

MoveS seminar Portugal

Free Movement of Workers in Portugal: Obstacles and challenges brought by the Covid-19 pandemic

29 March 2022

On location, in Lisbon and Online via Zoom

Language: English/Portuguese



Créditos: The foreign architect

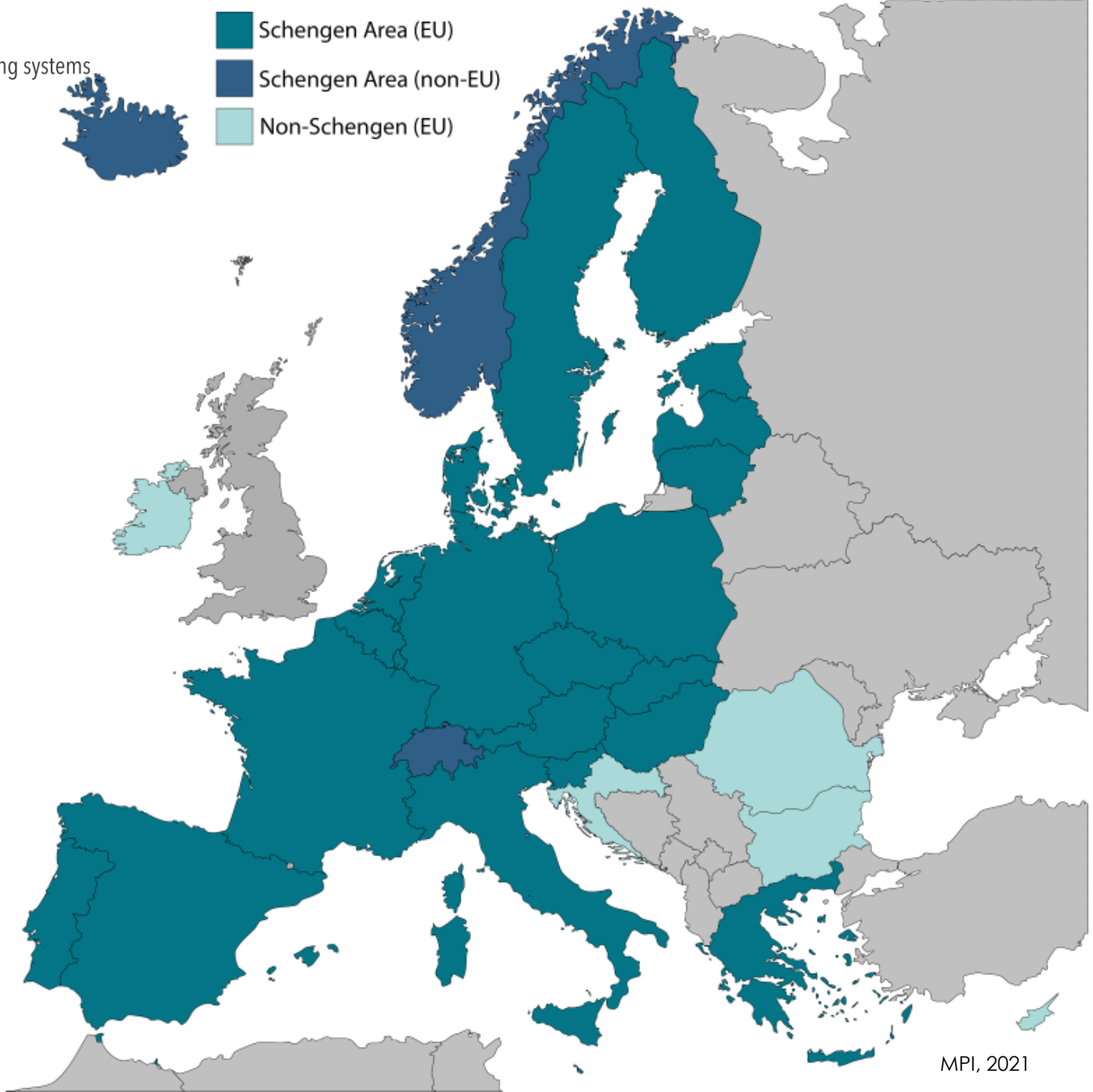
Free movement of workers in Portugal

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MoveS seminar Portugal | 29 de março 2022

- 1 Livre circulação na Europa
- 2 Mobilidade laboral intra-UE.
Alguns dados sobre Portugal
- 3 Notas finais

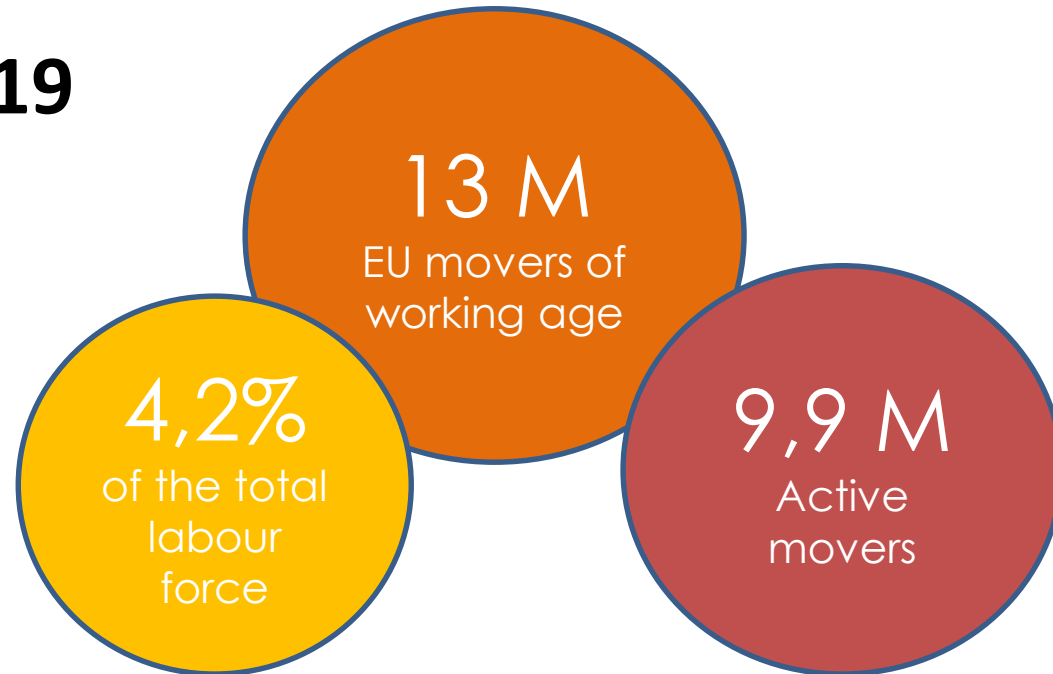
7 décadas de livre circulação

- **1957** Tratado de Roma
- **1958-1972** “Guest-workers”
● **1973** Mudanças nas políticas de imigração
- **1986** Adesão de PT e ES
- **1992** Tratado de Maastricht
- **1990-95** Acordo de Schengen
- **2004** Alargamento da UE a leste
- **2015** 1 M de requerentes de asilo
- **2020** Fecho temporário de fronteiras



Mobilidade laboral intra-UE

2019



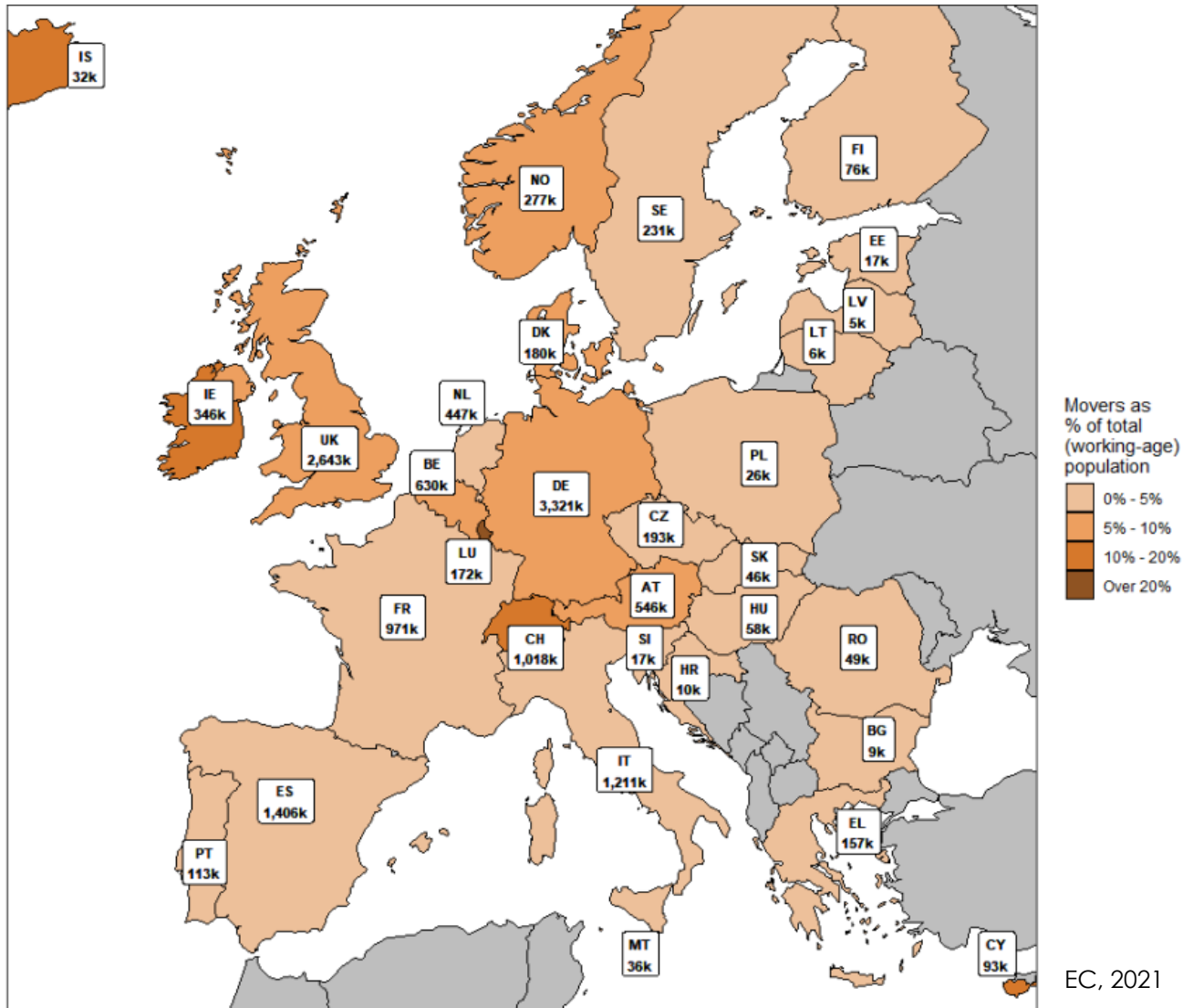
3,3 % dos cidadãos da UE em idade ativa (20-64) residiam num EM que não o seu de cidadania (2,4 % em 2009)
+ 1,5 milhão de trabalhadores transfronteiriços (Eurostat, 2020)

