

REPORT
on the Free Movement of Workers
in Portugal in 2010-2011

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Introduction

1. Concerning *residence rights of EU nationals*, there is nothing worth to note during 2010/11. Directive 2004/38/CE, as demonstrated in the report, was transposed in due terms by Law 37/2006, of 9 August. Its practical implementation did not give raise to particular problems till now. We are not aware of complaints against the competent administrative body – Serviço de Estrangeiros e Fronteiras – SEF (Aliens and Borders Service – ABS) – concerning delays in issuing the certificates and cards foreseen by the directive, or concerning illegal detention and expulsion of EU nationals from Portugal. This situation is linked to some extent to the relatively small number of EU nationals residing in Portugal. This also explains why most of the work of the SEF relates to third country nationals and not to EU nationals and their family members.

As regards *third country nationals who are family members of EU nationals* exercising their free movement rights in Portugal, their treatment tends to be the same that is accorded to the latter.

2. Concerning *access to employment* in general, it does not appear to be wide spread discrimination against EU nationals in the labour market. In 2011, the most relevant fact to report in this area concerns notaries. The Portuguese law foresees a *numerus clausus* system, according to which the vacancies for notary can only be fulfilled after an applicant has successfully completed an admission exam and, after that, a period of training. For this reason, the Commission initiated an infringement procedure against Portugal before the Court of Justice on the ground that this system of access to the profession of notary breached EU law, in particular Directive 2005/36/CE, of 7 of September, concerning professional qualifications (European Commission vs Portuguese Republic, C-52/08). Although Advocate-General Pedro Cruz considered that the Directive 2005/36/CE is not applicable to the activities of notaries in Portugal, since they perform public duties, the Portuguese Parliament, through Law 45/2010, of 3 of September authorized the Government to change by decree-law the Notary Statute in order to grant notaries already working in a EU Member State the right to establish and provide services in Portugal without the need to successfully complete an admission exam and, after that, a period of training in Portugal. After the entry into force of the Decree-Law 15/2011, of 15 of January, Art 1-A(1)(c) of the Notary Statute states that notaries registered in another EU may work in Portugal as long as they fulfill the conditions set forth in this Statute.

3. Concerning *employment in the public sector* the situation is somehow different. There is no reference to EU citizens in the laws and regulations governing access to the public sector. Nonetheless, the constitutional interpretation of these laws and regulations is that EU nationals should only be excluded from public service posts implying the exercise of public authority or sovereignty powers. This interpretation is followed in the National Health Service, where the number of Spanish employees remained significant in 2010/11. However, in most sectors of the public service, competitions are initiated with the sole reference to Art 8 of Law 12-A/2008, of 27 of February, which requires the Portuguese nationality of the applicants, except when exempted by the Constitution, by specific legislation or by international convention. These are competitions that should be open to any EU nationals, but where the

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announcement only expressly refers the Portuguese nationality. The lack of reference to EU nationals may lead the administration to follow the interpretation that the post is reserved solely to Portuguese nationals.

Moreover, in 2010/2011, in close connection with a public debt crisis that affected other European countries, Portugal has been experiencing a severe economic crisis. This crisis led to budget cuts determining that the vast majority of competitions are opened solely to applicants having already a permanent work relation with the Portuguese State. Since these internal competitions do not allow applications from public servants in other Member States, the public sector in Portugal is virtually closed to other EU nationals.

4. As to *other obstacles to free movement* in 2010/11, the Foundation for Science and Technology – an institution integrated in the Ministry of Science, Technology and Higher Education that awards several kinds of study grants – enacted regulations that severally restricted applications of EU citizens that do not hold a certificate of permanent residency in Portugal attested by the Aliens and Borders Service. Several associations of foreign students and others sectors of the civil society challenged these regulations with the argument that they breached the principle according to which EU workers are entitled to scholarships on a non-discriminatory basis.

Another obstacle regarding free movement that became particularly evident through the intervention of the media regarded access to housing on a non-discriminatory basis. Some local authorities, namely the cities of Famalicão and Salvaterra de Magos, applied a provision of the Decree-Law 797/76, of 6 of November, which granted the right to enter a competition for a house subsidized by the State only to Portuguese citizens who do not have a proper house and wanted to live in those cities. EU citizens who wanted to apply could not participate in these competitions.

5. One main problem for EU nationals exercising free movement rights in Portugal over this year is again *sports*. In fact, there are still some federation's regulations (concerning professional and non-professional sports) that discriminate against EU nationals. A clear example is the Competition Regulation for the Women's National League adopted by the Portuguese Basketball Federation, which establishes that a team can only play simultaneously with two players that cannot represent the Portuguese national squad (Art 107). This means that players from another EU Member States transferred to Portugal are included in this quota. Moreover, there is also information according to which a Spanish national was unable to play in the second division women's league because regulations only allowed the registration of Portuguese Nationals.

Another problematic example is Art. 45 of the Competition Regulation adopted by the Football Professional League which determines that football clubs must *register a minimum of 8 'locally trained players'*. A player is considered as trained locally if he/she is registered in the Portuguese Football Federation for at least three seasons between the ages of 15 and 21. This restriction does not lead to a direct discrimination on the basis of nationality as these players can have any nationality. Nonetheless, there is a risk of indirect discrimination on the basis of nationality as access to clubs' training facilities is easier for the young Portuguese players rather than players from other Member States.

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Finally, another discrimination against nationals of other Member States has to do with the *registration fees* in the national federations. For instance, in the Portuguese Volleyball Federation the registration fee for international transfers is 650 € and the registration fee for internal transfers is 30 €.

Chapter I – The Worker: Entry, residence, departure and remedies

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

1.1 *Art. 7(1)(a) of Directive 2004/38/CE*

All Union citizens have the right of residence on the Portuguese territory for a period longer than three months if they are workers or self-employed in Portugal [article 7(1)(a) of Law 37/2006, of 9 August].

1.2 *Art. 7(3)(a) to (d) of Directive 2004/38/CE*

According to Article 7(3) of Law 37/2006, the Union citizen who no longer works or is self-employed retains the status of worker or self-employed person and, therefore, the 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 *jobseeker* 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.

1.3 *Art. 8(3)(a) of Directive 2004/38/CE*

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 works on the Portuguese territory [Article 14(1) to (5) of Law 37/2006].

