



European Network Against Racism  
Réseau européen contre le racisme

# ENAR Shadow Report 2012-2013

## ENAR SHADOW REPORT

### **Racism and related discriminatory practices in employment in Portugal**

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Racism is a reality in the lives of many ethnic and religious minorities in the EU. However, the extent and manifestations of this reality are often unknown and undocumented, especially in official data sources, meaning that it can be difficult to analyse the situation and to establish solutions to it.

The ENAR Shadow Reports are produced to fill the gaps in the official and academic data, to offer an alternative to that data and to offer an NGO perspective on the realities of racism in the EU and its Member States. NGO reports are, by their nature, based on many sources of data - official, unofficial, academic and experiential. This allows access to information which, while sometimes not backed up by the rigours of academic standards, provides the vital perspective of those that either are or work directly with those affected by racism. It is this that gives NGO reports their added value, complementing academic and official reporting.

Published by the European Network against Racism (ENAR) in Brussels, March 2014, with the support of the European Union Programme for Employment and Social Solidarity - PROGRESS (2007-2013), the Open Society Foundations, and the ENAR Foundation.

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## Executive summary

The purpose of this report is to assist in furthering policies aimed at tackling racism and discrimination in Portugal by providing insights gleaned from activists and professionals on the ground. Though the reference period is from March 2012 to March 2013, most of what is reported is by no means novel.

There are little to no official data. The immediate problem with data collection is in the statistical system itself. This, in turn, results from the complacency of the institutions. It has been speculated that the reason for this institutional inertia and, ultimately, why there is no data disaggregated by ethnicity lies in the equality body's institutional nesting within the executive branch of government. These concerns were echoed by European Commission against Racism and Intolerance (ECRI) in its IV monitoring cycle report. While there is certainly some truth to that, a more likely reason for the said complacency is the apprehension – documented in interviews for this Report – that being more proactive might ignite social unrest, which has been remarkably absent even in these times of austerity. The incentives for institutional actors are clearly aligned against the production of disaggregated data.

Moreover, the very complexity of the institutional arrangements allows an endless shifting of responsibilities. Though the Report shows that the labour inspectorate is the usual means of redress, it appears that matters of discrimination are ancillary to its mandate. Other bodies' mandates assert quite simply that complaints should be forwarded to the labour inspectorate. These mandates will even have a provision stipulating that other institutions – *i.e.*, the labour inspectorate – must cooperate fully. However, the labour inspectorate's efficiency in this task is debatable. Some testimonies regarding complaint-forwarding suggest that a bottleneck of complaints may exist at the labour inspectorate. It has been found that institutional databases do not match and that at least two attempts to create a universal identifier for complaints were made by the equality body, which did not amount to anything as a result of lack of funds.

As for the labour inspectorate's day to day operations, racism and discrimination are unlikely to be brought to light. No prong of its inspective activity – which is concerned mostly with checking if paperwork and objective working conditions are in order – is attuned to racism and discrimination. As far as these phenomena are concerned, it operates on a purely reactive capacity. It won't chance upon racism and discrimination but will have to be addressed in their regard in order to notice them.

This leaves the burden of a low complaint number with the purported victims themselves. A combination of ignorance of one's rights, fear and a sense of the pointlessness of it all is certain to help keeping the number of complaints low. When asked, for the purpose of this Report, if, given the low number of complaints, they thought they should be more proactive – emulating, for example, the International Labour Organisation's methodology for discrimination-testing – the labour inspectorate implied that this would exceed its mandate.

The National Strategy for the Integration of the Roma Communities (ENICC) brought a welcome stir, but ongoing assessment by the Commission shows progress to be slow<sup>2</sup> and therefore it is too soon to judge what will come out of it.

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<sup>2</sup> [http://ec.europa.eu/justice/discrimination/files/roma\\_country\\_factsheets\\_2013/portugal\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_country_factsheets_2013/portugal_en.pdf), accessed 7<sup>th</sup> February 2014.

This Report recommends the following:

- the current working of the equality apparatus must be re-evaluated in order to ensure transparency and align incentives in order to guarantee that the technicians and institutions involved have an unambiguous understanding of their mandates as being for pushing for equality and not for avoiding social unrest;
- either the labour inspectorate's mandate must be amended to include racism and discrimination explicitly and centrally or, a single body should be created with an explicitly comprehensive mandate which will specifically combat the different forms of discrimination and have the requisite resources to fulfil this objective;
- the labour inspectorate should be invited to sit, even if informally, at the Commission for Equality and against Racial Discrimination (CIDR);
- the labour inspectorate should also engage in regular outreach activities, targeted at both individuals and NGOs, in order to compensate for the fear, disbelief and ignorance that prevent the filing of complaints;
- a monitoring process must be carefully laid out to oversee all cases at all stages - whether they are at the labour inspectorate stage or reach the court system, if the decision is disputed;
- given the existing culture of fear and disbelief in the justice system, proactive methodologies, as put forward by, for example, the International Labour Organisation, such as discrimination testing, should be implemented by the labour inspectorate in order to break with the vicious cycle of under-reporting;
- given that the existing statute of limitations allows any adequate lawyer to make the defendants labour market discrimination problem go away simply by the use of dilatory tactics, it must be amended;
- dispelling the culturally pervasive assumption that the absence of hard data means at least plausible deniability must be an integral part of any effort to monitor discriminatory practices in Portugal;
- the focus of studies should shift from the victimised minorities to the perpetrating society.

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## List of acronyms used

ACIDI – High Commission for Immigration and Intercultural Dialogue, the equality body

ACIME – High Commission for Immigration and Ethnic Minorities, a predecessor of ACIDI

ACM – High Commission for Migration, the new (2014) iteration of ACIME/ACIDI.

ACT – Authority for Labour Conditions

APAV – Portuguese Association for Victim Support

CEMRI – Centre for the Study of Migrations and Intercultural Relations

CGTP-IN – General Confederation of the Portuguese Workers

CIDR – Commission for Equality and against Racial Discrimination

CIG – Commission for Citizenship and Gender Equality

CITE – Commission for Equality in Labour and Employment

CLR – Commission for Religious Freedom

COCAI – Consultative Council for Immigration Affairs

CPR – Portuguese Refugee Council

ECRI – European Commission against Racism and Intolerance

ENICC – National Strategy for the Integration of the Roma Communities

ESS – European Social Survey

EU-MIDIS – European Union Minorities and Discrimination Survey

FRA – European Union Agency for Fundamental Rights

GEE/MEE – Office for Strategy and Studies of the Ministry of Economy and Employment

INE – Statistics Portugal

ILGA – International Lesbian and Gay Association

ISCO – International Standard Classification of Occupations

MP – Public Prosecutor's Office

PII – Plan for the Integration of Immigrants 2010-2013

SEF – Borders and Foreigners Service

UAVIDRE – Support Unit for Migrant Victims and Victims of Racial and Ethnic Discrimination

UGT – General Workers' Union

# 1. Introduction

Racism is a reality in the lives of ethnic and religious minorities in Portugal. The extent and manifestations of this fact are often unknown and undocumented, especially with regard to official data sources. As a consequence, it can be difficult to analyse the situation and to establish solutions. Even when there is extensive official data, NGOs offer a vital alternative data source which comes directly from the experiences of individuals and communities experiencing racism on a daily basis. The ENAR Shadow Reports have become a major tool for monitoring the situation of racism and xenophobia in EU Member States. Both ENAR's national and European Shadow Reports have proved to be an invaluable documented starting point for strategic and coordinated action, particularly for anti-racist civil society advocacy towards national governments, the European institutions, bodies and the media.

The aim of this report, therefore, is to contribute to knowledge and to provide insight from activists and professionals on the ground working to combat racism and discrimination in Portugal as an advocacy tool by which to influence policy. This report takes on a more narrow focus than previous reports, by exploring the situation of racism and discrimination in the field of employment in Portugal for the period of March 2012 to March 2013. The results will be used at national level to influence policy developments and will be further compiled into a European comparative report to influence European policies. With improved statistical and comparative data, the Shadow Reports will have a demonstrable impact for changing policy and bringing about necessary policy reforms.

