

**REPORT**  
**on the Free Movement of Workers**  
**in Portugal in 2006**

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November 2007



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**GENERAL REMARKS**

1. Concerning the free movement of persons, 2006 was marked by the entry into force of Law 37/2006, of 9<sup>th</sup> of August (published in *Diário da República*, 1.<sup>a</sup> série, n.º 153, of 9<sup>th</sup> of August 2006, p. 5717 to 5724) regulating the exercise of the right of free movement and residence of the citizens of the European Union and their family members within the national territory and transposing to the Directive 2004/38/CE into the Portuguese legal order. The Law 37/2006 repealed and replaced the Decree-Law 60/93 of 3<sup>rd</sup> of March, establishing the conditions of entry and residence in Portugal of EU citizens.

According to its Article 1(1), Law 37/2006 lays down (a) the conditions governing the exercise of the right of free movement and residence within the national territory by Union citizens and their family members; (b) the legal regime of the right of permanent residence in the national territory for Union citizens and their family members; (c) the limits placed on these rights on grounds of public policy, public security and public health.

In its Article 1(2), Law 37/2006 also lays down the legal regime of the entry, residence and exit of the citizens of the Contracting States of the European Economic Area and Switzerland and of the members of their family, as well as of the relatives of Portuguese citizens independently of their nationality. Because of that, the provisions of Law 37/2006 which apply to the Union citizens are considered as applying also to citizens of the Contracting States of the European Economic Area and of Switzerland, and its provisions applicable to relatives are also applicable to the relatives of Portuguese citizens, irrespective of their nationality [Article 3(4) and (5)].

2. The entry into force of the Adhesion Treaties of the 10 new Member States has had a very limited impact in Portugal concerning the free movement of workers, due to the fact that migratory flows from these Member States are insignificant. Only ----% of the applicants for residence permits came from their territory. Anyway, during a period of two years from 1<sup>st</sup> of May 2004, Portugal applied transitional measures to 8 new Member States: Czech Republic, Slovakia, Estonia, Latvia, Lithuania, Hungary, Poland and Slovenia, but not to Cyprus and Malta. This transitional period expired on 1<sup>st</sup> of May 2006.

It means that nationals coming from these 8 Member States after the 1<sup>st</sup> of May 2004 and till 1<sup>st</sup> of May 2006 were subject to Decree-Law 244/98, as amended lately by Decree-Law 34/2003, establishing the general rules for entry, stay and departure of foreign citizens in and from Portuguese territory (Immigration Act), and not to Decree-Law 60/93, which was repealed by the Law 37/2006. Till 1<sup>st</sup> of May 2006, these Union citizens were subject to the general conditions of entry and residence of foreign citizens. In this context, the Portuguese authorities required 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.

Only the citizens of these eight new Member States who (1) come to Portugal as self-employed or economically inactive persons or (2) stayed already here as employees before 1<sup>st</sup> of May 2004 were subject to Decree-Law 60/93.

## CHAPTER I. ENTRY, RESIDENCE AND DEPARTURE

### **A. Entry**

#### *1. Legislation in force*

According to Article 4(1) of Law 37/2006, the Union citizens are allowed to enter the Portuguese territory merely upon presentation of a valid identity card or passport and without any entry visa or equivalent formality.

Where a Union citizen does not have the necessary travel documents, he/she benefits of the possibility of obtaining such documents or to have them brought to him/her within a reasonable period of time, or of corroborating or proving by other means that he/she has the right of free movement and residence [Article 4(4)].

The entry of Union citizens in the national territory can only be denied on grounds of public policy, national security or public health in accordance with Chapter VIII of Law 37/2006. Such grounds may not be invoked to serve economic ends. Denial decisions taken on such grounds must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention may not be accepted. Previous criminal convictions do not in themselves constitute grounds for automatically taking such a measure (Article 22).

The person concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision of denial of entry taken in his/her case are based, unless this is contrary to the interests of State security, and of the court or administrative with which he/she may lodge an appeal and the time limit for the appeal [Article 25(2) and (3)].

When the appeal or judicial review concerns a decision of denial of entry to the Portuguese territory the person concerned has not the right to submit his/her defence in person [Article 26(5)].

The person who was subject to a measure of prohibition of entry to the Portuguese territory on grounds of public policy or public security may submit an application for lifting of such prohibition after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final prohibition measure which has been legally adopted. A decision on this application shall be reached within six months from its submission. The person concerned shall have no right of entry to the Portuguese territory while his/her application is being considered (Article 27).

#### *Judicial practice*

An examination of the case-law databases of the Administrative Courts revealed that in 2006 there is no case-law pertaining to the entry or denial of entry in Portugal of Union citizens.

#### *Administrative practices*

Administrative practices are limited to implementing current legislation on the entry of Union citizens. The fact that entry controls over such citizens are carried out in principle only at the Portuguese external borders accounts for there being no known cases of denial of entry.

#### *Recent Legal Literature*

The entry of Union citizens is not a subject which arouses a great deal of interest amongst Portuguese jurists. Hence, there is no legal literature specifically devoted to such subject. It is

covered in general terms by some textbooks on Community Law and certain monographs, referred to in Chapter XI of the Portuguese report of 2002/2003. The most recent textbook which deals with such subject is GORJÃO-HENRIQUES, Miguel, *Direito Comunitário* (Community Law) 3<sup>rd</sup> edition, Coimbra, 2006.

## **B. Residence**

### *1. Legislation in force*

*Article 6(1) of Law 37/2006 governs the right of residence up to three months of the Union citizens in Portugal*

According to it, they have the right of residence on the Portuguese territory for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

*Articles 7 to 9 (Chapter IV) and 14 and 15 (Chapter VI) of Law 37/2006 govern the right of residence for more than three months*

All Union citizens have the right of residence on the Portuguese territory for a period of longer than three months if they satisfy one of the following requirements: (a) are workers or self-employed on the Portuguese territory; (b) have sufficient resources for themselves and their family members, as well as a sickness insurance, provided that this is required in the Member State of their nationality to the Portuguese citizens; (c) are enrolled at a public or private educational establishment officially accredited, provided that they prove, by means of a declaration or by such equivalent means as they may choose, that they have sufficient financial resources for themselves and their family members, as well as a sickness insurance, if this is required in the Member State of their nationality to the Portuguese citizens; (d) are family members accompanying or joining a Union citizen satisfying one of the precedent conditions [Article 7(1)].

The notion of “sufficient resources” is defined by Article 2(f) of Law 37/2006 as follows: “the resources of the citizen which are not lower than the threshold below which the Portuguese State may grant social rights and supports to Portuguese nationals, taking into account the personal situation of the citizen concerned and, s the case may be, the situation of his/her family members.

According to Article 7(3) the Union citizen who is no longer a worker or self-employed person retains the status of worker or self-employed person and therefore his/her right of residence, where he/she: (a) is temporarily unable to work as a result of an illness or accident; (b) is in duly recorded involuntary unemployment and has registered as a *job-seeker* with the Institute of Employment and Vocational Training; (c) embarks on vocational training provided that this training is related to the previous employment, unless he/she is involuntary unemployed.

The loss of the right of residence of a Union citizen (or his/her family members) may not be the automatic consequence of their recourse to the Portuguese social assistance system [Article 9(2)]. Without prejudice of the restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health, an expulsion measure may in no case be adopted against Union citizens if they: (a) are workers or self-employed; (b) entered the Portuguese territory in order to *seek employment* and can provide evidence that they are continuing to seek employment [Article 9(4)]. The Union citizens covered by Article 9(4)(b) do not enjoy entitlement to social assistance [Article 20(3)].

The Union citizens whose permanence in the national territory is longer than three months must register with the Town Hall of the residence area within thirty days after a period of time of three months from the date of entry in the national territory. A registration certificate is issued immediately, stating the name and the address of the person registering and the date of registration. For the registration certificate to be issued it is required a valid identity card or passport, as well as a declaration under compromise of honour that the ap-

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plicant meets the conditions foreseen in points (a), (b) or (c) of the above quoted Article 7(1) [Article 14(1) to (5)].

*Articles 10, 11 (Chapter V) and 16 (Chapter VI) of Law 37/2006 govern the right of permanent residence*

According to Article 10, Union citizens who have resided legally for a continuous period of five years in the Portuguese territory have the right of permanent residence there, which is not subject to the conditions related to the right of residence for more than three months. The right of permanent residence is not affected by (a) temporary absences not exceeding six consecutive months a year, (b) absences of a longer duration for compulsory military service or (c) one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country for professional reasons.

Once acquired, the right of permanent residence shall be lost only through the absence from Portugal for a period exceeding two consecutive years.

By way of derogation from Article 10, the right of permanent residence in Portugal shall be enjoyed before completion of a continuous period of five years or residence by: (a) workers or self-employed persons who, at time they stop working, have reached the age laid down by the Portuguese law for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in Portugal for at least the preceding twelve months and have resided there continuously for more than three years; (b) workers or self-employed persons who have resided continuously in Portugal for more than two years and stop working there as a result of permanent incapacity to work; (c) workers or self-employed persons who, after three years of continuous employment and residence in Portugal, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in Portugal, to which they return, as a rule, each day or at least once a week [Article 11(1)].