Taxa de crescimento (*stock*) de ativos móveis na UE28



EC, 2021

Cidadãos móveis UE28 e EFTA em 2019



Concentração num número reduzido de EM

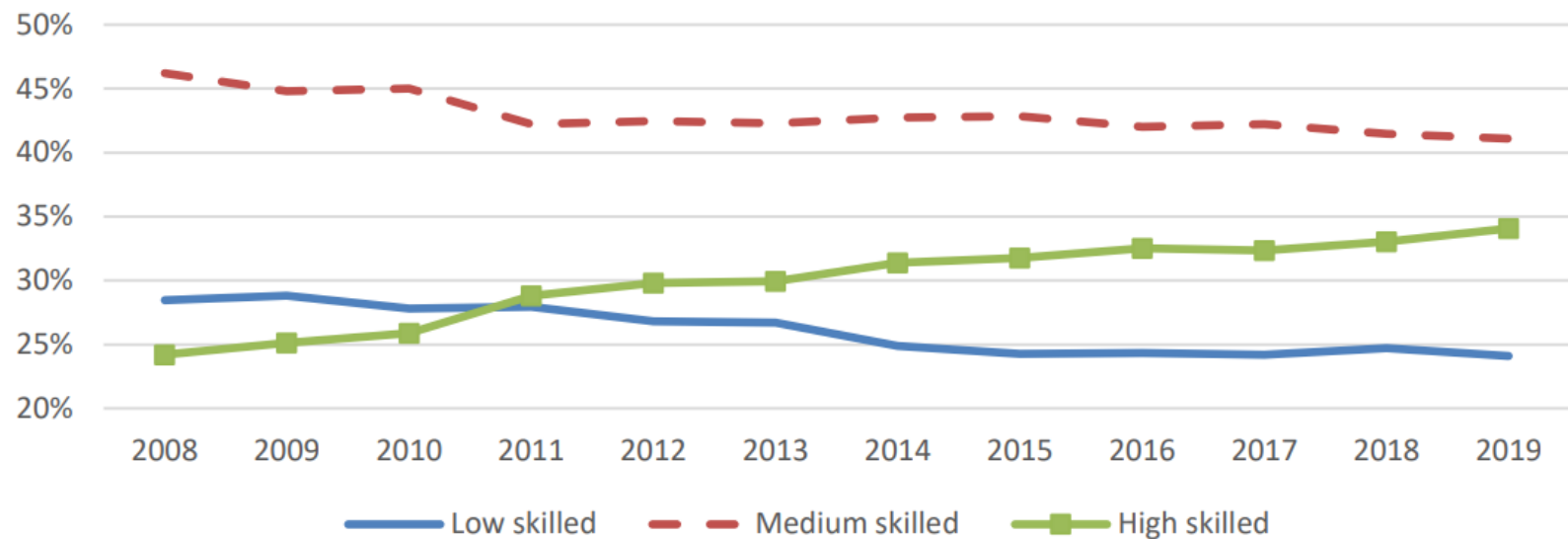
Alemanha
Reino Unido
Espanha
Itália
França

Destino de 80% dos
cidadãos ativos
móveis em 2019

Roménia
Polónia
Itália
Portugal
Bulgária

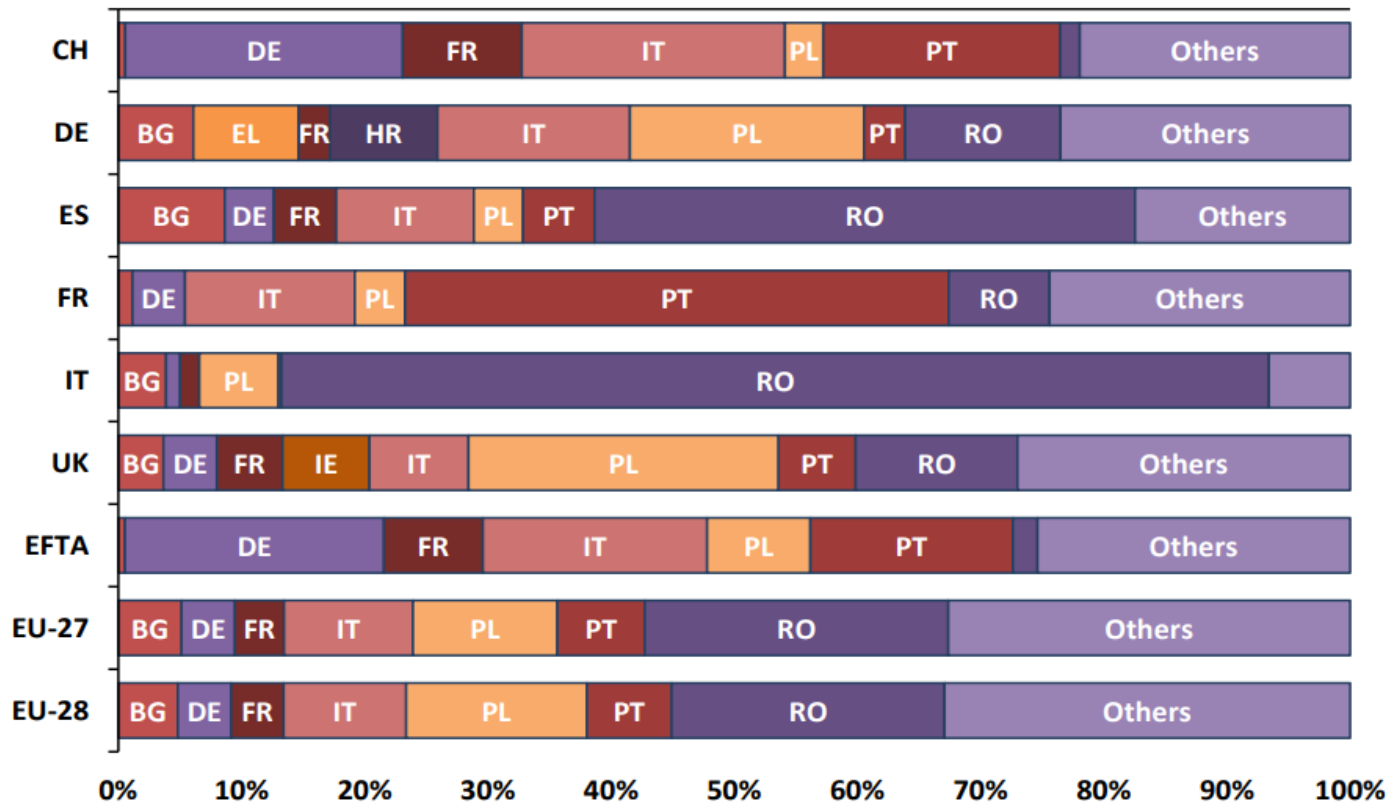
Origem de + de 50%
dos cidadãos móveis
em idade ativa em
2019

Cidadãos EU28 móveis, por nível de qualificação (em %)