The present report is divided into six sections. The introduction will not only establish the Report's aim, method and structure but also highlight the national context in which discrimination can be seen. Section two will look at the labour market and lay down the basics regarding statistics and legislation. The third section is the core of the report and will deal explicitly with how discrimination is seen by official sources and otherwise. This will be followed by any actions that have been introduced to address labour market discrimination. Section five will provide a synopsis of the situation as well as recommendations on policy and action at the national level to tackle discrimination in employment. Unless explicitly stated otherwise, this Report covers developments that took place from March 2012 to March 2013.

## 1.1 Definitions

Statistics Portugal (INE) uses the UN definition of permanent immigrant as being a person, regardless of his/her nationality or citizenship, who, after having resided abroad for over a year, enters the country with the intent of residing there for a period of a year or more.<sup>3</sup> Further, with reference to the law of the High Commission for Immigration and Intercultural Dialogue (ACIDI), the public institute responsible for immigrant integration and the fight against ethnic and racial discrimination, the legislators did not define 'immigrant'.<sup>4</sup> As a matter of fact, this opportunity to provide a clear definition had equally been missed when establishing the High Commission for Immigration and Ethnic Minorities (ACIME)<sup>5</sup> which preceded the ACIDI, and also when the post of High Commissioner for Immigration and Ethnic Minorities was first created.<sup>6</sup> All policies either rely on the definition provided by Statistics Portugal or substitute nationality for immigration whenever a clear cut definition is necessary.

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<sup>3</sup> INE, <http://smi.ine.pt/Conceito/Detalhes/5746>, accessed 5<sup>th</sup> October 2013.

<sup>4</sup> Decree-law No. 167/2007, 3 May 2007.

<sup>5</sup> Decree-law No. 251/2002, 22 November 2002.

<sup>6</sup> Decree-law No. 3-A/96, 26 January 1996.

None of the laws referenced above provide a definition for ethnic minorities. More recently, the Council of Ministers missed the chance to rectify this state of affairs when drafting the *Plan for the Integration of Immigrants 2010-2013*<sup>7</sup> (PII) and the National Strategy for the Inclusion of Roma Communities.<sup>8</sup> This falls into the policy pattern of recognising minorities *de facto* but not *de jure* that is laid out in the *Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*.<sup>9</sup>

Things are a little clearer regarding religious minorities. The Law of Religious Freedom<sup>10</sup> and the Agreement with the Holy See<sup>11</sup> come together to define three tiers of “churches” (ethnocentrically used in the Law as a catch-all term for organised religion): Catholic, “rooted” and other churches.<sup>12</sup> Rooted churches are those established in Portugal for 30 years or established abroad for 60 years, a timing which incidentally relegates the more proselytising neo-Pentecostal churches to the third tier. All tiers have in common that they are organized and enduring communities where believers can fulfil all religious ends determined by their respective faiths.<sup>13</sup> Though never explicitly named as such in the Law, second and third tier churches are, for all intents and purposes, religious minorities.

There is a tendency, mostly among researchers but also at the level of policy making, to differentiate between ethnic minorities regarding their having or not a recent migrant background. For instance, an interview with a researcher who conducted a preliminary study for the Choices program makes it clear that the original target population of the program were young second generation migrants.<sup>14</sup>

## 1.2 Statistical overview

The Constitution forbids the use of electronics to process data of a sensitive nature, such as religion or ethnicity; unless people give their formal consent and the output are statistics in which individuals cannot be identified.<sup>15</sup> In spite of this not being a blanket ban, very little gets done in the way of ethnic statistics.

The lack of disaggregated data according to religion and ethnicity creates problems relating to the identification of groups, and the ACIDI is currently trying, within the scope of the ENICC, to get a more precise estimate of the number of Roma in Portugal. Known estimates range from 30 000<sup>16</sup> to 100 000.<sup>17</sup> There is no prominent discussion regarding the number of people that may be categorised in other ethnic minorities.

However, there are a couple of sources that keep a register on citizenship. The Borders and Foreigners Service (SEF), the immigration law enforcement agency, reports a stock of 417 042 valid residence permits on 31/12/2012. Of these, 25% were Brazilians, 11% Ukrainians, 10% Cape-

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<sup>7</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>8</sup> Resolution of the Council of Ministers No. 25/2013, 17 April 2013.

<sup>9</sup> Unnamed branch of the Portuguese Government, *Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*, Council of Europe, Secretariat of the Framework Convention for the Protection of National Minorities, received on 23 December 2004.

<sup>10</sup> Law No. 16/2001, 22 de June.

<sup>11</sup> Parliamentary Resolution No. 74/2004, 16 November.

<sup>12</sup> Soares P., Santos T. and Tomás I., “A Discriminação Religiosa na Perspectiva das Confissões Minoritárias”, in *Prémio Liberdade Religiosa 2010*, Comissão da Liberdade Religiosa (ed.), Secretaria-Geral do Ministério da Justiça, Lisboa, 2011.

<sup>13</sup> Article 20, Law No. 16/2001, 22 de June.

<sup>14</sup> <http://www.programaescolhas.pt/conteudos/noticias/ver-noticia/4eef517a74899/entrevista>, accessed 8<sup>th</sup> October 2013.

<sup>15</sup> Article 35(3) of the Constitution of the Portuguese republic.

<sup>16</sup> Mendes M., “Etnicidade cigana, exclusão social e racismos”, *Sociologia, Revista da Faculdade de Letras da Universidade do Porto*, 8 (1998), 207-246.

<sup>17</sup> Machiels T., *Keeping the Distance or Taking the Chances. Roma and Travellers in Western Europe*, ENAR, Brussels, 2002.

Verdeans, 8% Romanians, 5% Angolans, etc.<sup>18</sup> SEF is the national entity that, in close collaboration with Statistics Portugal, informs Eurostat. Its numbers can be disaggregated by sex and age.

The same happens with the census data. The census is updated only decennially, using different concepts and fieldwork and claiming universal coverage (undocumented migrants are, by definition, invisible to SEF). The more recent published results illustrate that 28% of foreigners were Brazilians, 10% Cape-Verdeans, 7% Angolans and 6% Romanians. Statistics Portugal did not include Ukrainians as an autonomous category in this breakdown.<sup>19</sup>

Statistics Portugal asks a question about membership of a religious group in the decennial censuses, although there was talk of axing it for budgetary reasons before the current instalment and researchers had to make themselves heard in order to preserve it. In 2011, 8% of residents aged 15 or more declined to answer the question on religion. Most of the people who did respond claimed they were Catholic (88%). People who described themselves as having no religion – the way the question is posed does not allow to distinguish atheist from agnostics, etc. – were 7%. Other categories, for example, “other Christians” (2%) reported well below 5%.<sup>20</sup> This however does not provide adequate information so as to be able to determine the extent of inequality of religious and ethnic groups in Portugal. An exploratory analysis of the 1991 and 2001 censuses, looking specifically at the varying religious groups regarding their relative housing conditions education, occupational status, etc. is available but has yet to be updated to include the more recent results.<sup>21</sup>

Celebrated sources, such as the European Community Household Panel and the European Union Statistics on Income and Living Conditions, do not enquire about one’s ethnicity at all and though the European Social Survey (ESS) does, it lacks a greater sample to ensure its representativeness.<sup>22</sup> This is precisely the state of affairs that led the Fundamental Rights Agency (FRA) to launch the European Union Minorities and Discrimination Survey (EU-MIDIS), although the samples are only representative of local areas selected on account of a previously known high prevalence of individuals of the targeted minorities.<sup>23</sup>

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<sup>18</sup> Dias P., Machado R., Estrela J., Bento A., *Relatório de Imigração, Fronteiras e Asilo – 2012*, SEF, Barcarena, 2013.

<sup>19</sup> Statistics Portugal, <http://www.ine.pt>, accessed 20<sup>th</sup> October 2013.

<sup>20</sup> *Ibid.*

<sup>21</sup> Santos T., *Ensaio Estatístico sobre a Diversidade Religiosa em Portugal (1991-2001)*, Númena, Porto Salvo, 2007.

<sup>22</sup> Kahanec M., Zaiceva A., Zimmermann K., *Ethnic Minorities in the European Union: An Overview*, IZA Discussion Paper No. 5397, Bonn, 2010.

<sup>23</sup> European Union Agency for Fundamental Rights, *EU-MIDIS the European Union Minorities and Discrimination Survey Main Results Report*, European Union Agency for Fundamental Rights, Vienna, 2009.

