

# PORTUGAL

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## Foreword

Before answering the questionnaire, the author would like to point out the legal perspective of this Report. In this sense, statistical and economic information on the several topics will not be provided, on the one hand, because there is no available data on specific points, and, on the other hand, because the treatment of such information requires an economic insight that goes beyond our line of expertise.

Also, it is important to say that the opinions expressed in this Report reflect the author's point of view as an expert in labour law and equality law and are not to be considered as official opinions.

To make this Report easy to read, the author chose to keep the context remarks and the questions in the text (in a different lettering) adding the answers right below.

## *Question 1*

*a.*

**I.** In Portugal, the right to equal opportunities and to equal treatment is recognized in the Portuguese Constitution (Article 13) as a universal right of all persons, irrespective, among other factors, of their nationality, origin or place of birth. Under this general principle, no one can be denied of any right or granted a more favourable treatment based on those grounds.

The general principle of equality and non-discrimination is further developed in the Constitution in more concrete provisions in the field of work and employment relations. These provisions reinforce the right to equal opportunities in access to employment and in working conditions, professional training and pay (Articles 48, 58 and 59 (1) (a) of the Constitution). These provisions apply both in the private sector and in the public sector and some of them apply also to independent workers while others apply only to employees.

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On the other hand, the Portuguese Constitution has a wide set of workers' rights, some of which also apply to independent workers. These rights are qualified as fundamental rights and accordingly, they rank at the highest level in the Portuguese legal system, thus determining the evolution of the legal system as a whole, since other legal provisions must respect this rights and pursuit them.

Among the set of workers' rights described in the Constitution, a main division can be established between "individual" rights and "collective" rights of workers.

"Individual rights" of workers include the right to equal opportunities in access to work or to a job and the right to equal treatment in employment relations, including equal pay for equal work or work of the same value, the right to minimum wages, the right to a balanced reconciliation of professional and family life, the right to healthy, safe and adequate working conditions, including the right to daily and weekly resting periods and to annual paid vacations, the right to be protected in the event of an accident or professional disease, the right to be protected against unfair dismissal, and the right to social security protection, including unemployment allowance in case of involuntary termination of employment contract, old-age and invalidity pension and allowances related to the exercise of parenting rights (Articles 53, 58 and 59 of the Constitution).

"Collective" rights of workers include the right to instate trade unions at all levels, the right to elect workers' councils at company level, the right to collective bargaining and the right to strike (Articles 54 to 57 of the Constitution).

Since the Portuguese Constitution is a relatively modern Constitution (it dates from 1976), the main principles and the set of fundamental rights of workers inscribed in the Constitution are very complete and have largely benefited from the modern Welfare State cultural and legal acquis and also from the European Union social acquis. In fact, in some areas (including employment and industrial relations) the Portuguese Constitution goes beyond the level of protection granted by EU law. And in practice, the protection granted by the constitutional provisions is quite effective because these principles and rights rank among the more important legal provisions of the Constitution, so they influence the whole legal system and they must be respected by other legislation.

**II.** In the field of employment, equality and non-discrimination principles and workers' rights are further developed by the Portuguese Labour Code (LC), approved by Law No. 7/2009, of 12 February 2009, and outside the field of private employment relations, in several Acts.

In the Labour Code, the notions of discrimination (both direct and indirect discrimination) are inscribed and developed according to the EU-Law and to the European Court of Justice *acquis*. The sources of discrimination indicated in the Code include, among others, sex, sex orientation and sex identity, nationality, race and place of origin (Articles 24 and 25 of the LC). In this respect, the Directives related to gender equality and to non-discrimination have been transposed into national legislation and the more recent ones (Directive 2006/54/EC, of 5 July 2006, on gender equality in employment relations, Directive 2000/43/EC, of 29 June, on non-discrimination on the grounds of origin or ethnicity, and Directive 2000/78/EC, of 27 November 2000, regarding non-discrimination in general in employment relations) were transposed by the Labour Code.

