REPORT
on the Free Movement of Workers in Portugal in 2007

Rapporteurs: Nuno Piçarra
and Cristina Crisóstomo
University Nova of Lisbon

September 2008

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General Remarks

Concerning the free movement of workers, the year 2007 was marked in Portugal by three relevant facts.

The first was the adoption of several important legislative acts with direct and immediate repercussion in that field. These acts are (i) the new Basic Law on the System of Social Security (Law 4/2007 of 16 January 2007; (ii) the new Basic Law on Physical Activity and Sport (Law 5/2007 of 16 January); (iii) the new legal regime on the temporary work (Law 19/2007 of 19 May); (iv) the new legal regime on the recognition of foreign superior academic degrees (Decree-Law 341/2007 of 12 October). All these legislative acts include provisions aiming at the strengthening of the free movement of EU workers in Portugal.

The second relevant fact in this context was the detection of an obstacle affecting specially the free movement of Spanish cross-border workers, the political impact it produced and the solutions advanced to face this problem, which could not be entirely solved in the course of 2007.

The third relevant fact was, besides the Portuguese presidency of the EU Council, the series of colloquiums organized in Portugal to commemorate the fifty years of the Treaty of Rome, in the framework of which the free movement of persons in the EU was in the limelight.

Chapter I
Entry, Residence, 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 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 authority with which he/she may lodge an appeal and the time limit for the appeal. The notification shall specify, where relevant, the period of time allowed to leave the territory which save in duly substantiated cases of urgency shall be not less than one month from the date of the notification [Article 25(2), (3) and (4)].

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 available case-law databases of the Administrative Courts (limited to the Administrative Courts of Appeal and to the Administrative Supreme Court) revealed that

in 2007 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 textbook which deals with such subject is GORJÃO-HENRIQUES, Miguel, *Direito Comunitário* (Community Law) 3rd edition, Coimbra, 2006. The most recent textbook is ÁLVARES, Pedro, *Compreender o Tratado de Lisboa*, INA, 2007; see also MOURA RAMOS, Rui, "Da Livre Circulação de Pessoas à Cidadania Europeia", in TAVARES DE ALMEIDA, Marta & PIÇARRA, Nuno (ed.), *50 Anos do Tratado de Roma*, Lisbon, 2007.

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, such citizens 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, as 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 security system [Article 9(3)]. 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 the benefits of the solidarity sub-system [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 applicant 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 justified 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 only be lost 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 – Serviço de Estrangeiros e Fronteiras [Border and Immigration Service (thereinafter 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), (5) and (6)].

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 2nd of September.

Judicial practice

An examination of the case-law databases of the Administrative Courts[1] revealed that in 2007 there is no case-law pertaining to residence in Portugal of Union citizens.

[1] See supra, p. 6, under “Judicial practice”.

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 competent authorities, 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, except on serious grounds of public policy or public security, and only by a decision of a court of law.

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 20th 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.[2]

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.[3]

Administrative practices

Administrative practices are limited to implementing current legislation.

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2 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.

3 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.[4]

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 26/2004 of 4 February 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 Decree-Law 35/2004, of 21 February, amended by Decree-Law 198/2005, of 11 November, 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, of 26 April, 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, Law 19/2007 of 22nd May, on the Temporary Employment, forbid 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 Border and Immigration Service 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 entitlement to the non-contributory benefits, in accordance with Article 20(3) of Law 37/2006.

Our examination of case-law databases and collections available revealed that in 2007 there is no case-law pertaining specifically to equal treatment and access to employment of Community workers.

During 2007 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 previsions 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.

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[4] 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.

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.