## 2. The context: labour market and legal framework

### 2.1 Outlook of the labour market

The CIA World Factbook estimates that in 2012, Portugal had the 14<sup>th</sup> biggest GDP (purchasing power parity) in the EU, totalling 250.6 billion USD. The service sector accounted for 76.3% of this figure, but only 59.8% of the labour force. The remaining 11.7% and 28.5% of the labour force worked in agriculture and industry, respectively. The GDP per capita stood then “at roughly two-thirds of the EU-27 average”, while the unemployment rate was of 15.7%.<sup>24</sup>

The *Quadros de Pessoal*<sup>25</sup> (Personnel Records) – currently being managed by the Gabinete de Estratégia e Estudos of the Ministério da Economia e do Emprego (GEE/MEE) – is a matched employer-employee panel (annual iterations) of the Portuguese economy. Its database is cherished among researchers as the best source about the Portuguese labour market.

However, it does not hold data for all sectors of the labour market across Portugal. Its database is dependent on employers volunteering information; undoubtedly they would not invite the labour inspectorate to visit its premises or report undocumented migrants who work in their own firms. Furthermore, there is no information on public administration and similar jobs, or self-employed workers (a tax category that mixes professionals and the day labourers) and domestic workers. This creates some discrepancies, as public administration workers comprise few people with an immigrant background, while the opposite is true regarding self-employed and domestic workers. Also, data for the autonomous regions of Azores and Madeira are missing from the main publication. Though there are publications on these regions alone, the reports don't follow the same outline as the other reports and, in order to include them here would require a special request must be made to the respective regional governments. As a result, the following data comprise only the mainland.

With these limitations in mind, the data available show that in October 2011 – the most recent moment in this series – there were 37 353 Brazilians, 18 531 Ukrainians, 13 469 Cape-Verdeans, 9 670 Romanians and 7 893 Angolans working in Portugal.<sup>26</sup> About one per cent of these Cape-Verdeans, Romanians and Ukrainians were employers themselves, while the corresponding figure for Angolans and Brazilians was 3%. The overall percentage of employers among the workers surveyed, Portuguese nationals included, was 6%.

Most of the published tables of *Quadros de Pessoal*, that use the proxy of nationality, create a broad Portuguese / foreigners divide that makes it very difficult to ascertain ethnic diversity for the purposes of this report. Despite this however, a recent study was carried out whose authors manipulated disaggregated data to produce more targeted outputs on the wage gap between immigrant and native workers in the Portuguese labour market. Cabral and Duarte found out that:

Overall, the wages of immigrants do not fully converge to those of comparable natives as experience in the Portuguese labour market increases. Hence, the initial wage differences never disappear completely in most cases, implying that a wage penalty (premium) upon arrival, though varying in magnitude, persists over time spent in the [sic] Portugal.<sup>27</sup>

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<sup>24</sup> CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/>, accessed 10<sup>th</sup> October 2013.

<sup>25</sup> <http://www.gep.mess.gov.pt/estatistica/gerais/>, accessed 10<sup>th</sup> February 2014.

<sup>26</sup> GEE/MEE, *Quadros de Pessoal 2011*, GEE, Lisboa, 2013.

<sup>27</sup> Cabral, S. and Duarte, C., *Mind the Gap! The Relative Wages of Immigrants in the Portuguese Labour Market*, Working Paper, Lisboa, Banco de Portugal, March 2013.

These authors also found that the negative wage gap – the need to specify the direction the gap emerges from the fact that EU15 nationals have a distinctively positive wage gap – is wider for Chinese (-397,60 € / month) than for nationals of central and eastern European countries (-244,30 € / month) or former African colonies (-172,40 € / month) migrants.

Despite the fact that data on labour market participation has not yet been published in the 2011 census, an anonymous statistics expert – whoA5 – accepted to discuss their impression of the unpublished census data.<sup>28</sup> The labour market participation of foreigners, measured through the activity rate of people aged 15 and older, is quite greater than the equivalent figure for the Portuguese majority. However, Ukrainians, Brazilians and Romanians, who are all part of the more recent migration wave, are distinctively more active than the longer established Angolans and Cape-Verdeans. The employment rate (*i.e.*, the percentage of people aged between 15 and 64, at work either as employees or as self-employed) follows a similar pattern. The unemployment rate (*i.e.*, the avowedly unemployed as a share of the economically active) is far greater for foreigners, especially Angolans and Cape-Verdeans. Regarding the occupational level, foreigners are clearly under-represented in the International Standard Classification of Occupations' (ISCO)<sup>29</sup> major groups two and three (professionals and technicians) and overrepresented in ISCO's major group nine (elementary occupations). This concentration in ISCO major group nine is even greater for Cape-Verdean women in particular. Also, virtually no Cape-Verdeans or Romanians, men or women, hold an ISCO major group two occupation. Migrants are marginally more self-employed than the Portuguese. The major contribution for this difference comes from women. Brazilian and Russian women are the more self-employed. Migrants are also employers more often than the Portuguese. Once again, women are the major contributors for this difference, but none of the major nationalities stands out as driving this trend. Chinese women are really off the charts as employers, but they are surpassed by men of the same provenance. The number of hours worked varies in a way that is consistent with the fact that more foreigners are engaged in part-time work. However, the most striking fact is the small number of foreigners who work 35 to 39 hours, which may be a result of the difficulty of finding employment in the more regulated public sector and primary labour market in general.

Regarding the quality of work, while virtually every study corroborates that the Roma, some religious minorities or migrants are over-represented in specific sectors and tend to have more precarious jobs,<sup>30</sup> only Baganha, Marques and Fonseca tried to establish if an ethnic underclass was emerging in Portuguese society. Eventually, they had to acknowledge that the empirical evidence that would allow verifying the existence of the systematic and stable social exclusion, which is a mandatory requirement for the formation of an ethnic class, was lacking.<sup>31</sup> Important for advocacy purposes is the study of not only migrants and ethnic minorities, but also the majority population and host society – specifically employers and recruitment professionals – as perpetrators of labour market discrimination.

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<sup>28</sup> Anonymous statistical expert A5 accepted to discuss unpublished census data. The interview was conducted by instant messenger on October 23<sup>rd</sup> 2013.

<sup>29</sup> <http://www.ilo.org/public/english/bureau/stat/isco/>, accessed 10<sup>th</sup> February 2014.

<sup>30</sup> *E.g.*, Peixoto, J., "Imigração e mercado de trabalho em Portugal: investigação e tendências", in *Revista Migrações*, 2 (2008), 19-46; Santos T., *Ensaio Estatístico sobre a Diversidade Religiosa em Portugal (1991-2001)*, Working Paper, Númena, Porto Salvo, 2007; Santos, T. Oliveira, C., Rosário, E., Kumar, R. and Brigadeiro, E., *Research Survey on Migrants' Experiences of Racism and Discrimination in Portugal*. Númena, Porto Salvo, 2009.

<sup>31</sup> Baganha M., Marques J. and Fonseca G., *Is an ethclass emerging in Europe? The Portuguese case*, Fundação Luso-Americana para o Desenvolvimento, Lisboa, 2000.

Social experts point out that there is a concentration of African (the population of the neighbourhood served by their institution is mostly of Cape Verdean origin) women in office cleaning and restaurant kitchen work. They attribute this not to Africans being barred from other occupations but to low qualifications and recruiting through social networks.

While there are little to no ethnic or racial data, it can be said that things will begin to improve for the Roma as a result of the effective implementation of the ENICC.<sup>32</sup> Concurrently, measure four of the PII means the availability of statistics regarding citizenship is set to improve greatly in the next few years.<sup>33</sup> The program however does not provide any reference to ethnicity, race or religion.

## 2.2 Legal framework

The Constitution of the Portuguese Republic, 2 April 1976, establishes the general provisions of the equality principle, determining that all citizens are equal regardless of their “ancestry, sex, race, language, place of origin, religion...” (Article 13) and defining equality between national citizens and foreigners: “foreigners and stateless persons who find themselves or who reside in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens” (Article 15). In its chapter on economic rights and duties, the Constitution sets general provisions of equality in the work domain: “everyone shall possess the right to work” and the state’s responsibility to promote “equal opportunities in the choice of a profession or type of work” (Article 58). The Constitution also defines that the workers’ rights thereby described shall be provided “regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions” (Article 59).