1.4 *Art. 14 (4)(a) to (b) of Directive 2004/38/CE*

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) of Law 37/2006].

1.5 *Art. 17 of Directive 2004/38/CE*

The right of permanent residence in Portugal shall be enjoyed before completion of a continuous period of five years of residence by: (a) workers or self-employed persons who have reached the age laid down by the Portuguese law for entitlement to an old age pension or 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 in Portugal 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 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

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another Member State, while retaining their place of residence in Portugal, where they return, as a rule, each day or at least once a week [Article 11(1) of Law 37/2006].

For the purposes of entitlement to the rights referred to in points (a) and (b), periods of employment spent in the Member State in which the person concerned is working shall be regarded as having been spent in Portugal [Article 11(2) of Law 37/2006]. Unemployment periods duly registered by the Institute of Employment and Vocational Training, periods of suspension of activities not imputable to the person and the absence or termination of work caused by illness or accident are considered as periods of employment [Article 11(3) of Law 37/2006].

The conditions regarding the length of residence and employment laid down in point (a) and the condition regarding the length of residence laid down in point (b) shall not apply if the worker's or the self-employed person's spouse or partner is a Portuguese national or has lost the Portuguese nationality by marriage [Article 11(4) of Law 37/2006].

For the purposes of entitlement to the rights referred to in point (a), if the worker has exercised a non paid employment for which is not recognized an old age pension, the age condition shall be deemed to have been met once the person concerned has reached the age of 60 [Article 11(5) of Law 37/2006].

For the purposes of entitlement to the rights referred to in point (b), if the incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by a Portuguese institution, no condition shall be imposed as to the length of residence [Article 11(6) of Law 37/2006].

1.6. Art. 24(2) of Directive 2004/38/CE

Article 20(1) of Law 37/2006 provides that Union citizens residing in the Portuguese territory enjoy equal treatment with national citizens, without prejudice of the restrictions admitted by EU law. According to Article 20(3), by way of derogation, Portugal does not confer to the Union citizens entitlement to 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 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 or persons who retain such status, as well as members of their families [Article 20(4) and (5)].

1.7. 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 2010 there was no case-law pertaining to the referred specific provisions for workers.

Previously, in 2007, the Supreme Court of Justice, in a criminal case decided in 19 of April, process n° 06P4701, available in www.dgsi.pt, applied Law 37/2006 to sanction the expulsion of an European citizen. The supreme court considered that the nationality of the person prevented the application of the legal framework applied to foreigners foreseen in Decree-Law n° 244/98.

1.8. Administrative practices

Administrative practices are limited to implementing current legislation on the entry of Union citizens.

1.9. Recent Legal Literature

The entry, residence and departure of Union citizens is not a subject which arouses a great deal of interest amongst Portuguese scholars. Hence, there is no legal literature specifically devoted to such subject. It is covered in general terms by some textbooks on EU Law and certain monographs, referred to in Chapter XI of the Portuguese report of 2002/2003. The textbook which deals with such subject is Miguel Gorjão-Henriques, *Direito da União* (European Union Law) 6rd edition, Coimbra, 2010. See also Rui Moura Ramos, 'Da Livre Circulação de Pessoas à Cidadania Europeia', in Marta Tavares de Almeida & Nuno Piçarra (ed.), *50 Anos do Tratado de Roma*, Lisbon, 2007.

2. SITUATION OF JOBSEEKERS

2.1 Legislation in force

Union 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 [Article 6(1) of Law 37/2006].

Union citizens jobseekers whose stay in 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 [Article 14(1) of Law 37/2006]. 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 jobseekers 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 [Article 7(1) (b) of Law 37/2006]. The notion of 'sufficient resources' is defined by Article 2(f) of Law 37/2006 as follows: 'the resources of the citizen should not be 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'. Portuguese law does not establish any time limit for the stay of the jobseeker, which means that they can remain in Portugal as long as they can prove that they are seeking an employment [Article 7(1) (b) of Law 37/2006]. Therefore, the Portuguese law seems to comply with the ECJ Antonissen ruling, which forbids Member States to expel a jobseeker that provides evidence that is continuing to seek employment and have genuine chances of being engaged.

Although all Union citizens residing in the Portuguese territory enjoy equal treatment with the Portuguese nationals [article 20(1) of Law 37/2006], Article 20(3) of Law 37/2006 states that jobseekers do not enjoy entitlement to the benefits of the solidarity sub-system (non-contributory). This is an exception to the principle of equal treatment, which in any case is not subject to 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 residence in Portugal is the unemployment benefit). Moreover, since the revocation of Law 50/88 of 19 April, on the allowance concerning the insertion of young people in the active life, the Por-

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tuguese legal order does not foresee specifically tide-over allowances for young people seeking their first employment or jobseekers' allowances similar to those discussed in ECJ cases Collins and Ioannidis. However, it does not mean that persons in such conditions are not entitled to allowances under Law 13/2003 of 21 May on the social income for insertion ('rendimento social de inserção') as amended by Law 45/2005 of 29 August.

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 entered the Portuguese territory in order to seek employment and can provide evidence that they are continuing to seek employment [Article 9(4) of Law 37/2006].

2.2 Judicial practice

An examination of the case-law databases of the Administrative Courts revealed that in 2010 there was no case-law pertaining to situation of jobseekers.

2.3 Administrative practices

According to the model of registration certificate for periods of residence in Portugal longer than three months approved by the Portaria 1637/2006 of 2nd of September (execution regulation of the Law 37/2006), jobseekers must declare in point 14 (employment details) that they are 'seeking first job'.

3. OTHER ISSUES OF CONCERN

We did not find any other issues of concern in Portugal related to the entry, residence, departure or remedies of workers.

4. FREE MOVEMENT OF ROMA WORKERS

We did not find any issues of concern in Portugal in 2010/2011 related to the free movement of Roma workers.

Chapter II: Members of the family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

According to Article 2(e) of Law 37/2006 family members of a Union citizen are: (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).

2. ENTRY AND RESIDENCE RIGHTS

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 the Portuguese territory without visa if they possess a valid residence card. In such a case, no entry stamp is placed on 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).