According to Article 16, upon application the BIS shall issue Union citizens entitled to permanent residence with a document certifying it, within a maximum period of time of 15 days, after having verified duration of residence. The continuity of residence may be attested by any admissible means of proof. It is broken by any valid expulsion decision enforced against the person concerned [Article 10(6) and (7)].

*The right of residence (for up to three months and for more than three months) as well as the right of permanent residence cover the whole territory of Portugal (Article 18)*

In order to ascertain whether the Union citizen represents a danger for public policy or public security, when issuing the registration certificate, the Portuguese competent authority (BIS) may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous criminal records the person concerned may have. Such enquiries may not be made as a matter of routine [Article 22(4) and (5)].

According to Article 25(2), the Union citizen shall be informed precisely and in full, of the public policy, public security or public health grounds on which the denial decision of the registration certificate is based, unless this is contrary to the interests of State security.

An appeal can be lodged before the administrative courts against such decision, in accordance with Article 26. The person concerned has the right to submit his/her defence in person, except when his/her presence may cause serious troubles to public policy or public security. The appeal shall allow for an examination of the legality of the decision and of the facts and circumstances on which the denial decision is based, as well as for ensuring that the decision is not disproportionate, particularly in view of the requirements laid down in Article 23 (see below, point C).



*Draft legislation, circulars*

The Law 37/2006 imposes the adoption by the Minister of Home Affairs of three execution regulations concerning Union citizens through the form of *portaria*: (1) an execution regulation laying down the model of a registration certificate for periods of residence in Portugal longer than three months [Article 14(3)]; an execution regulation laying down the model of a certificate of permanent residence in Portugal [Article 16(1)]; (3) a execution regulation laying down the costs concerning the issuing of such documents [Article 29(1)]. All these execution regulations were adopted in 2006 through the Portaria 1637/2006 of 2<sup>nd</sup> of September.

*Judicial practice*

An examination of the case-law databases of the Administrative Courts revealed that in 2006 there is no case-law pertaining to residence in Portugal of Union citizens.

*Administrative practices*

There are no administrative practices concerning the issuing of registration certificates or documents certifying permanent residence to Union citizens which diverge from the legal norms. According to information obtained from the BIS, 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.

**C. Departure**

*1. Legislation in force*

Article 5 of Law 37/2006 provides that, without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport have the right to leave the Portuguese territory, without exit visa or equivalent formality.

On the other side, according to Article 33(2) of the Portuguese Constitution “Expulsion 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. The law must ensure accelerated decision procedures.”

In view of the right to free movement of Union citizens, one can conclude that it is legally impossible to administratively deport them from Portuguese territory, when they are in possession of a valid registration certificate. In such a case, their forced departure may only be determined by a court of law, in accordance with Articles 22 and following of Law 37/2006, quoted above.

Whatever the case, expiry of the identity card or passport on the basis of which the Union citizen entered Portugal and was issued with a registration certificate may not constitute a ground for expulsion from Portuguese territory [Article 9(5)]. Before taking an expulsion decision on grounds of public policy or public security, the competent authority shall take account of considerations such as how long the Union citizen concerned has resided on the Portuguese territory, his/her age, state of health, family and economic situation, social and cultural integration in Portugal and the extent of his/her links with the country of origin [Article 23(1)].

According to Article 23(2) the Union citizens (and their family members, irrespective of nationality) who have the right of permanent residence on Portuguese territory may not be expelled from it (only by a decision of a court of law), except on serious grounds of public policy or public security.

Except on imperative grounds of public security, an expulsion decision may not be taken against Union citizens if (a) they have resided in Portugal for the previous ten years or

(b) if they are minors, unless the expulsion is necessary for the best interests of them, as provided for in the United Nations Convention on the Rights of the Child of 20<sup>th</sup> of November 1989 [Article 23(3) and (4)].

Finally, concerning public health grounds, diseases occurring after a three-month period from the arrival to Portugal may not constitute grounds for expulsion from its territory [Article 24(2)].

According to Article 25(4) save in duly substantiated cases of urgency, the time allowed to leave the territory following an expulsion decision shall be not less than one month from the date of notification.

Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the national territory may not take place until such time as the decision on the interim order has been taken except: (a) where the expulsion decision is based on a previous judicial decision; (b) where the persons concerned have had previous access to judicial review; (c) where the expulsion decision is based on imperative grounds of public security under Article 23(3) [Article 26(2) and (3)].

Article 28 strongly limits the issuing of expulsion decisions of Union citizens as a legal consequence of a custodial penalty, by remission to Articles 22, 23 and 24. After more than two years from the date on which an expulsion decision was issued, this may only be enforced before it has not been checked that the individual concerned is currently and genuinely a threat to public policy or public security and it has not been assessed whether there has been any material change in the circumstances since the expulsion decision was issued [Article 28(2)].

#### *Judicial practice*

The Supreme Court of Justice clearly admits the possibility of deporting EU citizens, provided the one in question poses a real and serious threat to public policy or public security.<sup>1</sup>

As mentioned in the previous reports, the Supreme Court of Justice, on the basis of Community Law and the case-law of the European Court of Justice, has decided that EU citizens convicted of a crime should not be sentenced to the additional penalty of expulsion, except on grounds of public order or public security.<sup>2</sup>

#### *Administrative practices*

Administrative practices are limited to implementing current legislation.

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1 Ruling of the Supreme Court of Justice of 7th of January 1993, published in the *Bulletin of the Ministry of Justice*, no. 423, p. 172, and in the *Collection of Case-Law – Rulings of the Supreme Court of Justice*, year I, t. 1, p. 160 (note 25); Ruling of the Supreme Court of Justice of 10th of July 1996, published in *Rulings of the Supreme Court of Justice*, year IV, t. 2, p. 229; Ruling of the Supreme Court of Justice of 19th of April 2005.

2 Ruling of the Supreme Court of Justice of 19th of December 1991, published in the *Bulletin 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 23rd of November 1995, published in the *Bulletin of the Ministry of Justice*, no. 451, p. 130.

## CHAPTER II. ACCESS TO EMPLOYMENT

### **1. *Equal treatment in access to employment***

Pursuant to Article 20(1) of Law 37/2006, all Union citizens residing in the Portuguese territory enjoy equal treatment with the Portuguese nationals, without prejudice of the restrictions admitted by Community law. The Portuguese Employment Law consecrates the principle of equal treatment in access to employment.<sup>3</sup>

Several Acts governing a particular profession open it implicitly or explicitly to EU citizens. One case 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).

Private security is an example of explicit openness to Union workers. According to Article 10 (2), the professional card can be acquired by all citizens of the European Union that meet the admission requisites to the profession (Article 8) or that prove to have these requisites in accordance with the verification made in their country of origin.

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).

Concerning the access to employment through the employment agencies, the Decree-Law 124/89 of 14<sup>th</sup> of April, in its Article 5, forbids the collocation in the labour market of foreign citizens not possessing a residence permit valid in national territory.

The agencies are under the communication duty to the BIS in what concerns the requests made by foreign citizens possessing a residence permit. These dispositions are not applicable to the Union citizens, when they enter in Portugal looking for work, because they benefit of equal treatment in access to employment, except in what concerns the social benefits, in accordance with the Law 37/2006, Article 20 (3).

Our examination of case-law databases and collections revealed that there is no case-law pertaining specifically to equal treatment and access to employment of Community workers.

During 2006 there is no legislation or circular being drafted which specifically refers to equal treatment and access to employment of Community workers.

### **2. *Language requirement (private sector)***

There are no express legal provisions concerning linguistic abilities, but it is demandable that the level of the linguistic knowledge be the reasonably necessary for the proper fulfilment of the duties.

### **3. *Recognition of diplomas (initiatives to transpose the Directive 2005/36/EC)***

The general Directives 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

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3 Concerning this subject, the Resolution 13/2001 of the Assembly of the Republic approved the Convention 181 of ILO, which in its Article 5 prohibits the discrimination in the access to employment.

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.

The 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.

Finally, in what concerns the access to the career training of the superior health technicians, the Decree-Law 414/91 of 22<sup>nd</sup> of October defines which degrees of licentiate allow the levelling to the training and forward to the Decree-Law 396/99 that recognizes the qualifications obtained in the EU.

According to the provisions of the Statutes of the Order of Lawyers (Law 15/2005 of 16 Mars) 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 197 of the Regulation, they must be guided by a lawyer inscribed in the Order of Lawyers, or submitted to an inscription in the Order, that in accordance with the Article 200, demands an oral and written aptitude test – these exams must be answered in Portuguese. However, the European Union lawyers that demonstrate to have experience of the judicial practice in Portugal can be released from this oral test.

Regarding the architect's profession, the 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 the 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.