During the eighties and particularly the nineties, Portuguese legislators introduced several non-discrimination and equality rules in numerous legal acts, from the regulation of political parties, publicity to sports, penal law, etc.

The 1995 Penal Code<sup>34</sup> formalized the existence of a crime of racial discrimination. This was misnomer, actually, given that Article 240 covers organisation with intent to discriminate and public incitement to discrimination but not differential treatment *per se*, and thus is closer to hate crime than anything else. Its more recent iteration, established by Law 19/2013, 21 February, has a wider scope, including sexual and religious as motivations and public threats.

In 1999 the first law to address directly the prevention, prohibition and punishment of the racial discrimination and xenophobia was adopted. The Law on the Prohibition of Discrimination in the exercise of rights on the grounds of race, colour, citizenship or ethnic origin, Law 134/99, 28 August 1999, and its Regulation Act, the Decree-Law 111/2000, 4 July 2000, are applicable to all individual and collective persons, private or public. They define the concept of racial discrimination (Article 3), the punishable discriminatory practices (Article 4) and the penalty system (Articles 9 to 12 and Articles 3 and 4 of the Regulation Act).

Law 134/99 (Article 4) addresses discrimination in employment, considering a discriminatory practice:

- The adoption of a procedure, measure or criteria, directly by an employer or by its workers following instructions or by an employment agency, that subordinates on racial grounds a job offer, the termination of the employment contract or the hiring refusal;

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<sup>32</sup> Resolution of the Council of Ministers No. 25/2013, 17 April 2013.

<sup>33</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>34</sup> Decree-law No. 48/95, 15 March.

- The production or dissemination of job offers containing, directly or indirectly, any specification or preference based on racial discrimination factors;
- The adoption of a practice by an employer that in the context of an employment relationship discriminates an employee.

Additionally, Law 134/99 forbids the dismissal, application of punishments or other forms of injury towards a worker following the exercise of his rights or a legal claim against a discriminatory practice.

The authority created to monitor the application of Law 134/99 is the CIDR, which works nested within ACIDI, the Portuguese specialized body on immigration and the fight against xenophobia and racial discrimination matters.

Although the opening and the ensuing investigation of a case in issues of employment and work is the responsibility of the ACT, the results are forwarded to CIDR, whose permanent sub-commission advises the ACIDI before the latter defines the administrative offence and applies the fine and accessory penalties (Articles 6, 7 and 8 of the Decree-Law 111/2000).

Regarding the EU Directive 2000/78/EC – the Employment Directive – alongside some of the clauses of the EU Directive 2000/43/EC – the Racial Equality Directive – these were almost totally transposed into Portuguese legislation by the 2003 and 2009 Labour Codes. Eventually, Law No. 3/2011, 15 February, would transpose dispositions relative to access to and exercise of self-employment.

The Labour Code, approved by the Law 99/2003, 27 August, introduced norms concerning the principle of equality in access to employment, traineeships and promotion and in the treatment given in work; norms prohibiting discrimination, direct and indirect, based on citizenship and ethnic origin, among others grounds; and norms defining harassment based on the designated grounds for discrimination.

Additionally, the 2003 Labour Code reinforced the non-discrimination principle by establishing that the foreign worker “who has been authorized to work as an employee in Portugal” enjoys the same rights and has the same duties as a Portuguese worker (Article 87). A clause concerning the reversal of the burden of proof was also put in place: it resets on the employer to prove that the differences in the work conditions are not motivated by any of the discriminatory factors forbidden by law (Article 23).

The violation of the equality and the non-discrimination rules constitute very serious administrative offences (Article 642), punishable with a fine – currently from 2.040,00 € to 61.200,00 €, according to early turnover and negligence/intention –, and the violation of the Article regarding foreign workers’ right to equality represents a serious administrative offence (Article 648). The ACT is the authority responsible for the imposition of fines (Article 630).

Law 99/2003 was repealed by Law 7/2009, 12 February, which approved a new Labour Code. Regarding the equality and non-discrimination clauses, this new Labour Code clarified the concepts of direct and indirect discrimination (Article 23) and added the act of giving an order or instruction with the intention of injuring someone on any of the defined discrimination grounds (Article 23).

Race, place of origin and language were added as forbidden grounds of discrimination in access to employment, traineeships and promotion or career, as well as regarding work conditions (Article 24). Law 7/2009 also determines that the punishment of a worker who has been dismissed or subjected to a penalty, less than a year after a claim or another form of exercising one’s rights of equality and non-discrimination have been made, is abusive and consequently considered a serious administrative offence. In these cases, compensation would be granted for the victim (Article 329).

### 3. Manifestations of racism and structural discrimination in employment

#### 3.1 Perceptions of discrimination in employment

A comparative study of ethnic minorities' and migrants' perceptions of the discrimination they experience<sup>35</sup> – which features representative samples of Brazilians, Cape Verdeans, Guinea-Bissauans, Ukrainians and Roma – shows that 65% of Guinea-Bissauans had felt discriminated when applying for jobs in the past five years. This was the outside figure for all the groups, but it should be taken in to consideration that 67% of the Roma – of which just 41% had had such experiences – hadn't applied for a job in the period of reference. In the more recent FRA / UNDP / WB report, over 50% of the Roma interviewed state that they experienced discrimination while looking for work in the past 5 years.<sup>36</sup> It is unclear whether this is a trend that denotes a deteriorating situation or an effect of the methodological differences between the studies.

Santos *et al.* also established that, once in employment, the Ukrainians were the minority that more frequently felt discriminated regarding a potential promotion: 30% of them reported to have been passed over for promotion in the last five years, on account of their foreign background. The numbers for the Roma are apparently more benign, but only a minority of them (32%) had held formal employment in that period. As for insults and other harassment at work, this research reports that 41% of Brazilians and Guinea-Bissauans recount three or more such incidents in the reference period.

The interviewees of this Report agree that labour market discrimination and racism are generally conceived as major issues in Portuguese society. Activists resent the fact that their fight against discrimination is of little importance in the eyes of the general public and the state. Even anonymous legal expert A1,<sup>37</sup> a civil servant that claims that gender discrimination, at least, is clearly a public issue, admits that racism does not enjoy the same notoriety as this other subject.

Interviewees perceived institutional actors of the type in which themselves are involved – be it NGO or state institutions – as the most active. This view clearly results from positional bias and undermines the relevance of semi-structured interviews with stakeholders as a source to sort this matter out.

ACIDI was mentioned by virtually all interviewees, but not always in a positive manner. Marta Ramos<sup>38</sup> mentions that ILGA Portugal works closely with the Commission for Citizenship and Gender Equality (CIG), the public body responsible for putting in practice public policies in the fields of citizenship and gender equality, but that labour market discrimination is handled by the Commission for Equality in Labour and Employment (CITE), the public body responsible for gender equality in the spheres of work and employment. Nevertheless, discrimination on the grounds of LGBT does not seem to fall within the mandate of the CITE – which is the equality body responsible for gender equality in the labour, employment and vocational training – and this results in ILGA directly addressing the labour inspectorate, known in Portugal as the Authority for Labour Conditions (ACT). The same set of entities is mentioned by Rosario Farmhouse as being the ones that in a general

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<sup>35</sup> Santos, T. Oliveira, C., Rosário, E., Kumar, R. and Brigadeiro, E., *Research Survey on Migrants' Experiences of Racism and Discrimination in Portugal*. Númena, Porto Salvo, 2009.

<sup>36</sup> FRA / UNDP / WB, *The situation of Roma in 11 EU Member States. Survey results at a glance*, Publications Office of the European Union, Luxembourg, 2012.

<sup>37</sup> Anonymous legal expert A1 is a civil servant in the judicial branch of Government with a privileged perspective over the subject of this report. The interview was conducted by e-mail on September 20th 2013.

<sup>38</sup> Marta Ramos, a human rights specialist, is project officer at ILGA Portugal. The interview took place at International Lesbian and Gay Association (ILGA) Portugal headquarters on September 26th 2013.

context of neglect for the themes of racism and discrimination still manage to highlight these issues. The role of trade unions, namely through their legal departments, is also emphasized by Marta Ramos.