Under the Labour Code, all candidates to a job and all employees must be treated equality. This principle applies irrespective of the nature if the employment relation (permanent or fixed-term contracts and posted workers, including workers of temporary agencies), or of the nationality or place of origin of the worker (Articles 4 to 8 and Articles 24 and ff. of the LC). The Labour Code has also transposed Directive 1999/70/EC, of 28 June, regarding the protection of fixed-term workers, and Directive 96/71/EC, of 16 December, regarding the posting of workers from other Member States in the context of a service contract.

In the author's view, Portuguese courts are aware of the EU concepts of equality and non-discrimination (including indirect discrimination) and of the EU Law developments regarding workers' rights, since those concepts have been introduced in national legislation and, as regards workers' rights, the national legal system is even more protective than the EU legal system.

**III.** However, in practice, precarious workers and workers from countries outside Europe are not as protected as common employees: precarious workers are less protected than common workers especially as regards dismissal, due to the precarious nature of their employment contract; workers' from third countries (e.g. non-EU countries) are less protected than common workers because their employment relation depends upon a residence visa, that is granted by Portuguese authorities under specific conditions. Anyway, these limitations do not apply to citizens from EU-countries that choose to work and reside in Portugal.

**b.**

**I.** The answer to these questions depend upon the concept of "non economically active citizens", that may include very different situations: working persons that have lost their jobs; older persons or persons with a disability that have already

stopped working and other non-active and dependant persons; and persons that simply do not work and have no family income or only have a very low income.

These situations are treated differently under Portuguese legislation.

Working persons that have lost their jobs (except upon their own will or when the termination of the contract was agreed with the employer), have the right to apply for unemployment allowance (“subsídio de desemprego”) that is granted by the public social security system. This public allowance is granted under certain conditions and for a certain period of time, and is ruled by Decree-Law No. 220/2006, of 3 November 2006.

Older or disabled persons that have already stopped working have the right to apply for old age or for invalidity pension. These pensions are granted by the public social security system under certain conditions, linked to a minimum number of years of work with paid social security contributions. But, if these conditions are not met, the person is still protected by the social security system under another scheme. Old age and invalidity pensions are ruled by Decree-Law No. 187/2007, of 10 May 2007.

Other dependent persons, which include children but also disabled persons or other dependants, who do not work are also protected by the public social security system, on the basis of several schemes, including parenting allowances in the case of children.

Persons that do not work and have no means of subsistence may apply to a specific public allowance called “rendimento social de inserção” (“minimum public allowance for social integration”<sup>2</sup>), that is a public flat-rate allowance intended to compensate the absence of means of subsistence. The rules applicable to this allowance are established in Law No. 13/2003, of 21 May 2003.

This system has been established in Portugal for many years. The last measure indicated (“minimum public allowance for social integration”) is regularly challenged by some political sectors that argue that this allowance perpetuates public dependency of a wide range of persons that do not seek regular employment or keep working only in parallel and informal economy while benefiting of this protection.

More recently, there are also some critics regarding unemployment allowance that do not deny the right to such allowance but some aspects of its legal ruling. Some sectors consider that these rules are over-protective in the sense that it is relatively easy for the beneficiary of unemployment allowance to refuse engaging in a new

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<sup>2</sup> This is a rough and non-official translation of the author.

job (on the grounds that it is not a similar to his previous one, or arguing that the tasks involved are beneath his professional qualifications or even that his financial situation would not improve with the new job). So, it is possible for unemployed persons to keep benefiting from the allowance for a long period of time, during which they don't actively seek for a new job or only work in informal Economy.

### ***Question 2***

In Portugal, the principle of equal treatment applies to social security issues and does not discriminate between national citizens and other EU citizens working and/or residing in Portugal. This applies to all social security benefits including those related to child benefits: provided the legal conditions established in national legislation to have access to the benefit are met (and, as already mentioned, these conditions relate to residence in Portugal and in some cases, to a determinate period of social security contributions, but not to nationality or to the place of birth of the worker or of the child entitled to the benefit), the person can apply for the social security benefit in the exact same conditions that a Portuguese citizen can.

To the author's knowledge, there is no debate regarding the issues indicated in the questions.