Sectoral directives concerning the recognition of professional qualifications for certain professions (nurse; dentist; veterinarian; doctor; midwife; pharmacist; architect, barrister) are also transposed into the Portuguese legal order. For example, the Directive on recognition of diplomas for medical professions, as amended most recently by Directive 2001/19/CE is transposed by Decree-Law 177/2003, amending Decree Law 326/87 (amended by Decree-Laws 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 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 26 January) working as a lawyer/barrister in Portugal also depends on enrolling in the Order of Lawyers. EU citizens 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 Portuguese title of "advogado", then in accordance with Article 29 of Regulation 232/2007 of 4 September, 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 30, 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 February establishes the rules and the formal documents in order to create a European higher education area, facilitating students and teacher's 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.

Lately, the Decree-Law 341/2007 of 12 October establishes a new system of recognition of the foreign academic degrees, of similar level to the degrees of licentiate, master and doctor conferred by the Portuguese Institutions of Higher Education.

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."

However, Article 15(3) provides that, in conditions of reciprocity, the citizens of the Portuguese-speaking States with permanent residence in Portugal enjoy rights not conferred to aliens, except the access to the position of President of the Republic, President of the Assembly of the Republic, Prime Minister, Presidents of the Supreme Courts and to the service in the armed forces and the diplomatic career.

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 (Article19 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 purpose5.
- 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;

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

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);
- 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).

The Labour Code (Law 99/2003, lately amended by Decree- Law 237/2007 of 19 June) 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).

Some special clauses of the Labour 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 July (amended by Decree-Law 164/2007 of 3 May). Its Article 32 defines the concept of direct and indirect discrimination and Article 33 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 also be made to the Law 18/2004, of 11 May, which transposes the Directive 2000/43/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 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 the benefits granted by the solidarity sub-system (non-contributory) 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)].

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

In the field of social security, the Law 4/2007 (Framework Law of Social Security) of 16 January 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.

Judicial practice

Our examination of case-law databases and collections available revealed that in 2007 there is no case-law pertaining to equal treatment of Community workers and pertaining to frontier workers.

2. OBSTACLES TO FREE MOVEMENT OF FRONTIER WORKERS

The Decree-Law 264/93 of 30 July 1993 establishes a car tax exemption regime applicable to the transference to Portugal of vehicles from another Member State and the regime of temporary admission of vehicles registered in other Member States.

Article 1 establishes an exemption from car tax granted to vehicles for private use of non-resident persons in regime of temporary admission proceeding from other Member States.

The application of this exemption regime depends on the following conditions:

- The vehicle must be registered in the name of a person who is neither established nor resident in the Portuguese territory;
- The vehicle must be introduced in Portugal by its owner or legal holder;
- The use of the vehicle must be for particular aims;
- The vehicle documents must be presented.

Article 1(5) considers as resident the person who:

- remains in the national territory during periods of time equal or superior to 180 days, consecutive or interpolated, for each calendar year;
- exercises a remunerated professional activity or possess a residence permit in the Portuguese territory.

Thus, the vehicles temporarily admitted may only remain in the Portuguese territory during a period of 180 days in the course of a calendar year.

Article 8 of the Decree-Law 264/93 provides that a person who exercises a professional activity in the Portugal may not use a vehicle with a foreign registration number and cannot benefit of the regime of temporary admission.

In the course of 2007 several Spanish workers, especially doctors and nurses working in Portuguese hospitals, were fined for using vehicles with Spanish registration number in their daily displacement to their working place. According to Decree-Law 264/93, such workers may not benefit from the regime of temporary admission because they are exercising a professional activity in Portugal, and so they are subject to the fines foreseen in Article 35 of the Decree-Law 376-A/89 of 25 October.

In order to remove such obstacle to the free movement of the Spanish workers, the Law 22-A/2007 of 29 June extended the benefit of the exemption regime of the Decree-Law 264/93 to the cross-border workers residing in Spain who move daily to their working place from an "adjacent locality" to the Portuguese territory.

However, the interpretation of this new provision and in particular the term "adjacent" is not clear. Because of that, several Spanish cross-border workers continued to be fined.