Concerning the recognition of the diplomas, in accordance with the assumed compromises of The Bologna Process, the Decree-Law 42/2005 of 22<sup>nd</sup> of February establish the rules and the formal documents in order to create a European higher education area, facilitating students and teachers mobility.

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.

During 2006 no initiatives to transpose the Directive 2005/36/EC were publicized.

#### **4. Nationality Condition for Captains of Ships**

*Text in force*

The Decree-Law 104/89 establishing the new regulation on Maritime Inscription, demanded to those wishing to exercise the seaman profession, this inscription may only be required by

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individuals over 16 years and having the Portuguese nationality, “under safeguard of the obligations resulting of the accession of Portugal to the European Communities”.

According to Decree-Law 104/89, the access to posts in the maritime sector is subject to an inscription. Article 4 opens such an inscription also to EU citizens, without excluding the posts of master, chief mate and master of vessels of merchant ships flying Portuguese flag.

Independently of the question of determining if, according to Portuguese law, the rights under powers conferred on masters, chief mates of merchant ships and on masters of vessels flying Portuguese flag are actually exercised on a regular basis and do not represent a very minor part of their activities, no measures were taken or are planned to reserve to Portuguese nationals such posts.

### *Judicial Practice*

An examination of the case-law databases of the Administrative Courts revealed that in 2006 there is no case-law pertaining to access to the posts of captains of ships.

### *Administrative practice*

Administrative practices are limited to implementing current legislation.

## CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

### 1. Working conditions, social and tax advantages

According to Article 13 (“Principle of equality”) of the Constitution of the Portuguese Republic (CPR), “(1) All citizens have the same social rank and are equal before the law. (2) No one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances.”

According to Article 15 (“Aliens, stateless persons, European citizens”) of the CPR, “(1) 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.” In principle, equality extends to all rights, and not just those guaranteed by the Constitution, but also those enshrined in ordinary legislation.

The principle of equality is not absolute, since Article 15(2) of the CPR provides exceptions and allows the law to establish others: “Paragraph 1 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.”

The Constitution itself exclusively reserves certain rights which are expressly mentioned as the domain of the “Portuguese” or “Portuguese citizens” [Article 15(3)], in particular:

- The right to become members of the organs with supreme authority;
- The right to become members of the organs of self-government of the autonomous regions;
- The right to serve in the armed forces;
- The right to appointment to the diplomatic service.

With exception of these rights expressly reserved to Portuguese citizen, the CPR in Article 15(4) foresees that, provided that there is reciprocity, the law may confer upon aliens who reside in the national territory the right to vote for, and to stand for election as, members of the organs of local authorities. According to Article 15(5), the law may also confer upon citizens of the Member States of the European Union, who reside in Portugal, the right to vote for, and to stand for election as, Members of the European Parliament.

Finally, the CPR itself defines the conditions under which legislative acts may exclude foreign citizens from enjoying certain rights and thus establish legal exceptions to the principle of equality:

- Such exceptions may only be set by a formal law passed by Parliament (and not by Government).
- They do not cover the rights which cannot be suspended even in a curfew or state of emergency (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<sup>4</sup>.
- 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;

Pursuant to Article 15(3) to (5), several legislative acts allow the foreign citizens resident in Portugal to exercise some political rights, namely:

- The right to petition to defend their rights and legally-protected interests (Article 4, Law 43/90, amended by Laws 6/93 and 15/2003);

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

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- The right to form associations to represent their interests (Law 115/99);
- The right to take part in a local referendum, on a reciprocal basis (Article 35, Framework Law 4/2000).

Concerning the equality of treatment at the legislative level, a special mention should be made to Law 20/98 of 12<sup>th</sup> of May, governing the work of foreign citizens in Portugal, which is partly applicable to EU citizens. According to Article 2, 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.”

Pursuant to the principle of equality between Portuguese workers and EU workers, several provisions of Law 20/98 apply only to workers of third countries, namely those foreseeing the requirement of a written contract of employment (Article 3), 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 (Articles 4 and 5).

The new Labour Code (Law 99/2003, amended by Law 9/2006), in force since the end of 2003, ensures equal treatment regarding access to employment, vocational training, promotion and working conditions, and prohibits discriminations on the grounds of nationality (Article 22). 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). Like in Law 20/98, some special clauses of the new Code on the work of foreign citizens in Portugal, such as the ones foreseeing the written form for the labour contract (Article 88) or the obligation to inform the authorities of an employment contract signed with a foreign citizen (Article 89), are not applicable to EU workers.

The Labour Code was regulated by the Law 35/2004 of 29<sup>th</sup> of July that transposes to the internal law several communitarian directives, namely in the ground of equal treatment (Directives 2000/43/CE and 2000/78/CE). The Article 32 defines the concept of direct and indirect discrimination and the Article 3 regulates the right of equal opportunities concerning the access and the work conditions (selection criteria, hiring conditions, access to vocational guidance, retributions, career promotions, and affiliation in professional organizations).

A mention should be made to the Law 18/2004, of 11<sup>th</sup> May, which transposes the Directive 2004/43/CE implementing the principle of equal treatment between persons irrespective of racial or ethnic origins, and establishes a legal framework for combating direct or indirect discrimination on the grounds of racial or ethnic origin. This Act completes and strengthens Law 134/99 of 28<sup>th</sup> of August, which bans and punishes namely with fines discriminatory practices, such as refusing to hire a worker solely for reasons of race, colour, family background, ethnic origin or nationality, or refusing or restricting access or exercising basic rights and economic and social rights (access to housing, health, education) for the same reasons.

Law 18/2004 applies to the public and private sectors in relation to social protection, including social security and health care, social advantages, education and access to and supply of goods and services available to the public, including housing.

Lastly, Article 20(1) of Law 37/2006 provides that the Union citizens residing in the Portuguese territory enjoy equal treatment with the national citizens, without prejudice of the restrictions admitted by Community law. According to Article 20(3), by way of derogation, Portugal does not confer to the Union citizens entitlement to social assistance during the first three months of residence or during a longer period if the Union citizen entered in Portugal in order to seek a job on the basis of Article 9(4)(b). Neither does it grant, prior to acquisition of the right of permanent residence, scholarships, student loans or any other maintenance aid for studies, including vocational training, to persons other than workers, self-employed persons, persons who retain such status and members of their families [Article 20(4) and (5)].

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The Decree-Law 220/2006 of 3<sup>rd</sup> of November establishes a system of protection to the unemployment for the dependent workers, but in its Article 8 demands for the attribution of the unemployment benefit that the worker has celebrated a labour contract and that he inhabits in the national territory; however the demand of a valid residence permit is not applicable to the EU workers.

Our examination of case-law databases and collections revealed that there is no case-law pertaining specifically to equal treatment of Community workers.

Administrative practice follows equal treatment of EU citizens.

### *Judicial practice*

An examination of the case-law databases of the Administrative Courts revealed that in 2006 there is no case-law pertaining to frontier workers.

### *Administrative practices*

Administrative practices are limited to implementing current legislation.



## CHAPTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

### 1. Access to public sector

#### *Nationality condition for access to positions in the public sector*

Article 15(2) of the Constitution of the Portuguese Republic (CPR) restricts the performance of public functions that are not predominantly technical to Portuguese citizens. This is the case of (1) Judicial Magistrates and Public Prosecutors (Article 33 of Law 16/98), (2) Diplomatic Corps (Article 10 of Decree-Law n<sup>o</sup> 40-A/98), Armed Forces and Police (Article 11 of Decree-Law 122/2000) and Tax Administration. In the literature, Article 15 of the CPR is generally considered as compatible with Article 39 of the EC Treaty.

Thus, EU workers' and foreign citizens' access to public sector employment, as a public official or an employee, is restricted to predominantly technical posts that exclude the exercise of public authority or sovereignty powers.

Pursuant to Article 47(2) of the CPR, "*All citizens have the right, equally and without restriction, to become a public official, by means of general public competition.*"

Decree-Law 204/98 of 11<sup>th</sup> of July establishes the general regime of public competition. Article 29(2) sets out general requirements for admission to open competitions and recruitment to public sector posts, such as: (1) the legally-required qualifications for the post (the recognition of diplomas and professional qualifications obtained in the member states is guaranteed by the national acts transposing the EU Directives on this matter); (2) a minimum age of 18 years; (3) completion of military or civic service, when compulsory; (4) physical capability and absence of any impediment or ban from carrying out such an activity; (5) Portuguese nationality of the applicants, *except in those cases exempted by specific legislation or international convention.*<sup>5</sup>

In the literature, the nationality requirement foreseen by Article 29(2)(a) is deemed to be incompatible with Article 15(1) of the CPR and with Article 39 of the EC Treaty because it is equivalent to a generic prohibition of access of foreigners, including EU citizens, to the Portuguese public service. Or such a prohibition should be restricted to posts implying the exercise of authority powers. The conformity of Article 29(2)(a) with the CPR and the EC Treaty will only be assured if it is interpreted in the sense that the nationality requirement applies exclusively to a public competition related to posts implying the exercise of authority or sovereignty powers<sup>6</sup>.

