



**REPORT ON MEASURES TO COMBAT DISCRIMINATION**  
**Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT 2008**

**ROMANIA**

**Romanița IORDACHE**

**State of affairs up to 31 December 2008**

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## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

The Romanian Constitution provides for equality and non-discrimination in broad terms.<sup>1</sup> These provisions are implemented in practice by specific anti-discrimination legislation adopted in August 2000 through delegated legislation - the Governmental Ordinance 137/2000 (hereafter referred to as 2000 Anti-discrimination Law).<sup>2</sup> The Governmental Ordinance 137/2000 was amended subsequently in 2002, 2003, 2004 and 2006 to enhance transposition of the Directive 2000/43/EC and the Directive 2000/78/EC.<sup>3</sup> In 2006, the Anti-discrimination Law was amended and improved.<sup>4</sup> In order to comply with the Directive's requirement to have a specialised equality body at the national level, the Anti-discrimination Law provides for the establishment of *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)].

The scope of the Anti-discrimination Law was substantially diminished in 2008, following a series of decisions of the *Curtea Constituțională* [the Romanian Constitutional Court] which limited both the mandate of the NCCD<sup>5</sup> and of the civil courts in regard of cases of discrimination generated by legislative provisions,<sup>6</sup> as well as an Emergency Ordinance

1 See Section 1.a) Constitutional provisions on protection against discrimination and the promotion of equality.

2 The Ordinance 137/2000 was adopted by the Government based on a constitutional procedure which allows the Parliament to delegate limited legislative powers to the Government during the parliamentary vacation according to Articles 114 and 107 (1) and (3) of the Constitution. The ordinances (Statutory Orders) must be submitted to the Parliament for approval, though in the interval between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and generate legal consequences.

3 Romania/ Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (Statutory Order) was published in Monitorul Oficial al României No. 431 of September 2000. See also: Romania/ Law 48/2002 concerning the adoption of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (31 January 2002); see also Romania/ Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (30 August 2003); see also Romania/ Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (11 April 2004).

4 Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).

5 Romania/Curtea Constituțională/Decision 997 from 7 October 2008 finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to finding and sanctioning discrimination triggered by legislative provisions, is unconstitutional.

6 Romania/Curtea Constituțională/Decisions 818, 819 and 820 (3 July 2008) published in the Official Gazette 537 from 16 July 2008. In these three decisions, the Constitutional Court has concluded that the dispositions of Article 1(2) letter e) and of Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that in the application of the Law, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus 'creating legal norms or substituting them with other norms of their choice.' Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20 February 2009).

See also Romania/Curtea Constituțională/Decision 1325 (04.12.2008) maintaining the earlier finding that Article 27 of the Governmental Ordinance 137/2000 is unconstitutional, to the extent that it is understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.



approved by the Government which quashed the mandate of the national equality body in relation to discrimination in the area of salary related rights and benefits of civil servants.<sup>7</sup> As a positive development, the Romanian Constitutional Court seized the chance to clarify the legal status of the NCCD during a case challenging the constitutionality of Articles 16-25 of the Anti-Discrimination Law providing for the mandate of the NCCD affirmed that ‘the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Article 124 on administration of justice and Article 126 (5) prohibiting the establishment of extraordinary courts of law.’<sup>8</sup>

The 2000 Anti-discrimination Law is enforceable nation-wide and it is supported by relevant provisions in the legislation on equal opportunities for men and women,<sup>9</sup> the relevant provisions from the legislation on the protection of persons with disabilities,<sup>10</sup> in the Criminal Code,<sup>11</sup> and in the Labour Code.<sup>12</sup> In case of conflicting provisions of different relevant pieces of legislation, the 2000 Anti-discrimination Law would prevail as *lex specialis*.

The 2000 Anti-discrimination Law provides for the establishment of the national equality body, *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)] which is mandated to ensure its enforcement. The NCCD has as a mandate in preventing discrimination through awareness raising and information and education campaigns, mediating between the parties, providing legal assistance to victims of discrimination, investigating and sanctioning discrimination, including initiating *ex officio* cases, monitoring discrimination cases, as well as proposing legislative bills and public policies to ensure harmonisation of legal provisions with the equality principle.<sup>13</sup>

Alternatively, the Anti-discrimination Law can be enforced by civil courts if the plaintiff seeks only civil remedies. A decision of the NCCD in such cases is not required but it might help in making a claim for damages under general torts provisions. Civil complaints on grounds of the Anti-discrimination Law are exempted from judicial taxes.

7 Romania/ Emergency Ordinance 75 from 11 July 2008 regarding measures taken to solve financial issues in the area of justice-related work published in the Official Gazette 462 from 20 July 2008. The Emergency Ordinance provides that the Anti-discrimination Law will be amended with the following provision: Article 19.3: Petitions regarding legislative measures issued in the context of establishing salary-related policies for the personnel working in the public sector do not fall under the mandate of the National Council on Combating Discrimination. The Ministry of Justice publicly justified the need for the Emergency Ordinance by invoking the crisis in relation to employees in the area of justice but no explanation was available in relation to the limitation of the mandate of the NCCD.

8 Romania/ Curtea Constituțională/Decision 1096 (15 October 2008). The Court maintained the constitutionality of Articles 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20 February 2009).

9 Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25.07.2006).

10 Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).

11 Romania/ Criminal Code, Law 278/2006 (4 July 2006).

12 Romania/ Labour Code (24 January 2003).

13 Romania/ Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)]. The official website of the institution is available at: [www.cncd.org.ro](http://www.cncd.org.ro) (06 May 2008).





## 0.2 Overview/State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?*

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

*This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

- a. The provisions on the burden of proof are not in full compliance with the Directives as the Romanian 2006 amendments to the 2000 Law introduced the concept of ‘sharing the burden of proof’ meaning that ‘the person interested has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’<sup>14</sup> While the NCCD’s interpretation of this provision tends to be in compliance with the Directives, judicial interpretation varied and some courts interpreted it as placing an unreasonable burden on the victim, conflicting with the provisions of the Directives in relation to burden of proof.
- b. In the case of direct discrimination in the areas of housing, access to services (including financial services) and goods, the 2000 Anti-discrimination Law allows for restrictions, if such a ‘restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.’<sup>15</sup> The possibility to allow justification of direct discrimination in the fields of housing and services is in breach of Directive 2000/43, which does not foresee such possibilities.
- c. None of the definitions of harassment provided for in the different relevant pieces of legislation are in complete compliance with the definition of harassment spelled out in the Directives.
- d. The prohibition imposed to the NCCD to solve complaints on discrimination in the area of salary related rights and benefits of civil servants following the adoption of the Emergency Ordinance 75/2008 arbitrarily erodes the mandate of the national equality body.

<sup>14</sup> Art.20 (6) of the Governmental Ordinance 137/2000.

<sup>15</sup> Art.10, Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).

- Following the adoption of the Emergency Ordinance, such complaints will be dealt with at the level of Courts of Appeal as courts of first instance.<sup>16</sup>
- e. The limitation of the Anti-discrimination Law by the Romanian Constitutional Court in a series of decisions issued in 2008 which limited both the mandate of the NCCD<sup>17</sup> and of the civil courts in relation to discrimination generated by legislative provisions,<sup>18</sup> created a gap in the effective protection against discrimination. As the Constitutional Court is the only entity able to assess and decide when a legal provision (law or ordinance) conflicts with the equality principle spelled out by the Constitution, the mandate of the NCCD should be adequately amended to include the possibility of automatically seizing the Constitutional Court in cases of discrimination triggered by laws or ordinances, in accordance with Article 146 letter d) of the Constitution which is currently providing for this capacity only in relation to the *Avocatul Poporului* [the Ombudsman].
  - f. Though provided by the Anti-discrimination Law, the NCCD did not develop so far an operational mechanism to monitor infringements of the legislation or to monitor compliance with its decisions hence, it is difficult to assess the effectiveness of its mandate.

Romania did not take advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability.

Romanian Anti-discrimination legislation applies to a larger number of criteria going beyond those provided by the Directives and the scope of the Anti-discrimination Law is applicable to areas beyond those spelled out in the Directives. The fact that the Romanian legal provisions went beyond the minimum requirements of the Directive increased the effectiveness of the anti-discrimination mechanisms and helped in increasing the visibility of the NCCD and the awareness regarding the provisions of the law.

### 0.3 Case-law

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences)

<sup>16</sup> Romania/ Emergency Ordinance 75 from 11 July 2008 regarding measures taken to solve financial issues in the area of justice-related work published in the Official Gazette 462 from 20 July 2008.

<sup>17</sup> Romania/Curtea Constituțională/Decision 997 from 7 October 2008 finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions is unconstitutional.

<sup>18</sup> Romania/Curtea Constituțională/Decisions 818, 819 and 820 (3 July 2008) published in the Official Gazette 537 from 16 July 2008. The Constitutional Court has concluded that the dispositions of Article 1(2) letter e) and of Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.



→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

#### Romani CRISS v. Traian Băsescu (NCCD decision)

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 23 May 2007

**Name of the parties:** Romani CRISS v. Traian Băsescu

**Reference number:** NCCD Decision 92/2007;

**Brief summary:** On May 19<sup>th</sup> 2007, the President of Romania was recorded while discussing with his wife in his car, while calling a journalist who allegedly harassed him 'filthy Gypsy,' after publicly calling her 'birdie' (păsărică), a pejorative with demeaning and sexual connotations. The NGO Romani CRISS filed a complaint with the NCCD for the racist remarks of the President. (The video recording and the press articles are available at [http://www.antena3.ro/Basescu-despre-o-jurnalista--tiganca-imputita\\_act\\_32833\\_ext.html](http://www.antena3.ro/Basescu-despre-o-jurnalista--tiganca-imputita_act_32833_ext.html), accessed on May 21<sup>st</sup>, 2007.) The NCCD decided that the expression 'filthy Gypsy,' is 'discrimination according to Articles 2(1) and 4 of the GO 137 from 2000 (Anti-discrimination Law)...and that the use of this expression damaged the dignity of persons belonging to Roma community.' Mr. Băsescu subsequently contested the decision before the courts of law arguing that the decision is illegal. The case raised both substantive and procedural issues such as the discussion on the legal value of the general definition spelled out as principle in the Anti-discrimination Law in the cases when it is not subsequently detailed in express provisions of the law; balancing the right to privacy in the case of public persons and the right to information; the definition of private message (can a private discussion become public due to a fraudulent recording); the use of evidences under Anti-discrimination Law. The NCCD found that:

- a. the act reported by the plaintiff in terms of discrimination on grounds of gender does not fall under administrative liability (hence, it can not be sanctioned under the Anti-discrimination Law);
- b. the act reported by the plaintiff in terms of discrimination on grounds of ethnicity amounts to discrimination as per Articles 2(1) and Article 2(4) of the Anti-discrimination Law and
- c. decided that Mr. Traian Băsescu will be sanctioned with an administrative warning. The sanction per se does not carry any penalty and had merely a symbolic value, but it had a huge impact given the media coverage of the topic- this was the highest ranking official against whom the NCCD issued sanctioned.

#### Traian Băsescu v. Consiliul Național pentru Combaterea Discriminării (appeal against the NCCD decision 92 from 2007)

**Name of the court:** Curtea de Apel București [Bucharest Court of Appeal]

**Date of decision:** 8 November 2007

**Name of the parties:** Traian Băsescu v. Consiliul Național pentru Combaterea Discriminării

**Reference number:** 450/2/2007 sentința civilă 2799

**Brief summary:** Traian Băsescu filed an appeal against the NCCD decision 92 from 2007 which found that his labelling of a journalist as ‘filthy Gypsy’ amounts to discrimination on grounds of ethnicity as defined by Article 2 of the Anti-discrimination Law and sanctioned him with an administrative warning (no pecuniary damages included).

In his defence the plaintiff invoked his right to privacy given that the discussion was recorded while he was in his car speaking with his wife, mentioned the lack of discriminatory intentions as proved by the activities of Mr. Băsescu and also challenged the applicability of Article 2 of the Anti-discrimination Law considering that this is a framework provision which does not entail a sanction and that his deed does not amount to discrimination as there was no discriminatory intention in his statement. The sanction of administrative warning was also challenged as it is not specifically provided by the Anti-discrimination Law. In its defence, the NCCD argued on the enforceability of Article 2 and mentioned that while the discussion was a private one and the recordings were publicised later on by the media without the consent of the President, its impact is public, such a statement made by the President having an impact on the entire society.

The court rejected the arguments of the plaintiff and considered that the indirect discrimination consisted in the unjustified behaviour of the plaintiff which was made public and that the expression used amounted to discrimination as it represented a negative conduct, of humiliation and serious harm caused to the dignity of a person. The court maintained that discrimination occurred no matter where and how the discriminatory statement was made. The court held that the lack of intention is not relevant for the existence of the discrimination and that the plaintiff ‘given his quality of a public personality had a duty to be responsible and moderate when expressing himself no matter where he might be.’ As for the sanction of administrative warning, the court maintained that it is provided by the Ordinance 2/2001 which completes the Anti-discrimination Law. The Court of Appeal dismissed the appeal of Traian Băsescu.