### ***Question 3***

I. Regarding the first question, it is common knowledge that a number of workers from other Member States work and reside in Portugal, especially in recent years. Also, it is reported that some of those persons work remotely, with the support of digital technologies so they can live wherever they wish. For this purpose, Portugal is considered an attractive destination for a number a reasons that include the nice climate, good food, good healthcare service and general safety, but this means of course that some foreigners actually residing in Portugal are working for companies that are located elsewhere.

Aside these situations that seem to have grown in the last few years, there are also persons from other Member States that reside in Portugal and work for Portuguese companies or have developed their own business here, mostly in areas like agriculture or tourism.

On the other hand, traditionally, many Portuguese workers live and work abroad in other Member States.

Aside this general information, the author had no access to statistical data or more detailed information on this topic.

II. As to questions (b) and (c), the author is not aware of any debate at academic or political level regarding the notion of “fair movement”, as an alternate concept to “free movement” of persons and workers inside Europe or about the importance of the issue of movement of “essential workers in critical occupations” in relation to free movement of workers.

In this context, it is important to point out that Portugal is, by tradition, a very open country in the sense that, in different periods of its history (including recent history) and for very different reasons, the country has received huge groups of persons and many of them ended up living and working here – Jewish families in the Second World War, Portuguese coming back from ancient colonies and African people also from ancient colonies, in the mid 70’s of the XX Century and in more recent decades, waves of emigrants coming from Eastern Europe or from Brazil.

Maybe this tradition explains why the discussions about the above-indicated topic are not yet an issue in Portugal.

#### ***Question 4***

I. Portugal is a good example of a strong migration movement of young educated professionals from a southern Europe country to north-western countries in Europe, especially in the last two decades. To a certain extent, this movement has replaced the traditional waves of low qualified Portuguese immigrants that left the country to central Europe countries in search for better jobs and better living conditions in the 50’s, 60’s and 70’s decades of the XX century.

The author had no access to statistical data or more detailed information on this topic, but it is commonly recognized that this new migration tendency affects mostly young people, highly educated and qualified – almost all of them have a university degree, that includes graduation but in many cases a master or even a doctorate degree. Despite their high qualifications and skills, these persons do not find adequate and well-paid jobs in their field of expertise in Portugal and move to central-western or north-western European countries. And since, this generation is, in fact, the more educated and qualified of the country this is indeed a “brain drain” phenomena.

Several reasons are indicated for this phenomena: the low-level of remuneration in Portugal, including for highly skilled positions and especially when compared with remuneration level for equivalent positions in other European countries; the high price of housing in the major cities and surroundings, where highly skilled positions are to be found; and also the high level of professional expectations of the new generation in accordance with their level of education and qualification.

**II.** This movement has very negative consequences both from an economic perspective and from a social perspective.

From an economic perspective, this new migration movement entails an immediate loss for the State since the public investment that was made in the education of people of this generation will have no social return inside the country. But the more negative economic impact will of course be the massive loss of qualified professionals in all areas, that reflects on the society and on the Economy as a whole.

From a demographic perspective, the immigration of these young people has also a strong impact, since most of them will start their families abroad and this reflects in the lowering of fertility rate. Portugal is already a very bad example in this area, having one of the lowest fertility rates of European countries – according to published data<sup>3</sup>, the fertility rate in Portugal in 2021 was 1,34 children per woman in fertile age, against a rate of 3,20 in 1960 – and if this tendency persists the situation may get worse.

As known, a low fertility rate has also severe economic impacts in the long run, as it will mean an ageing population, less workforce and, as consequence, a less sustainable social security system.

**III.** Despite the gravity of the above-described situation, the author is not aware of any debate or of any legal or political measures intended to address the problem seriously.

Specifically as regards questions (b) and (c), there are no measures aimed at retaining certain types of workers, e.g. the young and highly qualified generation, that is leaving the country. Certainly, there are no measures requiring graduates to work in Portugal, which has financed their studies, for a certain period of time, before being able to migrate, as such measures would certainly be judged unconstitutional, and the author is not aware of other measures pursuing the same objective.