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* judgement. This case 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* judgement.

a) Right of residence for up to three months

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 forth 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.

b) Right of residence for more than three months

i) Application for a residence card

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 *Serviço de Estrangeiros e Fronteiras* [Aliens and Borders Service (ABS)] 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 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 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.

According to Article 17, the ABS shall issue a permanent residence card to the family members of a Union citizen jobseeker 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.

ii) Right of permanent residence

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 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 in Portugal 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 forth in Article 8(3): (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

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conditions referred to in points (a) or (b), provided that the family has been constituted on the Portuguese territory], shall acquire the right of permanent residence after residing legally for a period of five consecutive years in Portugal (Article 13).

iii) Loss of the right of permanent residence

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 shall take into account of considerations such as: (i) how long the individual concerned has resided in the national territory, (ii) his/her age, (iii) state of health family and economic situation, (iv) social and cultural integration in Portugal and (v) extent of his/her links with the country of origin [Article 23(1)].

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 (ABS) 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.

Whatever the case, expiry of the passport with which the third-country national who is a family member of a Union citizen entered the Portuguese territory may not constitute a ground for expulsion [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)].

iv) Right to leave the Portuguese territory

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.

3. IMPLICATIONS OF THE *METOCK* JUDGMENT

Law 37/2006 does not oblige a national of a non-member State who is the spouse of a Union citizen residing in Portugal, but who does not possess Portuguese nationality, to have previously been lawfully resident in another Member State before arriving in Portugal, in order to benefit from the provisions set forth in that law. Moreover, the rights foreseen in Law 37/2006 are granted to a national of a non-member country who is the spouse of a Union citizen residing in Portugal whose nationality he does not possess and who accompanies or joins that Union citizen, irrespective of when and where their marriage took place and of how the national of a non-member country entered the country.

4. ABUSE OF RIGHTS, I.E. MARRIAGES OF CONVENIENCES AND FRAUD

Article 31 of Law 37/2006 states that the residence permits and other social rights granted by this law are refused and withdrawn in case of abuse of rights or fraud, such as marriages of convenience.

5. 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.

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 EU law.

6. THE SITUATION OF FAMILY MEMBERS OF JOBSEEKERS

The legal framework explained in point 1 is also applicable to family members of jobseekers. That means that 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 family members of jobseekers, if the jobseeker has entered the Portuguese territory in order to seek employment and can provide evidence that they is seeking employment [Article 9(4) of Law 37/2006].

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)]; (2) an execution regulation laying down the model of a permanent residence card [Article 17(1)]; (3) an 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

An examination of the case-law databases in 2010 of the administrative courts revealed that there was no case-law concerning family reunification.

Previously, on 17 of December 2009, the Tribunal Central Administrativo Sul held, in process n° 5523/09, that Article 15 of Law 37/2006 (according to which family members of Union citizens who are *third-country national* must apply for a residence card before the ABS within thirty days after three months from the date of arrival) has to be interpreted according to the Directive 2004/38. The scope of the Directive is to 'protect the interest of the family'. However, this protection is only mandatory with regard to situations where there is a real family. Therefore, the right to a residence card does not apply in case of fraud. According to Article 31(1) of Law 37/2006 and to Article 35 of Directive 2004/38, in case of abuse of rights or fraud, such as marriages of convenience, any residence rights or other social

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rights are refused. In this case, the applicant was a third country national who married a EU national. The ABS denied its request for a residence card, with the argument that the marriage was a fraud. Based on the evidence brought to the case, the Court also qualified this marriage as a marriage of convenience intended to obtain a residence permit in Portugal.

Administrative practices

Administrative practices during are limited to implementing current legislation.

Recent Legal Literature

Constança Urbano de Sousa, 'A Directiva 2004/38/CE do Parlamento Europeu e do Conselho, de 29 de Abril de 2004, e o direito dos cidadãos comunitários ao reagrupamento familiar', *Estudos jurídicos e económicos em homenagem ao Prof. Doutor António de Sousa Franco*, I, Faculdade de Direito da Universidade de Lisboa, Lisboa 2006, p. 629-654.

Chapter III – Access to employment

1. ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

1.1 *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 EU law. The Portuguese Employment Law foresees the principle of equal treatment in access to employment.¹

Several acts governing a particular profession open it implicitly or explicitly to EU citizens.

One case is that of private notaries. According to Article 25 of the Notary Statute, approved by Decree-Law 26/2004, of 4 February, this profession is open to individuals, regardless of nationality, that hold a degree in Law or an equivalent qualification (for example an equivalent qualification in legal studies in another EU Member State). The Statute also foresees a *numerus clausus* system, according to which the vacancies can only be fulfilled after an applicant has successfully completed an admission exam and, after that, a period of training. For this reason, the Commission initiated an infringement procedure against Portugal before the Court of Justice on the ground that this system of access to the profession of notary breached EU law, in particular Directive 2005/36/CE, of 7 of September, concerning professional qualifications (case European Commission vs. Portuguese Republic, C-52/08). Although Advocate-General Pedro Cruz considered that the Directive 2005/36/CE is not applicable to the activities of notaries in Portugal, since they perform public duties, the Portuguese Parliament (see Law 45/2010, of 3 of September) authorized the Government to change the Notary Statute in order to grant notaries already working in a EU Member State the right to establish and provide services in Portugal without the need to successfully complete an admission exam and, after that, a period of training in Portugal. After the entry into force of the authorized Decree-Law 15/2011, of 15 of January, Article 1-A(1)(c) of the Notary Statute states that notaries registered in another EU may work in Portugal as long as they fulfil the conditions set forth in Statute. In this regard, one should also add that the Court of Justice held, on 24 of May 2011, that Directive 2005/36 is not applicable to the profession of notary.

The chartered accountants and nurses are another recent example. According to Article 5 of the Chartered Accountants Statute, approved by Decree-Law 310/2009, of 26 October, and Article 6 of the Nurses Statute, approved by Law 111/2009, of 16 of September, enrolment in the Chamber of the Chartered Accountants and in the Chamber of Nurses is compulsory for those who want to exercise those professions. Not only Portuguese citizens, but also EU citizens may apply to enrol.