Traian Băsescu v. Consiliul Național pentru Combaterea Discriminării (appeal against the decision of the Court of Appeal 450/2/2007 sentința civilă 2799 from 8.11.2007)

**Name of the court:** Înalta Curte de Casație și Justiție [High Court of Cassation and Justice]

**Date of decision:** 15 May 2008

**Name of the parties:** Traian Băsescu v. Consiliul Național pentru Combaterea Discriminării

**Reference number:** Decision 1960, File No. 4510/2/2007

**Brief summary:** Traian Băsescu filed an appeal against the NCCD decision 92 from 2007 sanctioning him with an administrative warning after he was recorded while saying about a journalist that she was a ‘filthy Gypsy.’ As the Court of Appeal maintained the decision of the NCCD, Traian Băsescu appealed against the decision of the Court of Appeal. The High Court of Cassation and Justice (HCCJ) quashed the decision of the Court of Appeal, quashed in part the decision of NCCD and maintained parts of the decision. While maintaining that the expression ‘filthy Gypsy’ amounts to discrimination, the HCCJ quashed the sanction of administrative warning.

In its reasoning, the HCCJ stated that Article 2 of the Anti-discrimination Law whose applicability was challenged by Traian Băsescu ‘offers the definitions in the area of anti-discrimination, establishing the principles governing this area and the scope of the norm as well as sanctions discrimination by triggering civil, administrative or criminal liability.’



The Court read the Anti-discrimination Law in conjunction with the special legislation regulating the regime of misdemeanours and found that only a limited category of types of discrimination, those specifically spelled out by Article 26 (7) of the Anti-discrimination Law can be sanctioned with an administrative fine, and the list does not include the general provisions provided for in Article 2 paras. (1) and (4).

Consequently, even if the affirmation of Traian Basescu was deemed as discriminatory, it could not be sanctioned due to the lack of specific legal provisions. In discussing the lack of guilt in the form of direct or indirect intention, the HCCJ emphasised that this was a private conversation between Traian Basescu and his wife, which was not meant to have public consequences, the Court stated that ‘the plaintiff was not supposed to and it was not possible for him to guess the impact of his action, lacking the concept that such a private discussion with his wife might be recorded and that the recording will be later on made available to the public.’ The Court considered that the jurisprudence of the ECHR invoked by the NCCD and by the Court of Appeal when finding that as a public person, the president was under a higher burden of a moderate behaviour was irrelevant for the case.

#### Glina School Segregation case

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 27 August 2007

**Name of the parties:** NCCD started the case *ex officio* against 3 schools in Ilfov county

**Reference number:** Glina School Segregation case, File no. 22A Bis /2006,

**Brief summary:** The NCCD started an *ex officio* investigation following a newspaper article entitled “*La Glina, țiganii sunt exilați în clasele lor*” [In Glina, Gipsies are Exiled in Their Own Classrooms] published in „Gândul” on 10 November 2006.

The report mentioned the disparate percentage of Roma pupils in two different schools in Jilava (almost no Roma pupils in one of the schools and 95% Roma pupils in the other) and the segregation of Roma pupils in Jilava and Glina where Roma students were enrolled in separate classes. In its reasoning, the NCCD referred to international prohibitions of school segregation (1960 UNESCO Convention on Fight against Discrimination in Education and Council of Europe and CERD recommendations) and used the definition of school segregation proposed by the Ministry of Education as „establishment of groups including exclusively or preponderantly Roma pupils, regardless of the reasons invoked for the segregation.” The NCCD found that the composition of the two schools in Jilava is justified by the topography of the Roma community (which was nearby the school with a higher percentage of Roma pupils and 3 kilometres to the other school) and that Roma pupils were segregated in the case of the school from Glina. The NCCD found that the situation in one of the schools amounted to segregation and issued an administrative warning to sanction the deed of discrimination under Article 2 (1) and Article 2(4) of the Anti-discrimination Law.

The administrative warning is an administrative sanction carrying no pecuniary penalty which has mostly an educational value. No follow-up monitoring to identify the impact of the NCCD Decision or whether the school is still segregated had been reported.



Daniel Zăvoian v. Distrigaz Sud

**Name of the court:** Judecătoria sectorului 4 București; [court of first instance No.4, Bucharest]

**Date of decision:** 01 August 2007

**Name of the parties:** Daniel Zăvoian v. Distrigaz Sud, Decision 4222

**Reference number:** Decision 4222 in File no.710/4/2006

**Brief summary:** The plaintiff complained of being subjected to discriminatory conduct based on his affiliation with an NGO defending the rights of LGBT in Romania (ACCEPT București).

The plaintiff was employed by the NGO and when he went to pay the monthly bill of the NGO to the defendant, employees of the defendant subjected him to degrading remarks. The plaintiff sought civil damages and asked the court to order the defendant to take institutional measures to preclude discriminatory behaviour in the future, to include in its internal norms a specific prohibition of discrimination on all grounds and to train its employees on anti-discrimination provisions. The court defined 'interest' in conjunction with 'the practical gain obtained' and stated that 'the interest must exist, be personal, real and actual and legal.' In the decision the court provided an explanation of its understanding of the concept of sharing the burden of proof, linking it to accessibility of evidence. The court stated that the plaintiff proved the existence of the facts entailing an act of discrimination while the defendant did not prove that the facts proved are not discriminatory. The court clarified the concept of liability of the employer for the deeds of its employees under the anti-discrimination legislation in conjunction with the provisions of the Civil Code for torts by referring to the fact that the discriminatory statements had been tolerated by the persons in positions of responsibility in that particular institution and that the requests of the plaintiffs to discuss with persons in senior positions had been dismissed. The court also discussed the issue of system remedies such as the institutional measures on combating discrimination and diversity management policies or the trainings requested by the plaintiff as a possible remedy and decided not to grant such remedies as it considered that there is no 'personal interest' for the plaintiff in being granted such general remedies.

B. R. v. A. V., administrator of the Oradea Zoo, M. I., human resources manager and Regia Autonomă de Piețe, Agreement și Salubritate Oradea

**Name of the court:** Tribunalul Bihor [Bihor County Tribunal]

**Date of decision:** 01 October 2007.

**Reference number:** Sentinta Civila [Civil Judgement] No.620/L.M./2007, File No.6094/111/2006;

**Name of the parties:** B. R. represented by ACCEPT v. A. V., administrator of the Oradea Zoo, M. I., human resources manager and Regia Autonomă de Piețe, Agreement și Salubritate Oradea (employer)

**Brief summary of the key points of law:** B. R. was subjected to discrimination and victimisation by his superiors and by his employer because of his supposed sexual orientation. The acts of discrimination included discriminatory remarks in the presence of his colleagues; B. R. was asked to resign; B. R. was given a disciplinary sanction because he lodged a complaint of discrimination with the equality body (NCCD) which conducted an investigation at his workplace; B. R. was removed from his position at the Zoo and sent to a different work place, the cemetery, also in the administration of the employer.

B. R. was subjected to discrimination, harassment and victimisation by the employer through its representatives (A. V. and M. I.). This was demonstrated by the decision of the NCCD and by the declaration of one witness.

The disciplinary sanction and the removal from his position at the Zoo are illegal and void. These behaviours created serious suffering for B. R. and require compensation. The application to the discrimination cases of the civil responsibility principle: the acts of the employees perpetrated at work or in relation to their work fall under the responsibility of the employer. The labour decisions sanctioning the plaintiff were declared illegal and void.

The payment of RON 3,000<sup>19</sup> (EUR 900) compensation for moral damages. Injunction upon the employer to end all discrimination, harassment and victimisation and to present public apologies in front of the Zoo's employees. RON 50 (around EUR 1.50) civil fine for each day of delaying the enforcement.

The appeal against this decision was rejected by Curtea de Apel Oradea, secția civilă mixtă [Oradea Court of Appeal - civil law section] in decision 647/2008-R from 17 April 2008 and remained final. The decision against the employer was not enforced as for July 15<sup>th</sup>, 2008. Since the employer is a public company, the case can be used to lobby the government to include standards of non-discrimination within public companies.

#### P.M.G. v. priest I.S.

**Name of the court:** Consiliul National pentru Combaterea Discriminarii [National Council on Combating Discrimination]

**Date of decision** 18 January 2005

**Reference number:** Decision 16 from 2005

**Name of the parties:** ACCEPT and CRL on behalf of P.M.G. v. priest I.S.

**Brief summary of the key points of law:** Two NGOs, ACCEPT and the Center for Legal Resources filed a complaint on behalf of the plaintiff who worked as a singer in the church choir of Biserica Adormirea Maicii Domnului, Braila County. After the religious service, the local priest presented a local newspaper with an announcement of a young gay man seeking a partner, claiming that the announcement belonged to P.M.G. P.M.G. complained to the Bishop but the priest started to spread rumours in the community and convened a local council to investigate the private life of PMG. The NCCD found that the deeds of the priest had the effect of excluding P.M.G. from the local community and from his position as a singer in the church choir and that the priest spread rumours with the effect of restricting the right to privacy and the right to dignity. The NCCD noted that the statements of the defendant were issued *nome proprio*, after the religious service and did not represent the position of the Orthodox Church, noting that the hierarchy of the church tried to intervene and mediate in the dispute.

In the dissenting opinion, it was underlined that the priest acted as a representative of the Orthodox Church which considers homosexuality as a sin and that the priest is under a religious oath all the time. The NCCD issued an administrative fine of ROL 10,000,000 (EUR 278).

19 On July 1st 2005 a process of denominationalization took place. Subsequently, ROL 10,000 became RON 1.





A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita [Harghita County Public Finances General Inspectorate]

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 09 January 2008

**Name of the parties:** A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate]

**Reference number:** Decision no. 43 from file number 353/2007

**Brief summary:** A.M. complained against the advertising of hiring possibilities as civil servants with the local finances inspectorate mentioning as specific condition ‘knowledge of Hungarian language.’ The NCCD applied the provisions of Article 9 of the Anti-discrimination Law and assessed both the legitimacy of the aim pursued and the methods used.

Though the purpose of ensuring services to minorities in their mother tongue was legitimate and the defendant justified its actions by invoking the legal requirement of making arrangements to ensure services for minorities when they amount to 20 per cent of the total population in a locality. The NCCD commended the value of affirmative measures such as establishing linguistic requirements in areas where national or ethnic minorities live but emphasised that such measures should be temporary and should cease once the objective of protecting the minority is achieved. The NCCD questioned the adequacy of the methods chosen to reach that particular aim and their negative impact in relation to the Romanian community which, in that particular area, is a *de facto* minority. The NCCD found that when the percentage of employees from a certain community is approximately the same with the percentage of that particular community in the area, affirmative measures cannot be maintained because otherwise they would generate by themselves a situation of discrimination. The NCCD sanctioned the Harghita county Public Finances General Inspectorate with an administrative fine of RON 1,000 (EUR 300).

Marginalisation of persons with hearing and speaking disabilities caused by the lack of adaptation of main TV shows broadcasted by the national TV stations

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 26 May 2008

**Name of the parties:** Societatea Română de Televiziune [Romanian Public Television]

**Reference number:** Decision no. 535,

**Brief summary:** The NCCD found that the persons with hearing or speaking deficiencies are denied their right to be informed, their right to education and culture because the Romanian public television provided a limited number of shows accessible for such groups (only TV shows targeting persons with disabilities).

The NCCD considered that the right to information of persons with disabilities is not fully satisfied by the specialised shows which do not include news and sanctioned the Romanian Public Television for infringing Articles 2 (1) and (3) corroborated with Article 1(2)c and Article 10 h of the Anti-discrimination law and issued an warning recommending the Romanian Public Television to take necessary measures to ensure access of persons with hearing and speaking deficiencies.



The decision also mentioned the intention to carry on monitoring the activity of the Romanian Public Television for six months to secure implementation of the recommendations. Subsequently, the Romanian Public Television provided for subtitles and interpretation of a larger number of TV shows, including news.

Discrimination generated by the provisions of the Emergency Ordinance 148/2005 regarding the support of the family for raising the child in relation to mothers with an income bigger than the average

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 10 April 2008

**Name of the parties:** Not available

**Reference number:** Decision no. 302,

**Brief summary:** The Emergency Ordinance 148/2005 provided that the parents who are taking leave of absence to raise their children until the age of two, respectively, until the age of three in the cases of children with disabilities, receive a monthly indemnity (compensation for raising their child) of RON 600 (approx. EURO 150) no matter the amount of their contribution to social services in the period when they were actively employed. The plaintiffs complained that the amount of RON 600 per month provides a net income of RON 300 for the mother and the child, lower than the minimum salary. In this way, the mothers with an income bigger than the average income are disadvantaged and discriminated against due to this flat indemnity which is not taking into consideration their contribution to the social insurances. The NCCD stated that the principle of equal opportunities would be adequately addressed in a system combining the principle of solidarity (by ensuring a minimum indemnity for persons with low incomes) with an individualisation by observing the incomes and correlative contributions to the state budget of each person (by ensuring indemnities proportional with the contributions to the state budget). The NCCD found that Articles 1(1) and @ of the Emergency Ordinance are discriminatory as they are not justified by an objective and legitimate objective according to Article 14 of the ECHR, Article 16(1) of the Romanian Constitution, Article 1 (2), Article 2(3), Article 6(1) of the Anti-discrimination Law and recommended to the Ministry of Labour, Family and Equal Opportunities to promote a law regulating the quantum of the indemnity for raising the children until they reach the age of two, also based on the contribution of the beneficiaries of the indemnity. Subsequently, the Romanian Parliament amended the Emergency Ordinance and provided for an indemnity for raising the child of 85% of the average income in the last twelve months before the birth. In 2009, a minimum limit of RON 600 (EURO 150) as well as a higher limit of RON 4000 (EURO 1000) had been introduced.