Posts implying the direct exercise of authority powers and sovereignty powers are in principle reserved to Portuguese citizens. These posts are namely: judges, public prosecutors, members of the diplomatic career (ambassadors, consuls and other members of such career), members of the armed forces, jobs at the Ministry of Defence in general. High state offices, as members of government, deputies of central and regional parliaments, ombudsman, etc., are in principle reserved to Portuguese citizens.

However, according to Article 15(3) of the Constitution, as amended in 2001, the only posts and high state offices strictly reserved to Portuguese citizens are the following: President of the Republic, President of the Parliament, Prime Minister, Presidents of the Supreme Courts and the posts in the armed forces or in the diplomatic career. In fact, this Article allows the Portuguese legislator to open the remaining posts implying the direct exercise of authority powers and sovereignty powers, under reciprocity, to citizens of Portuguese-speaking countries with permanent residence in Portugal. Till now, the legislator has not implemented such a constitutional provision.

5 For example, the Decree-Law 437/91 of 8th of November, amended by Decree-Law 414/98 and Decree-Law 411/99, establishes the legal regime for the nursing career, concerning the access to the public career and foresees in the Article 27, as condition to be admitted in the competition, to have the Portuguese nationality.

6 See Mário Torres, "O Estatuto Constitucional dos Estrangeiros", in *Scientia Iuridica*, 2001, p. 18, and Paulo Veiga e Moura, *A Privatização da Função Pública*, Coimbra, 2004, p. 136.

Anyway, acts governing access to certain public sector careers or announcements of open competitions frequently mention that applicants may be nationals of a Member State of the EU. This is the case, for example, of Article 22(1)(a) of Decree-Law 139-A/90 (Career Statutes for nursery school, teachers for primary and secondary school levels), which expressly foresees EU citizens' access to the teaching profession in state schools.

In cases where Portuguese legislation foreseeing specific public competitions does not mention the requirement of nationality of the applicants, it should be interpreted as opening the competition to both Portuguese and EU citizens.

Law 23/2004 of 22<sup>nd</sup> of June establishing the legal regime of the individual labour contract of the Public Service prohibits "activities implying the direct exercise of authority powers or the exercise of sovereignty powers" from being the subject of a labour contract in the ambit of the direct Administration of the State.

### *Judicial practice*

Our examination of case-law databases and collections revealed that in the ruling of the South Administrative Central Court of 11<sup>th</sup> of October 2006<sup>7</sup>, was analysed the compatibility with the communitarian law of a decision that prohibits the access of an EU worker to a post in the Public Sector.

This case was about a German citizen who worked as translation technician in the Consulate General of Portugal in Stuttgart and who made an application for a competition to work in the Public Sector. The act that rejected the integration of the worker has its basis in the Decree Law 444/99 of 3<sup>rd</sup> of March, which establishes the Portuguese nationality as general condition for the admission in the Public Sector. The Court decided that the Portuguese State is obligated to guarantee the principle of free movement of workers and the exception to this principle foreseen in the Article 39 (4) of EC Treaty, referring to jobs in the public administration, only concerns to the activities involving a direct or indirect participation in the exercise of the official authority and to the functions whose purpose is to protect the general interests of the State.

In this specific case, the question was about a function exclusively technician and administrative in the area of the linguistic translation. Thus, the EU worker can not be negatively discriminated in relation to the Portuguese in the access to the Public Sector Framework. The Court affirms that the Article 39 (4) of EC Treaty shall be interpreted restrictively, because it constitutes a derogation to the main principle of the free movement of workers and its attainment shall be limited to the strictly necessary to protect the interests that the Treaty allows to protect.

### ***Language requirement***

There are no express legal provisions concerning linguistic abilities, but it is demandable that the level of the linguistic knowledge be the reasonably necessary for the proper fulfilment of the duties.

### ***Recruitment procedures: follow up the Burbaud case***

The competition which gives access to a training and afterwards to a post in the public sector is a very common procedure in fields that are not open to the EU citizens: police forces and judicial bodies.

In the fields of activity of the public sector opened to EU citizens because they are predominantly technical (mainly, teachers for primary and secondary school levels), Portuguese authorities have to take in consideration the principle of judgment *Burbaud*, according to which a EU worker who is already fully qualified in the field of activity concerned does not have to participate in a competition procedure which gives access to a training and afterwards to a post in the public sector.

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7 Ruling 5021/00 of the South Administrative Central Court of 11th of October 2006.

During 2006, no specific measures have been taken or planned to bring the Portuguese legislation expressly in line with the *Burbaud* judgment.

### ***Recognition of diplomas***

The general Directives on mutual recognition of diplomas and professional qualifications (Directives 89/48/CEE, 92/51/CEE e 1999/42/CE) are transposed and sectorial directives, concerning the recognition of professional qualifications, are also transposed into the Portuguese legal order.

For the EU citizens the enrolment in the professional order, which is a requirement for performing regulated professions in both the public and private sectors, do not need to go through formal recognition or equivalence of diplomas.

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.

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.

Administrative practice has fostered large-scale admission of EU citizens to predominately technical posts in the public sector, especially in public hospitals and centres of the National Health Service.

Portuguese legislator has set up a system for automatic recognition of doctorates awarded by an EU university, allowing the access of EU Professors to Public Universities.

For the access to the profession of school teachers, the EU citizen must be qualified by his/her State of origin and have an authorisation issued by the Educational Ministry.

In the field of recognition of diplomas, there is no express specificity in the Portuguese legal order in relation to posts in the public sector in comparison to posts in the private sector.

### ***Judicial practice***

Our examination of case-law databases and collections revealed that in the ruling of the North Administrative Central Court of 22<sup>nd</sup> of June 2006, was analysed the subject of the recognition of a higher education diploma obtained by a Portuguese citizen in the EU, for the purpose of concession and equalization to the period of training of the superior health technicians career. The court reaffirmed the interpretation of the Decree-Law 289/91 of 10th of August that transposes the Directive 89/48/CEE, in the sense of being a regulated profession, it is the legislator who indicates the professional requirements considered appropriated to the fulfilment of the duty and is the Directorate-General for Public Service who recognize the academic diplomas and the equivalence of the degree of licentiate as legal obligation.

### ***Equality of treatment***

#### ***Recognition of professional experience for access to the public sector***

The Portuguese legal system includes general rules on the taking into account of professional experience and seniority for the purposes of access to public sector and for the purposes of progression in the Civil Service career.

These rules can be found in the several acts regulating the Civil Service and mainly in Decree-Law 204/98 establishing the general regime of public competition [Article 22(2)(c)].

None of such rules considers specifically the case of professional experience and seniority obtained *in another Member State*.

However the interpretation of such rules according to Community Law imposes the taking into account of the professional experience and seniority achieved in another Member State for those purposes. And the administrative practice goes in that sense.

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Till recently, the number of citizens of another Member States working in the Portuguese public sector was very tiny, and no real questions on this subject arose. In the late years things have changed. Nowadays, there is a large number of Spanish doctors and nurses working in the public hospitals and centres of the National Health Service. In the absence of specific legislation on the taking into account professional experience and seniority acquired in another Member State, it is plausible that the number of administrative and judicial controversies on this subject become significant.

In any case, the absence of specific legislation on that matter does not release the Portuguese administration from the obligation of taking into account the professional experience and seniority acquired in another Member State, as imposed by Community law. Without prejudice of the adoption of legislation on this specific point, the use of administrative circulars and instructions could contribute to achieve such a result.

Obviously, Article 20(1) of Law 37/2006, providing that all Union citizens residing in Portugal on the basis of this Act enjoy equal treatment with the Portuguese nationals, strengthens the obligation for the Portuguese State to take into account the professional experience and seniority acquired in another Member State in conditions equivalent to those it takes into account professional experience and seniority acquired in Portugal. Every exception must be justified on mandatory requirements of general interest and must comply with the principle of proportionality.

### *Recognition of professional experience for the purpose of determining the professional advantages*

During 2006 there are no new rules for the professional experience for the purpose of determining the professional advantages.

### *Administrative practices*

Administrative practices are limited to implementing current legislation and follows equal treatment of EU citizens.

### *Recent legal literature*

MOURA, Paulo Veiga e, *A Privatização da Função Pública*, Coimbra 2004, p. 135.

MOURA, Paulo Veiga e, *Função Pública*, 1<sup>o</sup> vol., 2<sup>a</sup> ed., Coimbra 2001, p. 129.

NEVES, Ana Fernanda, *Relação Jurídica de Emprego Público*, Coimbra 1999, p. 184.

TORRES, Mário, "O Estatuto Constitucional dos Estrangeiros", *Scientia Iuridica*, n.º 280, 2001, p. 7.