Concerning the access to employment through the employment agencies, Law 19/2007, of 22 of May, on Temporary Employment, forbids the insertion in the labour market of foreign citizens not possessing a residence permit valid in Portugal. The agencies have a com-

¹ Concerning this subject, the Resolution 13/2001 of the Portuguese Parliament approved the Convention 181 of ILO, which in its Article 5 prohibits the discrimination in the access to employment.

munication duty to the ABS in what concerns the requests made by foreign citizens possessing a residence permit. These dispositions are not applicable to 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 2010/11 there was no case-law pertaining specifically to equal treatment and access to employment of EU workers.

During 2010/11 there is no legislation or circular being drafted which specifically refers to equal treatment and access to employment of EU workers.

1.2 Language requirement

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

2. ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

2.1. Nationality condition for access to positions in the public sector

Pursuant to Article 47(2) of the Constitution of the Portuguese Republic (CPR), ‘Every citizen has an equal right to apply to the Public Administration, as a general rule by means of a competitive recruitment process’. However, Article 15(2) of the CPR restricts to Portuguese citizens the exercise of public functions that are not predominantly technical. That means that EU workers access to public sector employment, as a public official or an employee, is restricted to predominantly technical posts. On other words, the nationality requirement must be interpreted in the sense that applies exclusively to public posts implying the exercise of public authority or sovereignty powers.

Law 23/2004, of 22 June, that establishes the legal regime of the individual labour contract in the public sector, prohibits ‘activities that involve the direct exercise of authority powers or the exercise of sovereignty powers’ from being subject of a contract. Moreover, Law 12-A/2008, of 27 February, that establishes the general framework of access to positions in the public sector, sets out general requirements for admission to open competitions and recruitment to public sector posts, such as: (1) a minimum age of 18 years; (2) completion of the mandatory vaccination laws; (3) physical and psychological capability; (4) absence of any impediment or ban from carrying out public functions; (5) Portuguese nationality of the applicants, *except when exempted by the Constitution, by a specific legislation or by an international convention* (Article 8). There is no express reference to the specific to EU law in any of these laws.

Article 8 of Law 12-A/2008, of 27 February, revokes Article 29(2)(a) of the Decree-Law 204/98, which did not include any reference to the CPR. Therefore, in order to be compatible with Article 15(2) of the CRP, the nationality requirement foreseen in Article 8 must be interpreted in the sense that it applies exclusively to public posts implying the exercise of authority or sovereignty powers. Only these can be reserved to Portuguese citizens. Beyond the

posts specified in Article 15(3) of the CPR (*e. g.* President of the Republic, President of the Parliament, Prime Minister, President of the Supreme Courts), they include (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 Body (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) and (4) Armed Forces (Law 174/99, of 21 September).

Therefore, the Decree-Law 437/91 of 8th of November, as amended by Decree-Law 414/98 and Decree-Law 411/99, concerning the legal regime for the nursing career, wrongfully establishes the Portuguese nationality as a condition to be admitted in the competition (Article 27).

Judicial Practice

An examination of the case-law databases of the Administrative Courts revealed that in 2010/2011 there was no case-law pertaining to nationality condition for access to the public sector.

Administrative practices

Some competitions governing access to certain public sector careers or announcements of open competitions often 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 those 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.

However, open public competitions usually repeat Article 8 of Law 12-A/2008, of 27 February, which demands, as an admission requirement, 'the Portuguese nationality of the applicants, except when exempted by the Constitution, by a specific legislation or by an international convention' [see, for instance, the public job offer for a technical job in the Portuguese Diplomatic Institute of the Ministry of Foreign Affairs, published in the Official Journal (*Diário da República*) of 31 December 2009, p. 52711]. This is a clear case of a competition that should be open to both Portuguese and EU citizens, but where the announcement only expressly refers the Portuguese nationality. The lack of a direct reference to EU citizens may lead the administration to follow the interpretation that the post is reserved to Portuguese nationals.

2.2 Language requirement

EU citizens are required to prove their knowledge of the Portuguese language in applications for teaching positions in pre-school, primary and secondary education (Portaria 967/2009, of 25 of August). These skills are verified by the competent authorities (Centro de Avaliação do Português como Língua Estrangeira) as part of the procedure for the recognition of professional qualifications (Article 48 of Law 9/2009, of 4 of March, and Despacho 22238/2009, of 22 of September, published in *Diário da República*, of 7 of October 2009, approving the regime of the Portuguese exams).

For other competitions, there are no express legal provisions concerning linguistic abilities, although some demand foreign linguistic knowledge for the proper fulfillment of the job duties. For instance, the public job offer for a technical job in the Portuguese Diplomatic Institute of the Ministry of Foreign Affairs, published in the Official Journal (*Diário da República*), of 31 December 2009, p. 52711, mentions proficiency in the French, Arabic, German and English languages as an admission requirement.

2.3 Recognition of professional experience for the purposes of access to public sector

As a rule professional experience does not constitute a formal requirement for access to the public sector in Portugal. Competition notices cannot stipulate that previous experience is necessary when it is not a legal requirement for the post. Nevertheless, professional experience is usually taken into consideration in the evaluation of the applications.

Article 51(2) of Law 12-A/2008 of 27 February allows public competitions for the access to a public post to admit the application of a person who does not have the required qualifications, but has enough professional experience for that post. The competition board has the power to decide whether this training and experience is appropriate for the career, category and area of activity in question. Moreover, Article 53(2)(a) of Law 12-A/2008 of 27 February, determines that the selection of candidates for public posts can be made through a curricular evaluation. Finally, professional experience is also taken into account in the case of recruitment for middle management posts (Article 20 of Law 2/2004, of 15 of January).

None of the mentioned rules considers specifically the case of professional experience and seniority obtained *in another Member State*. However, the interpretation of such rules according to EU law imposes taking into account the professional experience and seniority achieved in another Member State for those purposes. The administrative practice follows this path.

Until 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 last years things have changed. Nowadays, there are 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 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 may become significant.

In any case, the absence of a 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 EU 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.

3. OTHER ASPECTS OF ACCESS TO EMPLOYMENT

Article 44 of Law 12-A/2008, of 27 February, requires that applicants for the career of ‘Técnico Superior’ must have a university degree. Although the law does not mention it specifically, degrees obtained in any Member State are recognized as valid in the competitions opened for the posts in this career.