Discrimination against persons with Hepatitis B,C,D who are older than 65 as well as against persons with hepatic cirrhosis with virus B,C and D by the Ministry of Health

**Name of the court:** Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]

**Date of decision:** 13 November 2008

**Name of the parties:** Ministerul Sănătății Publice [Ministry of Public Health] and Casa Națională de Asigurări de Sănătate [National Health Insurance College]

**Reference number:** Decision no. 605,



**Brief summary:** The Order 658/2006 regarding the criteria of eligibility for access to anti-viral treatment and therapeutic packages for patients suffering of viral chronic hepatitis B,C,D as well as patients suffering of hepatic cirrhosis BVB,C and D issued by the Ministry of Health and the National Health Insurance College provided that persons over 65 suffering of chronic hepatitis B, VHB+VHD as well as of chronic hepatitis of type C cannot receive the treatments they required.

The NCCD found that the justification for using different schemes of treatment is determined by the state of the patient and by the necessity of providing a treatment adequate to the clinical situation of the patient and not his or her age. The NCCD found that the provisions of the Order are discriminatory conflicting with Article 2(1) of the Anti-discrimination Law and recommended to the Ministry of Health and the National Health Insurance College to take all adequate measures to annul the provisions limiting access of persons over 65 to anti-viral treatment and a therapeutic scheme in case of patients with hepatic cirrhosis HVB, C and D.

**Name of the court:** Curtea Constituțională

**Date of decision:** 15 October 2008

**Name of the parties:** ALRO Slatina v. NCCD

**Reference number:** Decision 1096

**Brief summary:** ALRO Slatina, a private entity against whom the NCCD issued a decision for discriminatory treatment, challenged the constitutionality of Articles 16-25 of the Anti-discrimination Law, defining the mandate of the NCCD. The plaintiff alleged that the NCCD was an extraordinary jurisdiction established by ordinary legislation, thus infringing the constitutional prohibition of establishing extraordinary instances. The Romanian Constitutional Court ruled in favour of the NCCD. The Court affirmed the legality of the NCCD and its status of special administrative jurisdiction, an optional venue in addressing cases of discrimination and confirmed that the proceedings before the NCCD as provided by Article 21 (4) pass the constitutional muster. The Court highlighted that the NCCD is an administrative body with jurisdictional mandate, which presents the elements of independence required for administrative-judicial activities and which observes the constitutional provisions of Article 124 and Article 126 (5) on the prohibition of establishing extraordinary tribunals.

**Name of the court:** Curtea Constituțională

**Date of decision:** 03 July 2008, published in the Official Gazette 537 from 16 July 2008

**Name of the parties:** Ministry of Justice v. NCCD

**Reference number:** Decisions 818, 819 and 820 of the Romanian Constitutional Court

**Brief summary:** Following a pending conflict between the personnel from the judiciary and the Ministry of Justice regarding salary-related rights and a series of decisions issued by the equality body, the National Council on Combating Discrimination and by various courts of law finding that the relevant provisions of the norms regulating salary-related rights and benefits are conducive to discrimination, the Ministry of Justice challenged the constitutionality of Articles 1(2) letter e) and 27 of the Anti-discrimination Law.

The Constitutional Court has concluded that the dispositions of Art. 1(2) letter e) and of Article 27 of the Governmental Ordinance 137/2000 (the Anti-discrimination Law ) are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.



Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that in the application of the Law, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus ‘creating legal norms or substituting them with other norms of their choice.’

**Name of the court:** Curtea Constituțională

**Date of decision:**

07 October 2008 published in the Official Gazette 774 from 18 November 2008

**Name of the parties:** Ministry of Justice v. NCCD

**Reference number:** Decision 997 of the Romanian Constitutional Court

**Brief summary:** In Decision 997 of 7.10.2008, the Romanian Ministry of Justice challenged the constitutionality of Article 20 (3)<sup>20</sup> of the Anti-discrimination Law, defining the mandate of the NCCD.

In its argument, the Ministry stated that the decision of the NCCD forcing the Ministry of Justice and the relevant courts to pay salary related rights in a series of cases where the NCCD found that discrimination occurred was unconstitutional. The Romanian Constitutional Court ruled in favour of the Ministry of Justice, stating that even if ‘the NCCD can find that discrimination occurred (being triggered by legislative acts) and it can issue its opinion regarding the (need for) harmonisation of legal provisions with the principle of non-discrimination... (however) the NCCD can find that discriminatory situations took place and that they are caused directly by the provisions of certain legal norms, (subsequently) the decision of the NCCD might have as effect even bringing to an end the enforceability of such provisions and even the application by analogy of other legal norms, which are not related to the person or to the group which was discriminated against. In such a case, it is under question the very legitimacy of this body (the NCCD) to interfere with the competencies of the legislative power... as well as with the competencies of the Constitutional Court to act as a negative legislator when the provisions of a law or of an ordinance are not in conformity with the constitutional provisions from Article 16 on non-discrimination.’ The decision of the Constitutional Court declared unconstitutional the mandate of the NCCD in relation to examining and sanctioning complaints regarding legislative provisions which are deemed as triggering discrimination.

**Name of the court:** Curtea Constituțională

**Date of decision:** 04 December 2008

**Name of the parties:** Ministry of Justice v. NCCD

**Reference number:** Decision 1325 of the Romanian Constitutional Court

**Brief summary:** In Decision 1325 from 04 December 2008, the Romanian Ministry of Justice challenged the application of Article 27 of the Anti-discrimination Law by the courts which invoked the provisions of the Anti-discrimination Law when declaring legislative provisions as triggering discrimination in relation to salary related rights of the magistrates and when creating new norms to grant such rights based on the principle of equality.

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<sup>20</sup> Article 20 (3) reads: ‘In the complaint filed according to Article 20(1), the person who considers himself/herself discriminated against has the right to request for the consequences of the discriminatory deeds to be repealed and for the situation prior to the discrimination to be re-established (status quo antes).’



This practice was perceived as an infringement of the principle of separation of powers and the Constitutional Court decided that the provisions of the Anti-discrimination Law 'are unconstitutional as long as they are interpreted as implying that the courts are competent to nullify or refuse the enforcement of legal provisions adopted as laws, considering that they are discriminatory and replacing them with norms created by the judiciary or with provisions provided for in other norms.'

**Moldovan and others v. Romania (1) and (2)**

**Name of the court:** European Court of Human Rights

**Date of decision:** 12 July 2005

**Name of the parties:** Moldovan and others v. Romania (1) and (2)

**Reference number:** 41138/98 ; 64320/01

**Brief summary:** killing of a Roma man, arson, destruction of properties and failure in ensuing investigations. The Court found:

- continuing violation of Article 8 (right to respect for private and family life and home) of the European Convention on Human Rights;
- violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention;
- no violation of Article 6 § 1 (access to court);
- violation of Article 6 § 1 (right to a fair hearing) on account of the length of the proceedings;
- violation of Article 14 (prohibition of discrimination) taken in conjunction with Articles 6 § 1 and 8.

Out of the 25 plaintiffs, a part of the victims sought and were awarded pecuniary damages, for other 17 victims a friendly settlement had been reached with the Romanian authorities undertaking to:

- enhancing the educational programs for preventing and fighting discrimination against Roma within the school curricula in the Hădăreni community, Mureș County;
- drawing up programs for public information and for removing the stereotypes, prejudices and practices towards the Roma community in the Mureș public institutions competent for the Hădăreni community;
- initiating programs of legal education together with the members of the Roma communities;
- supporting positive changes in the public opinion ~~of the Roma~~ <sup>of the Hădăreni</sup> community concerning Roma, on the basis of tolerance and the principle of social solidarity;
- stimulating Roma participation in the economic, social, educational, cultural and political life of the local community in Mureș County, by promoting mutual assistance and community development projects;
- implementing programs to rehabilitate housing and the environment in the community;
- identifying, preventing and actively solving conflicts likely to generate family, community or inter-ethnic violence.



A Government Decision 523/2006 had been adopted in 2006 to provide for the implementation of these undertakings, as by 2008 no adequate intervention had been carried out, following a hunger strike, the NCCD undertook responsibilities in relation to most activities.

**Name of the court:** European Court of Human Rights

**Date of decision:** 26 July 2007

**Name of the parties:** Cobzaru v. Romania

**Reference number:** 48254/99

**Brief summary:** police violence against Roma man and failure in ensuing investigation. The Court found:

- violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights concerning the ill-treatment of the applicant – who is of Roma origin – by the police;
- violation of Article 3 concerning the inadequate investigation into the applicant's allegations of ill-treatment;
- violation of Article 13 (right to an effective remedy) of the Convention;
- violation of Article 14 (prohibition of discrimination) concerning the Romanian authorities failure to investigate possible racial motives in the applicant's ill-treatment and their attitude during the investigation.

**Name of the court:** European Court of Human Rights

**Date of decision:** 04 March 2008

**Name of the parties:** Stoica v. Romania

**Reference number:** 42722/02

**Brief summary:** racially motivated beating of a Romani youth aged 14 at the time by police officers, and the failure to ensure an adequate official investigation. The Court found:

- violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights concerning the applicant's allegation of ill-treatment by the police;
- violation of Article 3 of the Convention concerning the lack of an effective investigation;
- no violation of Article 13 (right to an effective remedy);
- violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 3.

**Name of the court:** European Court of Human Rights

**Date of decision:** Gergely v. Romania, 26 April 2007 and Kalanyos and Others v. Romania 26 July 2007

**Name of the parties:** Gergely v. Romania and Kalanyos and Others v. Romania

**Reference number:** 57885/00 and 57884/00

**Brief summary:** The applicants complained about destruction of their property and the ensuing proceedings before the domestic courts, relying on Articles 3 (prohibition of inhuman or degrading treatment), 6 § 1 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination).





The cases were struck out following an undertaking by the Romanian government to adopt relevant measures. The Governmental Decision 1283 from 8.10.2008 provided for the responsibilities of the NCCD in developing educational programs and taking relevant measures in the two villages.

**Name of the court:** European Court of Human Rights

**Date of decision:** 20 April 2004

**Name of the parties:** Notar v. Romania

**Reference number:** 42860/98

**Brief summary:** beating of Romani youth during arrest and subsequent detention, ill-treatment and degrading treatment during investigations relying on Article 3, failure in ensuring proper criminal investigations upon the complaint of the victim relying on Article 13, unlawful arrest and detention relying on Article 5 §§ 1, 2, 3, 4 and 5).

The case has been struck out following a friendly settlement in which the applicant is to receive EUR 40,000 plus EUR 875 for pecuniary damage and EUR 8,712.66 for costs and expenses.

A large amount of cases initiated by the NCCD ex officio and of complaints received by the NCCD are complaints filed by Roma victims or Roma NGOs on behalf of Roma victims.

The NCCD categorises under ethnic origin all cases regarding Roma-ethnicity in its data collection, as there are no clear published guides available on how the national equality body defines a case as a case of racial discrimination or as a case of ethnic discrimination.

The 2006 report of the NCCD states that from a total of 1.542 complaints received by the time of the reporting for the interval 2002-2006, 40 per cent (252 complaints) are complaints of alleged ethnic discrimination. In this case, the proportion of finding and sanctioning discrimination deeds is higher than in complaints on other grounds: 21 per cent.

The 2007 annual report of the NCCD mentions an increase in the number of petitions filed on grounds of ethnicity (82 in 2007 compared to 63 in 2006), with the largest percent of petitions in the area of the right to personal dignity (41.47 per cent), followed by access to public services (26.82 per cent) and access to education (14.63 per cent).<sup>21</sup>

The 2008 annual report of the NCCD mentions a total amount of 837 petitions filed with the NCCD, out of which 62 were on grounds of ethnic origin, 54 on grounds of nationality, 11 on grounds of language, 15 on grounds of religion and 14 on grounds of belief, 372 on grounds of belonging to a particular socio-professional group, 32 on grounds of gender, 6 on grounds of sexual orientation, 24 on grounds of age, 55 on grounds of disability, 4 on grounds of chronic non-contagious illness, seven on grounds of seropositive status, 22 on grounds of belonging to a vulnerable group and 159 on other grounds. The largest number of petitions are on access to employment (409), access to public services (213), personal dignity (100).<sup>22</sup>

21 Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2007.

22 Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2008.



The 2008 report highlights that in nine per cent of the cases decided in 2008, the NCCD found that discrimination occurred, while 67 per cent of the petitions reviewed had been rejected for various reasons and in 24 per cent the NCCD found that it was not under its competency to respond to the petitions.

### **NCCD procedures and complaints received and cases solved on ethnic origin for 2003-2007**

	2003	2004	2005	2006	2007
Procedures (investigations, audits etc.) initiated by NCCD on Roma cases ex officio	0	0	26	10	9
Complaints on Roma ethnic origin received by NCCD	41	45	85	69	82
Number of cases of discrimination established by NCCD for Roma ethnic origin	15	6	22	10	10
Sanctions issued by NCCD in cases of discrimination against Roma	-	5 warnings 1 fine- of RON 600	12 warnings 10 fines of RON 14500	3 warnings 4 fines of RON 4250  3 recommen- dations.	4 warnings 1 fine – of RON 600  5 recommen- dations

## NCCD statistics on ethnic discrimination occurred according to sanctions applied 2002-2006

Area of discrimination	Sanctions/Year			
	2002/03	2004	2005	2006
Discriminatory advertisement in press: 14	9	0	5	0
Discriminatory press articles on Roma: 12	8	0	4	0
Denial of access to public places: 10	7	1	2	0
Hate speech: 8	1	2	5	0
Discrimination in sport (racist slogans): 2	0	0	2	0
Employment (commercial relations): 1	0	0	1	0
Segregation in education (Roma): 2	1	0	0	1
Denial of service in public places: 1	0	0	1	0
Denial of access to stores: 1	0	0	1	0
Discriminatory statistics of Police: 2	0	0	1	0
Eviction and discriminatory relocation of Roma: 1	0	0	1	0
Total: 53	26	3	23	1

Although the number of complaints against alleged discriminatory behaviour of public officials (institutions) is the highest (18 complaints), no sanction was issued in this area by the NCCD. The behaviours most likely to be sanctioned are discriminatory remarks against Roma, media articles related to Roma (prejudice and stereotypes) (nine sanctions), and access to public places and stores (denial of access) (four sanctions) or discriminatory advertising (four).

