



# PRIV-WAR Report – Portugal

National Reports Series 09/09

## The Regulation of Private Security Companies in Portugal

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### **PRIV-WAR**

Regulating privatisation of “war”: the role of the EU in assuring the compliance  
with international humanitarian law and human rights

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## The Regulation of Private Security Companies in Portugal

### 1. Introduction

The challenging subject of privatisation of war as well as its problematic relation with International Humanitarian Law and Human Rights is one of the core international law issues being discussed both at academies and at governmental forums. Portugal is committed to the debate and is actively participating in the discussions on the matter. The present report was drawn up in the context of the PRIV-WAR project within the cooperation established between the European University Institute and the Department of Legal Affairs of the Ministry of Foreign Affairs of Portugal.

Portuguese Law does not provide for specific regulation for Private Military Companies. Therefore, the report will mainly outline the national regulation of private security activity by Private Security Companies (PSCs), which is primarily regulated by the Decree-Law governing Private Security Activity<sup>1</sup>. Other national legislation is also applicable, as will be mentioned later in the report.

It should be noted that the report relates mostly to the private security activity conducted in Portugal as there are no specific regulations for the performance of such activities abroad.

### 2. Domestic security and investigation services

The Portuguese legislation defines private security services as:

- a) The provision of security services by private entities to protect persons and goods, as well as for crime prevention.

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<sup>1</sup> Decree-Law 35/2004 of 21 February 2004, as amended by the Decree-Law 198/2005 of 10 November 2005 and by the Law 38/2008 of 8 August 2008.

- b) The organization of self-protection security services by private entities to protect persons and goods, as well as for crime prevention.<sup>2</sup>

The private security services have a subsidiary and complementary function in relation to the activity of the State's public security forces. However, some institutions are obliged by law to have a private security system. Such institutions include the National Bank, credit institutions, financial institutions, some nightclubs and sport grounds.<sup>3</sup>

To carry out private security activities a company needs to hold the necessary permit or license, depending on the activity it will provide. A person wishing to provide private security activities needs to hold a professional certificate.

### **3. Regulation of armed force**

The PSCs' personnel are subject to the general regulation of possession and use of weapons as established by the Law on Weapons and Ammunitions.<sup>4</sup>

Under the Law, it is forbidden to sell, acquire, possess or use class A weapons. This class includes: military equipment; war material; automatic firearms; chemical, biological or radioactive weapons.

When carrying out security activities an employee can only have weapons in his possession if he has the written authorization of the employer.

The export of weapons, components of firearms, ammunitions and other materials are subject to the prior authorization of the National Director of the Public Security Police.

In the military domain, the export of military equipment and technology by a private company is subject to the authorization of the Minister of National Defence.<sup>5</sup>

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<sup>2</sup> Article 1 (3) of the Decree-Law 35/2004.

<sup>3</sup> Article 8 of the Decree-Law 35/2004.

<sup>4</sup> Law 5/2006 of 23 February 2006.

<sup>5</sup> Article 4 of the Decree-Law 397/98 of 17 December.

#### 4. Commercial law

A company carrying out private security activities is classified at the Portuguese Central File of Legal Persons as “Private Security Company”. Such economic activity classification comprises companies providing the following services: surveillance of property; control of entry, stay and exit of persons; prevention of entry of weapons or other dangerous items and substances; protection of persons; operation of alarm receiving and monitoring centres; transport, security, handling and distribution of values.<sup>6</sup>

The companies providing private security activities cannot: carry out activities falling under the exclusive competence of the judiciary or of the police authorities; threaten or restrict the exercise of fundamental rights and liberties; protect property, services or persons involved in illicit activities.<sup>7</sup>

The authorization for the provision of private security activities requires the issuance of the necessary permit or license, depending on the activity to be carried out. The Minister of Interior holds the competence to issue the permits and licences. The request for authorization to provide private security activities shall be accompanied by a certificate of commercial registration.

The companies that wish to provide security services for the protection of persons and goods, as well as for crime prevention, must be established in accordance with the legislation of a European Union Member State or of a State Party to the Agreement on the European Economic Space and have its seat or a delegation in Portugal.

The PSCs can be legally established without any special prerequisite, except so far as it relates to the need to adjust its capital stock to the object of its security activities. The minimum capital stock required varies between 50 000 €, 125 000 € and 250 000 €, depending on the activity to be carried out.<sup>8</sup>

After a favourable decision by the Minister of Interior, the issuance of permit or license is subject to several conditions, such as: appropriate facilities, human and

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<sup>6</sup> Article 2, (1) of the Decree-Law 35/2004.

<sup>7</sup> Article 5 of the Decree-Law 35/2004.

<sup>8</sup> Article 23, (2) of the Decree-Law 35/2004.

material resources; a Security Director, where appropriate; fifteen employees; civil liability insurance; insurance against robbery.<sup>9</sup>

The Ministry of Interior is competent to control the private security activities. A Private Security Council has also been established which is a consulting organ to the Minister of Interior on matters regarding private security activities.

At the moment there are 400 PSCs registered at the Portuguese Central File of Legal Persons.

## **5. Labour Law**

Besides the specific applicable law, the Portuguese Labour Law, namely the Labour Code<sup>10</sup>, applies to any labour contract concluded within the personnel recruitment process for the PSCs. The labour relations between the PSCs and their employees can also be regulated by an instrument of collective labour regulation.