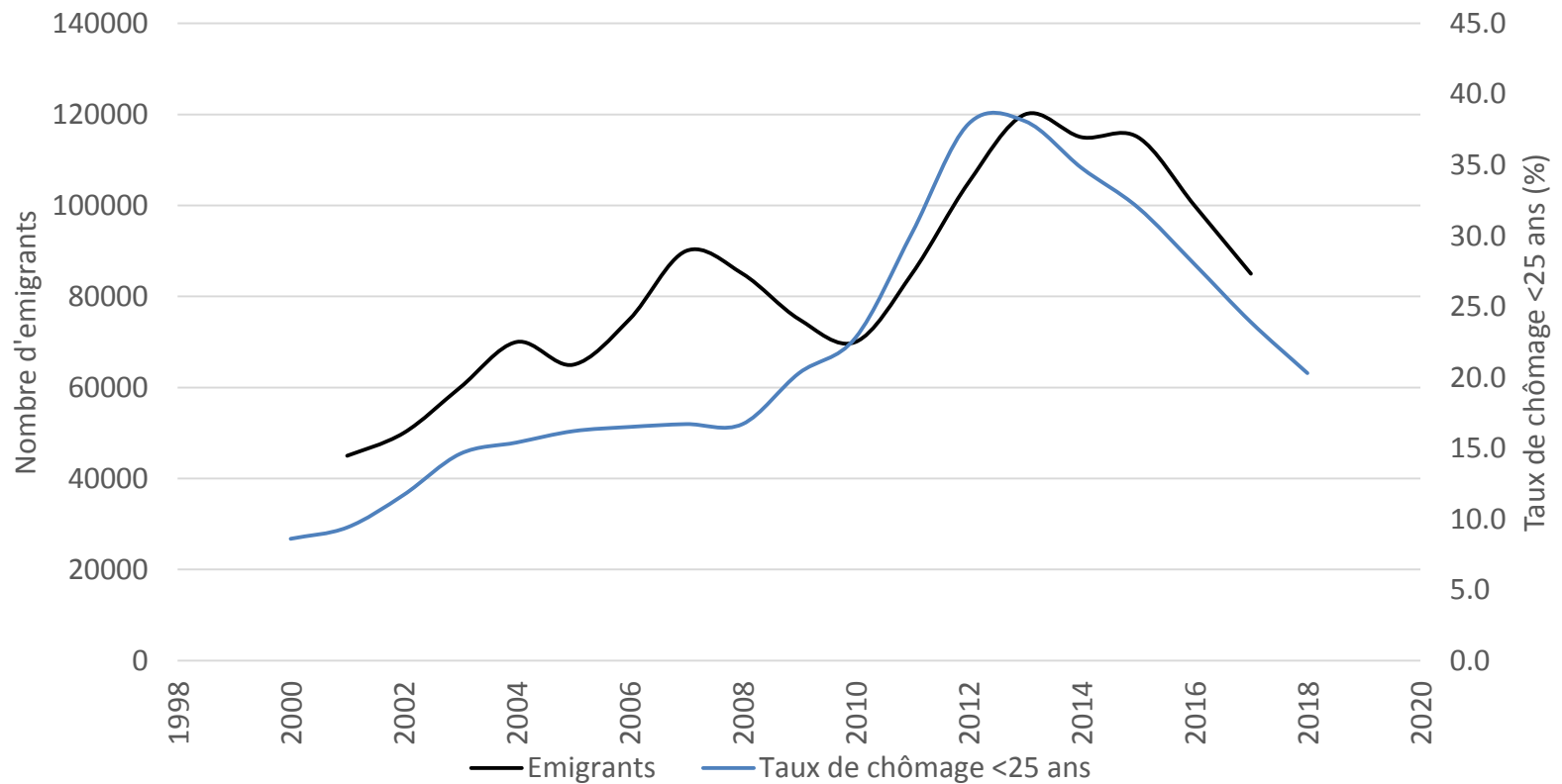


SOURCE: EU-LFS 2019, SPECIFIC EXTRACTIONS PROVIDED BY EUROSTAT, MILIEU CALCULATIONS

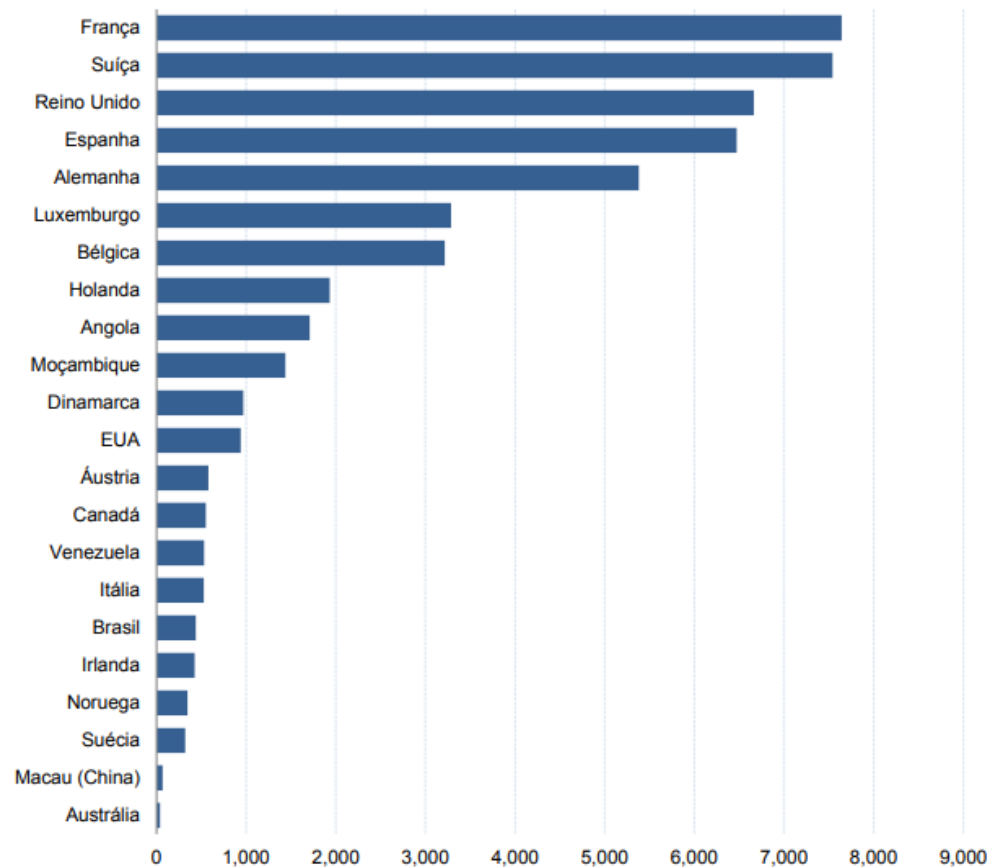
Repartição dos migrantes da UE-28 (20-64 anos) na UE-28 e EFTA por principais países de residência 2019



PT: taxa de desemprego jovem e migração



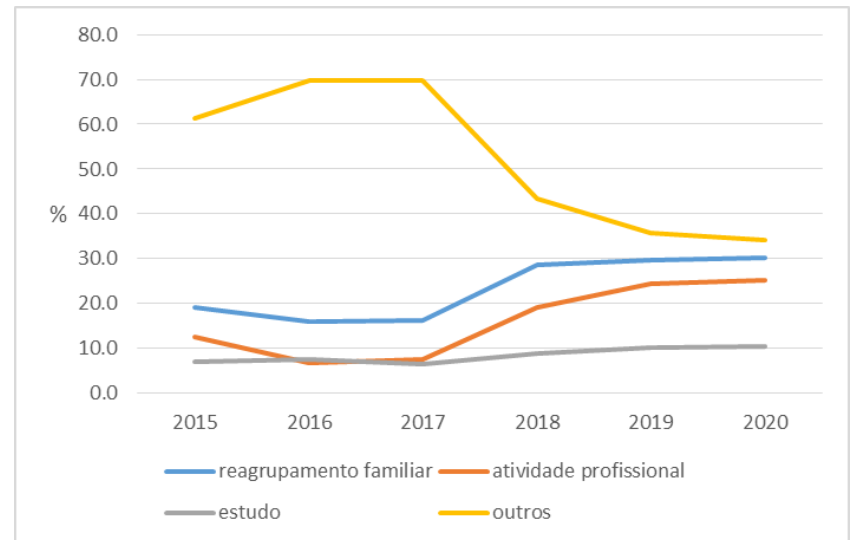
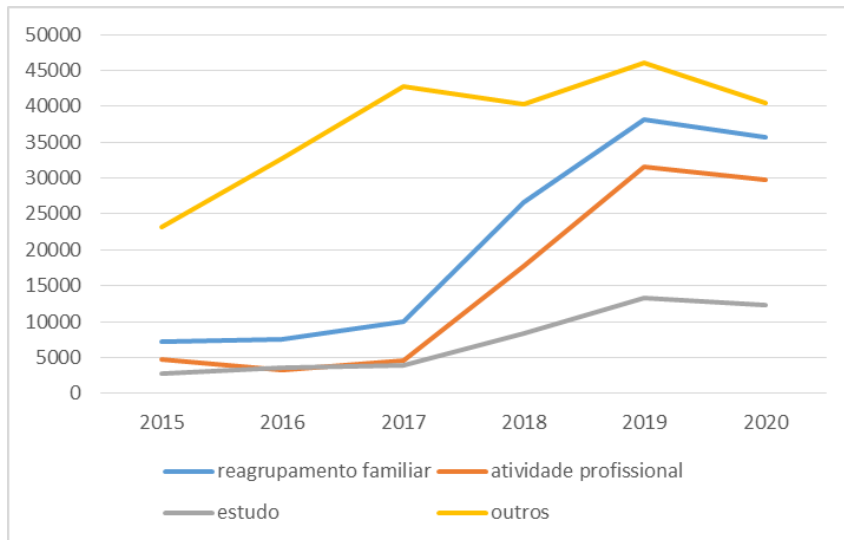
Entradas de portugueses em 2020



Nota [AGO] Dados dos vistos de emigração permanente. 2019. [BEL] 2019. [USA] 2019. [FRA] 2019. [IRL] 2015. [ITA] 2019. [MOZ] 2016. [VEN] 2011.

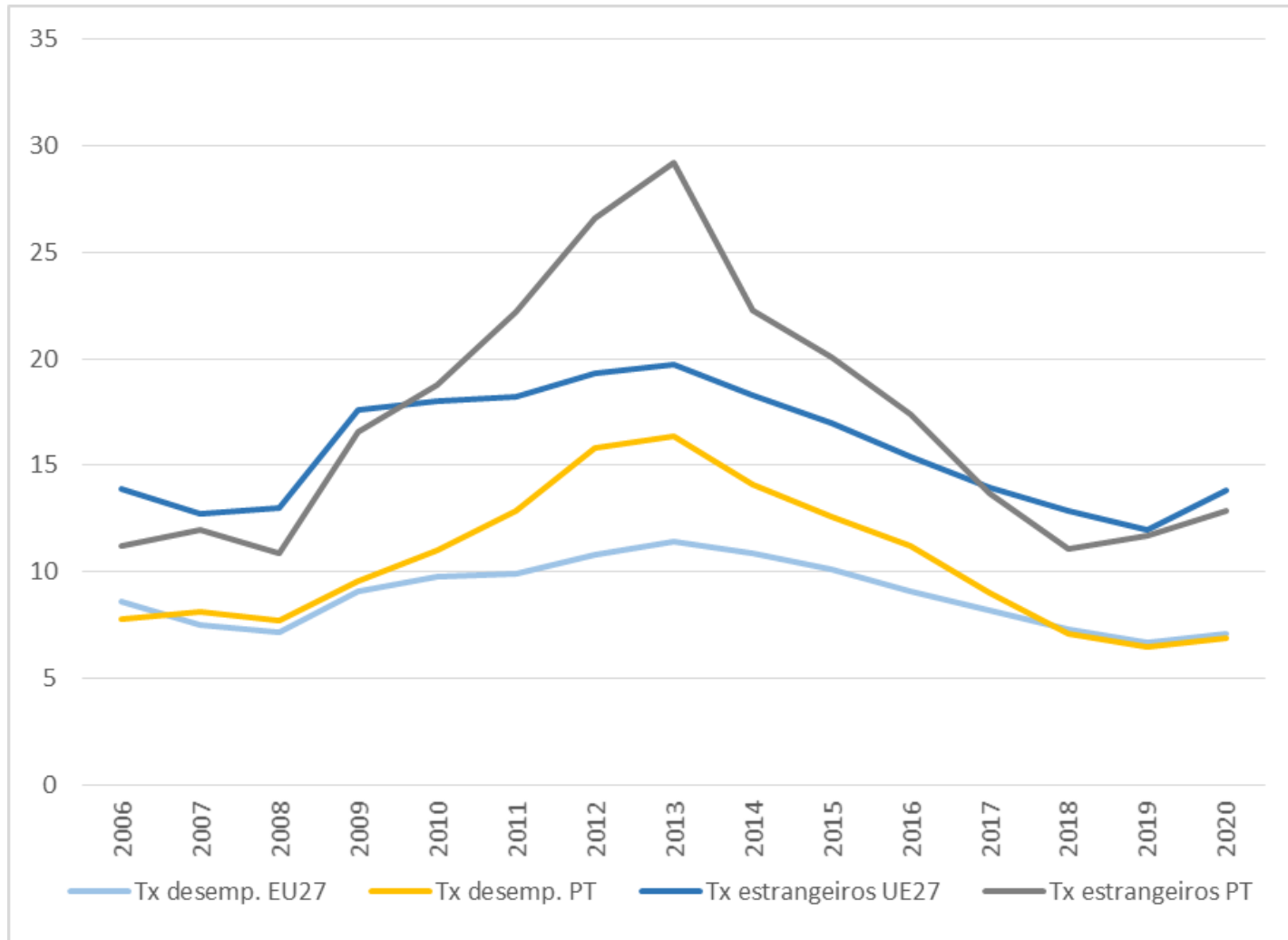
Fonte Gráfico elaborado pelo Observatório da Emigração, valores de: [DEU] Statistisches Bundesamt Deutschland; [AGO]