The following data is generated by a private researcher, currently a member of the Steering Board of the NCCD, Mr. Istvan Haller who reviewed and compiled all the decisions of the NCCD up to 2006.<sup>23</sup>

Haller's study for **2003** shows 48 decisions on Roma (representing 69,9 per cent of all racial discrimination decisions) – out of which:

- in 31 cases there was no sanction,
- in 7 cases the NCCD issued a warning, and
- in 9 cases it applied an administrative fine.

<sup>23</sup> Istvan Haller, Study on Racial and Ethnic Discrimination – analysis of statistical data: 2003-2006 (work in progress).



Haller's study for **2004** states that there were 59 decisions on discrimination against Roma, representing 67,8 per cent of racial discrimination decisions, out of which:

- in 54 cases there was no sanction,
- in 4 cases the NCCD issued a warning, and
- in 1 case the NCCD applied an administrative fine.

Haller's study for **2005** states that there were 67 decisions on discrimination against Roma, representing 60,4 per cent of racial discrimination decisions, out of which:

- in 48 cases there was no sanction,
- in 10 cases the NCCD issued a warning, and
- in 9 cases the NCCD applied an administrative fine.

Haller's study for **2006** states that there were 52 decisions on discrimination against Roma, representing 57,1 per cent of racial discrimination decisions, out of which:

- in 48 cases there was no sanction,
- in 3 cases the NCCD issued a warning, and
- in 2 cases it applied an administrative fine.

#### **Decisions sanctioning discrimination in 2008 as provided by the NCCD 2008 annual report**

Area/Ground of discrimination	Number of petitions in respect of discrimination with sanctions imposed
<b>Employment and work relations</b>	
Changing the position/beliefs/professional category	5
Access to profession/age	4
Not granting social rights and indemnities/professional category	3
Access to profession/professional category	3
Promotions /professional category	2
Work conditions/professional category	2
Conditions for employment/language	2
Access to a profession/social category	2
Access to a profession/nationality	1
Access to a profession/citizenship	1
Access to a profession/ethnicity	1
Access to a profession/residence	1
<b>TOTAL</b>	<b>27</b>



Area/Ground of discrimination	Number of petitions in respect of discrimination with sanctions imposed
<b>Access to public services and others</b>	
Access to public services and other premises/disability	5
Indemnity for raising the child/contribution	5
Access to public services and premises/social category	2
Access to public services and premises/language	2
Access to public services/refusal/ethnicity	2
Access to education/segregation/ethnicity	2
Access to health services/gender	2
Access to public services/age	1
Access to services and facilities/ethnicity	1
Access to public services/residence	1
Access to public services/criminal record	1
Access to education/social category	1
Access to association of tenants/refusal/age	1
<b>TOTAL</b>	<b>26</b>
<b>Right to personal dignity</b>	
Discriminatory statements/ethnicity	9
Discriminatory statements/Jewish nationality	2
Discriminatory statements/Turkish nationality	1
Discriminatory statements/Hungarian nationality	1
Discriminatory statements/Romanian nationality	1
Discriminatory statements/HIV	1
Discriminatory statements/region	1
Discriminatory statements/sexual orientation	1
Discriminatory statements/disability	1
<b>TOTAL</b>	<b>18</b>



## 1. GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The equal treatment of all citizens and general anti-discrimination provisions are guaranteed by the Romanian 1991 Constitution in Articles 1.(3), 4.(2), 6 and 16.<sup>24</sup>

- Article 1(3): ‘Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.’
- Article 4: ‘(1) The State foundation is laid on the unity of the Romanian people and the solidarity of its citizens. (2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.’
- Article 6: (1) The State recognises and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity. (2) The protection measures taken by the Romanian State for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens.
- Article 16: ‘(1) Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law. (3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities. (4) After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies.’
- Article 30 (7): ‘Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination...shall be prohibited by law.’<sup>25</sup>

The material scope of the constitutional equality clause covers all fundamental rights thus going beyond the material scope covered by the Directives.

<sup>24</sup> The Constitution of Romania of 1991 was amended and completed by the Law 429/2003 on the revision of the Constitution of Romania, (29.10.2003), available at <http://www.cdep.ro/pls/dic/site.page?id=371> (10.01.2008).

<sup>25</sup> The Constitution of Romania of 1991 amended and completed by the Law 429/2003 on the revision of the Constitution of Romania, (29.10.2003), available at <http://www.cdep.ro/pls/dic/site.page?id=371> (10.01.2008).



Specific grounds spelled out by the Constitution in the context of the equality principle are: race, nationality, ethnic origin, language, religion, gender, opinion, political adherence, property and social origin.

The constitutional text does not explicitly provide for the protection against discrimination on grounds of disability, age or sexual orientation as stated in the Directive 2000/78/EC but it mentions protection against discrimination on grounds of language, opinion, political adherence, property or social origin – none of these categories is further defined by the constitutional provisions or by implementing legislation.

The provision of positive measures from Article 6 (2) is specific to national minorities only, though nor the Constitution or the subsequent legislation define national minorities.

*b) Are constitutional anti-discrimination provisions directly applicable?*

The constitutional provisions are not self-enforcing, subsequent legislation is necessary for the effective implementation of all these principles.

*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

The provisions of the Romanian Constitution cannot be directly enforced against public or private actors and subsequent implementing legislation is required.





## 2. THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

Article 2 of the Anti-discrimination Law defines discrimination as:

‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’<sup>26</sup>

Article 4 of the Anti-discrimination Law defines ‘disadvantaged group’ as: ‘the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to personal differences or is faced with rejection and marginalisation.’ Prior to the 2006 amendment, the text included as exemplifications ‘chronic non-infectious disease, HIV infection or the status of refugee or asylum-seeker’ but this list with exemplifications was deleted by the Parliament in 2006 during subsequent rounds of amendments, thus leaving to the national equality body or to the courts to interpret the meaning of the concept of ‘disadvantaged group.’

The Romanian Anti-discrimination Law includes all grounds listed by the Directives and opens up for an even more inclusive approach by asserting also other protected grounds such as ‘social status,’ ‘belonging to a disadvantaged group’ or ‘any other criterion.’ Particularly the catch-all phrase ‘any other criterion’ proved itself useful in cases when discrimination was not based on any of the criteria spelled out in the law.

In a 2005 case started *ex officio*, the NCCD sanctioned Consiliul Județean Cluj (Cluj County Council) with ROL 40,000,000 (EUR 1,150) for treating differently employees in the private sector from employees in the public sector in relation to access to a national program of subsidised housing. For the purposes of the case, persons employed in the private sector were defined as belonging to a social category and were considered to be discriminated against on grounds of their belonging to such a group.<sup>27</sup>

In a 2007 case, the trade union from a private entity with public funding, SC STIPO SA filed a complaint against the Ministerul Muncii, Solidarității Sociale și Familiei [the Ministry of Labour, Social Solidarity and Family] and Agenția Națională pentru Ocuparea Forței de Muncă [the National Authority for Employment] regarding the policies adopted during the redundancies between 2003-2006 and the compensations offered.<sup>28</sup>

<sup>26</sup> The official English translation of the Ordinance 137/2000 had been used, unless the terminology used needed more clarifications.

<sup>27</sup> NCCD Decision, Cluj County Council case, 2005.

<sup>28</sup> NCCD Decision, Sindicatul Liber al Sticlarilor din cadrul SC STIPO SA Dorohoi v. Ministerul Muncii, Solidarității Sociale și Familiei și Agenția Națională pentru Ocuparea Forței de Muncă, from 13.03.2007, file 282/2006.

The plaintiff alleged that the employees of STIPO SA made redundant received a different treatment than employees made redundant in 2003 and 2004, though their situation was comparable. The NCCD found that ‘even though at the basis of the difference in treatment there was no criterion mentioned by the Ordinance as ground for discrimination, the failure of paying the compensation for those made redundant in 2006 generated the infringement of recognising a right granted in the legislation by the Emergency Ordinance 8/2003 regarding special measures of social protection.’ The NCCD found that the different treatment applied to groups in a comparable situation amounted to discrimination and recommended to the National Agency for Employment to take adequate measures.

In a 2008 case, initiated ex officio, the firm E SRL was sanctioned with an administrative warning following the publication of a job advertising including among the criteria the residence in particular districts of Bucharest. While recognising the intention of the plaintiff was not to discriminate against persons living in other districts than those listed in the advertisement, the NCCD considered that distinguishing on grounds of residence when employing a person cannot be objectively justified and that the advertising amounts to ‘exclusion on grounds of residence which has as effect limiting the access to a job and the publication of the advertising amounts to an active conduct which unjustifiably puts a group of persons in a less favourable position than others due to the effects of the announcement.’<sup>29</sup>

The NCCD found that the inadequate standards of treatment in relation to persons suffering from mental disabilities hospitalised in Predeal hospital when compared to patients in other hospitals amounts to discrimination and ‘recommended to the Ministry of Health to ensure adequate treatment of persons hospitalised in Predeal Sanatorium for persons suffering of neurosis, and of persons suffering of mental diseases in general, including by preparing objective criteria for financing medical facilities (hospitals and sanatoriums) and their periodic monitoring.’<sup>30</sup>

In another 2008 case, the NCCD sanctioned with a fine of RON 1000 (EUR 220) and a fine of RON 500 (EUR 110) discrimination of the plaintiff and subsequent victimisation on grounds of differences of opinion between the plaintiff and the defendant (the head of the firm).<sup>31</sup>

### 2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*  
*Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

Neither the Romanian Anti-discrimination Law nor other specific pieces of legislation define racial or ethnic origin, religion or belief, age or sexual orientation.

29 NCCD Decision 117 from 27.02.2008, ex officio case against the firm E SRL.

30 NCCD Decision 350 from 16.06.2008, Asociația Increderea v. the Ministry of Public Health.

31 NCCD Decision 337 from 04.06.2008, D.I. v B.V.



In its data collection, the NCCD does not have clear guidelines available but, in practice, it classifies under ‘ethnic origin’ cases related to Roma-ethnicity, as ‘nationality’ cases regarding other national minorities or foreigners and as ‘race’ cases filed by victims of African or Asian descent.

Romanian Anti-discrimination Law does not define ‘disability,’ or the connected protected grounds of chronic non-infectious disease or HIV infection though it provides for protection against discrimination on these grounds. The disability-related legislation still uses the concept of ‘handicap’ defined as ‘those persons lacking abilities to normally carry out daily activities due to a physical, mental or sensorial impairment and require protective measures for rehabilitation, integration and social inclusion.’<sup>32</sup> The law further defines disability (*handicap*) in Article 5 (16) as

‘the generic term for impairments/deficiencies, limitations in the activity and restrictions in participation defined according to the International Classification of Functioning, Disability and Health adopted by the World Health Organisation, and which highlight the negative aspect of the interaction between the individual and the environment.’<sup>33</sup>

There are no reported decisions of the NCCD or of the courts elaborating on the concept of disability.

The scope of the Romanian legislation on protecting the rights of persons with disabilities is not limited to employment relations and participation in professional life, but also includes provisions on social solidarity, prohibition of discrimination in general, the role of the community in the integration of the person with disabilities, a beneficiary-focused approach in providing services, protection against neglect and abuse, selecting the less restrictive alternative in designing the type of assistance and support, integration and social inclusion of persons with disabilities.<sup>34</sup>

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’; or a “disability”, sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

‘Ethnic and racial origin’ as well as ‘sexual orientation’ and ‘age’ are not defined or further interpreted in Romanian legislation.

‘Religion or belief’ is not defined in specific legislation either.<sup>35</sup> The Romanian Constitutional Court referred to the interpretation of the European Court of Human Rights in deciding cases involving religious education.<sup>36</sup>

32 Art.2 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006).

33 Art.3 (16) of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006).

34 Art.3 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006).

35 Romania/ Law 489/2006 on Religious Freedom and the General Status of Religions, Romania (8.01.2007).

36 Romania/Constitutional Court, Decision 72 (18.07.1995).

‘Disability’ is not defined in the 2000 Anti-discrimination Law and the special legislation is not using the concept of ‘disability’ using instead the concept of ‘handicap.’<sup>37</sup> The scope of the protection against discrimination of persons with disabilities has a broader scope of application than the one of Directive 2000/78/EC.<sup>38</sup> The use of the concept of ‘handicap’ might have a negative impact on the justiciability of relevant cases as under the special legislation, ‘handicap’ needs a medical certification which means that in order to make a case before the courts, disability must be medically certified.

c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

Besides mentioning ‘age’ as one of the protected grounds, the Romanian Anti-discrimination Law does not provide any guidance on the scope of this ground. There is no minimum or maximum age and, in practice, the NCCD applied the concept of discrimination on grounds of ‘age’ both in relation to a lower and an upper ceiling, mostly in cases of access to employment.