In general terms, the recruitment of personnel should comply with certain principles, such as: the equal right of access to the job and the prohibition of discrimination; the parties should negotiate the contract in good-faith; the object of the contract or the activity to be carried out cannot be contrary to the law. More specifically, the prerequisites for admission include having the adequate physical and psychological profile needed to perform the duties as well as the appropriate training courses.

The nationals of other Member States of the European Union authorized to provide private security activities in their State of nationality can carry out such activities in Portugal if they comply with the requisites established in the Portuguese Law.

It should be noted that the managers of PSCs are subject to very tight prerequisites in order to perform their duties. For instance, they cannot have been

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<sup>9</sup> Article 26, (2) of the Decree-Law 35/2004.

<sup>10</sup> Law 99/2003 of 27 August 2003, as amended by the Law 9/2006 of 20 March 2006, by the Law 59/2007 of 4 September 2007 and by the Law 12-A/2008 of 27 September 2008.

convicted for certain crimes or been expelled from the Armed Forces, the Secret Services or from any other security forces.<sup>11</sup>

The employment contracts should be made in writing and can assume the following forms: a fixed term contract; contract for commission of service; part-time contract.

The employer shall inform the employee on relevant aspects of the contract, such as: the identification of the company; the working place; his category and his general duties; the remuneration; the working period.

Regarding personnel health and safety, the general rules on health and safety are applicable.

The admission of personnel to carry out private security activities is subject to the attendance and completion of professional training courses. The courses are given by entities duly authorized to that effect.

The courses are divided into modules. The basic instruction module includes training in Law, surveillance techniques and deontology. The module of specific instruction for surveillance, escort, defence and protection of persons includes training in sociology, physical security, administrative techniques and matters related to drug addiction and alcoholism.

The personnel who will carry out activities such as surveillance, escort, defence and protection of persons and authorized to carry a weapon shall go through specific training on how to operate defence weapons, on physical preparation as well as practical training on a shooting range.

## **6. Criminal Responsibility**

Pursuant to the Penal Law regarding Violations of International Humanitarian Law<sup>12</sup>, a “mercenary” is a person who is considered as such by International Law. The Portuguese criminal legislation does not address the concept of “mercenary” specifically. However, the “recruitment of mercenaries” is criminalized. As such, any person who recruits or intends to recruit mercenaries is punished with imprisonment

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<sup>11</sup> Article 8 (1) of the Decree-Law 35/2004.

<sup>12</sup> Law 31/2004 of 22 July 2004.

between one to five years. In addition, a person convicted for “recruiting mercenaries” may have his right to vote, to be elected or to become a court juror restricted for a term of two to ten years.<sup>13</sup>

In connection with the “recruitment of mercenaries” and with the concept of “mercenary” as such, it is also worth considering the Law on the Fight against Terrorism<sup>14</sup>, as well as the Law on the Fight against Money Laundering and the Financing of Terrorism<sup>15</sup>.

As regards the Portuguese Armed Forces, they comprise exclusively Portuguese citizens.<sup>16</sup>

The PSC employees are subject to the same rules regarding criminal responsible as any other citizen who commits a crime punished by law.

However, it is important to note that the Portuguese penal legislation provides for the crime of illicit provision of private security activities, punished with a maximum of two years imprisonment or a fine up to 240 days.<sup>17</sup>

The illicit provision of private security activities includes carrying out security activities without permit or license, or the employee carrying out his duties without a professional certificate.

The PSCs must have a Security Director responsible for the training and provision of activities by the personnel.

The PSC employees do not enjoy any immunity from the local criminal law. However, it should be noted that when performing private security activities, those employees can carry out some acts that can amount to the restriction of rights and liberties, such as inspections of individuals or prevention and security searches.

As far as criminal responsibility of corporations is concerned, the PSCs are criminally responsible for the crime of illicit provision of private security activities.<sup>18</sup>

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<sup>13</sup> Article 19 of the Law 31/2004.

<sup>14</sup> Law 52/2003 of 22 August 2003.

<sup>15</sup> Law 25/2008 of 5 June 2008.

<sup>16</sup> Article 275 (2) of the Constitution.

<sup>17</sup> Article 32-A of the Decree-Law 35/2004, as amended by the Law 38/2008.

## 7. Civil Liability

The civil liability of PSCs does not have any specific characteristics. Thus, the general regime for civil liability is applicable, as provided for in the Portuguese Civil Code.

The Civil Code distinguishes between the responsibility for wrongful acts and the responsibility for the risk. The civil liability can derive either from the violation of a contract or from the violation of an individual personality right, a property right or other.

As a general rule, the Code of Civil Procedure stipulates that the Portuguese courts are internally competent to handle the claims that do not fall under another jurisdiction.

Without prejudice to the provisions of international conventions or of special laws, the Code of Civil Procedure also stipulates that the Portuguese courts may have international competence to handle claims when certain circumstances are met, such as: the accused resides in the Portuguese territory; the Portuguese courts have jurisdiction in accordance with the Portuguese law on territorial competence; some of the acts having given rise to the claim were committed in the Portuguese territory; the right invoked can only be effective if the claim is submitted to the Portuguese jurisdiction.<sup>19</sup>

## 8. Case law

Portuguese higher courts have developed jurisprudence on social, civil and administrative aspects regarding PSCs.

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<sup>18</sup> Article 32-B of the Decree-Law 35/2004, as amended by the Law 38/2008.

<sup>19</sup> Article 65 of the Code of Civil Procedure.