PT: Títulos de residência por categoria

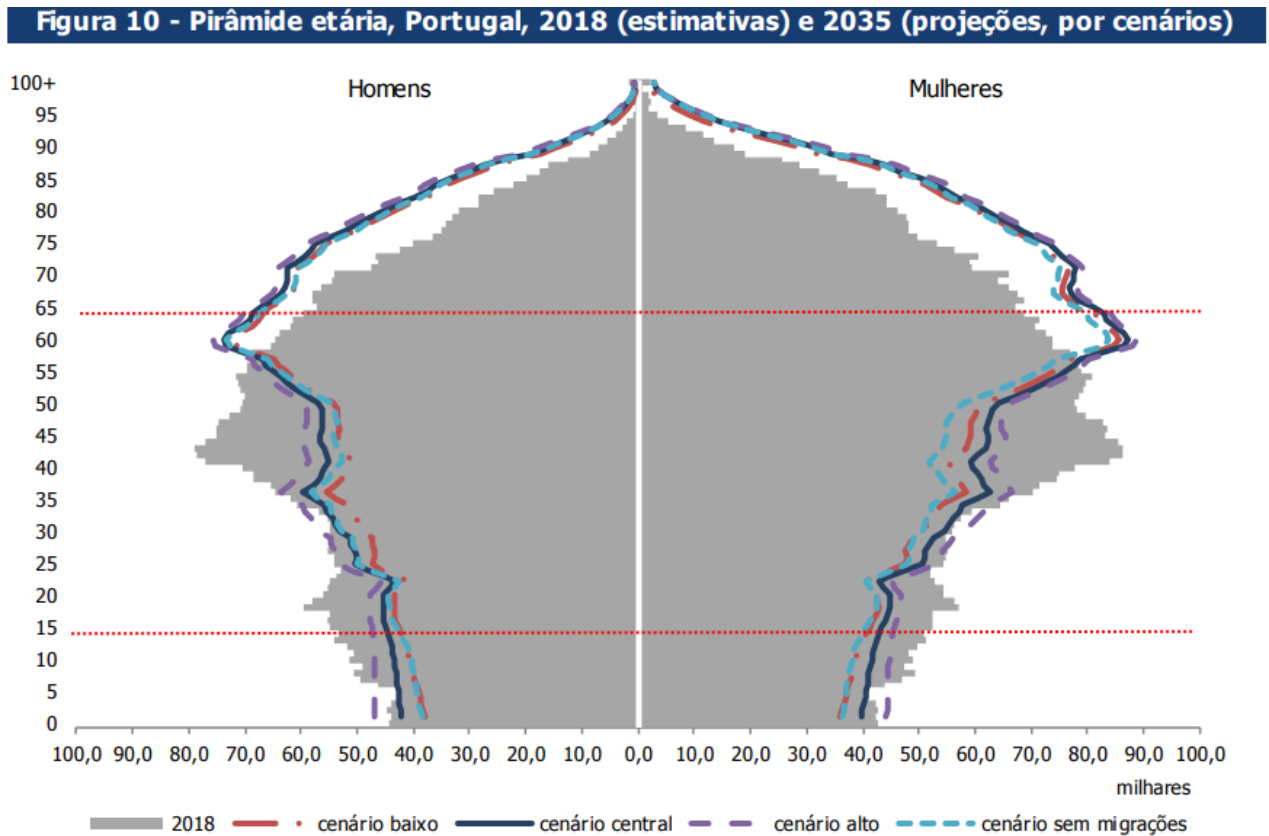


Fonte estatística: SEF

Taxa de desemprego (%)



O desafio demográfico



Fonte: INE 2018

Notas finais

1. Liberdade de circulação, um dos pilares da cidadania europeia. Realizações e obstáculos à sua aplicação
2. A mobilidade dos trabalhadores europeus tem aumentado, mas permanece reduzida
3. Acréscimo da mobilidade de trabalhadores mais qualificados
4. Impactos do Brexit nos números da mobilidade laboral intra-UE
5. Especificidades da mobilidade laboral em Portugal. Desafios da dinâmica demográfica e impactos da pandemia covid-19

Referências

EC (2021). *Annual report on intra-EU labour mobility*.

European Parliament (2021). *Fact sheets on the European Union*.

SEF (2021). *Relatório de Imigração, Fronteiras e Asilo 2020*.

Pires, R. P., J. Azevedo, I. Vidigal & C. Moura Veiga (2021). *Emigração Portuguesa 2021: Relatório Estatístico*. Observatório da Emigração e Rede Migra, CIES-IUL, ISCTE-IUL.

Koikkalainen, S. (2021). *Borderless Europe: Seven Decades of Free Movement*. MPI

OBRIGADA

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- Liberdade de circulação, princípio da não discriminação e benefícios sociais, à luz de jurisprudência recente do TJUE

Sofia David

Tribunal de Contas

Lisboa, Nova School of Law | 29 de Março de 2022

Liberdade de circulação, princípio da não discriminação e benefícios sociais, à luz de jurisprudência recente do TJUE

- Diferentes enquadramentos factuais e legais:
 - Cidadãos da EU
 - Nacionais de países terceiros, residentes permanentes da EU
 - Nacionais de países terceiros, residentes não permanentes da EU

- **Jurisprudência do TJUE**
 - Parcialmente abrangente, *vg.* conceitos “estatuto de cidadão europeu”, “trabalhador”, “mobilidade”
 - Trabalhadores nacionais de Estados Membros - estatuto de igualdade
 - Trabalhadores nacionais de Estados Terceiros – residentes permanentes – inexistência de uma proibição genérica de não discriminação - tendencial igualdade de tratamento
 - Trabalhadores nacionais de Estados Terceiros – sem residência permanente – admissão da possibilidade de se estabelecerem desigualdades de tratamento

Liberdade de circulação, princípio da não discriminação e benefícios sociais de trabalhadores cidadãos de países da EU e suas famílias

- Art. 45 do TFUE – direito fundamental
- Direito de livre circulação e permanência no território de qualquer Estado -Membro - art. 4/2/a), 20/1/2/a), 21, 26/1/2, 45 e 48 do TFUE
- Emprego, remuneração e demais condições de trabalho - proibição de discriminação em razão da nacionalidade - art. 18 e 45/2 do TFUE
- Regulamentos 492/2011, de 05/04/2011, 2019/1149, de 20/06/2019 e Diretiva 2004/38/CE, de 29/04/2014
- Direito de residência por mais de 3 meses – pode ser sujeito a condições - art 6 e 7.º da Diretiva 2004/38/CE
 - qualidade de trabalhador
 - condição de recursos mínimos
 - estudantes
 - desempregados voluntários

Ac. TJUE de 06/10/2020, C-181/19, Jobcenter Krefeld C. Widerspruchsstelle contra JD

- Art. 18, 1 paragrafo, do TJUE, 7/2 e 10 do Reg. 492/2011, e art 24 da Diretiva 2004/38/CE
- Art 10 do Regulamento 492/2011 – direito autónomo ou próprio das filhas e direito do progenitor com a guarda
- Garantia das “condições ótimas de integração para a família do trabalhador no Estado-Membro de acolhimento “durante a escolaridade das menores” sob pena de se privar as mesmas de “um direito que lhes foi reconhecido pelo legislador da União”
- “Os filhos de um nacional de um Estado-Membro que trabalha ou trabalhou no Estado-Membro de acolhimento, bem como o progenitor que assegura efetivamente a guarda destes, podem invocar, neste último Estado, um direito de residência autónomo ao abrigo apenas do artigo 10.º do Regulamento n.º 492/2011, sem que tenham de preencher as condições definidas pela Diretiva 2004/38, entre as quais a condição segundo a qual os interessados devem dispor de recursos suficientes e de um seguro de doença completo no referido Estado”
- Direito de igualdade nos benefícios sociais

Ac. TJUE de 06/10/2020, C-181/19, Jobcenter Krefeld C. Widerspruchsstelle contra JD

- O “conceito de «vantagem social» (..) compreende todas as vantagens que, ligadas ou não a um contrato de trabalho, são geralmente reconhecidas aos trabalhadores nacionais, em razão principalmente da sua qualidade objetiva de trabalhadores ou pelo simples facto de residirem no território nacional, e cujo alargamento aos trabalhadores nacionais de outros Estados-Membros se afigura assim apto a facilitar a sua mobilidade no interior da União e, por conseguinte, a sua integração no Estado-Membro de acolhimento”
- Inatividade temporal não afasta a “aplicação do princípio da igualdade de tratamento previsto no artigo 7.º, n.º 2, do Regulamento n.º 492/2011”
- As “pessoas que disponham de um direito de residência que tenha origem no artigo 10.º do Regulamento n.º 492/2011 também beneficiam do direito à igualdade de tratamento em matéria de concessão de vantagens sociais previsto no artigo 7.º, n.º 2, deste regulamento, inclusivamente quando essas pessoas já não beneficiem da qualidade de trabalhador em que inicialmente tinha origem o seu direito de residência”
- Absoluta igualdade de tratamento para “prestações de assistência social” que visem assegurar um patamar mínimo de sobrevivência, fundadas no princípio da dignidade humana