Subsequently, Article 66 of the Budget Law for 2008, approved in 31 December 2007, defined "adjacent locality" as a locality not more distant than 60 Km from the frontier. This provision did not solve all the problems concerning the Spanish cross-border workers circulating with vehicles registered in Spain. Such workers are estimated in 14,000 (3,000 of which are doctors and nurses).

The Portuguese Government already recognized the importance of creating permanent corridors of free movement in the border areas in order to allow the mobility of the citizens of both countries, especially in the context of the professional activity. The Portuguese Government also announced its intention to allow the cross-border workers residing in Spain to circulate in the national territory, in order to reach their working place, without any distance limit.

3. SPECIFIC ISSUES: SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

In 2007, the Law 30/2004 of 21 July (Basic Law of Sport) was substituted by Law 5/2007 of 16 January. According to Article 2 of the later (Principles of universality and of equality), everyone has a right to physical activity and sport, regardless of their origins, sex, race, ethnicity, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social conditions or sexual orientation.

The Basic Law of Sport sets out the general basis of the sportive system and the conditions to practice the sportive activity. It does not contain any discriminatory provision related to the free movement of Community workers.

In Articles 22, 27, 34 and 37, Law 5/2007 enumerates the professional sportive activities. Article 33 defines the non-professional sportive activity.

Article 34 forwards to the contractual system of the professional sportive practitioners established by the Law 28/98 of 26 June, as amended by Law 114/99 of 3 August. Once more there is no reference to the Community workers, but there are no discriminatory provisions 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[6].

In the recent literature two articles contain some references to the application of free movement legislation in the sports sector: 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, and MEIRIM, José Manuel, "*Bosman* was in the Convention? The Europe searching for the Sport", in *O Direito*, 2006.

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6 For example, concerning the inscription rates value, the Volleyball Association of Oporto differentiates between national athletes and athletes coming from a foreign federation, including from the EU.
Another example of discrimination concerns the participation of Union citizens in the national proves of sailing. The Portuguese Federation of Sailing decided that only the citizens from the Schengen area can participate.

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. Equal treatment is thus granted as regards employment in this sector and also as regards working conditions and pay. Lastly, concerning researchers and artists, although there is no specific legislation, EU nationals exercising such professional activities in Portugal are considered to have the same legal status as national researchers and artists.

4. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 OF REGULATION 1612/68

EU workers in Portugal have the same social security rights, including health care, as Portuguese citizens, regardless of being residents. This is confirmed by Article 20(1) of Law 37/2006, quoted above.

In 2007 a new Basic Law on Social Security was adopted – Law 4/2007 of 16 January. Its Article 7 establishes the principle of equality and prohibits any discrimination of the beneficiaries, specifically for reasons such as gender and nationality, without prejudice, in this context, of conditions of reciprocity.

Despite the consultation of the several data bases available, we were unable to find any jurisprudence or specific literature on social security regarding Community workers in 2007.

Chapter IV
Employment in the Public Sector

1. ACCESS TO PUBLIC SECTOR

1.1. 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 amended by Law 3/2000 of 20 Mars and by Decree-Law 11/2002 of 24 January), (2) Diplomatic Corps (Article 10 of Decree-Law 40-A/98), (3) Police (Law 53/2007 of 31 August, which approved the Organic Law on Public Security Force), (4) Armed Forces and (5) Tax Administration.
In the literature, Article 15 of the CPR is generally considered 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 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*.[7]

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.[8]

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),

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[7] 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.

[8] 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.

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, already mentioned,[9] 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.

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 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.

An examination of the case-law databases of the Administrative Courts revealed that in 2007 there is no case-law pertaining to nationality condition for access to the public sector.

Administrative practices are limited to implementing current legislation.

1.2. Language requirement

There are no express legal previsions 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.

1.3. Recruitment procedures

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 take generally 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.

An examination of the case-law databases revealed that in 2007 there is no case-law on this matter.