**CHAPTER V. MEMBERS OF THE FAMILY****1. Residence rights**

According to Article 2(e) of Law 37/2006, for the purposes of it, are family members of a Union citizen: (i) his/her spouse; (ii) the partner with whom the Union citizen lives in a *de facto* union constituted in accordance with national legislation, or with whom the Union citizen holds a permanent relationship duly certified by the competent authority of the Member State where he/she resides; (iii) the direct descendants who are under the age of 21 or who are dependants of the Union citizen, as well as of his/her spouse or partner as defined in point (ii); (iv) the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point (ii).

According to Article 4(2) of Law 37/2006, the family members of a Union citizen who are *third-country nationals* have the *right to enter* the Portuguese territory upon presentation of a valid passport. They are only submitted to visa requirements in accordance with the EU provisions in force, but they benefit from every facility to obtain the necessary visas, which are issued free of charge and on the basis of a special accelerated procedure.

Pursuant to Article 4(3) the family members of the Union citizen who are *third-country nationals* and are submitted to visa requirement in accordance with EU norms have the right to enter in the Portuguese territory without visa if they possess a valid residence card. In such a case, no entry stamp is placed in their passport.

If such family members do not have the necessary travel documents or, if required, the necessary visas, they enjoy the possibility of obtaining the necessary documents or of having them brought to them within a reasonable period of time or of corroborating or proving by other means that they are covered by the right of free movement and residence [Article 4(4)].

According to Article 4(5), the member of the family of a Union citizen who a *third-country national* must report his/her presence in the national territory in accordance with the law on the entry, permanence, exit and expulsion of foreigners (Immigration Act).

It follows that the family members of a Union citizen who are *third country nationals* are not under the scope of the Immigration Act, except in the cases where the Law 37/2006 expressly refers to that Act (in 2006, Decree-Law 244/98 as amended by Decree-Law 34/2003), as *e. g.* does its Article 4(5).

Concerning the *right of residence for up to three months*, Article 6(2) of Law 37/2006 provides that family members in possession of a valid passport who are third-country nationals and who accompany or join the Union citizen have such right in Portugal without any other conditions or formalities.

Article 7(2) of Law 37/2006 provides that family members who are *third-country nationals*, accompanying or joining a Union citizen, have the *right of residence for more than three months* on the Portuguese territory if such Union citizen meets one of the requirements set out by the above quoted Article 7(1)(a), (b) or (c): he/she is a worker or a self-employed person in Portugal; has sufficient resources for him/herself and his/her family members, as well as a sickness insurance, provided that this is required in the Member State of his/her nationality to the Portuguese citizens; is enrolled at a public or private educational establishment officially accredited, provided that he/she proves, by means of a declaration or by such equivalent means as he/she may choose, that he/she has sufficient financial resources for him/herself and his/her family members, as well as a sickness insurance, if this is required in the Member State of his/her nationality to the Portuguese citizens.

According to Article 15, the family members of the Union citizen who are *third-country nationals* and whose planned period of residence in the Portuguese territory is for more than three months must apply for a *residence card* before the Border and Immigration Service (BIS) within thirty days after three months from the date of arrival. For the residence card to be issued, the presentation of the following documents is required: (a) a valid passport; (b) a document attesting to the existence of a family relationship or the quality of part-

ner as defined in Article 2(e)(ii), quoted above; (c) the registration certificate of the Union citizen whom they are accompanying or joining in Portugal; (d) in cases falling under Article 2(e)(iii) and (iv) quoted above, documentary evidence that they are dependant of the Union citizen; (e) in cases falling under Article 3(2), a document issued by the competent authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

The residence card is issued no later than three months from the date on which the application was submitted. Such card is valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years. The right of residence of these family members is not affected by (a) temporary absences not exceeding six consecutive months a year, (b) absences of a longer duration for compulsory military service or (c) one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country for professional reasons.

Pursuant to Article 15(6) for the registration certificate to be issued to family members who are themselves Union citizens, the presentation of the following documents is required: (a) a valid identity card or passport; (b) a document attesting to the existence of a family relationship or of the partner quality as defined in Article 2(e)(ii), if this relationship or quality do not result evident from the identity card or passport; (c) the registration certificate of the Union citizen whom they are accompanying or joining; (d) in cases falling under Article 2(e)(iii) and (iv) quoted above, documentary evidence that they are dependant of the Union citizen; (e) in cases falling under Article 3(2), a document issued by the competent authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen.

Concerning the *right of permanent residence*, Article 10(2) of Law 37/2006 states that the family members of the Union citizen who are *third-country nationals* and have legally resided with him/her in Portugal for a continuous period of five years benefit of such right.

Continuity of residence shall not be affected by temporary absences not exceeding a total of six consecutive months a year, or by absences of a longer duration for compulsory military service, or by the absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country. The family members of the Union citizen who are *third-country nationals* and acquired a right of permanent residence in Portugal shall lose such right only through absence from its territory for a period of exceeding two consecutive years [Article 10(4) and (5)].

Pursuant to Article 12(1) if the Union citizen worker or self-employed acquired the right of permanent residence in Portugal in accordance with Article 11 quoted above, his/her family members who are residing with him shall also have such right, irrespective of their nationality. If, however, the worker or self-employed Union citizen dies while still working but before acquiring the right of permanent residence in Portugal on the basis of Article 11, his/her family members who resided with him shall acquire the right of permanent residence there provided that they meet one of the following conditions. (a) the worker or self-employed Union citizen had resided continuously in the Portuguese territory for two years; (b) the death resulted from an accident at work or an occupational disease, in which case a minimum period of residence is not required; (c) the surviving spouse lost the Portuguese nationality following marriage to the worker or self-employed Union citizen [Article 12(2)].

On the other hand, the family members who are *third-country nationals* and did not lose their right of residence following the Union citizen's departure from Portugal or his/her death, as well as divorce, annulment of marriage or termination of *de facto* union, because they met the conditions set out in Article 8(3) quoted above, shall acquire the right

of permanent residence after residing legally for a period of five consecutive years in Portugal (Article 13).

According to Article 17, the BIS shall issue a permanent residence card to the family members of a Union citizen who are *third-country nationals* within three months from the submission of the application. Such application must be submitted before the residence card expires and must be accompanied by the presentation of the family member of a Union citizen's residence card.

According to Article 8(1) of Law 37/2006, the Union citizen's death or departure from the Portuguese territory, as well as divorce, annulment of marriage or termination of his/her *de facto* union do not entail loss of the right of residence of his/her family members, regardless of their nationality.

Article 8(2) provides that before acquiring the right of permanent residence, the family members who are nationals of a Member State must meet the conditions laid down in the above quoted Article 7(1)(a), (b), (c) or (d).

According to Article 8(3) before acquiring a right of permanent residence the family members of a Union citizen who are *third-country nationals* keep their right of residence provided that they meet one of the following conditions: (a) they are workers or self-employed on the Portuguese territory; (b) they have sufficient resources for themselves and their family members, as well as a sickness insurance; (c) they are family members of a person who meets the conditions referred to in points (a) or (b), provided that the family has been constituted on the Portuguese territory.

According to Article 8(4) the departure of a Union citizen from the Portuguese territory, or his/her death, do not entail loss of the right of residence of his/her children residing in Portugal and enrolled at an educational establishment, for the purpose of studying there, or of the person who has actual custody of the children.

In order to ascertain whether the family members of the Union citizen who are *third-country nationals* represent a danger for public policy or public security, when issuing the correspondent residence card, the Portuguese competent authority (BIS) may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous criminal records the person concerned may have. Such enquiries may not be made as a matter of routine [Article 22(4) and (5)] of Law 37/2006.

According to Article 23(2) the family members of a Union citizen, irrespective of nationality, who have the right of permanent residence on Portuguese territory, may not be deported from it, except on serious grounds of public policy or public security. Before taking an expulsion decision on such grounds, the court (as seen above, Chapter I, point C.1, the only competent authority to take such a decision) shall take account of considerations such as how long the individual concerned has resided in the national territory, his/her age, state of health family and economic situation, social and cultural integration in Portugal and the extent of his/her links with the country of origin [Article 23(1)].

Whatever the case, expiry of the passport on the basis of which the *third-country national* who is a family member of a Union citizen entered Portugal and was issued with a residence card may not constitute a ground for expulsion from Portuguese territory [Article 9(5)].

Finally, concerning public health grounds, diseases occurring after a three-month period from the arrival to Portugal may not constitute grounds for expulsion of family members who are *third-country nationals* from the Portuguese territory [Article 24(2)].

Article 5 of Law 37/2006 provides that, without prejudice to the provisions on travel documents applicable to national border controls, all family members of a Union citizen who are *third-country nationals* and who hold a valid passport (at least for all Member States and for countries through which the holder must pass when travelling between Member States) have the right to leave the Portuguese territory, without exit visa or equivalent formality.

If they present a residence card no exit stamp is placed in their passport.

The Law 37/2006 does not provide that the right of a *third-country national*, who is accompanying or joining a Union citizen as a spouse, to enter and to reside in Portugal depends, in any circumstance, on the lawfully residence of this third-country national in another Member State when he/she moves to Portugal, accompanying or joining the Union citizen who is migrating or has migrated to Portugal.