Informants don't recall any developments in the way labour market discrimination and racism are taking place in public and political discourses, but José Falcão<sup>39</sup> and Rosário Farmhouse<sup>40</sup> both mention that the recent publication of the IV monitoring cycle ECRI report has been noticed, namely in what concerns its criticism of ACIDI being institutionally placed under the direct authority of the Prime Minister.<sup>41</sup>

### 3.2 Incidence of discrimination in employment

Anonymous legal expert A1 claims that gender-based labour market discrimination, specifically of pregnant women, tends to be well known. As for racism, they suggest that what has been the dominant narrative of national identity for the last 60 years stifles most of what might be categorized as blatant racism. The latter position, on the hegemony of this discourse and that, in consequence, little is generally known about the incidence of labour market discrimination and racism is also supported by José Falcão and Rosário Farmhouse.

Mónica Ribeiro<sup>42</sup> expresses the opinion that labour market discrimination is well-known to be pervasive and widely accepted by all parties, including the victim, given that fear stemming from precariousness and general disbelief in the justice system leaves no other alternative. José Falcão and Rosário Farmhouse agree that fear is what keeps the number of complaints down. For some of these workers at least, this fear will be accrued from being undocumented migrants, as social experts A3 and A4 indicate.<sup>43</sup> Under these circumstances, even though national, EU and international legal instruments may be very thorough; they are unable to help in overcoming these challenges.

For Rosário Farmhouse, the absence of blatant racism is a mixed blessing. For one thing, this could suggest that anti-racism is firmly rooted in Portuguese society and contributes to the social peace the country enjoys. Alternatively, it could also mean that the issue is doomed to be kept as low priority by politicians – no smoke, no fire, no budget – and conspires to make us complacent.

All the interviewed experts agree that there are differences in treatment in employment according to criteria such as nationality, ethnicity, descent, gender or sexual orientation. However, Mónica Ribeiro questions that this unequal treatment may arise unintentionally and suggests that it comes in many shapes and sizes – such as unequal pay or working hours –, often crossing the line into direct discrimination, while the *status quo* is enforced by harassment. The use of the category of intention seems to be contentious and the questions it raises are difficult to adjudicate. Perhaps it might be

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<sup>39</sup> José Falcão is an activist at SOS Racismo. The interview was conducted face to face and took place in Lisbon on September 18<sup>th</sup> 2013.

<sup>40</sup> Rosário Farmhouse is the High Commissioner for Immigration and Intercultural Dialogue. The interview was conducted face to face and took place in Lisbon on October 20<sup>th</sup> 2013/20<sup>th</sup> 2013.

<sup>41</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), ECRI Report on Portugal (fourth monitoring cycle), ECRI Secretariat, Directorate General II – Democracy, Council of Europe, Strasbourg, adopted on 21 March 2013, published on 9 July 2013.

<sup>42</sup> Mónica Ribeiro is an anti-racist activist, a researcher and a practicing lawyer. The interview was conducted by e-mail on September 20<sup>th</sup> 2013.

<sup>43</sup> Anonymous social experts A3 and A4 work at a community centre in a stigmatized neighbourhood with a mainly African population. The interview was conducted face to face and took place on the premises of the community centre on September 27<sup>th</sup> 2013.

relegated from analytic use to a mere utilitarian use, namely in questioning, to elicit examples of indirect discrimination.

All our informants mention the Roma minority as the group that suffers most severely from labour market discrimination and racism. This is in line with the findings of a recent qualitative study that concludes that the anti-racist norm, though comprehensively observed in Portuguese society, makes an exception regarding the Roma.<sup>44</sup>

There has been no particularly notorious or controversial incident regarding labour market discrimination between March 2012 and March 2013.

### **3.3 Patterns of inequality over the course of time**

Anonymous social experts A3 and A4 speak of an accumulation of disregard that eventually stifles aspirations in a way that is reminiscent of what Sennett and Cobb called the hidden injuries of class.<sup>45</sup>

Although lack of data means that there is no discernible trend with respect to the incidence of discrimination and racism over the last ten years, there is however an emerging upward trend in the availability of this albeit limited data. The pressure the Portuguese government has been under, namely from international organizations, is starting to pay off in this respect, as measure four of the PII, dubbed “improving official data on the integration of immigrants”, plainly shows.<sup>46</sup>

### **3.4 Discrimination in access to employment**

Mónica Ribeiro has no doubt that there are differences in treatment according to different ethnic/religious minorities and gender groups and by contrast to native mainstream European citizens, while A1 says that they cannot affirm it categorically but that this may reflect their own lack of information more than an absence of the phenomenon itself. As it turns out, Marta Ramos and A2<sup>47</sup> both share stories of employment advertisements that break the law inasmuch as they mention preferred nationalities, ages or even higher education establishments. Social experts A3 and A4 reinforce this notion by mentioning a case of word of mouth, social network job advertising for domestic service in which the prospective employer had passed the message that they did not want any African applicants. This is not uncommon, according to them. They also say, casually, that, inasmuch as undocumented migrants constitute a minority, the very demand for employment candidates to be documented constitutes discrimination. This shows that the categories people use to structure and navigate their everyday lives do not necessarily coincide with legal concepts.

Mónica Ribeiro has no doubt that there are unjustified differences/obstacles in recruitment policies, but A1 is more cautious, finding them likely but probably not explicitly spelled out in their ugliest form. Conversely, opinions are divided – from assertive to cautious – on the existence of direct discrimination in access to employment. Mónica Ribeiro and A1 both expect photos on CVs to be the basis for a first screening but think that the bulk of the sorting takes place during face to face meetings. A1 is far less assertive, though. Mónica Ribeiro also claims that there is evidence of indirect

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<sup>44</sup> Rosário, E., Santos, T. and Lima, S., *Discursos do Racismo em Portugal: Essencialismo e Inferiorização nas Trocas Coloquiais sobre Categorias Minoritárias*, ACIDI, Lisboa, 2011.

<sup>45</sup> Sennett, R. and Cobb, J., *The hidden injuries of class*, Knopf, New York, 1972.

<sup>46</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>47</sup> Anonymous legal expert A2 is a civil servant in the executive branch of with a privileged perspective over the subject of this report. The interview was conducted face to face and took place in Lisbon on October 20<sup>th</sup> 2013.

discrimination on the basis of unjustified dress codes or language requirements. More specifically, anonymous social experts A3 and A4 state that people of African descent who live in particularly stigmatised neighbourhoods cannot turn in job applications with their real address and expect to at least receive a call. Rosario Farmhouse, the High Commissioner for Immigration and Intercultural Dialogue, says that she has heard of this practice targeting various such neighbourhoods. José Falcão and Rosário Farmhouse both mention that accents can be used for screening. Rosário Farmhouse also mentions sitting in a jury for a literary prize and coming across autobiographical stories of people who experienced racism in job interviews.

None of our informants claimed to know of specific unintentional behaviour or institutional policies resulting in unequal treatment.

### **3.5 Discrimination in the workplace**

Anonymous legal expert A1 expects discrimination and unfair practices in the workplace that originate from the employer, human resources department or colleagues to assume the form of psychological harassment, as specified in Portuguese labour legislation. Alternatively, discrimination which may be caused by clients, if the position makes for direct contact, will be more immediate and obvious.

Regarding differences in treatment according to different ethnic/religious minorities and gender groups and by contrast to native mainstream European citizens, these are very obvious for Mónica Ribeiro, but more elusive to A1. However, regarding direct discrimination in the workplace, A1 explains that it is clear that women in high ranking jobs earn less than men for identical work. Mónica Ribeiro, in turn, states that pay grades – which were scrutinized in the already referenced study by Cabral and Duarte – are only one of many ways these unfair practices take place and point out other things that also differ: unpaid overtime and night work, rates of promotion, undeclared income (which affects future benefits), etc.

Although A1 has no knowledge of indirect discrimination that is detrimental to the position of migrants or ethnic/religious minorities, Mónica Ribeiro mentions that what is more frequent is the ban on the use of creole language even when off duty, during lunch time and breaks.

Mónica Ribeiro references the requirement of the Portuguese nationality to work in public administration and the limitation of the duration of contracts to the length of the residence permit as instances of unintentional behaviour or institutional policies resulting in unequal treatment. Marta Ramos states that whenever an inclusive work environment is actively promoted, indirect discrimination ensues.

### **3.6 Economic sectors**

Construction is generally considered to be the economic sector most prone to labour market discrimination and racism. Tourism, catering, domestic work, services and agriculture are also mentioned by anonymous social experts A3 and A4, for instance. Still, these are the sectors with the highest concentration of visible minorities (*i.e.*, people whose difference will not pass unnoticed) and perhaps that concentration itself is more significant.

