sup>84</sup> dependent parents/grandparents;<sup>85</sup> any

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76 Article 3 (b) of Decree-Law 60/93.

77 Article 3 (f) of Decree-Law 60/93.

78 Article 3 (i) of Decree-Law 60/93.

79 Article 3 (j) of Decree-Law 60/93.

80 Article 16 (c) and (e) of Decree-Law 60/93.

81 Article 17(1) (a) of Decree-Law 60/93.

82 Articles 19 (1) (d) and 20 (1) b) of Decree-Law 60/93.

83 Article 3 (b) of Decree-Law 60/93.

84 Article 3 (f) of Decree-Law 60/93.

85 Article 3 (i) of Decree-Law 60/93.



other member of the family who is dependent on him or lives with him in the country of origin.<sup>86</sup>

The nationals of a Member State, who are providers of services or recipients of services in Portugal for a period of over three months and the members of their family are entitled to temporary residence permits.<sup>87</sup> The temporary residence permit is valid for the expected duration of the services being provided.

Restrictions on their right to enter and stay are governed by the same system as that which is applicable to EU workers.

### 3. *Students*

The Portuguese law on free movement of EU citizens recognizes the right of residence to any student who is a national of a Member State and who does not enjoy this right under other provisions of Community law,<sup>88</sup> provided the student fulfils three conditions:

- He or she must assure, by means of a declaration or by alternative means of his/her choice, that he or she has sufficient resources to avoid becoming a burden on the social security system of the host Member State during his or her period of residence; The BIS requires that students prove that their means of subsistence are at least equivalent to the minimum national salary.
- He or she must be enrolled in a recognised educational establishment and pursue vocational training as his/her main activity.
- He or she must have taken out a comprehensive health insurance policy for the whole family.

According to article 3 (h) and 9 (c) of Decree-Law 60/93, the right of residence is extended to the student's spouse and dependent children.

The student and family members who are EU citizens are issued with a "residence permit for a national of a Member State of the European Communities",<sup>89</sup> which is valid for the period of study or one year, should the length of the course exceed one year, and is renewable on an annual basis (article 17 (c) of Decree-Law 60/93). Should the student's spouse and dependent children not be EU citizens, they are issued with a "temporary residence permit" (article 19, (1) (d) of Decree-Law 60/93), which is valid for the same length of time as the residence permit of the EU student (article 20 (1) (b) of Decree-Law 60/93).

Applications for residence permits are submitted to the Head Office or Regional Delegation of the Borders and Immigration Services of the area in which the student lives. Apart from his identification document, he must also present other documents that prove he has adequate resources, that he has enrolled at a Portuguese teaching establishment as well as a document that proves that he has medical care in Portugal (voluntary medical insurance or a Social Security card).

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86 Article 3 (j) of Decree-Law 60/93.

87 Article 19 (1) (b) and (c) of Decree-Law 60/93.

88 Articles 3 (d) and 9 (c) of Decree-law 60/93.

89 Article 16 (d) and (e) of Decree-Law 60/93.

The same regime that is applicable to EU workers, regarding restrictions on the right of entry and residence in Portugal also applies to students and the members of their family.

#### 4. Literature

The freedoms of the Common Market is not a subject that arouses interest among Portuguese jurists, thus there is no recent literature published in the years 2002 and 2003 that deals with this matter. However, one can refer to the following bibliography as being the most significant:

Alves, Jorge de Jesus Ferreira, *Os advogados na Comunidade Europeia* (Lawyers in the European Community), Coimbra, Coimbra Editora, 1989, 439 p.

Cabral, Pedro, Algumas considerações sobre a livre circulação dos advogados na Comunidade Europeia : à luz da nova directiva 98/5/CE do Parlamento Europeu e do Conselho (Observations on the free movement of lawyers in the European Community: in the light of the new Directive 98/5/EEC of the Parliament and Council), *Revista da Ordem dos Advogados*, Lisboa, a.59n.2(Abr.1998), p.589-664;

Correia, Margarida Brito, Liberdade de circulação de estudantes na Comunidade Europeia (Free movement of students in the European Community), *Direito e justiça*, Lisboa, v.11t.1(1997), p.131-138;

Ribeiro, José Manuel Coelho, O direito de estabelecimento dos advogados na Comunidade Europeia (Lawyers' right of establishment in the European Community) , *Boletim da Ordem dos Advogados*, Lisboa, s.3 (Maio-Jul.1994), p. 22-24;

Vasconcelos, Rita Leandro, A livre circulação dos advogados na comunidade europeia (Free movement of Lawyers in the European Community), *Revista da Faculdade de Direito da Universidade de Lisboa*, Lisboa, v. 42, n. 2 (2001), p. 1205-1259.

## Chapter XI Miscellaneous

### 1. Literature

2002

Amado, João Leal, *Vinculação versus liberdade : o processo de constituição e extinção da relação laboral do praticante desportivo* (Ties versus freedom: the process of entering and dissolving sportsmen's employment ties), Coimbra, Coimbra Editora, 2002.- 548 p.

Carreto, Lígia Lopes de Sousa, *Livre circulação de trabalhadores* (Free Movement of Workers), 2002, Faculdade de Direito de Lisboa (not published).

Fernandes, Francisco Liberal, *Liberdade de circulação dos trabalhadores na Comunidade Europeia* (Free Movement of Workers in the European Community), Coimbra Editora, 2002, 287 p.

Fonseca, Eugénia Peralta, *Trabalho desportivo e livre circulação de trabalhadores* (Sports work and the free movement of workers), Faculdade de Direito de Lisboa, 2002 (não publicado).

Mestre, Alexandre Miguel, *Desporto e União Europeia : uma parceria conflituante?* (Sport and the European Union: a partnership in conflict?), Coimbra, Coimbra Editora, 2002, 354 p.

Redinha, Maria Regina Gomes, Atipicidade do emprego no direito comunitário (Unusual Employment in EU law), in: *Estudos dedicados ao Prof. Doutor Mário Júlio de Almeida Costa*, Lisboa, Universidade Católica, 2002.- p.1053-1066

Vieira, José Eduardo Fanha, *O contrato de trabalho desportivo : colectânea de legislação e regulamentação* (The Sports work contract: collection of regulations and legislation), Centro de Estudos e Formação Desportiva,(Colecção direito desportivo) (Sport law collection), Lisboa, 2002, 158 p.

2003

Henriques, Miguel Gorjão, *Direito comunitário: sumários desenvolvidos* (EU law: extended summaries, 2.ed., Coimbra, Almedina, 2003, 509 p. Textbook on EU law with a chapter on the free movement of workers in the internal market.

### 2. Seminars, Conferences

No seminars or conferences on the specific subject of the free movement of workers were held during 2002 and 2003.

Mention should be made of the Portuguese Seminar "30 years of the Free Movement of Workers" held in Lisbon on 16 January 1998, which was organised by the Institute for Development studies.