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[9] See supra, p. 13.

1.4. Recognition of diplomas

Decree-Law 341/2007 of 12 October establishes a new system of recognition of the academic degrees obtained abroad.

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.

2. EQUALITY OF TREATMENT

2.1. Recognition of professional experience for the purpose of determining the professional advantages

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, including the determination of professional advantages such as salary and grade.

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.

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.

Recent legal literature

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

MOURA, Paulo Veiga e, *Função Pública*, 1º vol., 2ª 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 is 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 (Law 23/2007 on the Entry, Residence, Departure and Expulsion of Foreigners), as e. g. it 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 partner 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 14(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 loose 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 loose 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) and (6)] 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. It follows that there is no legal pretext for the application of the *Akrich* judgment and it has never been applied by the competent authorities.

The practice of the Portuguese authorities when issuing visas to third country-family members of EU citizens moving to Portugal is fully consistent with the MRAX judgment.

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 AND STUDY GRANTS

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 the benefits granted by the solidarity sub-system (non-contributory) 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, which in any case is not subject to the residence in Portugal, but to affiliation in and payment of contributions to the insurance sub-system (the only benefit of this sub-system that is subject to the residence in Portugal is the unemployment benefit).

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 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

Portuguese Courts usually follow the case-law of the European Court of Justice (ECJ) 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 March 1991.

In the Judgment 5021/00 of the South Administrative Central Court of 11 October 2006, the Court makes express reference to the jurisprudence of the European Court of Justice, namely to the sentences *Commission v Italy* (Proccess 225/85) and *Ioannis* (Proccess 258/04), reiterating the judgment 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 van Lent judgment, the above mentioned Article 6610 of the Budget Law adopted on 31 December 2007 can be considered as having taken into account, to some extent, that judgment of the ECJ.

A confrontation between the Portuguese legislation on free movement of workers and the case law of the European Court of Justice in the same field adopted in 2007 did not reveal any inconsistency of the former vis-à-vis the latter. From another perspective, the pertinent Portuguese legislation can be interpreted according to the several judgments of the ECJ from that year, without difficulties for the national administration and courts. This is particularly clear concerning the *Jia* and the *Metock* judgments, as already seen above.[11]

From the several judgments pronounced in 2007 by the ECJ in the field of the free movement of workers, three should have a particular impact in Portugal or vis-à-vis Portuguese citizens who exercise their rights of free movement.

The first is the judgment in the case *Hartmann* (C-212/05), where the ECJ decide that a national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the status of the migrant worker for the purposes of the Community law on freedom of movement for workers within the Community. As a matter of fact, there is already a significant number not only of Portuguese nationals who maintain their employment in Portugal and have transferred their residence to Spain, but also of UE citizens who maintain their residence in Spain and obtained an employment in Portugal. In this context, questions concerning the allocation of social advantages similar to those of case C-212/05 may arise.

The second judgment with a sure impact in Portugal is the one in case *Eind* (C-291/05) where the ECJ stated that the fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that third-country national's right to re-

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10 See supra, p. 15.

11 See supra, p. 22.

side in the latter State. It is well known that a significant number of Portuguese citizens are gainfully employed in another Member State and frequently constitute here family with third-country nationals who did not have a right to reside in Portugal under national law. This judgment clarifies that when a Portuguese worker returns to Portugal after being employed in another Member State, a third-country national who is a member of his family has the right under Community law to reside with him in Portugal even where that worker does not carry on any effective and genuine economic activities and even where that third-country national did not have such a right of residence under Portuguese law.

The third ECJ judgment to be mentioned in this context was pronounced in the case *Metock* (C-127/08) where it was clarified that a national of a non-member State who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of directive 2004/38/EC, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State. It is particularly relevant for the significant number of Portuguese citizens who exercise their rights of free movement the fact that the Directive 2004/38/CE confers to nationals of non-member countries who are family members of a Union citizen the right to join that UE citizen in the host Member State, whether he has become established there before or after founding a family.