To the contrary, the low level of medium wages, the difficulties in housing in the cities and the low level of support given to young families, as regards the reconciliation of family and working life and as regards child-benefits (many measures in this field are established in the law but in most cases they are unpaid or paid only at a flat rate) contribute to increase the young generation migration movement above indicated.

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<sup>3</sup> <https://www.pordata.pt/Portugal/Indicadores+de+fecundidade+%C3%8Dndice+sint%C3%A9tico+de+fecundidade+e+taxa+bruta+de+reprodu%C3%A7%C3%A3o-416>

### ***Question 5***

**I.** Portuguese law already establishes the principle of equal pay for equal work or work of the same value, as a general principle, inscribed in the Portuguese Constitution (Article 59 (1) (a)) and developed by the Labour Code (Article 24 (2) (c) and Article 25). The Labour Code develops the notions of direct and indirect discrimination, equal work and work of the same value (Article 23 (1)) in accordance with EU Law.

The general rule of equal pay for equal work or work of the same value applies to all workers irrespective of the nature of their employment relation, so there are no doubts that this rule applies to posted workers.

In any case, the Labour Code has transposed Directive 96/71/EC, on the posting of workers from another Member State in the context of a provision of service. This issue is ruled by Articles 6 to 8 of the LC, and Article 7 (1) (e) and (l) explicitly establishes the right of these workers to equal treatment and non-discrimination, that includes the right to equal pay.

The provisions of the Labour Code in this respect are complemented by Law No. 29/2017, of 30 Mai, that transposed Directive 2014/67/EU, of 15 Mai 2014, on the same topic. And more recently, this piece of legislation has been changed by Decree-Law No. 101-E/2020, of 7 December 2020, that has transposed Directive 2018/957, of 28 June 2018.

The subject of equal pay is ruled more extensively in Articles 3-A and 3-B of Law No. 29/2017, of 30 Mai, as amended by Decree-Law No. 101-E/2020, of 7 December 2020, and are in line with Directive 2018/957, of 28 June 2018.

Finally in the specific regulation of temporary agencies employment contracts, that is also inscribed in the Labour Code, Article 185 (5) of the Code explicitly addresses this issue: according to this provision, posted workers have either the right to the remuneration established for their professional category in the collective agreement that is in force in the company where the worker is posted, or the right to be paid according to the level of remuneration applicable to common workers of that company performing the same work or work of the same value, and equal value, according to the more favourable solution.

**II.** Theoretically, equal pay principles and rules apply to all workers, and in all economic sectors. However, the author had no information or way of knowing how are things in practice and is unaware of case law regarding this issue at national level.



**Question 6**

**I.** To the authors' knowledge, in Portugal the freedom of establishment and the right to conduct a business (Article 16 of the CFR) has not been used to challenge national or EU social law in national courts.

As to possible conflicts between freedom of establishment and the right to conduct a business and other EU social (and national) legislation regarding workers' rights and the non-discrimination principle (on several grounds, including, as indicated in the question above, a possible conflict between the right not to be discriminated against on the basis of religion and the right of the employer to conduct his business in a neutral way) under the Portuguese legislation such conflict would have to be considered in several perspectives and might fall under three types of provisions.

First, the non-discrimination principle in employment relations would apply, as religious belief is a relevant source of discrimination in employment relations and Article 25 (1) of the Labour Code prohibits discriminatory practices of the employer on such ground. Secondly, a personality right of the worker could be in stake, and such right must be respected by the employer under Articles 14 *et seq.* of the Labour Code. But, on the other hand, restrictions to non-discrimination principle, that are admitted by Article 25 (2) of the Labour Code (in line with EC Law) could also apply, and the right of the employer to conduct his business (that is also a constitutional right – Article 61 of the Portuguese Constitution) in a religious neutral way could be accepted as an objective justification that would allow for a proportional restriction of non-discrimination principle in such a case.

Despite no case law was discussed at national level on this type of conflict, in the author's opinion, these are very complex situations to deal with according to the opposite interests in presence, that are all relevant.

**II.** As to the right of strike, it is a fundamental right of workers inscribed in the Portuguese Constitution (Article 57). This right is extensively ruled in Articles 530 and ff. of the Labour Code.