## **2. Access to work**

According to Article 19 of Law 37/2006, irrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in Portugal are entitled to take up employment or self-employment there.

Article 20(1) and (2) provides that the family members of a Union citizen residing in Portugal who are *third-country nationals* enjoy equal treatment with the Portuguese nationals, without prejudice of the restrictions admitted by Community law.

## **3. Access to education**

It follows from Article 20(4) and (5) of Law 37/2006 that, prior to acquisition of the right of permanent residence, the family members of a Union citizen, irrespective of their nationality, are only entitled to student grants or student loans or any other maintenance aid for studies, including vocational training, if the Union citizen whom they are accompanying or joining is a worker, a self-employed person or a person who retains such status.

## **4. Other issues concerning equal treatment (social and tax advantages)**

According to Article 20(3) of Law 37/2006 the family members of a Union citizen who are *third-country nationals* (as well as those who are nationals of a Member State) are not entitled to social assistance in Portugal during the first three months of residence or during a longer period, if the Union citizen whom they are accompanying or joining entered the Portuguese territory in order to seek employment.

This is an exception to the applicable principle of equal treatment with the Portuguese nationals.

### *Draft legislation, circulars*

The Law 37/2006 imposes the adoption by the Minister of Home Affairs of three execution regulations concerning Union citizens' family members who are third country nationals: (1) an execution regulation laying down the model of a residence card for periods of residence in Portugal longer than three months [Article 15(1)]; an execution regulation laying down the model of a permanent residence card [Article 17(1)]; (3) a execution regulation laying down the costs concerning the issuing of such documents [Article 29(1)]. All these execution regulations were adopted in 2006 through the Portaria 1637/2006, of 22<sup>nd</sup> of September.

### *Judicial practice*

We are unaware of any national judicial decisions regarding family members of Union citizens moving to or residing in Portugal on the basis of Law 37/2006.

### *Administrative practices*

Administrative practices during are limited to implementing current legislation.

### *Literature*

There is still no legal literature which focuses specifically on the rights of the family members of the Union citizens residing in Portugal on the basis of Law 37/2006.



## CHAPTER VI: 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. Recently, the Supreme Administrative Court's decision 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, fully respected the case-law of the Court of Justice, in particular, the ruling handed down in the *Giagounidis* case of 5<sup>th</sup> of March 1991.

There is an administrative practice according to which an EU citizen is only eligible for Social Security benefits if he possesses a residence permit passed by the competent Portuguese authorities.

That systematic practice is problematic especially after the judgment *Collins* (C-138/02) stated that Articles 6 and 8 of the EC Treaty preclude eligibility for a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State from being subject to conditions which are liable to constitute discrimination on grounds of nationality. But no measures have been taken or are planned to bring Portuguese legal order into line with that judgement.

It should be mentioned in this context that Article 33 of Law 37/2006 provides as a transitional norm that, upon application of their holders, the residence permits issued on the basis of Decree-Law 60/93 (repealed by Law 37/2006) keep valid and may be replaced by the registration certificate or by the residence card, according to the case.

In the Ruling 5021/00 of the South Administrative Central Court of 11<sup>th</sup> of October 2006, the Court makes express reference to the jurisprudence of the European Court of Justice, namely to the sentences *Commission v Italy* (Process 225/85) and *Ioannis* (Process 258/04), reiterating the judgement of the EJC, in the sense that the derogation to the free movement of workers foreseen in the Article 39 (4) of the EC Treaty can not be justified only by the existence of authority prerogatives, because it is necessary that these prerogatives be effectively exercised as usual by the holders and that they do not represent a reduced part of its activity.

Concerning the follow-up of the ruling *van Lent*, the examination of the case-law databases and collections revealed that in 2006 there is no new case-law which specifically refers to this matter.

However, Portugal transposed the Directive 2000/56/CE respecting the communitarian driving license, in accordance with the Road Code, Article 125, the driving licenses obtained in other Member States are valid in Portugal, and shall only be communicated the change of residence to Portugal for the purpose of conductor's registration. The Portuguese law does not exclude the possibility of an EU worker who inhabit in Portugal of using a vehicle to the engagement in an occupation with number plate of the neighbouring Member State.

In the recent literature the most recent textbooks which contains some references to the jurisprudence of the European Court of Justice are:

Gomes, José Luis Caramelo, *O Juiz Nacional e o Direito Comunitário - O Exercício da Autoridade Jurisdicional Nacional na Jurisprudência do Tribunal de Justiça da Comunidade Europeia*, Almedina, 2006

Rosa, Fabiano Machado, *A tensão entre o Tribunal de Justiça das Comunidades e algumas jurisdições constitucionais europeias sobre o alcance do primado do direito da União Europeia*, Report of the Law Master degree in Constitutional sciences by the Faculdade de Direito de Lisboa, 2006

Gonçalves, Marcia Constantino, *Os problemas da aplicação do direito comunitário pelos estados membros*, Report of the Law Master degree in European Union Institutional Law of the Faculdade de Direito de Lisboa, 2006

## **2. Application of free movement legislation in the sports sector of workers**

In 2004 was approved the Law 30/2004 of 21<sup>st</sup> of July, Basic Law of Sport, that defines the general basis of the sportive system and the conditions to practise the sportive activity. In this Act, although there is no explicit reference to the free movement of community workers or to the principle of non-discrimination, it does not contain any discriminative disposition.

The Basic Law of Sport, in Article 50, classifies the professional and non-professional sportive activity and in the Article 60 defines the professional sportive activity.

According to Article 34(4), in what concerns workers, it is forwarded to the contractual system of the professional sportive practitioners, provided for by the Law 28/98 of 26<sup>th</sup> of June, amended by Law 114/99 of 3<sup>rd</sup> of August. Once more there is no reference to the community workers, but there are no discriminatory situations either.

Concerning specifically the non-professional sport, it is necessary to introduce some modifications into the regulations of the sportive federations in order to eliminate discriminative situations concerning the Union citizens' access to the federate sport<sup>8</sup>.

Concerning the professional sport, with regard to the foreigners' inscription, the Basketball Clubs League limits the foreigners' inscription, including Union citizens, to five athletes by team, which is a limitation to the free movement of workers in the EU.

The European Commission has received complaints against the sportive national Federations due to the existence of some obstacles to the free participation of the Union citizens in national competitions.

Following an informal meeting of the European Union Sports ministers, occurred in September 2005, the State Secretary of Sport issued an order admitting the existence of illegalities in some sportive federations and determining that the Sport Institute of Portugal should notify all the sportive federations, with the purpose of removing from the correspondent regulations "all the norms establishing distinct rules if there is Portuguese citizens in cause, Union citizens or citizens with whom the Portuguese State or the European Union have reciprocity agreements" (this order was not published, but it is mentioned in the article of José Manuel Meirim, "Bosman was in the Convention? The Europe searching for the Sport", in *O Direito*, 2006).

In conclusion, at the legislative level we do not verify restrictions to the free movement of sportive workers, but there still existing some federative regulations that are incompatible with the Community Law.

During 2006, the new Basic Law of Sport was being draft.

In the recent literature the most recent textbook which contains some references to the application of free movement legislation in the sports sector of workers is the one of Amado, João Leal "Das "cláusulas de nacionalidade" às "cláusulas de formação local": uma diferença insuficiente?", in *Revista Jurídica do Desporto*, nº 10 Setembro/Dezembro 2006.

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8 For example, in what concerns the inscription rates value, the Volleyball Association of Porto, makes a differentiation if it is a national athlete or an athlete coming from a foreign federation, even if from the EU.

Another example of discrimination occurs in the participation of Union citizens in the national proves of sailing, because the legislation that is in force is not clear and the Portuguese Federation of Sailing deliberated that only the citizens from the Schengen area can participate, but do not appear in the final classifications.

**CHAPTER VII. POLICIES AND PRACTICES OF A GENERAL NATURE WITH REPERCUSSIONS ON FREE MOVEMENT OF WORKERS**

Preferential access of EU workers to employment in Portugal is guaranteed by Article 41(1) of Decree-Law 244/98, as amended by Decree-Law 34/2003 (Immigration Act). According to this provision, the granting of work visas or residence permits to foreign workers (non EU workers) is subject to first option having been given to EU workers. 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.

Article 1(3) of Decree-Law 244/98 excludes the category of Member State nationals from its scope of application. Nevertheless, some of the provisions on 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, in its amended version, 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 person in question does not pose a threat to Portuguese public policy and public security.

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 contrary to EC Law.

Concerning the legislative modifications occurred in 2006 with repercussion in the movement of workers, it is important to make reference to the new Immigration Act that has been draft, which establish the legal regime of entry, stay and departure of foreigners from the national territory and which proceeds to the transposition of the Directives 2003/110/CE, 2003/86/CE, 2003/109/CE, 2004/81/CE, 2004/81/CE, 2004/82/CE, 2004/114/ CE e 2005/71/CE 4. The new Immigration Act will revoke the regime foreseen by Decree-Law 244/98 and it has four main purposes in the scope of the national immigration policy: regulation of the migratory flows, promotion of the legal immigration, fighting against the illegal immigration and integration of immigrants.