Ac. TJUE de 25/06/2018, C- 679/16, A C. Espoon kaupungin sosiaali- ja terveyslautakunnan yksilöasioiden jaosto

- Art. 3/1/a) do Reg. N.º 883/2004 - conceito de “prestação por doença” – fora do campo desta norma
- A organização dos sistemas educativos pelos Estados Membros não pode criar entraves injustificados à livre circulação
- Uma “legislação nacional que coloca determinados cidadãos de um Estado-Membro numa situação de desvantagem pelo simples facto de terem exercido a sua liberdade de circulação e de permanecer noutro Estado-Membro constitui uma restrição à liberdade garantida pelo art.º 21.º, n.º 1, do TFUE”
- As “facilidades concedidas pelo Tratado em matéria de livre circulação dos cidadãos da União não poderiam produzir a plenitude dos seus efeitos se um nacional de um Estado-Membro pudesse ser dissuadido de as exercer, em virtude de obstáculos colocados à sua permanência noutro Estado-Membro, por uma legislação do seu Estado de origem que o penalizasse pelo simples facto de as ter exercido”
- Art. 20 e 21 do TFUE – opõem-se a que seja recusada a um residente de um Estado-Membro, com deficiência grave, uma prestação como a assistência pessoal em discussão



Recent developments in the field of labour mobility

MoveS Seminar

Lisbon – 29/03/2022

*Francisco Pérez Flores. European Commission.
DG EMPL*

Overview

1. Intra EU labour mobility
2. Labour mobility during COVID-19
3. Recent activities and ongoing work

2019/2020: stable figures

- 9.9 mio working-age EU27 movers at 1.1.2020
- Up 1.6% as compared to 1.1.2019 (~100 000)
- 3.8% of EU working age population are movers
- ~1.5 mio frontier workers

Where do movers come from?

- They come from
 - RO (>1/5)
 - IT and PL (1/5)
 - PT, HR, BG (1/5)
 - DE, FR, EL, ES (almost 1/5)
 - Remaining 17 MS (1/5),



Where do they go to?

- They go to
 - DE (1/3),
 - ES, IT and FR (1/3),
 - 1/3 to the rest of the EU

Who are they?

- Women and men
- 55% are 20-49 years old (35% of residents)
- 34% are high-skilled
- ~ 50% less than 10 years in the country

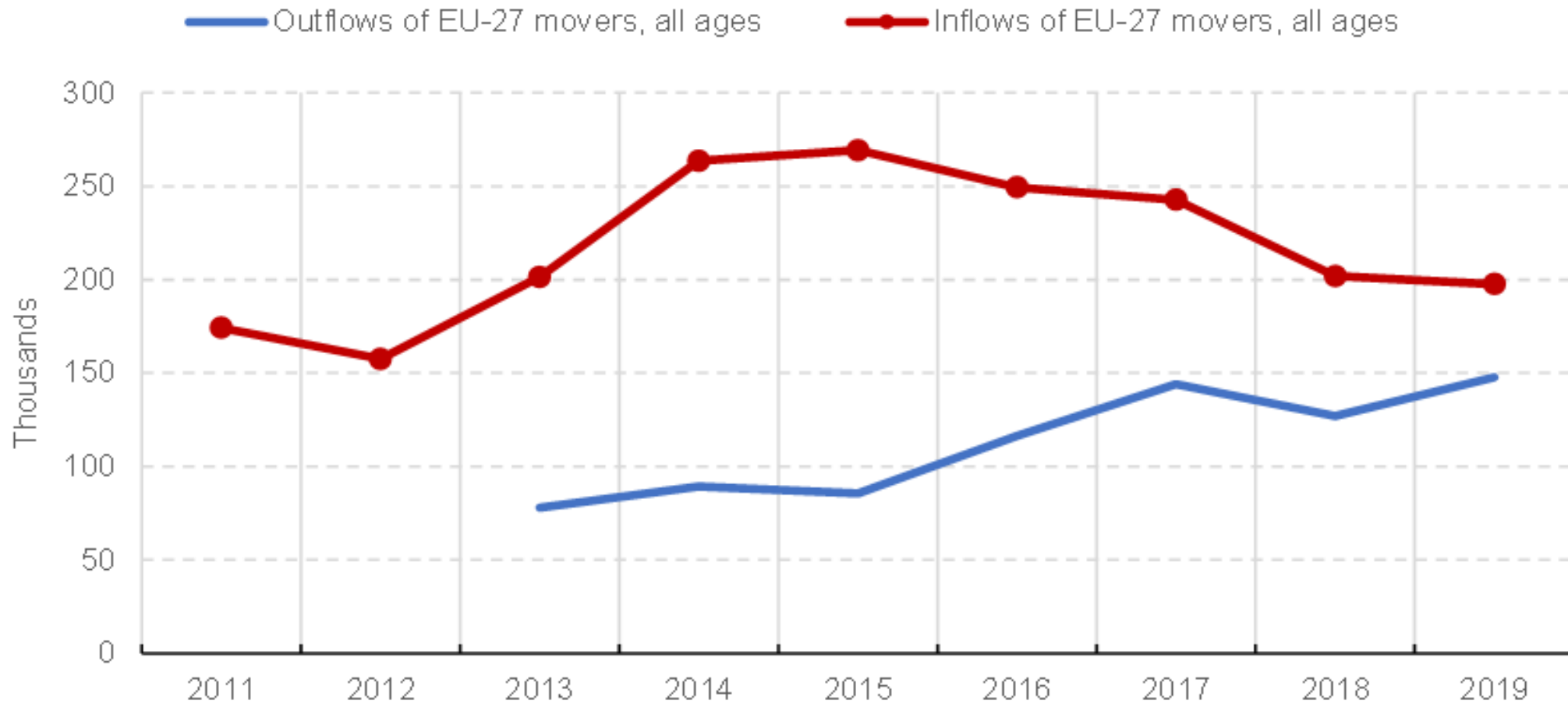
Free movement to/from Portugal

- In 2019 there were 654,000 PT movers in EU 27:
Main MS of residence: FR (360,000) and DE (107,000)
- UK (161,000) Switzerland (192,000)
- In 2019 there were 98,000 movers from EU27 in PT

Brexit – Impact on mobility?

- UK : an important destination country (~2.6 mio working-age EU-27 in the UK)
- several reasons for observed development
- No clear causalities...

Inflows to and outflows from the UK of EU movers 2011-2019



Source: Eurostat, international migration statistics [migr_imm1ctz]; population statistics [migr_pop1ctz]; EU-LFS [LFSA_PGANWS], Milieu calculations

Mobile work in the pandemic

- The pandemic reduced mobility – to a certain degree...
- ... but also made the importance of mobile workers more visible.

Mobile work in the pandemic

- The effect came in waves – as did the pandemic
- Movers' employment rate decreased more than nationals (-2.6% vs. -0.7%)
- Employment structure of movers is one reason

What's going on: Posting of workers

- Conformity check on enforcement Directive
- Conformity check on amending Directive
- Implementation report on amending Directive due for 2023

What's going on: Free movement

- Enforcement activities: complaints, infringements
- Functioning of bodies on Free Movement
- Withdrawal Agreement monitoring
- Negotiation Agreement on Gibraltar

What's going on: European Labour Authority

- Year 2021 transition; 2022, consolidation
- Concerted and Joint inspections
- Information activities
- Platform on undeclared work
- Cooperation: National Liaison Officers

Thank you



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Cross-border telework and Covid-19

MoveS Seminar

29 March 2021, Lisbon

Pr dr Jean-Philippe Lhernould, University of Poitiers (FR)

I- Labour legislation applicable

Background

- Specific issues related to telework: which national law is applicable?
 - Rules applicable for working time,
 - Rest period,
 - Health & safety
 - Leave (e.g., sickness)
 - fixed-term contracts
 - contract termination
 - **Specific rules on telework (passage to telework, work equipment, privacy, equality of treatment with other employees...)**
 - ...

Right to choose law applicable

- An individual employment contract is governed by **the law chosen by the parties** (art. 8, Reg. 593/2008 “Rome I”)
 - Applicable to cross-border telework relationship
 - F. works for a Spanish company located in Salamanca. She resides near the border in Portugal from where she habitually works remotely from home.
= By agreement between parties, Spanish law can apply to the employment contract
- Only the chosen law?
 - The contract is **also governed by the law** (only for its more protective non amendable provisions) **which, in the absence of choice, would have been applicable** = “objective law” of the contract

Which law is (objectively) applicable to the employment contract?

- Article 8, Rome I: 3 connecting factors
 - a. *Lex loci laboris* (place of work)
 - b. Law of the place of engagement
 - c. Law of the country where the contract is more closely connected
- Impact of the law objectively applicable
 - Applies in addition to the law chosen by the parties, for its “**non derogable by agreement**” **more protective** provisions (Art. 8(1), Rome I)
 - If no law has been chosen, it governs entirely the contractual relationship

If PT law is objectively applicable, PT law will apply (for its non derogable more protective provisions) in addition to ES law or may even be the only law applicable to the contract (if no law chosen by parties)

Case 1: temporary telework

- The contract is governed by the law of the country **in which or**, failing that, **from which** the employee **habitually carries** out his work in performance of the contract.
- The country where the work is habitually carried out **shall not be deemed to have changed if he is temporarily employed in another country** (art. 8(2))
 - **Occasional tele-work** (e.g., during pandemic) should not affect identification of workplace
 - = Z habitually works in Spain. For 6 months during the pandemic, he worked full-time from home (Portugal). Whether or not his employment contract stipulates that Spanish law is applicable, Spanish law should govern the contract

Case 1: temporary telework

- **Overriding mandatory provisions** of the law of the country of telework should anyhow apply (Art. 9, Rome I)!
 - Z habitually works in Spain for a Portuguese company. For 6 months during the pandemic, he worked full-time from home (Portugal).
 - Even if Spanish law governs the contract, Portuguese law may be applicable for what a Portuguese court would consider as “overriding mandatory” national rules = Criminal employment law, fundamental freedoms, right to strike, health & safety provisions, “protected employees”...
 - Ex. Z is Peruvian, he should need to claim a work permit in Portugal

Case 2: permanent telework

- Where is the teleworker's place of work?
 - “in order to determine the meaning of the words '**place ... where the employee habitually carries out his work**' (...) in a case where the employee carries out his work in more than one Contracting State, the Court's previous case-law must be taken into account when determining the place with which the dispute has **the most significant link**, while taking due account of the concern to afford proper protection to the employee as the weaker party to the contract (case C-383/95, Rutten)
 - “Where the work entrusted to the employee is performed in the territory of more than one Contracting State, it is important to define **the place of performance of the contractual obligation**, (...) as being the place **where or from which the employee principally discharges his obligations** towards his employer (case C-125/92, Mulox).