In 2010/2011, budget cuts severely restricted access to the public sector in Portugal. During this period, the vast majority of competitions were opened only to applicants having already a permanent work relation with the Portuguese State. These internal competitions do not allow applications from public servants based in other Member States.

Case Law

An examination of the pertinent databases revealed that in 2010/11 there was no case law on this matter.

Administrative Practices

Competitions that give access to a training or to a post in the public sector are very common in fields that are not open to the EU citizens, such as police forces and judicial bodies.

Due to the fact that the fields of activity of the public sector opened to EU citizens are predominantly technical (mainly, teachers for primary and secondary school levels), Portuguese authorities generally take into consideration the principle of the *Burbaud* judgement, 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.

Recent legal literature

Paulo Veiga e Moura e Cátia Arrimar, *Os novos regimes de vinculação, de carreiras e de remunerações dos trabalhadores da administração pública: comentário à Lei n° 12-A/2008, de 27 de Fevereiro*, Coimbra Editora, Coimbra, 2008

Chapter IV – Equality of treatment on the basis of nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATIONS

1.1 *Legislation in force*

According to Article 13 (‘Principle of equality’) of the CPR, ‘(1) Every citizen shall possess the same social dignity and shall be equal before the law’, and that ‘(2) No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.’

According to Article 15 (‘Aliens, stateless persons, European citizens’) of the CPR, ‘(1) foreigners and stateless persons who fund themselves or who reside 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 CPR, but also those enshrined in ordinary legislation. That means that a European citizen residing in Portugal has the same rights of a Portuguese citizen.

The principle of equality is not absolute, since Article 15(2) of the CPR provides exceptions and allows the law to establish others: ‘Political rights, the exercise of public offices that are not predominantly technical in nature, and the rights that this Constitution and the law reserve exclusively to Portuguese citizens shall be excepted from the provisions of the previous paragraph.’

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 EU, 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 law approved by the Parliament (and not by the 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 purpose². 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;

² 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, no. 62 of 14 March, 2002, p. 2318, and jurisprudence quoted therein.

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Pursuant to Article 15(3) to (5), several legislative acts allow the foreign citizens residents in Portugal to exercise some political rights, namely: (i) The right to petition to defend their rights and legally-protected interests (Article 4, Law 43/90, as amended by Laws 6/93 and 15/2003); (ii) The right to form associations to represent their interests (Law 115/99); (iii) The right to take part in a local referendum, on a reciprocal basis (Article 35 of Framework Law 4/2000).

The new Labour Code (Law 7/2009) follows the solutions already foreseen by Law 99/2003 mentioned in other reports. It continues to ensure equal treatment regarding access to employment, vocational training, promotion and working conditions, and prohibits discriminations on the grounds of nationality (Article 24). Moreover, employers are expressly prohibited from any form of discrimination (Article 25), and the worker or applicant who is the victim of a discriminatory act is entitled to compensation for material and moral damages (Article 28). Some special provisions on the work of foreign citizens in Portugal, such as those foreseeing the written form for the labour contract and the obligation to inform the authorities of an employment contract signed with a foreign citizen, are not applicable to EU workers (Article 5).

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.

1.2. Judicial practice

Our examination of case-law databases and collections available revealed that in 2010 there is no case-law pertaining to equal treatment of EU workers and pertaining to frontier workers.

Specific issue: Working Conditions in the public sector

Law 59/2008, of 11 September, which approved the public sector work contract regime, ensures to all workers an equal treatment regarding access to employment, vocational training, promotion and working conditions, and prohibits discriminations on the grounds of nationality (Articles 13 and 14). Moreover, employers are expressly prohibited from any form of discrimination (Article 14), and the worker or applicant who is submitted to a discriminatory act is entitled to compensation for material and moral damages (Article 17). Moreover, according to Law 12-A/2008, of 27 February, working conditions are not determined on the basis of professional experience and/or length of service. Changes to pay grades are linked to the assessment of the worker's performance (Articles 47 and 48).

2. SOCIAL AND TAX ADVANTAGES

2.1 *General Situation as laid down in Article 7(2) of Regulation 1612/68*

a) Legislation in force

Law 18/2004, of 11 May, implements the principle of equal treatment between persons irrespective of racial or ethnic origins. This law 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.

Article 20(1) of Law 37/2006 also provides that 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 (i) has a labour contract and (ii) resides in the national territory. However, the demand of a valid residence permit is not applicable to 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.

b) Judicial practice

Our examination of case-law databases and collections available revealed that in 2010-2011 there is no case-law pertaining to equal treatment of EU workers or related to frontier workers.

c) Administrative Practices

Some local authorities, namely the cities of Famalicão and Salvaterra de Magos, applied a provision of the Decree-Law 797/76, of 6 of November, which granted the right to enter a competition for a house subsidized by the State only to Portuguese citizens that do not have a proper house and wanted to live in those cities (see newspaper Público of 22 Abril 2010, p. 12). EU citizens who wanted to apply could not participate in these competitions. This obviously infringes the non-discrimination principle foreseen in the Treaties.

2.2 *Specific issue: the situation of jobseekers*

Article 20(3) of Law 37/2006 states that jobseekers do not enjoy entitlement to the benefits of the solidarity sub-system (non-contributory). This is an exception to the principle of equal

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treatment, 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 residence in Portugal is the unemployment benefit). Moreover, Portuguese legal order does not foresee tide-over allowances for young people seeking their first employment or social security allowances paid to jobseekers similar to those discussed in ECJ cases *Collins* and *Ioannidis*. However, as seen above in I.2.1., it does not mean that persons in such conditions cannot receive allowances under Law 13/2003 of 21 May on the social income for insertion as amended by Law 45/2005 of 29 August.

Chapter V: Other obstacles to free movement of workers

We did not find any other obstacles to free movement of workers in Portugal in 2010.

Chapter VI: Specific issues

1. FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES)

The Decree-Law 264/93, of 30 July, established 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 established 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 was dependent on the following conditions: (i) The vehicle should be registered in the name of a person which is neither established nor resident in the Portuguese territory; (ii) The vehicle should be introduced in Portugal by its owner or legal holder; (iii) The use of the vehicle should be for particular aims; (iv) The vehicle documents should be presented.