As a fundamental right that belongs to the core of the workers' "collective" rights indicated above in this Report, the right to strike prevails over freedom of business or market freedom. Additionally, it is important to say that the right to strike is not subjected to proportionality requirements in Portugal, unlike in other countries.

## ***Question 7***

***a.***

**I.** Anti-discrimination EU law and *acquis* are well implemented in Portugal, from a legal perspective. The Portuguese legislation has evolved from addressing sex discrimination issues to the coverage of all other sources of discrimination.

As regards sex equality, national legislation is very protective and complete and aims towards the active promotion of equality between women and men at all levels: employment and self-employment (including equal opportunities in access to employment, and equality in working conditions, including pay and career, prohibition of harassment practises, and possibility of positive action), professional training, social security, violence against women, women in decision making positions, including quotas, and the reconciliation of work and family life, including women's protection during pregnancy and in maternity, adoption and parenting protection measures.

Most of these topics were addressed even before the Portuguese accession to the European Union (that occurred in 1985), but the legal rules were of course developed and updated according to the evolution of EU legislation and to EU case law over the years.

**II.** Similar legal developments occurred as regards the implementation of non-discrimination principle related to other grounds of discrimination, such as nationality, place of origin or ethnicity, sexual orientation and sex identity, age and disability, religious and political beliefs, economic and family situation. All these grounds of discrimination are covered by the Labour Code (Article 25 (1)) but the measures in place cover also other areas aside employment, with some exceptions where only equality between men and women is covered – for instance violence against women, women in decision making positions, including quotas, and of course women's protection during pregnancy. As regards these other sources of discrimination, the evolution of national legislation occurred later than in the area of gender discrimination, and much under the influence of the EU directives in this field, published in 2000.

Specifically as regards religious discrimination, the recent developments in CJEU case law did not have a significant impact on religious discrimination at national level, since the law was not subjected to change and also because there is yet no case-law on this issue. But as already explained just above, should the situation arise, it would be a problematic issue, since the opposite interests in stake are all relevant and they both fall under different constitutional provisions.

As to reasonable accommodation, Article 84 (1) of the Labour Code imposes upon the employer the duty to adapt the working conditions and working facilities in order to accommodate disabled workers as well as other workers suffering from a condition that impacts on their working capacities. But the exact notion of “reasonable accommodation” is not defined by national law, so the content of this concept must be found directly by reference to EU law.

II. This short résumé of the Portuguese legislation in the field of gender equality and non-discrimination gives ground for the conclusion that the problem does not rely in the legal system that is very complete and quite protective.

To the contrary, the practical implementation of the legal provisions already in force remains problematic in many areas. In the author’s opinion, the difficult implementation of the legal provisions is due to a number of reasons, including social and cultural reasons, deficient monitoring of the implementation of legal provisions and also financial reasons.

On the one hand, Portugal is a traditional society where men are still seen as the major providers within the family, where the tasks related to the care of children and other family dependants still rely predominantly on women, where employers tend to prefer extensive hours of work and where predominantly feminine professions are less valued than predominantly masculine professions. Also, despite being considered an open country where important communities from other ethnicity, other religious beliefs or other races are welcomed to live and work, the fact remains that people from those groups are more vulnerable to discrimination.

An example of these practical difficulties is the gender pay gap, as shown in available data: the more recent survey published by the CITE – ‘*Comissão para a Igualdade no Trabalho e no Emprego*’ (‘Gender Equality Agency in the Field of Employment’) and relating to 2020<sup>4</sup> indicates that the gender pay gap is still high (14.0 % when considering basic salary, and 17,1 % when considering the earning capacity), and that the pay gap is more severe in higher positions (25,5 % in favour of men, when considering only the basic salary, and 26,5, when considering the total earning capacity)<sup>5</sup> despite the fact that women have better qualifications than men.<sup>6</sup> Another example is the issue of access to decision making positions,

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<sup>4</sup> The more recent general report of the CITE (‘Relatório sobre o Progresso da Igualdade entre Homens e Mulheres 2020’ – ‘Report on the Progress of Equality between Men and Women 2020’) relates to 2020 and is available at: [https://cite.gov.pt/documents/14333/137018/Relat\\_Lei10\\_2020.pdf/cbd12a55-f152-43bb-abf5-03f2ee7f0c28](https://cite.gov.pt/documents/14333/137018/Relat_Lei10_2020.pdf/cbd12a55-f152-43bb-abf5-03f2ee7f0c28). This Report will be mentioned hereafter as *CITE 2020 Report*.