On 15<sup>th</sup> of December 2006, the new Nationality Law entered into force (Organic Law 2/2006 of 17<sup>th</sup> of April). By way of this Law it is attributed the Portuguese nationality to the descendants of foreigners born in the national territory, when the ancestor has been born and inhabits in Portugal or when the ancestor inhabits in Portugal for more than five years. This regime was regulated by the Decree-Law 237A/2006 of 14<sup>th</sup> of December.

With regard to the right to the social assistance benefits to the family of foreign citizens, the Decree-Law 176/2003 amended by Decree-Law 41/2006 of 21<sup>st</sup> of February attributes the familiar benefits to the foreign citizens possessing the residence permit and to the holders of a permanence permit, thus including the refugees and the stateless. The Decree-Law 42/2006 extends the benefit of the 'social integration income' to the foreigners having the permanence permit, work visas and temporary stay visas.

It should be also mentioned the Decree-Law 7/2006 of 4<sup>th</sup> of January that establishes the legal regime of the carriage of passengers and goods by sea, that exceptionally allows the possibility of shipment of passengers from third countries in coasting-ships, situation that before was only allowed to the nationals of the Member States.

The Asylum Law (Law 15/98 of 26<sup>th</sup> of March) amended by Law 20/2006, that transposes the Directive 2003/91/CE relating to the minimum rules of reception of the asylum applicants and to the Decree-Law 222/2006 of 10<sup>th</sup> of November, that defines the organic structure for the execution of the European Refugee Fund and the Decree-Law 44/2006 of 24<sup>th</sup> of February, that creates the temporary reception center of foreigners and stateless, thus achieving the integration and reception policy of foreign nationals.

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Lastly, it is important to mention the national implementation of the Schengen Borders Code, foreseen in the Regulation CE 562/2006 of 15<sup>th</sup> of March.

During 2006 occurred some legislative modifications, namely the Nationality Law, that can originate a large number of residence ceasing in the next year by reason of the acquisition of Portuguese nationality.

In December 2006, the Plan for the immigrants' integration was presented for public discussion, which establishes a national strategy concerning the reception and integration of immigrants. This plan includes measures in several areas such as the employment and the vocational training, residence and health, education, culture, sport and social solidarity and justice.

In short, the foreign population resident in Portugal did not increase significantly, but the number of residence permit holders has been registering a solid rise and simultaneously the family reunification has assumed a role of consolidation of the foreign community in Portugal.

During 2006, a new Immigration Act was being drafted.

## CHAPTER VIII: EU ENLARGEMENT

### 1. *Transitional arrangements regarding EU 8*

#### 1.1. *Changes in national law and practice in all EU Member States*

In the Treaty of Accession Portugal negotiated a transitional period of two years starting from 1<sup>st</sup> of May 2004 and terminated in 1<sup>st</sup> of May 2006 with eight new Member States: Czech Republic, Slovakia, Estonia, Latvia, Lithuania, Hungary, Poland and Slovenia. There is no transitional period for Cyprus and Malta.

The employees of all the new Member States residing legally in Portugal before 1<sup>st</sup> of May 2004 were not affected by the transitional measures. Thus, they became subject to Decree-Law 60/93 and from 10<sup>th</sup> of August 2006 to Law 37/2006 and not to Decree-Law 244/98.

This means, e. g., that the members of the family of such workers who resided with them before 1<sup>st</sup> of May 2004 had an automatic access to the Portuguese working market.

Concerning the situation of self-employed and economically inactive citizens there was no transitional period and no measures negotiated for these citizens of the ten new Member States. It means that from 1<sup>st</sup> of May 2004 the Decree-Law 60/93 and from 10<sup>th</sup> of August 2006, the Law 37/2006 became applicable to them.

Thus, from that date self-employed and economically inactive persons of the ten new Member States did not need a work visa or a residence visa in Portugal, contrarily to the employees of eight new Member States till 1<sup>st</sup> of May 2006.

Till that date, the entry and residence of *employees* coming from the EU 8 were regulated under the Immigration Act, Decree-Law 244/98, as amended by Decree-Law 34/2003, that establishes the legal framework on entry and residence of aliens, and not under Decree-Law 60/90, setting out the conditions of entry and stay for the citizens of the EU Member States and their family members.

It meant that, in the absence of a bilateral agreement between Portugal and one these new Member States establishing specific provisions on this matter, a citizen of these Member States could only exercise a subordinated professional activity in Portugal if he had a work visa or a residence permit. Such a citizen needed to accept an offer of employment and obtain a work visa in a Portuguese consular post in his country of origin. Nevertheless, after 1<sup>st</sup> of May 2004, preferential access for EU citizens to subordinated work activities in the Portuguese territory assured by Article 41(1) of the Immigration Act also applies to employees of those eight new Member States.

The acquisition of a resident status by an employee of one of those eight Member States depended on the previous acquisition of a residence visa issued by the consular authorities in his country of origin. The applicant must indicate the purpose of the stay and to prove that he has means of subsistence and housing conditions. During the period of validity of such a residence visa (six months), the applicant must obtain a residence permit issued by the Regional Direction of the BIS competent for the area where he intends to reside. If he possessed a work visa for a period of three months, he could obtain a residence permit without obtaining previously a residence visa.

The workers of those eight Member States exercising legally a subordinated activity in Portugal enjoyed equal treatment vis-à-vis the national workers, concerning namely working conditions, salaries and social security, since no derogation to Regulation 1408/71 was negotiated.

The members of the family who joined these workers from 1<sup>st</sup> of May 2004 – spouse, descendants under the age of 21 years or over 21 dependent on them – had access to the working market after a stay of six months in Portugal.

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### *1.2. Changes in position with regard the second phase of the transitional arrangements*

From 1<sup>st</sup> of May 2006, Portugal has not applied any longer national measures to the EU 8 citizens. It means that from that date the EU citizens moving or residing in Portugal are fully under the scope EC Regulation 1612/68 and from 10<sup>th</sup> of August 2006 under the scope of Law 37/2006.

### *1.3. Practical problems, individual cases and national case law pertaining to the transitional arrangements*

The effective participation of the new Member States in the Schengen Information System it is an essential condition for the elimination of border control in relation to the citizens of these States.

During 2006, efforts were developed to exceed some technical problems, namely under a Portuguese proposal, the SIS ONE 4ALL system, that will allow to release these problems. The aim fixed for the end of 2007 it is the abolition of land and sea borders and in 2008 the air borders.

Other problems and cases were not identified till now.

## **2. Possible transitional measures for workers from Bulgaria and Romania**

From 1<sup>st</sup> of January 2007 Portugal is applying to Bulgarian and Romanian citizens national measures provided for in Annex VI and Annex VII of the Accession Act to EU of Bulgaria and Romania, which correspond essentially to those Portugal applied to the EU 8 citizens during a transitional period of two years, as described above in point 1.1.

Although this was not publicly discussed during 2006, it should not be excluded that Portugal renounces to apply such national measures to Bulgarian and Romanian citizens from the date of 1<sup>st</sup> of January 2009, similarly to what it decided concerning EU 8 citizens from 1<sup>st</sup> of May 2006.

The national citizens of Romania and Bulgaria are liable to the legal regime suitable to the foreign citizens foreseen in the Law 34/2003 of 25<sup>th</sup> of February.

In the Ruling 06P2825 of the Supreme Court of Justice of 18<sup>th</sup> of October 2006 it was analysed the application of the additional penalty of expulsion to a Romanian citizen, who was condemned for having committed a crime. The Court applied the legal regime of foreigners' (the Decree-Law 244/98 of 8th of August, that in the moment of the facts was in force), but considers that the penalty of expulsion applied to a foreign citizen holder of a valid residence permit has to be justified by the existence of a sufficiently serious threat to the public policy or national security. Furthermore, the Law demands that the deportation order establishes which the term of interdiction of entrance in the national territory.

When there is no valid residence permit, the Law only demands that the foreign citizen be condemned to a prison penalty superior to 6 months.

**CHAPTER IX. STATISTICS**

All statistics presented in this chapter were supplied by the BIS ([www.sef.pt](http://www.sef.pt)), in Statistical Report for 2006.

The BIS statistical reports do not allow us to draw a distinction between EU workers and EU citizens who are living in Portugal for reasons other than employment or self-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.

**1. Foreign residents in Portugal**

	<b>2005</b>	<b>2006</b>
Union Citizens	77.504	79.712
Third Country nationals	198.956	241.421
<b>Total</b>	<b>276.460</b>	<b>321.133</b>

Concerning the policies and practices related to the workers of third countries, it is important to mention the redefinition of the concept of resident foreigner, used for statistical results, that includes the foreign holders of a residence permit and the holders of a prorogation of the long-term permanence. This concept allows quantifying more strictly the number of foreign citizens who regularly remain in Portugal.