Article 1(5) considered as resident the person who: (i) remained in the national territory during periods of time equal or superior to 180 days, consecutive or interpolated, for each calendar year; (ii) exercised a remunerated professional activity or possess a residence permit in the Portuguese territory. Thus, the vehicles temporarily admitted could 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 provided also that a person who exercises a professional activity in Portugal could not use a vehicle with a foreign registration number.

In the course of 2007 and 2008 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 could not benefit from the regime of temporary admission because they are exercising a professional activity in Portugal, and so they were subject to the fines foreseen in Article 35 of the Decree -Law 376-A/89, of 25 October. In order to remove this obstacle to the free movement of Spanish workers, Law 22-A/2007, of 29 June, extended the exemption regime benefit to cross-border workers residing in Spain who move daily to their working place from an 'adjacent locality' in Spain.

However, the interpretation of this new provision and in particular the term 'adjacent' was 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 within 60 Km from the border. However, this provision did not cover all Spanish cross-border workers who reside beyond that limit and circulate in Portugal with vehicles registered in Spain. Therefore, Law 44/2008, of 27 of August, amended Law 22-A/2007, of 29 June, and extended the exemption regime to all cross-border workers residing in Spain who move daily to their working places in Portugal. The 60 Km limit was abandoned, which means that the exemption regime now covers any cross-border workers residing in Spain, with effects from 1 July 2007.

2. SPORTSMEN/SPORTSWOMEN

Legislation in Force

Sports are organized in Portugal within the general framework of the Law on Physical Activities and Sports – Law 5/2007, of 16 of January – and, specifically, in the Decree-Law n.º 248-B/2008, of 31 of December, that develops the framework law. According to Article 2 of 5/2007, of 16 of January, (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.

Article 48(2) of Decree-Law 144/93, of 26 of April, established that individual sports could only be practiced in Portugal by Portuguese citizens. This very strict regime was revoked by Article 62(2) of Decree-Law 248-B/2008, which now establishes that in individual sports national titles can only be granted to Portuguese citizens.

Administrative Practices

Concerning professional and non-professional sports, there are some federations regulations that discriminate against Union citizens.

The most relevant case is Basketball. It was only on 22 of February 2011, that the Portuguese Basketball Federation amended Article 184 of the Competition's Regulation in order to establish that a EU national is to be considered equal to a Portuguese national in what regards the competitions organized by the Federation (Official Communication no. 206 for the 2010/2011 season, of 18 of March). Until now there was an informal agreement between clubs not to hire EU nationals. The Competition's Regulation still establishes, however, that in the Women's National League a team can only register three players that cannot represent the Portuguese national squad and can only play simultaneously with two of those players (Article 107). It means that EU nationals transferred to Portugal are included in this quota. There is also information according to which a Spanish national was unable to play in the second division women's league because regulations only allowed the registration of Portuguese nationals³.

Furthermore, Article 45 of the Competition Regulation adopted by the Football Professional League establishes that football clubs must register a minimum of 8 'locally trained players'. A player is considered to be trained locally if he is registered in the Portuguese Football Federation for at least three seasons between the ages of 15 and 21. This restriction does not lead to a direct discrimination on the basis of nationality as these players can have any nationality. Nonetheless, there is a risk of indirect discrimination on the basis of nationality inasmuch as access to clubs' training facilities is easier for the young Portuguese players than for players from other Member States.

A case of restriction based on nationality was revealed in the autumn of 2008 by the Portuguese media. This case concerned a regulation of the Portuguese Football Federation that established much higher registration fees for international transfers than for national transfers and discriminated against non Portuguese players (Official Communication no. 1 of the Portuguese Football Federation for the season 2008/2009). A 14 year old German national, who

3 <http://www.solobasket.com/contenidos/como/esta/situacion/comunitarios/portugal/c-26361.html>.

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played in a German club and whose parents moved to Portugal to work, wanted to play for a Portuguese football club. The Portuguese Football Federation required the payment of a mandatory 1320 € registration fee. According to the Portuguese Football Federation regulations, if the transfer occurred between national clubs, the registration fee would be of only 37,50 €, almost 4000% less than an international transfer. This reduced fee is also applicable ‘to Portuguese national players who is transferred from foreign clubs to Portuguese clubs’ (Point 4 of Chapter 9 of the Official Communication no. 1 of the Portuguese Football Federation for the season 2008/2009’). This discrimination was considered to be ‘shocking’ and in breach of EU law by the Portuguese Ombudsman (Process n° R-3682/08 (A6), of 6 of October 2008).

This kind of registration fees are also in force in several other sports federations. For instance, in the Portuguese Volleyball Federation the registration fee for international transfers is 650€ and the registration fee for internal transfers is 30€ (Point 4.2. of the Circular no. 20 of the Portuguese Volleyball Federation for the season 2010/2011).

Recent legal literature

Two articles contain some references to the application of free movement legislation in the sports sector:

João Leal Amado, ‘Das ‘cláusulas de nacionalidade’ às ‘cláusulas de formação local’: uma diferença insuficiente?’, *Revista Jurídica do Desporto*, n° 10 Setembro/Dezembro 2006.
José Manuel Meirim, ‘Bosman was in the Convention? The Europe searching for the Sport’, *O Direito*, 2006.

3. MARITIME SECTOR

According to Decree Law 104/89, of 6 of April, access to posts in the maritime sector needs registration. Article 4 opens such registration to EU citizens. Equal treatment is thus generally granted as regards employment in this sector and also as regards work conditions and pay. Concerning the post of master of merchant ships, Article 61(2) of the Decree-Law 280/2001, of 23 of October, as amended by the Decree-Law 226/2007, of 31 of May, requires the Portuguese nationality or that of any another EU Member State. Previously, access to the post of master of merchant ships flying a Portuguese flag was restricted to Portuguese nationals. Other EU citizens needed the approval of the competent maritime authorities (The Institute for Ports and Maritime Transports). The 2007 amendment was justified by the need to comply with EU rules regarding free movement of workers (see the preamble of the Decree-Law 226/2007, of 31 of May).

4. RESEARCHERS/ARTISTS

There is no specific legislation regarding artists and researchers. Article 15 of the Constitution grants them the same rights as the Portuguese artists and researchers.

5. ACCESS TO STUDY GRANTS

The Portuguese grants two kinds of scholarships: study grants (5.1.) and social study grants (5.2.).