In the case L.D. v. Uniunea Notarilor Publici [Notary Public Union], from 20 January 2004, the NCCD sanctioned as discriminatory the provision of the Statute of the Notary Public Union, limiting the access to the competition for notary public of persons over 35. In its defence, the Notary Public Union mentioned that this age limit for entering the profession as junior notary public was adopted by the General Assembly of the Notary Public Union in order to encourage young candidates to apply. The NCCD noted that by establishing the upper age ceiling, the declared aim is not likely to be reached, though both legitimate and commendable, and that this restriction infringes the principle of equality. The NCCD found that the methods used are not adequate as they are limiting the free access to the profession of junior notary public and are infringing the free exercise of the profession. The NCCD issued an administrative warning for the Notary Public Union.<sup>39</sup>

In a 2008 case, Uniunea Democrat Creștină [Christian Democratic Union] v. Cozmin Gușă, from 08 July 2008, the NCCD sanctioned the fact that a political party decided to establish a maximum age for the competition for the selection of candidates for the local elections. As the defendant established as a criterion for candidates to be less than 45 years old, the NCCD considered that the announcement for the selection had the effect of discouraging persons older than 45 to participate in the selection competition. No pecuniary or administrative sanction was issued but the NCCD recommended to the party to reconsider its eligibility criteria.<sup>40</sup> The NCCD does not have a mechanism to monitor observance of its decisions and there is no way to verify whether the party enforced the recommendation.

37 See 2.1.1.a).

38 Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06/12/2006).

39 NCCD, L.D. v. Uniunea Notarilor Publici [Notary Public Union], from 20.01.2004.

40 NCCD, Decision 386 from 08.07.2008, Uniunea Democrat Creștină v. Cozmin Gușă.



- d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

Multiple discrimination is treated by the Anti-discrimination Law as an aggravating circumstance though the NCCD did not develop clear comparators to be applied in cases of multiple discrimination. Article 2 (6) of the Law reads:

‘Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing the contraventional responsibility, unless one or more of its components is not subject to criminal law.’<sup>41</sup>

In the famous decision issued against the Romanian President, Decision 92 from 23 May 2007, in which the plaintiffs sought for a harsher sanction on grounds of the aggravating circumstances of multiple discrimination (the expressions used by Traian Băsescu in relation to the journalist being ‘birdie’ and ‘filthy Gypsy’), the NCCD did not consider that gender discrimination occurred and it did not assess the case from the perspective of multiple discrimination.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

No reports are available regarding jurisprudence developed by the courts on cases lodged using the Anti-discrimination Law. No information is available on cases of multiple discrimination and the application of the burden of proof in such cases by the courts.

### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Romanian Anti-discrimination Law does not provide specifically for a prohibition of discrimination based on a presumption of or assumed characteristics.

41 Art.2(6), Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20.07.2006).



The NCCD discussed the concept in the interpretation of the law and considered such aspects in its case law particularly in cases of discrimination on grounds of association with a particular group or presumed belonging to a protected group (mostly in cases involving sexual orientation) but did not use it in its reasoning.<sup>42</sup>

- b) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

The Anti-discrimination Law does not specifically address discrimination based on association with persons with particular characteristics though the definition provided by the Romanian Anti-discrimination Law is broad/open enough to allow for interpretation in line with the judgment in Coleman v Attridge Law and Steve Law. In a 2007 case, Daniel Zăvoian v. Distrigaz Sud, Decision 4222, from 01 August 2007, the court of first instance ruled in favour of the plaintiff who complained against being subjected to discriminatory conduct based on his affiliation with an NGO active in defending the rights of LGBT in Romania (ACCEPT București) when paying the monthly utilities at the offices of the defendant. The defendant was ordered to pay EUR 1000 as civil damages but the court denied the request of the plaintiff for institutional measures on combating discrimination in the workplace (the plaintiff requested for the defendant to be ordered by the court to engage in general measures to combat discrimination in the future, such as diversity management, equality trainings for employees, adopting a code of conduct with clear prohibitions). The decision was appealed both by the defendant and by the plaintiff but the decision of the first court was maintained.<sup>43</sup>

## 2.2 Direct discrimination (Article 2(2)(a))

- a) How is direct discrimination defined in national law?*

Article 2 (1) of the Anti-discrimination Law defines direct discrimination as ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’ Different from the definitions proposed by the Directive 2000/43/EC and the Directive 2000/78/EC, the Romanian 2000 Anti-discrimination Law provides a detailed definition, attempting to cover the whole variety of actions and inactions leading to discrimination.

- b) Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

<sup>42</sup> NCCD Decision 92 from 23 May 2007, case Romani CRISS v. Traian Băsescu. The NCCD analysed the assumption made by the President when calling a journalist “filthy Gypsy” as being discriminatory to the Roma community in general.

<sup>43</sup> Romania/Judecătoria sectorului 4 București; [court of first instance No.4, Bucharest], Daniel Zăvoian v. Distrigaz Sud, Decision 4222, from 01.08.2007, Decision 4222 in File no.710/4/2006.



Discriminatory statements as well as discriminatory announcements for job vacancies amount to discrimination under Article 2 of the Anti-discrimination Law and are sanctioned consequently. For example, in 2008, the NCCD sanctioned in a series of cases discriminatory job vacancies announcements posted on internet.<sup>44</sup>

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The Romanian 2000 Anti-discrimination Law does not permit any general exemption or exception justifying direct discrimination (including in the particular case of age).

In the case of housing, access to services and goods, restrictions are allowed by the law, if such a 'restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.'<sup>45</sup> The possibility to allow justifications in cases of direct discrimination regarding housing and access to services and goods is in breach of Directive 2000/43.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

The Romanian 2000 Anti-discrimination Law does not include a definition of discrimination on grounds of age and does not provide for justifications in the case of age discrimination.

### 2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

The Romanian 2000 Anti-discrimination Law does not include specific provisions on situational testing and there is no specific definition provided either in the Law or in the internal procedures of the NCCD. The NCCD does not have particular guidelines or protocols on the use of situation testing and only anecdotal data reflect the use of testing as means of evidence in judicial proceedings. While the 2006 amendments to the Anti-discrimination Law make video and audio recordings admissible in cases of discrimination, this is an exception from ordinary civil procedure norms and the admissibility of such evidence before the courts it is still under a question mark.

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

44 NCCD Decision 117 from 27 February 2008, ex officio case against the firm E SRL.

45 Art.10, Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).



In its recent practice, the NCCD did not use testing. It is unclear if this was a legal decision based on the limitations of this method in terms of admissibility as means of evidence or if it was an internal decision generated by the scarce human and material resources the NCCD has to deal with.

c) *Outline important case-law within the national legal system on this issue.*

Recent cases using testing are not available.

In a case started by the NCCD *ex officio* following media reporting, the Council sanctioned the refusal to allow access to a swimming club from Timisoara “No Name” for persons older than 35. The evidence was provided by a journalist who was refused access while recording the whole incident with a hidden camera. The perpetrators were sanctioned with an administrative warning.<sup>46</sup>

d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

NGOs, particularly Roma NGOs such as Romani CRISS used testing in the past in the field of denial of access to services (clubs and pubs) and there are plans to use testing in cases of access to employment on grounds of ethnic background. In the past, Roma NGOs coordinated with the NCCD in testing cases of denial of access to various facilities (clubs and pubs) by organising joint teams for the testing/investigations after the NGOs filed petitions with the NCCD.

## 2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

Though not asserting it as indirect discrimination, Article 2 (3) of the Anti-discrimination Law prohibits:

‘any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para.(1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.’<sup>47</sup>

In a complaint filed by a Syrian citizen, B.A., the NCCD found that the requirement established by the Law 306/2005 on exercising the profession of medical doctor, which is restricting the right to obtain an authorisation for the free practice of the medical profession to Romanian citizens, citizens of the EU Member States, spouses or descendants of EU citizens and long term residents (but not to spouses of Romanian citizens as in the case of the plaintiff), amounts to indirect discrimination on grounds of nationality.<sup>48</sup>

46 NCCD, ex officio case, decision 01 August 2006.

47 Art.2(3) of Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).

48 NCCD, B.A v. Ministerul Sănătății și Comisia Medicilor din România [Ministry of Health and the College of Doctors], from 31 August 2005.

In a 2008 case, Asociația Increderea v. Ministerul Sănătății Publice [Ministry of Public Health], the NCCD found that the inadequate standards of treatment in relation to persons suffering from mental disabilities hospitalised in Predeal hospital when compared to patients in other hospitals amounts to discrimination and ‘recommended to the Ministry of Health to ensure adequate treatment of persons hospitalised in Predeal Sanatorium for persons suffering of neurosis, and of persons suffering of mental diseases in general, including by preparing objective criteria for financing medical facilities (hospitals and sanatoriums) and their periodic monitoring.’<sup>49</sup> The NCCD ruled that ‘the lack of interest showed by the defendant in relation to hospitals for persons with mental disabilities as proved by the fact that no monitoring or control was conducted in the last two years, the under-financing of the Hospital of Neurosis from Predeal, lead to inadequate conditions of treatment of the patients, which amounts to a differentiation on grounds of disability having as effect a limitation of the right to medical treatments, defined as indirect discrimination by Article 2 (3) corroborated with Article 10 letter b of the Anti-discrimination Law. At the same time, this passive conduct, due to the effects generated, unjustifiably puts in a less favorable position a group of persons, that of the beneficiaries of the Hospital of Neurosis from Predeal.’

- b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

In its decision D. v. N. and Șofronea swimming pool, case no. 221 from 21 September 2005, regarding the denial of access to a swimming pool to a Moslem woman wearing a swimming costume appropriate to her religious beliefs but perceived by the owners of the pool as ‘casual clothing,’ the NCCD invoked the provisions of Article 2(3) under its previous wording, sanctioning ‘Any active or passive behaviour which, through its consequences, favours or prejudices in an unjustified manner or subjects an individual, a group of individuals or a community to an unjust or degrading treatment, in relation to other individuals, groups of individuals or communities, shall trigger contraventional liability according to the present norm, unless it falls under the incidence of criminal law.’ In this 2005 decision, the NCCD did not look in depth at the question of legitimate aims which might justify discrimination and did not develop any kind of test in assessing the aims and the methods used to reach a particular legitimate aim. The NCCD mentioned cursorily the constitutional provisions on restriction of rights and freedoms (Article 53 of the Romanian Constitution). The Council concluded that by requesting the plaintiff to leave the swimming pool, the owners of the club restricted her fundamental rights on account of her religious practices.<sup>50</sup> The NCCD sanctioned the owner of the swimming pool with 1.000 RON (EUR 300).

- c) *Is this compatible with the Directives?*

49 NCCD Decision 350 from 16 June 2008, Asociația Increderea v. the Ministry of Public Health.

50 Art. 53 of the Romanian Constitution provides: ‘(1) The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens’ rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. (2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.’

The 2006 amendments to the definition of indirect discrimination brought this concept in line with the European standard. Further interpretation by the courts and by the NCCD will prove if the definition is fully compatible.

*d) In relation to age discrimination, does the law specify how a comparison is to be made?*

No specific references are provided on developing a test and on the use of comparable data in particular cases such as age discrimination.

*e) Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

Language is one of the criteria protected by the Anti-discrimination law. Differences in treatment based on language had been sanctioned as discrimination.

In a 2007 case, the NCCD started an ex officio investigation against the Mayorality of Târgu Mureş and in decision 131 from 21 June 2007 found that the Mayor's office in Târgu Mureş is liable for not providing public interest information in Hungarian, in spite of the fact that more than 20 per cent of the people living in Târgu Mureş are Hungarians. The NCCD issued an administrative warning and decided to monitor the website of the institution.<sup>51</sup>

In a ground breaking decision, A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate], decision no. 43 from 09 January 2008, file number 353/2007, regarding the advertising of hiring possibilities as civil servants with the local finances inspectorate mentioning as specific condition 'knowledge of Hungarian language,' the NCCD applied the provisions of Art. 9 of the Anti-discrimination Law stating that 'the provisions of Art.5-8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse hiring a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods used are adequate and necessary.' In order to assess both the legitimacy of the aim pursued and the methods used, the NCCD used the test developed by the European Court of Human Rights. The NCCD cited the provisions of the Romanian Constitutions, of the ECHR, of ICERD Art.1 (1) and (4), the European Charter of Regional and Minority Languages (Art.10), the Framework Convention for the Protection of National Minorities (Art.10). The NCCD noted that 'the difference in treatment amounts to discrimination not only when people in analogous positions are treated differently without objective and reasonable justifications, but also when the states fail to treat differently persons who are in incomparable, different situations, also without objective and reasonable justifications.'<sup>52</sup> The NCCD commended the value of affirmative measures such as establishing linguistic requirements in areas where national or ethnic minorities live but emphasised that such measures should be temporary and should cease once the objective of protecting the minority is achieved.

<sup>51</sup> NCCD Decision 131 from 21 June 2007, ex officio case against the Mayorality of Târgu Mureş.

<sup>52</sup> NCCD, decision A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate], decision no. 43 from 09 January 2008, file number 353/2007.



Though the purpose of ensuring services to minorities in their mother tongue was legitimate and the defendant justified its actions by invoking the legal requirement of making arrangements to ensure services for minorities when they amount to 20 per cent of the total population, the NCCD questioned the adequacy of the methods chosen to reach that particular aim and their negative impact in relation to the Romanian community which in that particular area is a *de facto* minority. The NCCD found that when the percentage of employees from a certain community is approximately the same with the percentage of that particular community in the area, affirmative measures cannot be maintained because otherwise they would generate by themselves a situation of discrimination. The NCCD sanctioned the Harghita Public Finances Inspectorate with an administrative fine of 1,000 RON (EUR 300).

### 2.3.1 Statistical Evidence

- a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

Art. 20 (6) of the Anti-discrimination Law provides that

‘the person interested has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination. Any means of evidence can be invoked before the Steering Board, including audio and video recordings or statistical data.’

The law does not establish any subsequent criterion for the admissibility of such evidence before the NCCD or the courts of law.