A1 stresses that there is a strong propensity for the discrimination of women in the highest ranks women of the services sector.

Dias *et al.* point out that, given that the two conditions tend to overlap, economic deprivation and precariousness are likely to be the main obstacles in the way migrants access basic bank accounts and financial services. Nevertheless, migrants are also perceived by financial institutions as more mobile and thus are perceived as a highly risky of not being able to fulfil their obligations.<sup>48</sup>

## 4. Tackling the challenges

### 4.1 Public policies

Mónica Ribeiro downplays policies or public programs that aim at reducing current discrimination in employment. Marta Ramos mentions the existence of national plans for equality<sup>49</sup> but has doubts on what practical results they may have had. Anonymous legal expert A1 quotes articles 23-28 of the Labour Code<sup>50</sup> and points out one national level programme that although not specifically targeted at reducing current discrimination in employment, will nevertheless not fail to make a contribution. The programme they speak of is dubbed ‘Choices’ and aims to foster the social inclusion of young people from vulnerable strata, specifically immigrants and ethnic minorities, thus bringing about equal opportunities, encouraging social bonding and bridging social capital.

Informants stress that the associative movement tends to critique public efforts as sadly lacking and that, on the other hand, whatever measures for inclusion there might be are commonly regarded by the public as giveaways to the “undeserving poor”.

### 4.2 Access to effective remedies

#### 4.2.1 Judicial remedies

Although racial motivations aggravate other crimes – such as murder – and the Penal Code<sup>51</sup> recognises a crime of racial discrimination – which actually covers hate speech and organization – under Portuguese law labour discrimination is not a crime in itself but an administrative offence. Under these circumstances, one would expect this heading to be deflated in favour of the one which deals with the activity of the labour inspectorate. The interview conducted at the ACT with Susana Luz suggests that courts are only involved when the ACT refuses to drop the fine and the putative offender refuses to pay it.

Our informants point out that labour market discrimination is not a crime but a labour violation and thus handled by the labour inspectorate. Only if no consensus can be reached, will the Labour Courts take over the case.

Mónica Ribeiro mentioned having personal knowledge of one complaint moving through the Labour Courts which pertained to religious discrimination. It seems that these files are not coded according to the kind of specific labour violation and thus cannot be tracked through statistics. One of the informants suggests that perhaps the Directorate-General for Businesses also has some data.

Though having no specific knowledge of labour complaints, anonymous legal expert A2 pointed out that the nature of the complaints is bound to shift with the evolution of jurisprudence and that any statistics should reflect that and be read with this *caveat*.

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<sup>48</sup> Dias, B., Silva, E., Kumar, R. and Ralha, T., *Acesso dos Imigrantes aos Serviços Bancários em Portugal*, ACIDI, Lisboa, 2009.

<sup>49</sup> Resolution of the Council of Ministers No. 5/2011, 18 January 2013.

<sup>50</sup> Law 7/2009, 12 February.

<sup>51</sup> Decree-law No. 48/95, 15 de March.

Further, the same expert commented on the profiles of both the applicants and defendants, explaining that nothing can be said regarding defendants, but those who have been convicted for racial discrimination have been, for example, skinhead football fans or politicians that in the heat of debate use racist metaphors.

Regarding the representation of the victim, immigrant organisations can assist in penal processes where the victim is an immigrant.<sup>52</sup> Their actions will be framed by the Public Prosecutor's Office (MP) but they may act alone if, for instance, the MP decides not to prosecute.

None of the legal experts interviewed knew of available data on different types of discrimination. Anonymous legal expert A1 points out that judicial database typically work on the basis of the article number. Finally, a generalised restrictive reading of Article 35 of the Constitution amongst public bodies and academics has hampered statistical production on matters that may be deemed sensitive, such as racial discrimination.

Our experts do not know how many decisions were favourable to the applicants. Although all decisions are public, only superior court decisions are published. Consequently, only contested verdicts will be thus available. This has led anonymous legal expert A1 to collect court decisions on the basis of gaining knowledge of them through the press and requesting the sentences from court offices. This sample, however, will be heavily biased in favour of the cases that get some press, and that is assuming that the clipping service that A1 uses will miss nothing.

Legal expert A2, Marta Ramos and Rosário Farmhouse all mention the moroseness of Portuguese justice as something that demotivates people from making an official complaint and pursue it to its end.

Anonymous legal expert A1 points out that, in spite of the effort put into transposing the EU Directives on equality of treatment and non-discrimination into national labour legislation, ECRI does not consider the international guidelines for sharing the burden of proof (switching from *affirmanti incumbit probatio* to a distinction between *prima facie* evidence and proof beyond reasonable doubt) to be operative in Portugal. In fact, the way the law is written makes the principle of sharing the burden of proof operative only in extra judicial procedures.<sup>53</sup>

## **4.2.2 Non-judicial remedies**

### **4.2.2.1 Ombudsman or equality body**

The institutional architecture is somewhat complicated. ACIDI is the equality body, but the portfolio of labour market discrimination belongs to the labour inspectorate and any complaints must be forwarded to that body. Concurrently, the CIG is a separate equality body concerned with gender equality. But the labour market is again an exception and falls in the portfolio of another commission, the CITE.

Racial and religious discrimination in not only employment, on the other hand, falls under the mandate of the CIDR, which operates under the auspices of ACIDI. The latter also covers religious

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<sup>52</sup> Law No. 20/96, 6 July.

<sup>53</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), *ECRI Report on Portugal (fourth monitoring cycle)*, ECRI Secretariat, Directorate General II – Democracy, Council of Europe, Strasbourg, adopted on 21 March 2013, published on 9 July 2013.

discrimination beyond employment, having thus some overlap with the Commission for Religious Freedom (CLR).<sup>54</sup>

Furthermore, as we have seen, Labour Courts handle violations in labour law but if there is a crime of racial discrimination involved (Article 240 of the Penal Code) it will be assigned to the Criminal Courts. The general workflow regarding the phenomena covered by this Report seems to be from all other bodies to the ACT, which then may start administrative offence procedures.

The Ombudsman's chief responsibilities, in turn, cover some areas of the labour market that are not covered by the Labour Code,<sup>55</sup> which for practical purposes means some, but not all, jobs in the public administration. It will only venture away from this in cases of exceptionally serious allegations. All other labour relations are under ACT, the labour inspectorate. The only case the Ombudsman had to report is actually one of attempted positive discrimination. It took place in 2011, when a school explicitly tried to recruit someone with a Roma background. The Ombudsman received a complaint, investigated and talked to the school, which retreated.<sup>56</sup> Regarding statistics, the Ombudsman's 2012 report to the Parliament mentions 10 proceedings regarding equality and non-discrimination in public sector employment being opened in 2011. The corresponding figure relating to private employment is one.<sup>57</sup>

Informants don't know how many complaints on discrimination in employment were filed during the reporting period. The nature of these complaints would be administrative, determining inhibitions and fines, or of a penal nature, if committing a crime of discrimination is involved. Informants had no knowledge of the profile of the victims and defendants.

The number of complaints forwarded by the equality body to the labour inspectorate in the last few years was 19 in 2009, 24 in 2010, 15 in 2011 and 11 in 2012. From January 1<sup>st</sup> up to 31 March 2013 there were none. Some of these referred to job advertisements that mentioned nationality as a filter.

Experts tend to agree that the complaint procedure is ineffective and lengthy (often up to a year and a half). Given that neither the CIDR nor the ACIDI have investigative powers, investigations are carried out by ACT. Mónica Ribeiro observes that CIDR's portfolio does not even include labour market discrimination, but only discrimination in access to goods and services.<sup>58</sup> The CIDR typically forwards complaints to the ACT. But the ACT and the MP, which do handle cases concerning labour market discrimination, are not equality bodies. Anonymous legal expert A1 comments that international organisations are sceptical of ACIDI's independence, given that it operates under the Presidency of the Council of Ministers.<sup>59</sup> However, the High Commissioner herself, Rosário

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<sup>54</sup> The president of this commission declined to answer an interview for the present report on the grounds that it would fall out of its scope. Nevertheless, the CLR is responsible for protecting religious freedom and monitoring the Law of Religious Freedom (Law No. 16/2001, 22 June), which on its second article consecrates the principle of equality and non-discrimination. More specifically, the CLR mandate (Decree-law No. 308/2003, 10 December) states in art. 3, No. 1, subparagraphs j) and l), that it will collaborate in public debates with a view to fighting religious intolerance and discrimination and exchange information and cooperate with national and national institutions.