<sup>5</sup> *CITE 2020 Report*, pp. 49-50.

<sup>6</sup> *CITE 2020 Report*, p. 24. In Portugal the number of women with a graduation degree is consistently higher in recent years than the number of men.

where the legislation on binding quota in favor of the under-representative sex, which is women (quota for the elections for the National Parliament and regional and elected boards<sup>7</sup>, quota for the boards of public companies and of private listed companies<sup>8</sup> and for highly qualified public officials<sup>9</sup>) was absolutely essential to increase the number of women in those forums.

Another problem of the Portuguese legal system is that the protective measures and benefits inscribed in the law are not always financially supported by the State, so these measures are not taken in practice. One simple example of this situation concerns the payment of paternity leave: when this leave was not paid, it was not taken by the fathers, despite being a mandatory leave; now that it gives right to a social security allowance that corresponds to the medium salary of the worker, 72,1% of the fathers enjoy the leave (this percentage relates to 2020)<sup>10</sup>, thus demonstrating that the loss of the salary was damaging the practical implementation of a measure intended to promote gender equality, throughout a more balanced reconciliation of family and professional life.

Finally, the deficient monitoring of the practical implementation of the measures in the area of non-discrimination, by the authorities, is also worth mentioning.

As a conclusion to this point, we would say that there is of course still room for further developments in the field of anti-discrimination law, to be initiated at EU level or at national level, but it would more important to focus on the practical implementation of the measures that are already in force.

**a.**

As regards employment relations in the private sector, the issue of working time is dealt with at national level by Articles 197 *et seq.* of the Labour Code. As regards employment relations in the public sector, working time provisions are inscribed in Articles 101 *et seq.* of Law No. 34/2014, of 25 June (“Lei Geral do Trabalho em Funções Públicas” – “General Law for Public Servants”<sup>11</sup>), and in more specific legislation, applicable to specific categories of public servants. Aside some minor differences (the more significant one being the maximum number of working hours per week, which is more favourable for public servants than for private employees – 35 versus 40 hours per week), the rules applicable in both sectors are quite similar.

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<sup>7</sup> Lei Orgânica No. 3/2006, of 21 August 2006 (known as ‘Parity Law’), with the changes introduced by Lei Orgânica No. 1/2017, of 29 March 2017, and by Lei Orgânica No. 1/2019, of 2 May 2019.

<sup>8</sup> Law No. 62/2017, of 1 August 2017.

<sup>9</sup> Law No. 26/2019, of 28 March 2019.

<sup>10</sup> *CITE Report 2020*, pp. 88-89.

<sup>11</sup> This a rough and non-official translation of the author.

Since the Portuguese legislation in relation to working time arrangements and working time patterns complies with EU Law and is in fact much more developed and, in several aspects, more protective than EU law in this respect, national case law relies mostly in domestic legal provisions rather than in EU legal provisions or case law, and the EU *acquis* in this area is not usually invoked before national courts.

Nevertheless, EU law (especially Directive 2003/88), has had an impact on the Portuguese legal system in this area, especially for the purpose of clarifying some concepts attached to working time.

**b.**

I. Platform work is regulated in Portugal only as regards one specific situation: platform drivers carrying persons (e.g., not platform drivers in general nor for the purpose of delivery of goods and other services). This piece of legislation is Law No. 45/2018, of 10 August, that is prior to the EU Directive Proposal on this subject.

Under this piece of legislation, only legal entities are able to register at the digital platform as “platform operators” (“operador de TVDE”), thus establishing a service contract with the digital platform (Uber or similar platform). Platform workers as such (e.g. natural persons driving the cars) will then carry their activity under a service contract or under an employment contract with the legal entity that is registered at the platform (e.g. the “platform operator”) and not directly with the platform. In this sense, employment or service relations related to these digital platforms involve not three entities (the owner of the platform, the driver and the costumer) but four entities (the owner of the platform, the platform operator, the driver and the costumer).