5.1 Study Grants

The Foundation for Science and Technology (FCT) – an institution integrated in the Ministry of Science, Technology and Higher Education – awards several types of study grants, both for studies in Portugal and for studies abroad.

According to Article 17(1) of the Regulation for Advanced Training and Qualification of Human Resources of 2010 (Regulation FCT 2010), established by the Notice 11258/2010 of the FCT (published in *Diário da República*, 2.º série, n.º 109, 7 June 2010), the following individuals may apply for grants directly funded by the FCT:

- ‘a) Portuguese citizens, or citizens of other European Union Member States that hold a certificate of permanent residency in Portugal attested to by the Aliens and Borders Service, under the terms of Article 16(1) of Act 37/2006, of 9 August;
- b) Citizens of other countries that hold permanent residency permits in Portugal or that hold long-term resident status, attested to by the Aliens and Borders Service, under the terms respectively of Articles 80 and 125 of Act 23/2007, of 4 July;
- c) Citizens of other European Union member states or other countries, whose applications are made in the framework of agreements or international partnerships in which the Portuguese State is a part or has committed itself to abide.’

Article 17(2) states that

‘for grants in which the plan of work is to be carried out in foreign institutions, only Portuguese citizens, individuals who hold permanent resident status in Portugal and those referred to in item c) of the previous provision are eligible to apply’.

Finally, Article 17(3) states that

‘for invited scientist, scientific career development or post-doctoral grants, foreign nationals who are not residents of Portugal may also apply, as long as their application is sponsored by a Portuguese host institution.’

Following the public protests of associations of foreign students, of several political parties represented in the Portuguese Parliament and also of some sectors of the civil society⁴, Article 45-A of the Regulation FCT 2010 contains a transitional arrangement of 21 July 2010, according to which:

4 See the newspaper ‘O Público’ of 13 June 2010 (available at http://www.publico.pt/Ci%C3%A4ncias/alunos-de-doutoramento-estrangeiros-impedidos-de-se-candidatar-a-bolsas_1441679), the newspaper ‘I’ of 15 June 2010 (available at <http://www.ionline.pt/conteudo/64554-portugal-pode-perder-700-investigadores-estrangeiros>) and finally the news published on 15 June 2010 in the website of the Portuguese Television Channel TVI24 (available at <http://www.tvi24.iol.pt/tecnologia/ciencia-tecnologia-bolsas-fct-be-tvi24/1170266-4069.html>).

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‘1. In the Call for Individual Grants 2010, second phase, the following types of candidates can also be considered:

- a) Foreign candidates having obtained a Licentiate or Master degree in Portugal;
 - b) Foreign candidates who, at the time of the call launch, or in the two previous years, are or have been enrolled in a Doctoral Program in Portugal;
 - c) Candidates holding a fellowship or a research contract in the framework of a project or of a relation with an institution of the national scientific and technological system, at the time of call launch.
2. The candidates whose application has been discarded in the first phase of the 2010 call for individual grants on account of failing the conditions stated in Article 17 can renew their application in the second phase of the call, provided they satisfy the conditions mentioned in paragraph 1 of the current Article.
3. The FCT Board can consider accepting other candidates who prove their connection to the scientific activities pursued by the host institution.’

In the Regulation for Advanced Training and Qualification of Human Resources of 2011 (Regulation FCT 2011), established by the Notice 10406/2011 of the FCT (published in *Diário da República*, 2.º série, n.º 89, 9 May 2011), a new provision was added aiming at comprehending other applications of foreign students: ‘In case of public interest, FCT may exceptionally admit to competition other applications that prove their effective insertion in the scientific activities pursued by the host institution’ [Article 17(1)(d)]. The limited scope of this disposition, as well as the wide discretionarily it grants to the FCT, has been criticized in the media by EU students that do not fulfil the other criteria set forth in Article 17⁵.

5.2 Social Study Grants

According to Article 1 of the Regulation for the Granting of Scholarships to Students in Higher Education, established by the Order 14474/2010 of the Ministry for Science, Technology and Higher Education (published in *Diário da República*, 2.ª série, no. 181, 16 September 2010], social study grants may be awarded to students enrolled in technological specialization, Licentiate or Master degree courses in Portuguese institutions of higher education. Grants for the enrolment in a professional internship may be awarded to holders of a Licentiate or Master degree.

According to Article 3(1) of the Decree-Law 129/93, of 22 April, as amended by the Decree-Law 204/2009, of 31 August, the following students registered in a Portuguese institution of higher education may benefit from a social study grant:

- ‘a) Portuguese citizens;
- b) Citizens of other European Union member states that hold a certificate of permanent residency in Portugal and their family members, under the terms of Act 37/2006, of 9 August;
- c) Citizens of other countries: (i) that hold permanent residency permits in Portugal, under the terms of Article 80 of Law 23/2007, of 4 July; (ii) that hold long-term resident status, under the terms of Article 125 of Law 23/2007, of 4 July; (iii) with which Portugal has established cooperation agreements providing for such benefits; (iv) whose law, under the same circumstances, grants the some benefits to Portuguese students;
- d) Stateless citizens;
- e) Holders of political refugee status.’

5 See the newspaper ‘O Público’ of 6 May 2011 (available at www.publico.pt/Ciencias/estrangeiros-vaio-ter-mais-dificuldade-em-conseguir-bolsas-de-doutoramento-em-portugal_1493064).

In order to apply for a social study grant, a student must prove that the financial resources of his/her household do not reach a certain pre-established amount. According to Article 7(2) of the Notice 20906-A/2010 of the Directorate General for Higher Education (published in *Diário da República*, 2.^a série, no. 203, 19 October 2010), social study grants are only awarded to students whose per capita household income is equal or inferior to 14 times the amount of the social support index in force in the beginning of the respective academic year plus the amount of the maximum tuition fee established by the government for the Licentiate degree courses in the respective academic year.

In order to benefit from a social study grant, a student must achieve a certain degree of academic performance. This degree is established by Article 5 of the Notice 20906-A/2010.

6. YOUNG WORKERS

Workers under 18 are granted special protection *vis-à-vis* other workers based on subsection V (Articles 66 to 84) of the Labour Code, approved by Law 7/2009, of 12 of February, and other legislation, namely Law 105/2009, from 14 September, that develops and amends the Labour Code, and Decree-Law 220/2006, of 3 of November, as amended by Decree-Law 72/2010, of 18 of June, establishing the unemployment benefits.