- b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

There is scarce evidence of the use of statistical data in the past. A ground breaking case from January 2008 introduced a thorough use of statistical analysis in determining the adequacy and appropriateness of the methods used in order to ensure the right of national minorities to use their mother tongue in relation to public local officials.<sup>53</sup>

- c) *Please illustrate the most important case law in this area.*

In decision A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate], decision no. 43 from 09 January 2008, file number 353/2007, regarding the advertising of hiring possibilities as civil servants with the local finances inspectorate mentioning as specific condition ‘knowledge of Hungarian language,’ the NCCD made extensive use of the statistical data.

<sup>53</sup> NCCD, decision A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate], decision no. 43 from 09 January 2008, file number 353/2007.



By looking at the percentages of civil servants speaking only Romanian or Hungarian and their specific position within the institution as well as their geographical representation compared in the context of the percentages of Hungarians or Romanians in each city, the NCCD assessed the ways in which the defendant understood to fulfil its legal obligation to make arrangements to respond to the needs of national minorities in the counties where national minorities represent at least 20 per cent of the population. The NCCD sanctioned the Harghita county Public Finances General Inspectorate with an administrative fine of RON 1,000 (EUR 300).

- d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

The Law 677/2001 on the protection of persons regarding the use of personal data and the free movement of personal data prohibits in Art. 7.(1) 'the use of personal data regarding the racial or ethnic origin, political, religious, philosophical or similar beliefs, trade union membership, as well as personal data regarding health status or sexual life,'<sup>54</sup> hence barring data collection on all five grounds. This provision is invoked in practice by authorities when required to compile or provide statistical data by domestic or international institutions. International reports described this prohibition as a deterrent to effective data gathering and policy making in the case of women,<sup>55</sup> sexual minorities<sup>56</sup> or Roma.<sup>57</sup>

Theoretically, the collection of personal data is possible under certain limitations provided by Article 7 (2):

- a. with the express consent of the individual,
- b. when required for the purpose of observing specific duties or rights of the operator in the area of employment,
- c. when required for the protection of life, physical integrity or health of the individual or of another person,
- d. when conducted during legitimate activities by a foundation, association or any other non-for-profit organisation and with a political, philosophic, religious or trade union related mandate, if the individual is a member or has regular relations with the institution,
- e. when done in relation to data made publicly available by the individual,
- f. when necessary for establishing, exercising or defending a right before the courts of law,

<sup>54</sup> Romania/Law 677 on the protection of persons in relation with use of personal data (21 November 2001).

<sup>55</sup> In its Concluding Comments on Romania, the Committee on the Elimination of All Forms of Discrimination Against Women 'regrets the limited availability of statistical data disaggregated by gender as well as by ethnicity, age, and by urban and rural areas, which makes it more difficult to assess progress and trends over time in the actual situation' and 'calls upon the State to enhance its data collection in all areas covered by the Convention so as to assess the actual situation of women and their enjoyment of their human rights, disaggregated by sex, as well as by ethnicity, age, and by urban and rural areas as applicable, and to track trends over time. See, CEDAW/C/ROM/CO/6, Concluding comments of the Committee on the Elimination of Discrimination against Women, Romania, June 2006.

<sup>56</sup> FRALEX. Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Romania, [http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgso-NR\\_RO.pdf](http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgso-NR_RO.pdf) (09 January 2009).

<sup>57</sup> DecadeWatch : Roma activists assess the progress of the Decade of Roma Inclusion 2005-2006, available at: <http://www.romadecade.org/index.php?content=6> , (10 October 2007).





- g. when necessary for purposes of preventive medicine,
- h. when the law includes an express provision with the purpose of protecting an important public interest, under the condition that the collecting of data should be done with the observance of the rights of the person involved and with all guarantees provided by the law.

The list of exemptions, particularly the one on data collection in relation to an important public interest (such as designing effective public policies in relation to minorities) allows for the possibility to compile and use relevant statistical data if there is a will.

Similarly, the Law 489/2006 on religious freedom and the general regime of religious denominations prohibits in Art.5 (5):

‘the processing of personal data concerning religious beliefs or membership of denominations, except for the case of a national census as sanctioned under the law or the situation where the concerned individual has provided explicit agreement to that effect.’

The Law 489/2006 provides that ‘it is hereby forbidden to compel an individual to declare their religion, in any relationship with public authorities or private-law legal entities.’<sup>58</sup>

When private or public operators make general statistical data available or when the National Institute for Statistics<sup>59</sup> is publishing its findings, such information is used in designing public policies (e.g. the case of the National Strategy for Improving the Situation of Roma<sup>60</sup> or the National Strategy for the Protection of the Rights of the Child<sup>61</sup>). There are no guidelines regarding the handling of ethnic data in the context of general statistical endeavours.

## 2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Article 2.(5) of the Anti-discrimination Law regarding the prevention and the punishment of all forms of discrimination defines harassment as a form of discrimination:

‘any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, disability, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.’

58 Art.5 (6) of Romania/ Law 489/2006 on Religious Freedom and the General Status of Religions, Romania (8 January 2007).

59 The National Institute for Statistics is the national operator in charge with collecting data and organizing the census. Data available at: [www.insse.ro/](http://www.insse.ro/) (01 May 2008).

60 Strategia Guvernului României de îmbunătăţire a situaţiei romilor, aprobată prin H.G. Nr.430/2001 [Government Strategy for improving the situation of Roma], available at <http://www.anr.gov.ro/> (01 May 2008).

61 Strategia naţională pentru protecţia copilului [the National Strategy for the Protection of the Rights of the Child] available at <http://www.copii.ro/content.aspx?id=40> (01 May 2008).



A specific definition of sexual harassment is provided by the Law on equal opportunities between men and women, in Article 4 (c):

'any form of behaviour in relation to gender, about which the person who is responsible knows that is affecting the dignity of persons, if such a behaviour is rejected and represents the motivation for a decision affecting those persons.'<sup>62</sup>

The New Romanian Criminal Code also sanctions sexual harassment by providing that:

'the harassment by threatening or forcing a person, with the purpose of gaining sexual satisfactions, by a person abusing his or her status or the power ensured by a particular position in work relations, is punishable with prison from three months to one year or with criminal fines.'<sup>63</sup>

None of the definitions provided for are in complete compliance with the definition of harassment spelled out in the Directives.

*b) Is harassment prohibited as a form of discrimination?*

The Anti-discrimination Law specifically prohibits harassment in Article 2 (5) and provides for the specific sanctions in Article 26, the amount of the fines differs: when the victim is only one individual, the amount varies from 400 RON to 4,000 RON (EUR 114-1,114) when the victims consist in a group or a community (e.g.: ethnic minority or the LGBT community as a group), the fine ranges between 600 and 8,000 RON (EUR 170-2,285).<sup>64</sup>

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

Besides the anti-discrimination framework legislation prohibiting harassment on all grounds, sexual harassment is defined and sanctioned in the Law on equal opportunities between women and men in Article 4 (c):

'any form of behaviour in relation to gender, about which the person who is responsible knows that is affecting the dignity of persons, if such a behaviour is rejected and represents the motivation for a decision affecting those persons.'<sup>65</sup>

The New Romanian Criminal Code also sanctions sexual harassment with prison from three months to one year or with criminal fines.<sup>66</sup>

62 Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25 July 2006).

63 Art.223 of Romania/2004 Criminal Code republished, (12 April 2005).

64 Art.26 of Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).

65 Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25 July 2006).

66 Art.223 of Romania/2004 Criminal Code republished, (12 April 2005).



## 2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case-law) prohibit instructions to discriminate?*

*If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

Article 30 (7) of the Constitution while providing for freedom of expression also prohibits hate speech:

‘Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.’

Article 2(2) of the Anti-discrimination Law regarding the prevention and the punishment of all forms of discrimination: ‘The order to discriminate a person on any ground mentioned in para.(1) is considered discrimination.’ The prohibition of instruction to discriminate is applicable both in relation to individuals and with legal persons given Article 3 of the Anti-discrimination Law.

The members of the Steering Board of the NCCD acknowledge the difficulty in investigating cases of alleged instruction to discriminate due to the challenges raised by the need to prove the existence of the order (particularly in the cases of access to pubs or clubs when the bodyguards invoke an instruction from the owners or from the management).

## 2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

The Anti-discrimination Law does not provide for reasonable accommodation for persons with disabilities.<sup>67</sup>

<sup>67</sup> Romanian legislation still uses the concept of ‘handicap’ instead of ‘disability’ (see Romanian Constitution, the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination as well as special legislation such as 448/2006 on the protection and promotion of the rights of persons with a handicap).



The special legislation on the promotion and protection of the rights of persons with disabilities, having the same personal scope as the Anti-discrimination Law, provides for the duty to ensure reasonable accommodation in accessing various public and private services and facilities and in labour relations. The law 448/2006 defines reasonable accommodation in the workplace as:

‘all the changes undertaken by the employer in order to facilitate the exercising of the right to work of the person having a disability (*handicap*); this entails adjusting the work schedule, buying supporting equipment, devices and technologies related to the disability and other similar measures.’<sup>68</sup>

Reasonable accommodation in the work place is ensured both to persons with disabilities seeking a job and for those already hired according to Article 83 of the law, no matter what type of disability they might have. Law 448/2006 does not provide for any limitation or restriction regarding persons entitled to claim reasonable accommodation.

There is no sanction provided by this law in case of failure to comply but the general anti-discrimination provisions can be applied under the caveat of Article 9 of the Anti-discrimination Law which allows exemptions from the prohibition of discrimination in labour relations when the employer is

‘refusing to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.’

There is no interpretation of what is ‘reasonable’ and what constitutes a ‘disproportionate burden’ neither in the practice of the NCCD, or of the *Autoritatea Națională pentru Persoanele cu Handicap* [National Authority for Persons with a Disability (NAPD)].

Law 448/2006 introduces certain benefits for the employers of persons with disabilities, including deductions from the taxes of the costs of the adaptation of the work place and equipments and devices bought to ensure accommodation of the persons with disabilities.<sup>69</sup>

b) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

The definition of reasonable accommodation for persons with disabilities as spelled out by Law 448/2006 is specific to the area of employment.

<sup>68</sup> Art.5 (4) of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).

<sup>69</sup> Art.84 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).



However, a duty to provide adequate technical support appears also in the area of education as provided by Article 18 of Law 448/2006, in access to public buildings as provided by Article 63 or in access to transportation services as provided by Article 64 of the Law.

For example, Art. 18 of Law 448/2006 mentions the duty to provide technical equipment, adapt the furniture to the needs of pupils with disabilities, ensure special handbooks and software applications. Failure to comply with this obligation is sanctioned with a fine of RON 3.000 -9.000 (EUR 833-2500). The authority in charge with finding and sanctioning such cases is the NAPD.<sup>70</sup>

- c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

Law 448/2006 on the promotion and protection of the rights of persons with a disability does not include specific sanctions on failure to ensure reasonable accommodation in the work place and does not define this failure as discrimination. Theoretically, the 2000 Anti-discrimination Law can be applied accordingly (Articles 5-8). Article 9 of the Anti-discrimination Law allows for justifications in cases of differential treatment in labour relations when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

In a 2007 case, the NCCD sanctioned as discrimination and issued an administrative warning against the defendant in the case 255 from 17 September 2007, M.E.R. v dr. PG and the mayoralty of village V. The plaintiff, a dentist technician with a hearing impairment complained that her patients and the doctors collaborating with her can not reach her office as the doctor PG having an office on the same floor used to lock the doors thus making access impossible as the plaintiff could not hear the bells. She requested for the entry into the building to be left open during office hours to allow her to meet her clients. In its decision, the NCCD applied also the provisions of Law 448/2006, particularly of Article 74 providing for ‘the right of the person with disabilities to enjoy all the conditions required for choosing and exercising his or her profession or trade, for getting and maintaining a job, as well as to develop professionally’ and for the correlative duty of public authorities to ‘a) promote the idea that a person with disabilities who is working constitute added value to the society and for his or her community; b) promote a work environment open, inclusive and accessible for persons with disabilities.’<sup>71</sup>

- d) *Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

The Anti-discrimination Law does not provide for reasonable accommodation in respect of any protected ground.

<sup>70</sup> Art.100 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).

<sup>71</sup> NCCD, decision M.E.R. v. dr. PG and Mayoralty of V. , 17 September 2007.



Limited accommodation in respect of religion is spelled out in Article 134 (1)f of the Labour Code in relation to observance of religious celebrations of the employees by granting two vacation days for two religious celebrations each year to be taken according to the faith of the employee, under the condition that the faith of the employee is recognised as a state recognised religion (special procedure established by Law 489/2006, the Law on religious freedom and the general status of religious denominations).

e) *Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

The general provision on sharing the burden of proof is applicable in all cases, included in cases on reasonable accommodation. In practice, the NCCD interpreted the legal provision on sharing the burden of proof in line with the concept of the shift of the burden of proof as provided by the Directives. In a 2007 case, the NCCD sanctioned with an administrative fine of RON 400 (EUR 114) for refusal to allow participation in a job competition due to physical disability. The NCCD found According to Article 20 (6) that the plaintiff provided evidence on the rejection from participating in the selection for the position of teaching staff as well as evidence on his background adequate to the job while the defendant P alleged without providing any evidence that the capacity of the plaintiff did not meet the requirements of the job.<sup>72</sup>

f) *Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

The Anti-discrimination Law does not include specific provisions establishing an obligation to make services available to the public but is sanctioning in Article 10 as discrimination the denial of access to services and facilities. The wording of Article 10 can be interpreted as applicable also in the cases of *de facto* denial of access to facilities and services triggered by lack of appropriate infrastructure which would allow accessibility. There is no relevant jurisprudence of the NCCD reported on this topic.