In the year of 2006, there was a significant increase of the number of residence permits and of the permanence prorogations associated to the work visas. The most representative foreign nationalities are from the nationals of Cape Verde, Brazil, Ukraine, Angola and Guinea-Bissau, which represent 55% of the foreign population with regular permanence in the national territory.

During 2006 were registered 51970 applications for residence permits, verifying an increase three times superior comparing to 2005. The main reason for this increase is related with the conversion of the permit of stay (granted in 2001) in residence permits.

As for the concession of visas, there was a decrease, being distinguished the transit visas (3421), followed by the short-term visas (479) and the special visas (112) in a total of 4012 visas granted during 2006.

In 2006 were taken 3598 decisions of denial of entry, namely, decisions of non-admission of foreigners in the national territory for not having the necessary conditions to enter in the country, verifying a reduction of about 14% comparing to 2005. The reasons that justified these decisions are related to the absence of visa or lapsed visa, absence of reasons justifying the entry and the use of false documents.

With regard to the decisions of foreigners' removal from the national territory, they assume the mode of administrative expulsion for entry or illegal permanence, or the mode of judicial decision, as additional penalty for the practice of a crime. During 2006 were initiated 2659 administrative processes of expulsion, what represents an increase of nearly 33% comparing to 2005. As for the notifications for the voluntary departure from the national territory were registered 8076 notifications, what represents an increase of 66% comparatively to 2005.<sup>9</sup>

Finally, it is important to make reference to the report of the Observatory of the Employment and Vocational Training,<sup>10</sup> which says that between the 143 thousand foreign workers labouring in Portuguese enterprises, the majority are employed persons in the real state sector and civil construction and in the sector of the provision of services. The majority of citizens coming from Europe are from third countries, namely of Ukraine.

9 Data gathered in the annual report of BIS.

10 In 2006 were presented the data related to the Questionnaire of the Personnel Office Staff – data of 2004.

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**2. EU citizens residing in Portugal**

	2005	2006	M	W
United Kingdom	18.942	19.592	1.040	9.172
Spain	16.350	16.597	8.175	8.422
Germany	13.529	13.851	7.501	6.350
France	9.617	9.733	5.106	4.627
Netherlands	5.637	5.854	3.164	2.690
Italy	4.820	4.951	2.987	1.964
Belgium	2.730	2.801	1.438	1.863
Luxemburg	129	138	83	55
Austria	727	742	399	343
Greece	209	217	106	111
Ireland	680	695	341	354
Denmark	990	1.009	560	449
Finland	618	641	270	371
Sweden	1.492	1.521	807	714
Czech Republic	118	141	37	104
Estónia	41	49	8	41
Látvia	46	91	28	63
Lithuania	77	188	77	111
Slovenia	33	37	15	22
Slovakia	47	65	29	36
Hungary	225	248	83	165
Poland	434	537	208	329
Cyprus	4	4	3	1
Malta	9	10	2	8

*2.1. Citizens From the New Members States residing in Portugal*

	2006	M	W
Bulgaria	1.536	946	590
Romania	4.314	2.451	1.863

Some statistical data related to the two new Member States disclose that during 2006 and in the scope of inspection actions of Serviço Estrangeiros e Fronteiras, were identified 2015 Romanian citizens, of who 515 were in illegal situation, as well as 449 citizens from Bulgaria, of who 114 were also in illegal situation. During the year of 2006 there was registered an increase of the processes of removal of these citizens, having been initiated 593 administrative processes in order to remove the Romanian citizens of who 151 were performed. 1401 citizens of Romania and 229 citizens of Bulgaria also received notifications for the voluntary departure from the national territory.<sup>11</sup>

<sup>11</sup> Data supplied by the Report of Internal Security of 2006, Ministry of Home Affairs.



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**3. Repartition of resident EU citizens by region**

	<b>2005</b>	<b>2006</b>
<b>Braga</b>	1.520	1.566
<b>Viana do Castelo</b>	1.260	1.278
<b>Porto</b>	5.496	5.809
<b>Aveiro</b>	1.962	20.066
<b>Bragança</b>	246	26
<b>Vila Real</b>	306	351
<b>Viseu</b>	534	559
<b>Guarda</b>	437	446
<b>Coimbra</b>	4.287	4.536
<b>Castelo Branco</b>	388	401
<b>Leiria</b>	1.542	1.564
<b>Santarém</b>	927	916
<b>Lisboa</b>	28.256	28.348
<b>Setúbal</b>	3.277	3.388
<b>Portalegre</b>	614	624
<b>Évora</b>	728	803
<b>Beja</b>	1.121	1.220
<b>Faro</b>	21.820	22.643
<b>Madeira</b>	2.016	2.149
<b>Açores</b>	735	785

## CHAPTER X. SOCIAL SECURITY

In the field of social security, Article 8 of Law 32/2002 (Framework Law of Social Security), of 20<sup>th</sup> of December 2002, 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.

During 2006 there is no legislation being draft which specifically refers to equal treatment of the beneficiaries of the systems of social protection.

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

EU workers residing in Portugal have the same social security rights as Portuguese citizens. This is confirmed by Article 20(1) of Law 37/2006, quoted above. 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 cover namely 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.

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

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

### **2. Supplementary pension schemes**

Law 32/2002 (Article 94) 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;
- 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.
- 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.

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

### ***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 2006.

## **CHAPTER XI. FREEDOM OF ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS**

### ***1. Establishment***

According to Article 7(1)(a) of Law 37/2006, all Union citizens have the right of residence in Portugal if they are entitled to exercise here an activity as a self-employed person in accordance with Community law.

According to Article 7(1)(d) and (2) of Law 37/2006, the right of residence of these self-employed persons is extended to their family members as defined in Article 2(e), irrespective of nationality, who are accompanying or joining them.

The general regime of Law 37/2006 analyzed above fully applies to self-employed persons who are Union citizens.

In the majority of the regulated activities, the Portuguese law confers the equality of access to the EU Workers. For example, in the Statute of the Order of Lawyers, the Article 202 only demands the register in the Order for the establishment of a law firm.

### ***2. Provision of services***

According to Article 7(a) of Law 37/2006, Union citizens who wish to provide and to be recipient of services in Portugal are allowed to enter the national territory and are granted the right to reside here.

According to Article 7(1)(d) and (2) of Law 37/2006, the right of residence of service providers is extended to their family members as defined in Article 2(e), irrespective of nationality, who are accompanying or joining them.

The general regime of Law 37/2006 analyzed above fully applies to self-employed persons who are Union citizens.

The transposition of Directive 2006/123/EC to the Portuguese legal order will complete the regime applicable to the provision of services.

### ***3. Students***

Article 7(1)(c) of Law 37/2006 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, provided that the student fulfils three conditions:

- he/she must be enrolled at a officially accredited educational establishment, public or private;
- he/she must assure, by means of a declaration or by such equivalent means as they may choose, that he/she has sufficient resources form him/herself and for his/her family members; the BIS requires that students prove that their means of subsistence are at least equivalent to the minimum national salary.
- he/she must have a health insurance provided that this is required in the Member State of his/her nationality to Portuguese citizens.

According to Article 7(2) of Law 37/2006, the right of residence of these students is extended to their family members as defined in Article 2(e) who are third-country nationals and who are accompanying or joining them.

The general regime of Law 37/2006 fully applies to students who are Union citizens.

In Portugal there are no foreign students' quotas.

The private diplomas issued by private educational institutions officially accredited are generally recognized.

#### *Draft legislation, circulars*

See above Chapter I, B.2. and Chapter V, Draft legislation, circulars.

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**CHAPTER XII. MISCELLANEOUS**

***List of internet sites of legislation and court judgments***

[www.portugal.gov.pt](http://www.portugal.gov.pt)

[www.mai.gov.pt](http://www.mai.gov.pt)

[www.mne.publinet.com.pt](http://www.mne.publinet.com.pt)

[www.msst.gov.pt](http://www.msst.gov.pt)

[www.sef.pt](http://www.sef.pt)

[www.seg-social.pt](http://www.seg-social.pt)

[www.inac.pt](http://www.inac.pt)

[www.dgsi.pt](http://www.dgsi.pt)

[www.dre.pt](http://www.dre.pt)

[www.pgr.pt](http://www.pgr.pt)

[www.oa.pt](http://www.oa.pt)

[www.ordemdosmedicos.pt](http://www.ordemdosmedicos.pt)

[www.ordemenfermeiros.pt](http://www.ordemenfermeiros.pt)

[www.cnj.pt](http://www.cnj.pt)

[www.idesporto.pt](http://www.idesporto.pt)

[www.cdp.pt](http://www.cdp.pt)

[www.fdl.ul.pt](http://www.fdl.ul.pt)

[www.fd.uc.pt](http://www.fd.uc.pt)

[www.unl.pt](http://www.unl.pt)