Finally, it should be noted in this context that till now none of the judgments of the ECJ in the field of the free movement of workers (with one exception) had its origin in a preliminary references made by Portuguese courts.

Recent legal literature

SILVA, Miguel Moura, *Direito da União Europeia – Jurisprudência Essencial*, AAFDL, Lisboa, 2007;

Jurisprudência Comunitária. Grandes Casos Portugueses, Petrony, Lisboa, 2007.

Chapter VII
Policies and Practices of a General Nature with Repercussions on Free Movement of Workers

Concerning the legislative modifications occurred in 2007 with repercussion in the movement of workers, it is important refer the new Immigration Act (Law 23/2007 of 4 July) and Regulation 84/2007 of 5 November, establishing the legal regime of entry, stay and departure of foreigners (third country nationals) from the Portuguese territory.

The Immigration Act transposes 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. It has four main purposes: regulation of the migratory flows, promotion of the legal immigration, fighting against the illegal immigration and integration of immigrants. It also standardized the permits that entitle the foreign citizens to reside in Portugal.

Article 4(2) of Law 23/2007 excludes from its ambit of application nationals from the EU Member States, as well as members of their families who are third country nationals.

Article 59(1) imposes a preference in access to employment in Portugal for workers who are nationals of EU Member States.

The Decree-Law 368/2007 of 5 November concerning de protection of the victims of trafficking in human beings completes the Law 23/2007 and establishes a special regime of residence for such victims.

The Plan for the immigrants' integration was approved by the Resolution of the Council of Ministers 63-A/2007 of 3 May and establishes a national strategy concerning the reception and integration of immigrants. This plan includes measures in several fields such as the employment and the vocational training, residence and health, education, culture, sport, social benefits and justice.

The entry into force of the new Immigration Act led to an increase of the residence permits. In 2007 the foreign population living in Portugal with a residence permit registered a moderate growth around 3,7%.[12]

[12] Data from the Report on the Activities 2007 of the BIS

Chapter VIII
EU Enlargement

1. TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATE WHO JOINED THE EU IN 2004

In the Treaty of Accession Portugal negotiated a transitional period of two years starting from 1st of May 2004 and terminated in 1st 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 1st of May 2004 were not affected by the transitional measures. Thus, they became subject to Decree-Law 60/93 and from 10 August 2006 to Law 37/2006.

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

Thus, from 1st of May 2004 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 1st of May 2006.

Till this date, the entry and residence of employees coming from the EU 8 were regulated under the Immigration Act and not under the Act 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 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.

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 1st 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.

2. CHANGES IN NATIONAL LAW AND PRACTICE SINCE PREVIOUS NATIONAL REPORTS AND IN POSITION WITH REGARD THE SECOND PHASE OF THE TRANSITIONAL ARRANGEMENTS

Since from 1st of May 2006, Portugal has not applied any longer transitional measures to citizens of the Member States who joined the EU in 2004, the main change in the position of such citizens moving to or residing in Portugal, is the fully application to them of the of the EC Regulation 1612/68 and of Law 37/2006. Thus, since that date there is no special regime applicable to them in Portugal.

3. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHO JOINED THE EU IN 2007

From 1st 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 of 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.

Although this was not publicly discussed in 2007, it should not be excluded that Portugal renounces to apply transitional measures to Bulgarian and Romanian citizens from the date of 1st of January 2009, similarly to what it was decided concerning EU 8 citizens from 1st of May 2006.

It is also important to mention that during 2007, Romania and Bulgaria were not any longer included in the list of "target countries" for the purpose of identification of citizens in illegal situation. At present, Bulgarian and Romanian citizens are not subject to administrative decisions of expulsion or notifications for voluntary departure which can affect third country nationals.[13]

[13] See the report on internal security of 2007 of the Ministry of Home Affairs.