<sup>55</sup> Law 7/2009, 12 February.

<sup>56</sup> Armanda Fonseca and João Portugal are the Portuguese Ombudsman staff responsible for coordinating the areas of labour and other fundamental rights, respectively. The interview was conducted face to face and took place in the offices of the Portuguese Ombudsman on September 27<sup>th</sup> 2013.

<sup>57</sup> Provedor de Justiça, *Relatório à Assembleia da República 2011*, Provedor de Justiça, Lisboa, 2012.

<sup>58</sup> Law No. 134/99, 28 August.

<sup>59</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), *ECRI Report on Portugal (fourth monitoring cycle)*, ECRI Secretariat, Directorate General II – Democracy, Council of Europe, Strasbourg, adopted on 21 March 2013, published on 9 July 2013.

Farmhouse, stated plainly to this report that, when in doubt, she prefers to err on the side of punishment.

The equality body is quite focused on preventing discrimination. So far, all its campaigns try to stay positive, give visibility to success and try to make the majority population comfortable with diversity. Nevertheless, the Rosário Farmhouse said in her interview for this report that in the near future the gloves will come partially off, namely in its TV and radio programmes. These were mentioned as a good practice by social experts A3 and A4, who emphasized the positive depiction of minority professionals and related success stories.

#### **4.2.2.2 Mediation or conciliation**

Although mediation or conciliation is not currently an optional solution, measure 54 of the PII<sup>60</sup> defines that the law will be amended to include mediation as a procedural step in the administrative offence proceedings.

#### **4.2.2.3 Labour inspectorate**

The legal experts interviewed state that in cases of discrimination in employment, ACT can start an administrative offence procedure (or pick up one that has been forwarded by another agency) but will not forward the complaint to a court. It may, however, inform the victim of his or her rights and of where to go to seek further redress. Informants were not able to comment on how many sanctions were issued in the last three years.

Anonymous legal expert A2 pointed out that the time limit for the prescription of administrative offenses is proportional to the amount of the fine<sup>61</sup> and that the maximum prescription period for labour market discrimination<sup>62</sup> is set at one year. This therefore means that, given the inefficiency of the Portuguese justice system, an adequate use of delaying tactics by the defendant will most likely result in impeding the successful outcome of the complaint.

ACT it is, according to its annual plan,<sup>63</sup> both proactive, which includes investigating cases of discrimination, and reactive, regarding complaints.

Regarding the proactive aspect, it should be noticed that:

- a) discrimination is addressed by project 19, which is dubbed “promotion of the rights of vulnerable groups”;
- b) this is just one out of 55 projects;
- c) project 19 bundles
  - 1) equality and non-discrimination in access to employment and the labour market with
  - 2) the prevention of exceptionally serious cases and
  - 3) human trafficking;
- d) within the discrimination subject there is an extremely clear emphasis on gender;
- e) “racial” discrimination is only approached through the proxy of nationality;
- f) actual inspections are one amongst six activities in this project;
- g) inspections only take place six months in a year, namely from May to July and September to November.

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<sup>60</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>61</sup> Decree-law No. 433/82, 27 October.

<sup>62</sup> Law No. 18/2004, 11 May.

<sup>63</sup> Autoridade para as Condições de Trabalho, *Plano de Actividades 2013*, ACT, Lisbon, 2012?

Regarding the reactive aspect, anyone can make a complaint and although they cannot be anonymous, they are confidential.

Complaints can reach the labour inspectorate through a number of ways: they may be forwarded by the CIDR, can be filed in writing, or filed online via a form on the ACT internet page, etc.

Regarding statistics, anonymous legal expert A2 pointed out a mismatch between ACT data and those compiled by ACIDI: ACT totals are surprisingly lower than the cases ACIDI informs ACT of. This may be as a result of the institutions using different concepts of complaint (*i.e.* the labour inspectorate using a more restrictive approach). The interview at ACT showed that what is considered are processed complaints, meaning that either some sort of inspection took place or that the grounds were considered insufficient and this was communicated to the person who originally issued the complaint. The same source mentions that institutional databases don't match and that at least two attempts to create a universal identifier for complaints were made by the equality body. These efforts however failed due to lack of funds.<sup>64</sup> In fact, lack of funds was also used as a reason to deflect the High Commissioner's push for a more thorough approach to immigrant equality data via the decennial census.

Anonymous legal expert A2 also points out that regardless of how the labour inspectorate handles the surveillance and punishment of labour market discrimination it most certainly fails at prevention. However, while this was true of the 2011 and 2012 work plans – which, respectively, forgot that ACT was also entrusted by the PII with co-responsibility with measure 55 (dissemination and training regarding the combating discrimination)<sup>65</sup> and focused on the relevant project four solely on inspections<sup>66</sup> – the most recent labour inspectorate work plan has this covered under project 19: promotion of the rights of vulnerable groups; prevention of exceedingly serious situations and signalling of any traces of human trafficking.<sup>67</sup>

One of our interviewees pointed out that, although the ACT holds a seat at the Consultative Council for Immigration Affairs (COCAI) it is absent from the CIDR. This report cannot but point out that such an arrangement does not favour the labour inspectorate's involvement in the portfolio of the latter commission and subject matter of this Report.

As a result of a commitment inscribed in the PII, the labour inspectorate is currently implementing disaggregated statistics for racial discrimination. This was to be implemented by 2012<sup>68</sup> and, in fact, its activity report for that year explicitly mentions, for the first time, under the heading “inspective activity regarding vulnerable groups”, nine administrative offences on the grounds of racial discrimination and 85 on the grounds of nationality. Currently, available data do not distinguish between different forms of discrimination.<sup>69</sup> The new features are expected to be fully operational by 2014.<sup>70</sup>

To close this subject, Armanda Fonseca and João Portugal, the Ombudsman team interviewed for this Report made clear that outreach activities are necessary to correct situations of this kind. Drawing an

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<sup>64</sup> Susana Luz is a legal expert at ACT. The interview was conducted face to face and took place in Lisbon on October 4<sup>th</sup> 2013.

<sup>65</sup> ACT, *Plano de Atividades 2011*, ACT, Lisboa?, 2010?

<sup>66</sup> ACT, *Plano de Atividades 2012*, ACT, Lisboa?, 2011?

<sup>67</sup> ACT, *Plano de Atividades 2013*, ACT, Lisboa?, 2012?

<sup>68</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>69</sup> Autoridade para as Condições de Trabalho, *Atividade de Inspeção do Trabalho, Relatório 2012*, ACT, Lisbon, August 2013.

<sup>70</sup> Susana Luz is a legal expert at ACT. The interview was conducted face to face and took place in Lisbon on October 4<sup>th</sup> 2013.

example from the Ombudsman's activity, they mentioned that distributing to SEF clients (i.e., third country nationals, mostly) leaflets with information on their rights resulted in a spike of complaints presented to the Ombudsman's office. They also reported that regularly reaching out to NGOs is fundamental because much is lost in the succession cycles of governing bodies.<sup>71</sup>

### **4.3 Civil society initiatives**

#### **4.3.1 Trade Unions**

Catarina Tavares, of União Geral de Trabalhadores (UGT), the socialist / social democrat leaning trade union federation, explains that a best practice, in terms of collective bargaining, is the inclusion of a chapter on non-discrimination in the model contract drafted by UGT. She also mentions that UGT, as a social partner, sits on committees such as COCAI, CIDR or Palataforma Imigração (set up by the Calouste Gulbenkian Foundation). Furthermore, UGT and ACIDI have signed a memorandum with the aim of improving and promoting migrants' access to information on their labour rights. Finally, UGT keeps a nationwide network of contact points open to all workers, regardless of union membership, aiming to resolve issues regarding all rights, among which are those pertaining to Social Security.<sup>72</sup> Other informants consulted had no knowledge of any good practices by trade unions to tackle discrimination in employment. While having UGT sitting at CIDR is undoubtedly positive, it is more to the legislators' credit than anything else. The model contract, on the other hand, is unambiguously to UGT's credit and contains an interesting specification regarding religious holidays, namely that whenever possible these should be shifted to accommodate the needs of workers who belong to minority confessions. So far, no answer has been received from CGTP-IN, the trade union federation that leans further to the left.