This legal system is very criticized by some sectors, not only because of its unjustified complexity, but also because it has led thousands of platform drivers that were already performing their activity as natural persons directly registered at the platforms to create a legal entity for that purpose, that, in most cases, has only one worker, e.g. the same driver . On the other hand, in this system, the digital platforms can never be recognized as employers with the inherent responsibilities because they contract with a legal entity, and, under the Labour Code, only natural persons can be qualified as employees.

In short, this system favours the entity that owns the platform and does not protect platform drivers as such.

**II.** Social partners did not play a significant role as regards the establishment of platform drivers regulation. Only the taxi associations manifested rather firmly against the admission of Uber drivers in Portugal but did not succeed in their intent.

Presently a new bill is being discussed at the National Parliament that will introduce some changes in the Labour Code and apparently a new regulation about platform workers (not specifically on drivers but in general) may be included in this new legislation.

**a.**

In the area of employment, Portugal has dealt with conflicts between EU law and international law since the accession to the European Union, in 1985, and especial with conflicts between EU law and ILO Conventions, since Portugal is a founding member of the ILO and has ratified most of its Conventions.

When such conflict arises, the Convention in stake cease to be applied at national level and are formally denounced by the Portuguese State.

A classic example of such a conflict is ILO Convention n° 89, on the prohibition of nightwork for women in industry that Portugal had ratified long before acceding to the EU and that was considered contrary to EU Law gender equality principle. In time, that Convention, which had been ratified before the Constitution of 1976, also became contrary to our Constitution, so it was not applied in Portugal since 1976, but, to make things clear in EU context the Portuguese State formally denounced the Convention.

**II.** The European Social Charter is invoked from time to time by the legislator, in the preamble or at the formal justification of the bills, and also in case law.

### ***Question 8***

**I.** To the author's knowledge, the question of enlarging the range of action of the EU to social policy issues that are not yet covered, due to the Treaties restriction rules, has not been discussed in Portugal. However, it is important to say that in Portugal the issue of remuneration is extensively ruled by the law, and the freedom of association (both for workers and for employers) is established as a fundamental right in the Portuguese Constitution and also addressed extensively by the Labour Code, as well as the right to strike.

In the author's view, the enlargement of social policies of the EU in some of these areas might be delicate for a country like Portugal, for fear that the national *acquis*

in these areas, which is very protective, would be challenged, at least in some points – a good example is lock-out, which is admitted in some countries, at least implicitly allowed for by EU-law and strictly prohibited in Portugal, being qualified as a criminal offence (Article 57 (3) of the Constitution and Articles 544 (2) and 545 of the Labour Code).

II. In Portugal, EU social Law is viewed as being applicable mostly in employment relations, but also in self-employment, in areas like equality and non-discrimination (where the directives related to self-employment and to the access to and providing for goods and services have been transposed into domestic legislation).

In any case, if EU Law develops further as regards self-employment, including by extending some provisions related to employment relations to self-employed persons, especially when they depend economically on the creditor of the provided services, this would not be a problem for Portugal, because national legislation already establishes specific rules for these persons and extends some provisions of the Labour Code to those situations.

### ***Question 9***

The author has no information on this topic.

### ***Question 10***

As indicated above in this Report, Portugal has a relatively modern Constitution (dating from 1976) that integrates a very complete set of fundamental rights of different nature: personal rights and liberties of all individuals, citizens' rights, specific rights of workers (related to employment, working conditions, dismissal, protection in involuntary dismissal, protection in professional hazards, reconciliation of family and working life, but also liberty to instate trade unions and workers councils at the companies, right to collective bargaining and right to strike – e.g. “individual” and “collective” rights of workers, as already indicated) and social and economic rights, concerning private propriety and private businesses, family, education, health or social security, among others.