Case 2: permanent telework

- Where is the teleworker's place of work?
 - “refer to the place where the employee has established **the effective centre of his working activities and where, or from which, he in fact performs the essential part** of his duties *vis-à-vis* his employer” (Rutten)
 - “the place where **the employee actually performs the work** covered by the contract with his employer” (Rutten)
 - the relevant criterion for establishing an employee's habitual place of work (...) is, in principle, the place **where he spends most of his working time** engaged on his employer's business (C-37/00, Weber)

a) Where is the teleworker's place of work?

- **If only remote work**

- Law applicable should be that of country of residence = habitual workplace (see case law + wording of Art. 8(2) : "from which")

Z is employed by an Italian company. Since the pandemic, she works exclusively and permanently from her "secondary home" in Porto.

= PT law should be applicable to the contract (in addition to the law chosen by parties, if any)

- **If mix of remote work/ on-site work**

- Solution may depend on the **proportion between remote work and on-site work**

Z is employed by an Italian company. Since the pandemic, he works permanently from his "secondary home" in Porto. He goes to Roma once per month for one week.

= PT law should be applicable to the contract: most of his working time in Portugal (in addition to the Italian law, if chosen by parties)

a) Where is the teleworker's place of work?

- If workplace is in the country of telework
 - Scenario 1: Parties have not chosen the law applicable to the contract
 - **Law of country of telework applies entirely and exclusively** to the employment contract
 - P works remotely from Lisbon for a Belgian company. Since March 2020 he works 90% of his time from home. The employment contract does not stipulate a legislation applicable.
= PT law should be exclusively applicable
 - Scenario 2: Parties have chosen the law where company is established
 - **Law of country of telework applies for its “non derogable by agreement” provisions** if they are more protective than the law chosen
 - P works remotely from Lisbon for a Belgian company. Since March 2020 he works 90% of his time from home. The employment contract provides the application of BE law.
If the employee is dismissed, it will be necessary to compare PT and BE law, and apply the more protective one
 - Scenario 3: Parties have chosen law of country of telework
 - P works remotely from Lisbon for a Belgian company. Since March 2020 he works 90% of his time from home. The employment contract provides the application of PT law.
If the employee is dismissed, PT law will be exclusively applicable

b) Law of the place of engagement

- The criterion of the country in which the employee ‘habitually carries out his work’ (...) must be broadly construed, whereas the criterion of ‘the place of business through which [the employee] was engaged’ (...) **can apply only in cases where the court hearing the case is not in a position to determine the country in which the work is habitually carried out**
 - Connecting factor **unlikely to apply for** cross-border telework
- Z is employed by an Italian company and has been recruited in Milano. Since the pandemic, he works permanently from his “secondary home” in Porto.
= Irrespective of the fact he has been engaged in Italy, PT law is objectively applicable to the contract (in addition to the law chosen by parties, if any)

c) “Escape clause”

- “Where it appears from the circumstances as a whole that **the contract is more closely connected with a country other** than that indicated in paragraphs 2 or 3, the law of that other country shall apply.
- “**among the significant factors** suggestive of a connection with a particular country, account should be taken in particular of the **country in which the employee pays taxes** on the income from his activity and the country in **which he is covered by a social security scheme** and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the **parameters relating to salary determination and other working conditions**” (Case C-64/12, Schlecker)
- The search for the closest link “**must not automatically result in the application, in all cases, of the law most favourable to the worker**” (Schlecker).

c) “Escape clause”

- **Even if workplace is at home, could the place where the company is located be that of the closest connection?**
 - Place where employee has been hired, place of key meetings, trainings, HR events (promotion interviews, sanctions, dismissal...), place of work community = centre of gravity of relationship?
 - Place of social security affiliation / tax?
 - If so, would prevail over the criterion of habitual workplace
- **Escape clause should prevail over *lex loci laboris*?**
 - P, a Belgian citizen, works remotely from Lisbon for a Belgian company. Since March 2020 she works from home. The employment contract provides the application of BE law. She remains insured for social security in BE where she goes one day per week. She is paid from there and gets instructions from BE. The company’s activity is centered in Belgium. P is supposed to go back to work in Belgium in 2023.
 - Is the contract more closely connected with Belgium (therefore disregarding law of Portugal as the country of habitual work)?

II- Social security legislation applicable

Background

- **No statistics on telework and cross-border telework**
- Strong suspicion that telework increased during pandemic especially in border areas and in “touristic areas” (such as in Portugal)
- **Temporary practices becoming permanent?**
- Various cases
 - Work exclusively carried out abroad by (frontier) worker in one country before pandemic, then full-time or part-time telework in another country during pandemic, pattern possibly lasting after pandemic
 - Work performed in several countries before pandemic, then full-time or part-time in country of residence through telework
 - Telework being temporary or meant to become (full-time / part-time) permanent
 - Full-time telework already before pandemic...

Background

- **Does telework affect the social security legislation applicable (and how)?**
- In the context of the pandemic
 - Who pays **sickness benefits in cash** (replacement income in case of disease, accident at work...)?
 - How (and where) does worker have access to **healthcare**?
 - Who pays (partial) **unemployment benefits**?
 - Where are **contributions** paid?

Solutions are found in existing rules determining the legislation applicable set out by Regulations 883/2004 and 987/2009

Option 1: Law where activity is pursued?

Lex loci laboris

“a person pursuing an activity as an employed person in a Member State shall be subject to the legislation of that Member State” (Art. 11(3)(a) – general rule)

Law where activity is pursued

- Where does a cross-border teleworker perform his activity?
 - No specific solution in Reg. 883/2004, in 987/2009, by AC nor in EC practical guide
 - “the concept of the ‘location’ of an activity must be understood, in accordance with the primary meaning of the words used, as referring to the place where, **in practical terms**, the person concerned carries out the actions connected with that activity” (Partena, case C-137/11)
 - “that it is incumbent on the institution concerned, whatever the wording of those contractual documents, to base its findings **on the employed person’s actual situation**” (Format I, case C-115/11)

Law where activity is pursued

- **If work entirely and permanently carried out from home**
 - **Residence** is where the activity is performed = social security law of that country
 - If A works permanently and full-time from home in Lisbon for an Austrian employer, she should be subject to Portuguese social security
- **If work partly and/or temporarily carried out from home**
 - Could the **place where company is situated be identified as place where activity is pursued?** Yes, if...
 - Company is the place where instructions are given, remuneration is paid, important events take place (recruitment, evaluation interviews, dismissal interview...), where the work community is situated + equal treatment of colleagues
 - In both cases, “close link” with country where employer is located (the search for “close link” being at the core of title II of Reg. 883/2004)
 - “In order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the **duration of periods of activity** and to the nature of the employment as defined in the contractual documents, as well as to the **actual work performed**, where appropriate, namely, inter alia, the way in which the employment contracts concluded between the employer and the worker concerned **have been performed in practice in the past**, the circumstances surrounding the conclusion of those contracts and, more generally, the **characteristics and modalities of the activities pursued by the undertaking concerned**” (Format II, case C-879/19)

Option 2: Pursuit of activities in 2 countries

“A person who **normally pursues** an activity as an employed person in **two or more countries** shall be subject:

(a) to the **legislation of the country of residence** if he/she pursues a **substantial part of his/her activity** in that country; or

(b) if he/she does not pursue a substantial part of his/her activity in the MS of residence: (i) to the **legislation of the country in which the registered office or place of business** of the undertaking or employer is situated if he/she is employed by one undertaking or employer”
(Art.13(1)(a))

Pursuit of activities in 2 countries

“A ‘substantial part of employed activity’ pursued in a MS shall mean a **quantitatively substantial part of all the activities** of the employed or self-employed person pursued there, without this necessarily being the major part of those activities.

The following indicative criteria shall be taken into account: (a) in the case of an employed activity, the **working time and/or the remuneration** (...)

In the framework of an overall assessment, **a share of less than 25 %** in respect of the criteria mentioned above shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State Reg. 987/2009, Art.14(8).

NB: Flexibility for assessing the 25% rule = the institutions concerned shall take into account the **situation projected for the following 12 calendar months** (Reg. 987/2009, Art.14(10)) + “**past performance** is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity” (practical guide).

Pursuit of activities in 2 countries

- Telework 2 days/ week in Porto where employee resides, and 3 days in Madrid where employer is located
 - = PT social security law (40% of working time in PT)
- In 2020, the person worked from home in Porto for 4 months (more than 25% of working time) and in Madrid the rest of year, but in 2021 work should be 90% in Madrid, just like it was before pandemic
 - = ES social security law (considering the situation projected for the following 12 calendar months + past performances)?

Pursuit of activities in 2 countries

- **Temporary (occasional) activities** in 2 countries, as the result of a combination remote work / company work, **should be disregarded**
 - “A person **who normally pursues** an activity as an employed person in two or more MS shall be subject...”
 - “the fact that a person works in a MS **merely occasionally** cannot be taken into account for the purposes of application of Art. 14(2)(b)(i) of Reg. 1408/71”(case C-570/15, X.)

P worked 6 months from home in Lisbon in 2020 as a result of successive lockdowns. Before that, she performed his activities in France and resumed working in France after the lockdowns

= FR social security law applicable?