#### **4.3.2 NGOs activities**

From 2004 onwards, the Portuguese Association for Victim Support (APAV), an NGO, maintains a Support Unit for Migrant Victims and Victims of Racial and Ethnic Discrimination (UAVIDRE) funded through a protocol with ACIDI.

The role of the NGO in reducing the incidence of discrimination and racism in employment is alternatively depicted by informants as either negligible or unknown. The exception is Rosário Farmhouse, who commented that SOS Racismo is often her "wakeup call": strident but indispensable in raising awareness. SOS Racismo also supplies legal advice, as does Immigrant Solidarity and the Jesuit Refugee Service, which extends its mandate a bit to help out economic migrants as well as refugees. The Portuguese Refugee Council (CPR) was also mentioned as tending to the needs of its specific target group.

José Falcão of SOS Racismo points out that the independence of migrant organisations is largely compromised by their dependence on government subsidies, as is that of researchers who have been consistently funded through government-sponsored Immigration Observatory studies.

#### **4.3.3 Employers' organisations**

Our informants had no knowledge of good practices by employers' organisations and neither CAP, CCP, CIP nor CTP answered the request for an interview for this Report.

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<sup>71</sup> Armanda Fonseca and João Portugal are the Portuguese Ombudsman staff responsible for coordinating the areas of labour and other fundamental rights, respectively. The interview was conducted face to face and took place in the offices of the Portuguese Ombudsman on September 27<sup>th</sup> 2013.

<sup>72</sup> Catarina Tavares is a member of the Executive Secretariat of UGT. Though her availability was limited, she answered the question on trade unions' best practices by e-mail October 14<sup>th</sup> 2013.

#### **4.3.4 Other civil society initiatives**

Armanda Fonseca, João Portugal and social experts A3 and A4 mentioned the role of the church. Marta Ramos criticises the apathy of civil society, whose members often even ignore the international commitments assumed by the Portuguese state and therefore do not monitor their implementation. José Falcão of SOS Racismo mentions how researchers complain about low response rates when, for instance, inquiring municipalities regarding the Roma populations. He points out that better results, such as those achieved by SOS in the past, are within the grasp of whoever is actually willing to chase those in positions of responsibility and follow up.

#### **4.4 Individual employers' initiatives**

One of our informants acknowledges that multinationals usually have codes of conduct and hotlines to deal with internal individual complaints, but little else is known given that these are internal procedures.

### **5. Conclusions and recommendations**

#### **5.1 Political and societal developments related to racism and discrimination**

The situation in Portugal regarding racism and discrimination remains at a standstill and the few changes taking place are a direct result of international pressure. While it is too soon to say if anything worthwhile will come out of the recent burst of activity concerning the Roma minority that stems from the ENICC – chief among which, from a research perspective, is the national study on Roma communities that is being carried out by the Centre for the Study of Migrations and Intercultural Relations (CEMRI) of the Open University –, it clearly illustrates that the combination of EU clear directions, a generous financial package and some close monitoring<sup>73</sup> actually succeeds in jolting Portuguese institutions out of their complacency. Measure 54 of the PII – which will reform the ineffective CIDR – specifically shows the government taking note of ECRI's assessment.<sup>74</sup> However, just as this report was being revised for publication a new iteration of the equality body emerged. A cursory look at the organic law for this High Commission for Migration (ACM)<sup>75</sup> reveals that it remains under the direct control of the Prime Minister, thus brazenly challenging ECRI's admonitions.

Intriguingly, the crisis has had no impact on societal extremism, xenophobia, or labour market racism and discrimination specifically. Although Portugal is one of the countries which has been hit the worst financially, social peace can be said to prevail and voting intentions for the far-right racist and xenophobic party seem contained. The social foundations of this Portuguese exception are an interesting mystery. An educated guess would point to the emigration of nationals and even of immigrants themselves to be playing some role.

#### **5.2 Conclusions and recommendations**

Given the social peace which the country enjoys, even amidst the paroxysms of the economic crisis, and that only immigration has ever become a public issue in Portugal – racism and discrimination are

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<sup>73</sup> [http://ec.europa.eu/justice/discrimination/roma/national-strategies/index\\_en.htm](http://ec.europa.eu/justice/discrimination/roma/national-strategies/index_en.htm), accessed 10<sup>th</sup> March 2014.

<sup>74</sup> Resolution of the Council of Ministers No. 74/2010, 17 September 2010.

<sup>75</sup> Decree-law No. 31/2014, 27 February.

nonentities –, our short-term challenge will therefore be to preserve this concern with immigration. In fact, such erosion is already apparent in the conflation of the emigration and immigration portfolios in the new ACM.<sup>76</sup>

This Report recommends the following:

- the current working of the equality apparatus must be re-evaluated in order to ensure transparency and align incentives in order to guarantee that the technicians and institutions involved have an unambiguous understanding of their mandates as being for pushing for equality and not for avoiding social unrest;
- either the labour inspectorate's mandate must be amended to include racism and discrimination explicitly and centrally or, a single body should be created with an explicitly comprehensive mandate which will specifically combat the different forms of discrimination and have the requisite resources to fulfil this objective;
- the labour inspectorate should be invited to sit, even if informally, at the CIDR;
- the labour inspectorate should also engage in regular outreach activities, targeted at both individuals and NGOs, in order to compensate for the fear, disbelief and ignorance that prevent the filing of complaints;
- a monitoring process must be carefully laid out to oversee all cases at all stages - whether they are at the labour inspectorate stage or reach the court system, if the decision is disputed;
- given the existing culture of fear and disbelief in the justice system, proactive methodologies, as put forward by, for example, the International Labour Organisation, such as discrimination testing, should be implemented by the labour inspectorate in order to break with the vicious cycle of under-reporting;
- given that the existing statute of limitations allows any adequate lawyer to make the defendants labour market discrimination problem go away simply by the use of dilatory tactics, it must be amended;
- dispelling the culturally pervasive assumption that the absence of hard data means at least plausible deniability must be an integral part of any effort to monitor discriminatory practices in Portugal;
- the focus of studies should shift from the victimised minorities to the perpetrating society.

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<sup>76</sup> Decree-law No. 31/2014, 27 February.

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## 6.6 List of experts interviewed

Anonymous legal expert A1 is a civil servant in the judicial branch of Government with a privileged perspective over the subject of this report. The interview was conducted by e-mail on September 20<sup>th</sup> 2013.

Anonymous legal expert A2 is a civil servant in the executive branch of Government with a privileged perspective over the subject of this report. The interview was conducted face to face and took place in Lisbon on October 20<sup>th</sup> 2013.

Anonymous social experts A3 and A4 work at a community centre in a stigmatized neighbourhood with a mainly African population. The interview was conducted face to face and took place in the premises of the community centre on September 27<sup>th</sup> 2013.

Anonymous statistical expert A5 accepted to discuss unpublished census data. The interview was conducted by instant messenger on October 23<sup>rd</sup> 2013.

Armanda Fonseca and João Portugal are the Portuguese Ombudsman staff responsible for coordinating the areas of labour and other fundamental rights, respectively. The interview was conducted face to face and took place in the offices of the Portuguese Ombudsman on September 27<sup>th</sup> 2013.

Catarina Tavares is a member of the Executive Secretariat of UGT. Though her availability was limited, she managed to answer the question on trade unions' best practices by e-mail October 14<sup>th</sup> 2013.

José Falcão is an activist at SOS Racismo. The interview was conducted face to face and took place in Lisbon on September 18<sup>th</sup> 2013.

Marta Ramos, a human rights specialist, is project officer at ILGA Portugal. The interview took place at ILGA headquarters on September 26<sup>th</sup> 2013.

Mónica Ribeiro is an anti-racist activist, a researcher and a practicing lawyer. The interview was conducted by e-mail on September 20<sup>th</sup> 2013.

Rosário Farmhouse is the High Commissioner for Immigration and Intercultural Dialogue. The interview was conducted face to face and took place in Lisbon on October 20<sup>th</sup> 2013.

Susana Luz is a legal expert at ACT. The interview was conducted face to face and took place in Lisbon on October 4<sup>th</sup> 2013.



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