The employer must guarantee work conditions adequate to the age and development of the minor. Therefore, before hiring a minor, employers must carry out, or review, a risk assessment, paying attention to the health and safety implications of employing young people (art. 66.º of the Labour Code).

Minors under 16 can be employed if they have finished compulsory education and only to perform ‘light works’ (art. 68.º of the Labour Code).

Young workers aged between 16 and 18 can only be hired if they (i) have finished compulsory school and (ii) have adequate physical and psychological abilities (Article 55 of Labour Code).

Young workers under 16 can only be hired to participate in cultural, artistic or publicity activities, namely as actors, supporting actors, singers, dancers, musicians or models (including rehearsals), as long as they do not involve animals, dangerous substances or activities that may be harmful to the health or safety of the minor. This participation must also be authorised by the Children and Youngster Protection Commission of the residence area of the minor [Article 81 of Labour Code and Articles 2(1) and 5 of Law 105/2009, of 14 September].

Concerning circus activities, the minor under 16 can only perform if he is at least 12 years old and the show, including the rehearsals, is performed under the supervision of one of the parents, legal representative or an adult brother. These activities cannot involve wild animals [Article 2(2) and (3) of Law 105/2009, of 14 September].

Minors under 16 who have finished compulsory education but do not have professional qualifications, or minors above 16 who did not finish compulsory education or do not have professional qualifications, can only be employed if they are enrolled in a training program that grants compulsory education (if the minor did not finish it) or professional qualifications (if the minor has already finished compulsory education) [Article 69(1) of Labour Code]. In any of these cases, the employer has 8 days to inform the public authorities of the hiring of the minor, according to Article 69(4) of Labour Code. This legal framework does not apply to minors who work during school holidays [Article 69(2) of Labour Code]. Minors must

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work less hours and have longer resting periods than adults, by virtue of Articles 73 to 79 of the Labour Code.

The employer is obliged to grant professional training to the minor [Article 67(1) of the Labour Code]. The minor has the right to a leave of absence without salary to enrol in a professional program that grants school qualifications, except if the leave of absence causes a serious harm to the company [Article 67(2) of Labour Code). A minor may also request the application of the worker-student framework foreseen in arts. 89.º to 96.º of the Labour Code.

Concerning social benefits, an apprentice or a trainee can have a 20% reduction in the amount of the National Minimum Wage (475€ month for 2010). A young worker that loses his/her job can request social security services for an unemployment benefit. Currently there are two kinds of benefits: the unemployment benefit and the social unemployment benefit (see Decree-Law 220/2006, of 3 of November, as amended by Decree-Law 72/2010, of 18 of June, establishing the unemployment benefits).

Chapter VII: – Application of transitional measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

In the Treaty of Accession of 2003, 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 on 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.

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 EC Regulation 1612/68 and of Law 37/2006 (which transposes Directive 2004/38/EC. Thus, since that date there is no special regime applicable to them in Portugal.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

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

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and of Romania, which correspond essentially to those Portugal applied to the EU 8 countries during a transitional period of two years, as described above in point 1.

It is also important to mention that from 2007, Romania and Bulgaria were no 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.

Until now the application of the transitional arrangements has not given rise to particular problems or a relevant case-law.

Chapter VIII: Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ARTICLE 45 TFEU AND REGULATION 1612/68

Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the EU has a more specific and limited scope than Regulation 1612/68 (replaced by Regulation 492/2011 in force since 16 June 2011) on freedom of movement for workers within the EU. It follows that in some cases the basic principle of equal treatment established by the latter regulation implementing Article 45 TFEU leads to derogations to the application of the former regulation.

A good example of this is the Hendrix judgment (C-287/05), where the Court of Justice decided that, although Article 45 TFEU and Article 7 of Regulation 1612/68 must be interpreted as not precluding national legislation which applies Article 4(2a) and Article 10a of Regulation 1408/71 and provides that a special non-contributory benefit listed in Annex IIa to the latter Regulation may be granted only to persons who are resident in the national territory, in cases where, for example, the person in question has maintained all of his economic and social links to the Member State of origin, such non-contributory benefit should continue to be granted to him/her, even if he/she changed his residence to another Member State. In such case, Article 7 of Regulation 1612/68 will prevail against Article 4(2a) and Article 10a combined with Annex IIa of Regulation 1408/71, in conformity with the protection of the rights of the person and the principle of proportionality.

According to Article 45 TFEU and Article 7 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. On the other side, Article 7 of the Basic Law on Social Security – Law 4/2007, of 16 January – 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 Portuguese jurisprudence or specific literature on social security regarding EU workers in 2010/11.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

Since Directive 2004/38/CE amended only Articles 10 and 11 of Regulation 1612/68, it is conceivable that all other provisions of this regulation, including the case-law *acquis* developed around them, remain unaffected. This solution was confirmed by the judgments of the ECJ of 23 February 2010, Ibrahim (C-310/08) and Teixeira (C-480/08) on the interpretation of Article 12 of such regulation (now Article 10 of Regulation 492/2011).

3. EXISTING POLICIES, LEGISLATION AND PRACTISES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

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

Law 23/2007 transposes 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. 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 scope nationals from the EU Member States, as well as members of their families who are third country nationals.

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

3.1 Integration measures

The II Plan for the immigrants' integration was approved by the Resolution of the Council of Ministers 74/2010, of 4 July. It develops the national strategy concerning the reception and integration of immigrants and includes measures in several fields such as the employment and the vocational training, residence and health, education, culture, sport, social benefits and justice.

3.2 Immigration policies for third-country nationals and the Union preference principle

Article 59(1) of Law 23/2007 imposes a preference in access to employment in Portugal for workers who are nationals of EU Member States.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

- a) Assembly of the Republic, through petitions;
- b) Ombudsman, through complaints;
- c) Ministry of Home Affairs, through complaints concerning the action of the ABS and of other entities hierarchically dependent on such Ministry.

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SEMINARS, REPORTS AND ARTICLES

Report on the activities of the Aliens and Borders Service concerning 2010.

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List of internet sites of legislation and court judgments

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