Pursuit of activities in 2 countries

- **Marginal activities** are disregarded
 - Activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, **activities accounting for less than 5%** of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal activities (Art. 14(5)(b) Reg. 987 + practical guide)
 - However, “the situation of a Danish worker, residing in Denmark and employed exclusively by an undertaking with its seat in Germany, who in the course of that employment relationship, regularly, **for several hours each week and for a period not limited to 12 months** pursues his activity partly in Denmark, falls under Article 14(2)(b)(i) [person normally employed in 2 MS] of Regulation No 1408/71” (case C-425/93, Calle Grenzshop Andresen)

Consequence: back to *lex loci laboris* conflict of rule

If A works from home one week per year in Portugal, she remains subject to the social security of the country of workplace

Pursuit of activities in 2 countries

- As a derogation, **Article 13 (Reg. 883/2004) must be applied strictly (Format II)**
 - “ As is clear from [the lex laboris rule of conflict], **it is necessary to derogate from the general rule of connection to the country of employment only in specific situations which demonstrate that another connection is more appropriate**” ”(case C-570/15, X.)
 - “ To accept that application of Article 14(2) of Regulation No 1408/71 could be justified in circumstances in which a person, who out of the total hours worked in one year for his employer established in one MS carried out **only 6.5% of those hours (at home) in another MS, without such an arrangement having been agreed with his employer in advance**, would be inconsistent with the fact that **connection to the MS of residence is a derogation and would create a risk of the conflict rules contained in Title II of that regulation being circumvented**”(case C-570/15, X.).

Pursuit of activities in 2 countries

- Drawbacks of Article 13:
 - Complex case by case implementation
 - Risk of frequent change in legislation applicable (if place of residence / distribution of working time change)
 - Risk of instrumentation / fraud (through location of place of residence + distribution of working time between 2 countries)
 - Unequal treatment of employees belonging to the same work community
- ❖ What about a company's regulation forbidding cross-border telework for more than 25% of the working time?
- ❖ Or requiring employee to arrange his working time with a view to remaining insured in the country where company's office is located?
- ❖ Can a company's collective agreement forbid telework from abroad?

Option 3: Posting

“ A person who pursues an activity as an employed person in a MS on behalf of an employer which normally carries out its activities there and who is posted by that employer to another MS to perform work on that employer’s behalf shall continue to be subject to the legislation of the first MS, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person” (Art. 12(1), special rule).

Posting

- Relevant rule of conflict for cross-border teleworkers?
 - Teleworker is not providing a cross-border service + no service recipient
 - Telework is usually voluntary (or made compulsory by State/local authority regulations)
- In practice, A1 forms are granted by some “sending country”
 - G works for an Italian company. Since the pandemic, she works from Aveiro where she owns a house. She has been granted a PD A1 by the Italian competent institution.
 - Portugal may claim withdrawal of PD A1, but Italian institution remains free not to do so

Commission guidelines during pandemic

- Scenario 1: frontier worker working exclusively in a MS other than that of residence
 - **If you are now unable to work in your ordinary country of employment, and for a temporary period, you have to work from home, this situation should in principle not lead to a change** in the applicable legislation as regards your social security coverage, since that situation is temporary. You will continue to be entitled to all social security benefits from the MS of employment.

NB: consistent with the idea that Article 11(3)(a) refers implicitly to the habitual workplace + no “normal activity” in the MS of residence + coherence with Title II objectives (search for close link+ continuity of affiliation) + consistent with case C-570/15 (“**occasional activities**”).

Commission guidelines during pandemic

- Scenario 2: Working in both countries of employment and of residence + insured in the country of employment because activity in the country of residence is not substantial (less than 25% of your working time)
 - You are currently insured in the MS of employment. **Now that the activity in your MS of residence is going to increase, it may become substantial** (understood as more than 25% of your working time over a period of 12 months).
 - In that case, the legislation of your MS of residence could become applicable under Article 13 (...) only if the average working time over a period of 12 month exceeds 25% of your total working time in all MS. Therefore, **the fact that for the next few weeks you will be performing a substantial activity in your MS of residence, this should not have an impact on your social security situation.**

NB: consistent with Art.14(10) Reg. 987/2009: “the institutions concerned shall take into account the situation projected for the following 12 calendar months” + “past performance is also a reliable measure of future behaviour and thus when it is not possible to base a decision on planned work patterns or duty rosters, it would be reasonable to look at the situation over the previous 12 months and to use this for assessing substantial activity (practical guide).

Commission guidelines during pandemic

- What if the **above scenarios are not applicable** to your case and as a result of the COVID-19 pandemic, **you may end up with a change in the country of social insurance?**
 - As a result, this may lead to a change in your MS of social security insurance, you may **ask your employer to submit a request to the competent authority of the MS whose legislation you wish to continue to be applied**, to continue to be subject to its legislation.
- The employer should substantiate this request **that it is in your best interest to remain insured** in the Member State where you are currently covered
- + reminder that MS can conclude **‘Article 16 agreements’**

(Source: Covid-19 - Information for frontier workers and posted workers)

Countries' initiatives: Portugal

- Guidance has been provided to competent institutions to the effect that teleworking should not involve changes to the applicable legislation as regards posted workers, workers performing activity in two or more Member States and cross-border workers (Article 9 of Order No. 94-A/2020 of 2020-04-16 – see ELA report, July 2021)

Other countries' initiatives

- Several MS (BE, CH, DE, FR, LU...) have **unilaterally decided to extend the rule according which periods of telework on the national territory due to the Covid-19 crisis should not be considered as work in that country** for the purpose of determining the legislation applicable.
 - Law of country where employer is located /habitual workplace continues to be applicable
 - 25% rule is neutralized

NB: no legal binding effect of such informal and unilateral decisions

Article 16 agreements?

“Two or more MS, the competent authorities of these MS or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons“

Conclusion

- One single place of activity? Activities in 2 countries? Posting?
- One underlying Title II Rg. 883/2004 objective
 - **continuity of insurance in the same country**
 - Continuity vs facts (close link)?
- **Need for an *ad hoc* rule of conflict** distinguishing two cases
 - exclusive remote work / work shared between home and company
- In the meantime: “**the concept of the ‘location’ of an activity** must be considered to be **a matter**, not for the legislation of the Member States, but **for EU law** and, consequently, for interpretation by the Court” (case C-137/11, Partena).

OBSTÁCULOS À MOBILIDADE *TRANSFRONTEIRIÇA*



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The screenshot shows the website header with contact information: Av. Miguel Dantas, nº 69, 4930-678 VALENÇA (Portugal), phone (+351) 251 095 721, and email eures@iefp.pt. It features the EURES logo and a navigation menu with links: INÍCIO, CONHECE-NOS, CONTATOS CONSELHEIROS EURES, PERGUNTAS FREQUENTES, and JORNADAS E EVENTOS. Below the menu are three main service buttons: SOU CANDIDATO A EMPREGO QUERO..., SOU EMPRESÁRIO QUERO..., and SOU TRABALHADOR TRANSFRONTEIRIÇO. The background image shows a long, modern metal bridge with a checkered floor.

MoveS seminar Portugal

*Free Movement of Workers in Portugal: Obstacles
and challenges brought by the Covid-19
pandemic*

Lisbon, 29 March 2022

NOVA School of Law

Recognition of Academic and Professional Qualifications

Pedro Góis

Pedro.gois@uc.pt



FEUC FACULDADE DE ECONOMIA
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	Público	Privado
EQUIVALÊNCIAS DE HABILITAÇÕES ESTRANGEIRAS (ensinos básico e secundário)	Reconhecimento de habilitações e classificações	Formal/informal
EQUIVALÊNCIAS DE HABILITAÇÕES ESTRANGEIRAS (Ensino superior)	Reconhecimento de Graus e Diplomas	Formal/informal
RECONHECIMENTO DE QUALIFICAÇÕES PROFISSIONAIS	Autorização por parte de uma autoridade competente para o exercício de uma determinada profissão ou atividade profissional regulamentada	Formal

Equivalências Estrangeiras

EQUIVALÊNCIAS DE HABILITAÇÕES ESTRANGEIRAS

(ensinos básico e secundário)

- Em Portugal, o regime de concessão de equivalência de habilitações de sistemas educativos estrangeiros a habilitações do sistema educativo português ao nível dos ensinos básico e secundário encontra-se definido no Decreto-Lei n.º 227/2005, de 28/12,

EQUIVALÊNCIAS DE HABILITAÇÕES ESTRANGEIRAS

(Ensino superior)

- O reconhecimento de Qualificações Estrangeiras pode ser feito através de **reconhecimento académico** ou por **reconhecimento profissional**.
 - O **reconhecimento académico** é um processo pelo qual uma qualificação académica estrangeira é comparada a uma qualificação portuguesa relativamente ao nível, duração e conteúdo programático.
 - O **reconhecimento profissional** é a autorização por parte de uma autoridade competente (Ministério, Ordem, etc.) para o exercício de uma determinada profissão ou atividade profissional regulamentada.

RECONHECIMENTO DE QUALIFICAÇÕES PROFISSIONAIS

- Relativamente ao Reconhecimento de Qualificações Profissionais, é necessário que a profissão a exercer noutra país seja regulamentada. Entende-se por profissão regulamentada, aquela que necessita de formação e exames específicos para ser exercida.

Reconhecimento Profissional

- O reconhecimento profissional consiste na autorização, por parte de uma autoridade competente (Ministério, Ordem, Associação Profissional, etc.), para o exercício de uma determinada profissão ou actividade profissional regulamentada.
- É regulado pela Diretiva 2005/36/CE, do Parlamento Europeu e do Conselho, alterada pela Diretiva 2013/55/CE.
- Através desta Directiva um Estado-Membro reconhece, para o acesso a uma profissão regulamentada e para o seu exercício, as qualificações profissionais adquiridas noutro ou em vários outros Estados-Membros que permitem ao seu titular nele exercer a mesma profissão.