Chapter IX
Statistics

All statistics presented in this chapter were supplied by the BIS (www.sef.pt), in Statistical Report for 2007.

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 with non-EU citizens.

1. Foreign residents in Portugal

2007	Total	M	F
Residence Authorisations	401.612	219.765	181.847
Total Renewals of Permissions to Stay (Aps)	5.741	3.906	1.835
Total renewals Long-Term Visas	28.383	16.425	11.958
Total	435.736	240.096	195.640

Concerning the policies and practices related to the workers of third countries, it is important to mention the redefinition of the concept of foreigner resident, used for statistical results, which 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.

The entry into force of the new Immigration Act led to an increase of the residence permits, as noted above.

	2007	M	F
Union Citizens	115.556	61.664	53.892
Third Country nationals	320.180		
Total	435.736	240.096	195.640

2. EU citizens residing in Portugal

	2006	**2007**[14]	**M**	**F**
Áustria	742	820	441	379
Belgium	2.801	3.091	1.584	1.507
Bulgaria	1.536	5.028	2.850	2.178
Cyprus	4	3	2	1
Czech Republic	141	244	77	167
Denmark	1.009	1.068	592	476
Estonia	49	86	14	72
Finland	641	691	291	400
France	9.733	10.556	5.542	5.014
Germany	13.851	15.498	8.340	7.158
Greece	217	247	116	131
Hungary	248	377	117	260
Ireland	695	883	436	447
Italy	4.951	5.985	3.606	2.379
Látvia	91	190	55	135
Lithuania	188	429	186	243
Luxemburg	138	164	96	68
Malta	10	14	3	11
Netherlands	5.854	6.589	3.553	3.036
Poland	537	911	353	558
Romania	4.314	19.155	11.068	8.087
Slovakia	65	186	80	106
Slovenia	37	54	192	35
Spain	16.597	18.030	8.911	9.119
Sweden	1.521	1.649	864	785
United Kingdom	19.592	23.608	12.468	11.140

3. Repartition of resident EU citizens by region

	2006	**2007**[15]
Braga	1.569	2.287
Viana do Castelo	1.278	1.578
Porto	5.813	7.255
Aveiro	2071	2.708
Bragança	260	396
Vila Real	351	561
Viseu	559	1.037
Guarda	447	641
Coimbra	4.541	6.310
Castelo Branco	402	711
Leiria	1.567	2.464
Santarém	924	2.123
Lisboa	28.368	38.788
Setúbal	3.390	5.516
Portalegre	625	999
Évora	803	1.263
Beja	1.221	2.424
Faro	22.651	34.357
Madeira	2.149	3.099
Açores	785	1039

[14] Data from the BIS Statistical Report for 2007.

[15] Temporary data from the BIS Statistical Report for 2007.

CHAPTER X
MISCELLANEOUS

List of internet sites of legislation and court judgments

www.portugal.gov.pt
www.mai.gov.pt
www.mne.publinet.com.pt
www.msst.gov.pt
www.sef.pt
www.seg-social.pt
www.inac.pt
www.dgsi.pt
www.dre.pt
www.pgr.pt
www.oa.pt
www.ordemdos medicos.pt
www.ordemenfermeiros.pt
www.solicitadores.net
www.cnj.pt
www.idesporto.pt
www.cdp.pt
www.fdl.ul.pt
www.fd.uc.pt
www.unl.pt

Minutes of Colloquiums organized in 2007 commemorating the 50 Years of the Treaty of Rome and including texts on the free movement of persons in the EU

SILVEIRA, Alessandra (ed.), *50 Anos do Tratado de Roma*, Lisboa, 2007;
TAVARES DE ALMEIDA, Marta e PIÇARRA, Nuno (ed.), *50 Anos do Tratado de Roma*, Lisboa, 2007;
PITTA E CUNHA, Paulo e MORAIS, Luís Silva (ed.), *A Euro*