All the provisions of the Constitution instating these fundamental rights are binding and rank at the highest position in the Portuguese legal system, therefore influencing the whole legal system, as already indicated. But some of them are self-executing and have an horizontal effect (in the sense that they can be directly invoked not only against the State but also against the other party in a private relationship), while others are addressed to the State and not self-executing.

All the rights inscribed in the ECFR (mainly in the “Solidarity” section) are also inscribed in the Portuguese Constitution in one of the above mentioned categories of fundamental rights. This means that in practise there is no need to call upon the Charter and the problems listed in the questions above do not raise in Portugal in the context of the Charter but raise and are discussed directly in the context of the fundamental rights and principles inscribed in the Portuguese Constitution.

In any case, should there be an issue when the ECFR is directly called-upon, its provisions would rank at the same level or immediately below the Portuguese Constitution (there is a discussion among academics on this specific point), but certainly above ordinary law, according to the rule established in Article 8 of the Portuguese Constitution. And the nature of the principle in stake and to what extent it could be applied, would certainly be discussed as principles and fundamental rights of the Portuguese Constitution are.

### ***Question 11***

Public procurement rules are in fact used to foster social rights here and there, especially throughout the imposing of sanctions to those who do not comply with specific rights. For instance, if a company does not comply with this or that rule, it may be left out from a public contract or contest, or may lose a public benefit or be considered unable to apply for such benefit, or may be subjected to a certain penalty.

In general, these sort of provisions are directly imposed by the law. But some companies (especially bigger companies) adopt internal codes of conduct for several purposes or adopt internal plans to achieve determinate social goals. In other cases, the adoption of such codes of conduct or internal plans by the companies is imposed by the law: for instance, all companies with seven or more workers must adopt a code of conduct regarding harassment practices (Article 127 (1) (k) of the Labour Code); and the companies where a salary gap between man and women is detected by the Labour Inspection Services, must establish an equality plan that is implemented under close public monitoring (Article 5 *et seq.* of Law No. 60/2018, of 21 August, on equal pay).

#### ***a.***

The author has no knowledge of transnational collective agreements concluded by national firms.

The main obstacles that a transnational agreement would face *vis a vis* the national legal system regard the legitimacy of the parties and the legal conditions for its application.



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On the one hand, under the Labour Code, a collective agreement must be concluded by a regular trade union, that can be of any level (union, union federation, or union confederation) and that can also be a member of an international trade union. But the union must have its by-laws registered in Portugal to be recognized as an adequate partner of the collective agreement (Article 2 and Article 447 of the Labour Code). And the same rule applies to the other party of the collective agreement that is an employers' association, except in the case of collective agreements concluded at company level, that can be signed directly by the employer. So, in the event of transnational collective agreements some legitimacy problems can arise.

On the other hand, to be qualified as a source of law and to enter into force, collective agreements must follow a procedure of formal deposit at the Labour Ministry and have to be published in a Portuguese official journal ("Boletim do Trabalho e Emprego") (Article 494 and Article 519 of the Labour Code). Again, these formal procedures may be very difficult to apply to transnational collective agreements.

In short, the legal provisions in the area of collective bargaining are conceived for collective agreements concluded at national level and between national trade unions and national employers or national employers' associations.

### *b., c. and d.*

As regards these last questions, civil or criminal claims for violations of social rights that have taken place abroad would be difficult to admit, but class actions are allowed for the defence of collective interests and rights.

Finally, national law does not require specific due diligence in relation to social rights inside the companies, aside from the compulsory codes of conduct and plans intended to pursue determinate social goals that were already mentioned above, and that also involve prior due diligence to a certain extent.

### *Question 12*

The author has no information on this topic.

### *Question 13*

The author has no information on this topic.

***Question 14***

Most national developments in the area of fundamental social rights are closely linked to the values of democracy and the rule of law, especially because Portugal lived under a dictatorship from 1927 until 1974, and the great development of fundamental social rights happened after the end of that period and under the umbrella of the first democratic Constitution (the Constitution of 1976), that is still in force.

But, since the Portuguese Constitution treats those issues in a very extensive way, as already indicated, it is fair to say that in Portugal the major legal reference for fundamental rights is the Constitution and not necessarily the European Union.

***Question 15***

Yes.