Reconhecimento Profissional

- O reconhecimento de qualificações profissionais por nacionais de Estados Membros da União Europeia e do Espaço Económico Europeu obedece ao regime jurídico aprovado pela **Lei n.º 9/2009, de 4 de março**, alterada pelas Leis n.ºs **41/2012, de 28 de agosto**, **25/2014, de 2 de maio** e **26/2017, de 30 de maio**, que transpôs para o ordenamento jurídico português a **Diretiva n.º 2005/36/CE**, do Parlamento Europeu e do Conselho, de 7 de setembro de 2005, relativa ao reconhecimento das qualificações profissionais, alterada pela **Diretiva 2013/55/UE** do Parlamento Europeu e do Conselho, de 20 de novembro de 2013.

<u>Name of regulated profession</u> ^A ↓ _Z	<u>Country</u>	<u>Region</u>	<u>Recognition under Directive 2005/36/EC</u>	<u>Qualification level</u>
<u>Maquinista de locomotivas e comboios do sistema composto pelas infra-estruturas ferroviárias</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Acupuntor</u>	Portugal	All regions	General system of recognition - primary application	Diploma of post-secondary level (exactly 4 years)
<u>Administrador, director ou gerente de empresas de transporte público rodoviário de passageiros por conta de outrem, nacional ou internacional</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Administrador, diretor ,gerente ou gestor de empresa de transporte rodoviário de mercadorias por conta de outrem, nacional ou internacional</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Advogado</u>	Portugal	All regions	General system of recognition - primary application	Diploma of post-secondary level (3-4 years)
<u>Agente de acompanhamento de comboios</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Agente de inseminação artificial de bovinos</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Agente oficial da propriedade industrial</u>	Portugal	All regions	General system of recognition - primary application	Diploma of post-secondary level (3-4 years)
<u>Ajudante de Cozinheiro (Marítimo)</u>	Portugal	All regions	General system of recognition - primary application	Attestation of competence
<u>Ajudante de maquinista</u>	Portugal	All regions	General system of recognition - primary application	Certificate attesting the completion of a secondary course
<u>Analista de sementes</u>	Portugal	All regions	General system of recognition - primary application	Certificate attesting the completion of a secondary course
<u>Anatomia patologica</u>	Portugal	All regions	Doctor in basic and specialised medicine both listed in Annex V	Diploma from post-secondary level (more than 4 years)
<u>Anestesiologia</u>	Portugal	All regions	Doctor in basic and specialised medicine both listed in Annex V	Diploma from post-secondary level (more than 4 years)
<u>Angiologia/ Cirurgia vascular</u>	Portugal	All regions	Doctor in basic and specialised medicine both listed in Annex V	Diploma from post-secondary level (more than 4 years)

245 item(s) found, displaying 241 to 245

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<u>Name of regulated profession</u> <small>A Z</small>	<u>Country</u>	<u>Region</u>	<u>Recognition under Directive 2005/36/EC</u>	<u>Qualification level</u>
Técnico responsável pela manutenção de instalações de elevação	Portugal	All regions	General system of recognition - primary application	Diploma of post-secondary level (3-4 years)
Técnico(a) de veículos automóveis a gás (auto)	Portugal	All regions	General system of recognition - primary application	Certificate attesting the completion of a secondary course
Urologia	Portugal	All regions	Doctor in basic and specialised medicine both listed in Annex V	Diploma from post-secondary level (more than 4 years)
Verificador do sistema de gestão de segurança para a prevenção de acidentes graves	Portugal	All regions	General system of recognition - secondary application	Not applicable
Veterinário	Portugal	All regions	Veterinary Surgeon	Diploma from post-secondary level (more than 4 years)

Regime especial: reconhecimento de qualificações

Foi publicado o Decreto-Lei n.º 28-B/2022, de 25 de março, que estabelece medidas relativas ao reconhecimento de qualificações profissionais de beneficiários de proteção temporária no âmbito do conflito armado na Ucrânia.

O regime especial apenas se aplica aos beneficiários de proteção temporária, refugiados provenientes da Ucrânia e às profissões regulamentadas.

No prazo de 10 dias a contar da submissão de um pedido de reconhecimento de qualificações, o órgão instrutor emite o comprovativo de que o pedido foi instruído com a documentação legalmente exigida, ou profere despacho de convite ao aperfeiçoamento. No caso de documentação insuficiente em virtude da situação de guerra, o órgão instrutor diligencia, oficiosamente, através da Direção-Geral do Emprego e das Relações de Trabalho (DGERT), junto da Comissão Europeia, no sentido de obtenção de segunda via da documentação em falta.

Reconhecimento de Graus e Diplomas

- O reconhecimento em Portugal de graus académicos e diplomas de ensino superior, atribuídos por instituições de ensino superior estrangeiras, é efetuado pela Direção-Geral do Ensino Superior (DGES) em articulação com a Comissão de Reconhecimento de Graus e Diplomas Estrangeiros, e é regulado, desde 1 de janeiro de 2019, pelo Decreto-Lei n.º 66/2018 de 16 de agosto.

Reconhecimento de Graus e Diplomas

- Existem três tipos de reconhecimento em Portugal.
-
- **RECONHECIMENTO AUTOMÁTICO**
- **RECONHECIMENTO DE NÍVEL**
- **RECONHECIMENTO ESPECÍFICO**

RECONHECIMENTO AUTOMÁTICO

- É o ato que permite reconhecer genericamente um grau ou diploma de ensino superior estrangeiro, cujo nível, objetivos e natureza sejam idênticos aos graus portugueses de licenciado, mestre e doutor ou de diploma de técnico superior profissional, que conste do elenco de graus e diplomas fixado pela comissão de reconhecimento de graus e diplomas estrangeiros
- O Reconhecimento Automático é um procedimento mais simplificado, mais célere, no entanto, ainda, não é aplicado a todos os países e a todos os graus.

RECONHECIMENTO DE NÍVEL

- O Reconhecimento de **Nível** permite reconhecer por comparabilidade um grau ou diploma de ensino superior estrangeiro como tendo um nível correspondente a um grau académico ou diploma de ensino superior português (*ex. licenciado*).

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Tipo de Ensino

Tipo de Estabelecimento

0 - Programas Gerais

Tipo de curso

SUBMETER



Pesquisa de precedências - Precedence search

Atenção! / Warning!

A Informação aqui disponibilizada é meramente indicativa e não garante a existência de uma precedência.

Deverá entrar em contacto direto com a Instituição/ões que lhe aparece nos resultados para confirmar a existência, ou não, de Precedência.

Podem ainda consultar os [requisitos para Precedência na legislação em vigor](#)

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RECONHECIMENTO ESPECÍFICO

- O Reconhecimento **Específico** permite reconhecer um grau ou diploma de ensino superior estrangeiro através de uma análise casuística do nível, duração e conteúdo programático, especificando a área de formação a que é dado o reconhecimento (*ex. licenciado em psicologia*).
- Legislação aplicável [Decreto-Lei nº. 66/2018](#)
- <https://www.dges.gov.pt/RecOn/Formulario/Files/Manual%20prático%20do%20Pedido%20de%20Reconhecimento%202021.pdf>

Reconhecimento de Qualificações

- Formação adquirida em países terceiros
- [Portaria n.º 33/2019, de 25 de janeiro](#)
Regula aspetos da tramitação procedimental do reconhecimento de graus académicos e diplomas atribuídos por instituições de ensino superior estrangeiras.
- [Decreto-Lei n.º 66/2018, de 16 de agosto](#)
Aprova o regime jurídico de reconhecimento de graus académicos e diplomas de ensino superior atribuídos por instituições de ensino superior estrangeiras.
- [Decreto-Lei n.º 63/2016, de 13 de setembro](#)
4.ª alteração ao Decreto-Lei n.º 74/2006, de 24 de março.
- [Decreto-Lei n.º 341/2007, de 12 de outubro \(Revogado\)](#)
Aprova o regime jurídico do reconhecimento de graus académicos superiores estrangeiros.
- [Decreto-Lei n.º 283/83, de 21 de junho \(Revogado\)](#)
Regula as equivalências de habilitações estrangeiras de nível superior às correspondentes habilitações portuguesas.

Reconhecimento de Qualificações

- [Lei n.º 26/2017 de 30 de maio](#)
Facilita o reconhecimento das qualificações profissionais e diminui os constrangimentos à livre circulação de pessoas, procedendo à terceira alteração à Lei n.º 9/2009 de 4 de março, e transpondo a Diretiva 2013/55/EU, do Parlamento Europeu e do Conselho, de 20 de novembro de 2013, que altera a Diretiva 2005/36/CE, relativa ao reconhecimento das qualificações profissionais e o Regulamento (UE) n.º 1024/2012, relativo à cooperação administrativa através do Sistema de Informação do Mercado Interno.
- [Lei n.º 25/2014 de 2 de maio](#)
Segunda alteração à Lei n.º 9/2009 de 4 de março
- [Lei n.º 41/2012 de 28 de agosto](#)
Primeira alteração à Lei n.º 9/2009 de 4 de março
- [Lei n.º 9/2009 de 4 de março](#)
Faz a transposição da Diretiva Comunitária das Qualificações 2005/36/CE do Parlamento Europeu e do Conselho de 7 de setembro
- [Diretiva Comunitária das Qualificações 2005/36/CE do Parlamento Europeu e do Conselho de 7 de Setembro](#)
Relativa ao reconhecimento das qualificações profissionais

Reconhecimento de Qualificações

- [Tratado de Amizade, Cooperação e Consulta entre a República Portuguesa e a República Federativa do Brasil](#) (Publicado no diário da república n.º 287, I série-A, de 14 de dezembro de 2000 – págs. 7172 a 7187)
Define os princípios gerais que hão-de reger as relações entre os dois países
- [Despacho Normativo n.º 33/2002 de 2 de maio](#)
Regulamento do acesso dos cidadãos oriundos dos Estados-membros da União Europeia e dos países signatários do Acordo sobre o Espaço Económico Europeu ao exercício das profissões de técnico de diagnóstico e terapêutica
- [Decreto-Lei n.º 107/2008 de 25 de junho](#)
Alteração ao Decreto-Lei n.º 74/2006 de 24 de março
- [Decreto-Lei n.º 74/2006 de 24 de março](#)
Aprova o regime jurídico dos graus e diplomas do ensino superior
- [Decreto-Lei n.º 42/2005 de 22 de fevereiro](#)
Aprova os princípios reguladores de instrumentos para a criação do espaço europeu de ensino superior.

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- [Decreto-Lei n.º 107/2008 de 25 de junho](#)
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- Muito obrigado!