Law 448/2006 on the promotion and protection of the rights of persons with a disability provides for an obligation to ensure access to public buildings (including private buildings under the ownership of the state) and to local administration facilities and for the duty to take measures for ensuring access in Article 63 (3). The sanction for failing to observe this duty is a fine of RON 3.000 -9.000 (EUR 833-2500) which is decided by NAPD.<sup>73</sup>

The law also provides for access to transport services - Art. 64 provides for an obligation of local public authorities to gradually adapt all public means of transportation (by Dec 31<sup>st</sup> 2010) and adapt all stations for public transportation.

The sanction for failing to observe this duty is a fine of RON 3.000 -9.000 (EUR 833-2500).

<sup>72</sup> NCCD, Decision 256 from 17 September 2007, M.D. v. P.

<sup>73</sup> Art.100 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).





The authority in charge with finding and sanctioning such cases is the NAPD.<sup>74</sup>

- g) *Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

The Anti-discrimination Law and Law 448 on the promotion and protection of the rights of persons with a disability do not include any provision on a duty to provide accessibility for people with disabilities by anticipation.

- h) *Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

The framework law concerning people with disabilities, Law 448/2006, in force since January 6<sup>th</sup> 2008, has a broader, general approach including provisions on the rights of these persons, health and integration, education, housing, culture, sport and tourism, transportation, legal assistance, fiscal facilities, social services, social benefits granted to persons having a disability, accessibility, labour relations, establishing the different categories of disability and the procedure for being recognised a certain category, the financing of the system of protection of persons with disabilities and the role of the National Authority for the Persons with a Disability.

Law 448/2006 provides for special rights and facilities for persons with disabilities which vary depending on the type of disability and the category of disability assigned following a strict procedure.

There are four different categories of disability depending on the gravity of the infliction: light, medium, accentuated and serious according to Article 86 (1) and the law lists various types of disability in Article 86 (2): physical, visual, hearing, somatic, mental, psychical, HIV/AIDS, associated, rare diseases. The criteria for assigning a particular category of disability are decided in a joint order of the Ministry of Health, the Ministry of Labour and Social Protection following the proposal of the NAPD. The mandate of the evaluation committees in charge with assessing the situation of persons with disabilities and assigning a particular degree of disability is defined by the law. The commissions are established at county level and function under the monitoring of the NAPD.

Some of the benefits provided for persons with disabilities in Law 448/2006 include:

- free medical assistance, including free medication, free hospitalisation and treatment and reimbursement for supportive devices and technologies – Art.10;
- pupils with disabilities receive free meals and accommodation in school boarding - Art.16 (7);

<sup>74</sup> Art.100 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).

- students with disabilities (serious and accentuated disability) receive upon request a waiver of 50% for meals and accommodation in school canteens and student dormitories – Art. 16(8);
- persons with disabilities have priority in being assigned public housing -Art.20;
- persons certified with a serious disability can receive an supplementary room and have a minimal rent in public housing -Art.20(2);
- adults with a serious or accentuated disability and the person accompanying such an adult have free access to shows, exhibitions, museums, artistic and sportive events and adults with a medium or light disability pay reduced tickets– Art.21(4);
- persons with a serious or accentuated disability have free transportation on all venues in urban public transportation, this benefit applies also to assistants of persons with serious disability, assistants of children with accentuated disability, assistance of persons with accentuated hearing and mental disabilities, based on a social inquiry conducted by a social assistant from the local mayor's office, personal assistants of persons with a serious disability and professional assistants of persons with a serious or accentuated disability – Art.23;
- persons with a serious or accentuated disability have the following fiscal facilities – Art.26:
  - a) exemption from paying income tax for salaries and similar income;
  - b) exemption from paying land and property taxes;
  - c) exemption from paying taxes for cars, bikes, motorbikes adapted to the disability;
  - d) exemption from paying the tax for issuing the authorisation for functioning for economic activities and the annual certification;
  - e) exemption from paying hotel tax.
- adults with a serious or accentuated disability can receive a credit and the interest will be paid from the state budget in case of acquiring a vehicle or adapting a house according to personal access needs – Art.27;
- persons with a disability owing cars adapted to their disability are exempted from paying the fees for using the national roads – Art.28;
- the person with a serious disability can choose to have a personal assistant paid by the state– Art.35;
- the adult with a serious or accentuated disability who does not have any living conditions and does not have any income or has an income of the average income in the economy can choose to have a personal professional assistant paid by the state – Art.45;
- the person with a disability can receive social services in day care centres and in residential centres – Art.51;
- the adult with a disability receives the following amounts monthly – Art. 58(4):
  - a. monthly indemnity, no matter what income the person has:
    - i. RON 179(EUR 50) for adult with a serious disability;
    - ii. RON 147 (EUR 40) for adult with accentuated disability;
  - b. monthly personal complementary budget, no matter what income the person has:
    - i. RON 80 (EUR 20) for adult with a serious disability;
    - ii. RON 60 (EUR 16), or adult with accentuated disability;
    - iii. RON30 (EUR 8), for adult with a medium disability.



- any person with a disability who wants to be integrated and work, has access to free evaluation and professional counselling, no matter what age, type or category of disability he or she has – Art. 72;

## 2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

Law 448/2006 on the promotion and protection of the rights of persons with a disability provides for sheltered employment and sheltered units in Article 79. The law defines as sheltered employment:

‘the adequate space for the activity of a person with a disability, adapted to his or her needs, including at least the location where that person works, the equipment used, the toilet and the access space (Art.5).

The law specifies that any private or public legal person or even individuals can establish a sheltered unit which is defined as ‘the public or private law economic agent, autonomously administered, in which at least 30 per cent of the total number of employees having an individual labour contract are persons with a disability.’<sup>75</sup> Sheltered units can have legal personality or can have no legal personality and operate autonomously as workshops or other structures within economic agents, public institutions or non-governmental organisations. NAPD adopted an order on the procedure for authorising a sheltered unit.<sup>76</sup>

Sheltered units receive the following benefits according to Article 82:

1. exempted from paying taxes for being established and subsequent taxes;
2. exempted from paying profit taxes, under the condition that at least 75 per cent of the amount generated due to the exemption will be used for restructuring or for purchasing technology, vehicles, tools, equipment and/or adapting the sheltered work units;
3. other facilities granted by local public administration and funded from local budget.

In order to maintain their status, sheltered unit must present at the beginning of each year a report to the NAPD.

- b) *Would such activities be considered to constitute employment under national law?*

Law 448/2006 spells out that the employment of a person with disabilities can take the following forms: a) general free market employment; b) work from home; c) sheltered work.<sup>77</sup> All these forms constitute employment and are protected by the Labour Code.

<sup>75</sup> Art.5 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).

<sup>76</sup> Romania/ Order of the President of the National Authority for Persons with Handicap No. 60/2007 regarding the approval of the Procedure for authorizing sheltered units (3 May 2007).

<sup>77</sup> Art.79 of Romania/Law 448/2006 on the protection and promotion of the rights of persons with a handicap (06 December 2006).



### 3. PERSONAL AND MATERIAL SCOPE

#### 3.1 Personal scope

##### 3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

Article 1(2) of the Anti-discrimination Law guarantees the principle of equality among citizens and provides for the exclusion of discrimination in the same context. The limitation is triggered by the constraints of Article 1 (3) of the Romanian Constitution which guarantees fundamental rights in relation to citizens only. However, the comprehensive definition of discrimination provided in Article 2 (1) of the Anti-discrimination Law does not include any residence, citizenship or nationality requirements to qualify for protection as proved by the case law of the NCCD.<sup>78</sup>

##### 3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

Under the Romanian Anti-discrimination Law both natural and legal persons are protected against discrimination, with higher fines in the case of discrimination perpetrated against groups or communities according to Article 26: if the victim is an individual, the amount of the fine ranges from RON 400 to 4,000 (EUR 114-1,114) when the victims consist in a group or a community, the fine ranges between RON 600 -8,000 (EUR 170-2,285).<sup>79</sup>

Article 2 (4) of the 2000 Anti-discrimination Law specifies that all public and private natural or legal entities have an obligation to observe the principles of Article 1 (2) and Article 26 (2) provides that the sanctions can be enforced against legal persons as well. Furthermore, the 2000 Law establishes an obligation for 'legal representatives of authorities and public institutions and of the economic agents under investigation, as well as natural persons to:

- a. provide any document that might help in clarifying the objectives of the investigation;
- b. provide information and explanations verbally or in writing, in relation to the issue under investigation;
- c. provide copies of the documents requested;
- d. provide support and ensure adequate conditions for carrying out the control and help out in view of clarifications.'

<sup>78</sup> See NCCD case D. v. N. and Șofronea swimming pool, case no. 221 from 21 September 2005, in which the victim of discrimination was an Egyptian national.

<sup>79</sup> Art.26 of Romania/ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20 July 2006).



### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

The Anti-discrimination Law does not include specific provisions on the scope of the liability. Liability is individual and in order to find discrimination, the NCCD is identifying the agent of discrimination and his or her responsibility. The case law of the NCCD indicates that employers can be held liable for actions of their employees, if there is joint responsibility. The NCCD used personal liability in determining the degree of responsibility for each party. Employers had not been held liable for actions of third parties. Trade unions or professional associations cannot be held liable for the actions of their members. The courts imposed vicarious liability upon the employers for the action of their employees.<sup>80</sup>

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

Articles 5-9 of the Romanian Anti-discrimination Law prohibiting the various aspects of discrimination in labour relations do not distinguish between the different types of actors (public or private, secular or religious).

The Labour Code provides for a specific prohibition of discrimination in relation to labour relations, in Article 5:

- 1) In labour relations the principle of equal treatment in relation to all employees and employers applies.
- 2) It is prohibited any direct or indirect discrimination in relation to an employee on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political options, social origin, disability, family situation or responsibility, membership or activity in a trade union.
- 3) Direct discrimination consists in exclusion, difference, restriction or preference, based on one or more grounds provided for in para (2), which have the purpose or the effect of not granting, limiting or denying the recognition, use or exercise of the rights provided for in the labour legislation.

<sup>80</sup> Romania/Tribunalul Bihor [Bihor County Tribunal] Sentinta Civila [Civil Judgement] No.620/L.M./2007, File No.6094/111/2006; 01 October 2007. B. R. v. A. V., administrator of the Oradea Zoo, M. I., human resources manager and Regia Autonomă de Piețe, Agrement și Salubritate Oradea (employer).



- 4) Indirect discrimination consists in acts or facts which in appearance are based on other criteria than those provided for in para. (2) but which generate the effects of direct discrimination.

Furthermore, Article 59 of the Labour Code prohibits firing of employees

- a. on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political options, social origin, disability, family situation or responsibility, membership or activity in a trade union.
- b. for exercising, according to the law, the right to strike and trade-union related right.

While discrimination is prohibited, the Labour Code does not offer guidance in the case of employees dismissed or sanctioned as they are not available or competent to do their job due to a family situation or disability and labour law jurisprudence is vague in this regard.

The Criminal Code includes specific provisions applicable only to civil servants guilty of discrimination in the form of abusing their official position. Article 247 of the Criminal Code provides:

‘the limitation of the use or of the exercise of certain rights of a person by a civil servant or the fact that a civil servant creates a situation of inferiority on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political membership, beliefs, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS is punishable with prison from six months to five years.’

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

**3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?**

The Anti-discrimination Law sanctions discrimination in relation to employment of any type and on grounds of race, nationality, ethnic group, religion, social status, on one's beliefs, gender or sexual orientation and disadvantaged group (interpreted by the NCCD as including age<sup>81</sup> and disability<sup>82</sup>), including in selection criteria, recruitment conditions, treatment during the work relations and promotion or professional training or other benefits, as well as in ending the work relation:

81 NCCD. Decision 2707 of the National Council on Combating Discrimination, from 20 January 2004.

82 NCCD. Decision P/0797 of the National Council on Combating Discrimination, from 06 April 2006





Art. 5 – According to the ordinance herein, conditioning the participation of a person in an economic activity or one's freely chosen exercise of a profession on one's belonging to a race, nationality, ethnic group, religion, social status, on one's beliefs, gender or sexual orientation, respectively, or on one's belonging to a disadvantaged group shall constitute an offence.

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

- a) initiation, suspension, modification or the end of the labour relation;
- b) establishing and modifying of job-related duties, of the work place or of the wages;
- c) granting of social rights other than the wages;
- d) professional training, refreshment, conversion or promotion;
- e) enforcement of disciplinary measures;
- f) right to join a trade union and to access to the facilities it ensures;
- g) any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 7 - (1) In accordance with the ordinance herein, the refusal of any legal or natural entity to hire a person on account of the applicant's race, nationality, ethnic belonging, religion, social status, beliefs, gender or sexual orientation shall constitute an offence, excepting the cases specified by the law.

(2) If, in any job advertisement or interview, the employer or employer's representative set conditions related to the belonging to a race, nationality, ethnic group, religion, gender or sexual orientation, social status or disadvantaged group or the applicant's beliefs for filling in a position, except for the situation provided under Art. 2 paragraph 9, this deed shall constitute an offence.

(3) Natural or legal entities involved in mediating and distributing work places shall ensure the equal treatment of all applicants, their free and equal access to opportunities to consult the supply and demand of the labour market, to consulting on opportunities to obtain a job or a qualification, and shall refuse to support the employers' discriminatory requirements. All information related to the race, nationality, ethnic belonging, gender or sexual orientation of applicants for a job or any other private information shall be confidential.



Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, mother tongue, ethnic background, religion, gender, social status, sexual orientation or beliefs shall constitute an offence.

Art. 9 - None of the provisions of articles 5-8 shall be interpreted as a restriction of the employer's right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.'

In practice, the NCCD applied these provisions also to the case of different treatment in relation to access to the profession and professional development in the case of resident doctors who graduated in different years. In its decision from 27 July 2006, G.T. v. the Ministry of Health, the NCCD sanctioned as discriminatory the Order 1000/2005 of the Ministry of Health which established that in the case of graduates of medical schools who graduated in 2005, the access to continuing professional studies as resident doctors in the area of general practitioners can be done on the basis of a request upon meeting a minimal set of criteria, while graduates from other years of the same faculties did not have access to the same procedure. The NCCD noted that the Order established a different treatment for graduates of medical schools from different years and this resulted in differences in their enjoyment of the right to professional development.<sup>83</sup>

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by law. This means that following the decisions of the Romanian Constitutional Court declaring that the courts are not mandated to quash legal provisions when deemed as conducive to discrimination (Decisions 818, 819 and 820) and the decisions finding that the mandate of the national equality body is unconstitutional in cases of petitions filed in relation to discrimination triggered or embedded in legislative norms (Decision 997), there is a de facto difference between the public and the private sector in the treatment of discrimination regarding conditions for access to employment.

### **3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))**

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

<sup>83</sup> NCCD, decision G.T. v. the Ministry of Health (27 July 2006).



Discrimination in employment and working conditions, including pay, social benefits other than wages, dismissal is specifically mentioned by the Anti-discrimination Law in Articles 5-9:

Art. 5 – According to the ordinance herein, conditioning the participation of a person in an economic activity or one's freely chosen exercise of a profession on one's belonging to a race, nationality, ethnic group, religion, social status, on one's beliefs, gender or sexual orientation, respectively, or on one's belonging to a disadvantaged group shall constitute an offence.

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

- a) initiation, suspension, modification or the end of the labour relation;
- b) establishing and modifying of job-related duties, of the work place or of the wages;
- c) granting of social rights other than the wages;
- d) professional training, refreshment, conversion or promotion;
- e) enforcement of disciplinary measures;
- f) ...
- g) any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 7 - (1) In accordance with the ordinance herein, the refusal of any legal or natural entity to hire a person on account of the applicant's race, nationality, ethnic belonging, religion, social status, beliefs, gender or sexual orientation shall constitute an offence, excepting the cases specified by the law.

(2) If, in any job advertisement or interview, the employer or employer's representative set conditions related to the belonging to a race, nationality, ethnic group, religion, gender or sexual orientation, social status or disadvantaged group or the applicant's beliefs for filling in a position, except for the situation provided under Art. 2 paragraph 9, this deed shall constitute an offence.

Emergency Ordinance 75 from 2008<sup>84</sup> (secondary delegated legislation adopted under Article 115(4) of the Romanian Constitution) meant to address the issue of the financial disputes with the magistrates and auxiliary justice personnel amended the Anti-discrimination Law to exclude from such conflicts from its jurisdiction:

<sup>84</sup> Emergency Ordinance 75 from 11 June 2008 regarding measures taken to solve financial issues in the area of justice-related work published in the Official Gazette 462 from 20 June 2008.

Article 19(3) ‘Petitions regarding legislative measures issued in the context of establishing salary-related policies for the personnel working in the public sector do not fall under the mandate of the National Council on Combating Discrimination.’

The Emergency Ordinance 75 establishes as a single forum for submitting complaints on salaries or salary-related matters in the case of the justice personnel, the courts of law, with the Courts of Appeal acting as courts of first instance and the High Court of Justice and Cassation deciding in appeal. Cases currently under proceedings are to be discontinued and sent to the Courts of Appeal or to the High Court accordingly.’<sup>85</sup>

There are no specific provisions in the Anti-discrimination Law prohibiting discrimination in respect of occupational pensions but the law provides for specific sanctions in case of discrimination in relation to salary-related rights as well as in granting social rights other than salary-related rights.

The framework law on pensions, Law 19/2000 on the public pension system and other social security rights<sup>86</sup> mentions in Article 2 (2) the principle of equality as ‘ensuring to all participants in the public system, tax payers and beneficiaries, a treatment without discrimination in respect of the rights and obligations provided for in the law’ without further detailing on prohibitions against discrimination or including any sanctions in this regard. Law 204 from May 2006<sup>87</sup> on facultative pension schemes provides in Article 51 that ‘all participants and beneficiaries to a private pension scheme have the same rights and obligations and are treated without discrimination...they have the right to equal treatment ...’ Article 51 (4) provides:

No person wishing to become a participant (in a facultative pension scheme cannot be discriminated against and cannot be rejected from joining the scheme as participant if he or she is eligible.

Law 204/2006 does not include any sanction correlative to the prohibition to discriminate in respect of facultative pension schemes.

### **3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))**

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category.*

<sup>85</sup> The different categories of personnel working in the justice system filed cases against the Ministry of Justice before the courts of law and before the NCCD claiming that they are discriminated against in regard of their salary-related rights. The decisions of the NCCD in finding that discrimination occurred was appealed by the Ministry of Justice before the Court of Appeal and during the proceedings, the Ministry of Justice also challenged the constitutionality of the NCCD before the Constitutional Court but before receiving a decision from the Constitutional Court, the Government adopted the Emergency Ordinance 75/2008.

<sup>86</sup> Romania/ Law 19/2000 Law on the public pensions system and other social benefits.(17 March 2000).

<sup>87</sup> Romania/Law 204/2006 on Facultative Pensions Schemes (22 May 2006).



*Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?*

Though not using expressly the wording of the Article 3(1)(b) of the Directive 2000/43, the Anti-discrimination Law mentions express prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work both in the section on access to labour and in the section on access to education which is not distinguishing between the different forms, types, stages or levels of education:

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

d)professional training, refreshment, conversion or promotion;

...

g)any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 11 (1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, on account of their beliefs, gender or sexual orientation, shall constitute an offence.

(2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.

...

(4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, ethnic group, nationality, religion, social category or to a disadvantaged category, by his/her beliefs, gender or sexual orientation.

...

(6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute an offence.'



### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

Different from Article 3 (1)(d) of the Directive 2000/43/EC, the Romanian Anti-discrimination Law does not spell out expressly the prohibition of discrimination on grounds of membership in a trade union or in a any professional organisation (employers' association, lawyers' bars, professional colleges or unions).

Still, all these categories are protected by the anti-discrimination legislation as interpreted by the NCCD and by the courts which decided that membership in trade unions or professional organisations is falling under the protected grounds 'social category' or under 'any other category.' The 2000 Anti-discrimination Law also mentions trade unions in the context of the denial to discriminate in restricting the right to join the trade unions:

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

....

- f) right to join a trade union and to access to the facilities it ensures;
- g) any other conditions related to the carry out of a job, in accordance with the law in force.'

Further protection is ensured in the special legislation on trade unions<sup>88</sup> and in the Labour Code which clearly spells out the prohibition against firing employees due to their exercise of the right to strike and of their rights related to their trade union activities – Article 59.b) of the Labour Code.

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

Protection against discrimination in social protection is provided for both in connection with work relations and in general:

<sup>88</sup> Romania/Law 54 /2003 Trade Unions Law (24 January 2004).





Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

...

c) granting of social rights other than the wages;

...

g) any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, mother tongue, ethnic background, religion, gender, social status, sexual orientation or beliefs shall constitute an offence.'

More specific provisions on prohibition of discrimination in social services and health care services are listed in Article 10 (a) of the Anti-discrimination Law which states:

'Under the ordinance herein, the following deeds shall constitute an offence, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, gender or sexual orientation:

a) the refusal to ensure legal and administrative public services.

b) denying the access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services).

...

h) the refusal to ensure rights and benefits to a person or to a group of persons.'

The Romanian legislation does not include any exemptions for payments of any kind made by state schemes or similar, including state social security or social protection schemes, relying on the exception allowed in Article 3(3), Directive 2000/78.

### 3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*



The Anti-discrimination Law prohibits discrimination in granting social advantages in Article 6 and in Article 8 without distinguishing between the different types of benefits private or public actors might grant to their employees:

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

...

c) granting of social rights other than the wages;

...

g) any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, mother tongue, ethnic background, religion, gender, social status, sexual orientation or beliefs shall constitute an offence.

A general prohibition of discrimination in the context of access to public services of administrative and legal nature, health and other services, goods and facilities is spelled out in Article 10 (h) of the Anti-discrimination Law:

Under the ordinance herein, the following deeds shall constitute an offence, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, gender or sexual orientation: (h) refusal to grant the rights or benefits to a person or a group of persons.

### 3.2.8 Education (Article 3(1)(g) Directive 2000/43)

*This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education is favoured and supported.*

Article 11 of the Anti-discrimination Law substantiates the prohibition of discrimination in education, at all levels and in all forms, both private and public:

‘(1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, on account of their beliefs, gender or sexual orientation, shall constitute an offence.

(2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students’ knowledge.

(3) Under the ordinance herein, requiring a declaration to prove a person’s or group’s belonging to an ethnic group as a condition for access to education in their mother tongue shall constitute an offence.

The exception to the rule is the situation when the candidates apply in the secondary and higher education system for places allotted specifically to a certain minority, in which case they must prove their belonging to that minority by means of a document issued by a legally established organisation of the respective minority.

(4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person’s belonging to a race, ethnic group, nationality, religion, social category or to a disadvantaged group, by his/her beliefs, gender or sexual orientation.

(5) The provisions under paragraphs (1) and (2) shall not be interpreted as a restriction of the right of education institutions that train religious personnel in view of being employed in worship places to deny the application of a person whose religious status does not meet the requirements established for access to the respective institution.

(6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute an offence.’

The requirement from Article 11 (3) had been interpreted as a certificate or letter issued by a legally established non-governmental organisation of the respective minority or declaring in its by laws interest in working on behalf of a particular minority group.

The NCCD applied the provisions of Article 11 in the context of segregation and denial of access to education cases particularly in the cases of Roma children and in the cases of children and youth living with HIV/AIDS. In a case started *ex officio* following an article in the newspaper Gândul under the headline ‘*La Glina, țiganii sunt exilați în clasele lor*’ [In Glina Gypsies are exiled in their own classrooms], the NCCD decided in the file 22A Bis/2006, that the situation of de facto segregation amounts to direct discrimination under Article 11 of the Ordinance and sanctioned Glina school with an administrative warning.<sup>89</sup>

<sup>89</sup> NCCD, Glina segregation case, in the file 22A Bis/2006. (27 August 2007).

In its decision, the NCCD mentioned the ECHR jurisprudence on Article 14 highlighting that in finding that discrimination occurred it must be established that persons in analogous and comparable situation, receive a preferential treatment and that this distinction does not have an objective and reasonable justification, citing *Fredin v. Sweden*, *Hoffman v. Austria*, *Spadea and Scalabrino v. Italy* and *Stubbings and others v. U.K* as well as the jurisprudence of the Romanian Constitutional Court and the relevant standards spelled out in UNESCO Convention against Discrimination in Education, ICERD General Recommendation XXVII, Recommendation 4/2000 of the Council of Ministers of the Council of Europe, ECRI Recommendation no. 3. The case predated the Grand Chamber decision in *D.H. and Others v. CZECH REPUBLIC* (13 November 2007) and does not reflect upon the findings in that case. Similarly, the NCCD found against schools segregating Roma pupils in a series of cases mainly brought by a Roma NGO.<sup>90</sup>

In regard of segregation in education, the Romanian Ministry of Education adopted Order no. 1540/2007 on Banning School Segregation of Roma Children and on approving the Methodology on Preventing and Eliminating School Segregation of Roma Children. The Order aims at preventing, banning and eliminating segregation, seen as a severe form of discrimination, with negative consequences on equal access of children to quality education. The Order includes sanctions for those who do not observe its provisions. Segregation of Roma remains as problem as evidenced by the Fourth Quarterly Report of a multiannual Phare programme of the Romanian Ministry of Education, Research and Youth, which stated that out of a total of 209 schools investigated, nine schools had 100 percent Roma students, and in 31 schools there were segregated classes.<sup>91</sup>

‘Equal Access to Quality Education for Roma, Romania’ a report produced by the Open Society Institute<sup>92</sup> identifies the following constraints on access to education for Roma in Romania: structural constraints, legal and administrative requirements, costs, residential segregation/geographical isolation, school and class placement procedures, and language. The report discusses the following barriers to education: school facilities and human resources, school results, curricular standards, classroom practice and pedagogy, school-community relations, discriminatory attitudes, and school inspections.

90 Romani CRISS filed on 25 January 2007 a complaint to the NCCD regarding the differentiated treatment applied to Roma pupils in Dumbrăveni by separating them from the majority pupils in grades 1st-8th and moving them from the local Theoretical Highschool to a special school. According to Romani Criss, over 90 per cent of the students in the special school are Roma, and they are transferred to the special schools because they fail to obtain passing grades in the mainstream school, and not because they have special needs. Roma parents claim that their children fail because they are seated at the back of the classroom, and the teachers do not pay due attention to them. Available at: <http://www.romanicriss.org> (20 October 2007). In a similar case, on 07 February 2007, Romani CRISS filed a complaint to the NCCD reporting on discrimination against Roma children in 3rd, 4th and 6th grade in School no. 17, and 1st, 3rd and 4th grade students in School no. 19, both in Craiova, Dolj County. These children are allegedly segregated from majority students because their parents enrol them late. Roma parents state that the teachers physically abuse their children and the educational provision is of worse quality than that received by the majority students in the same school. The NCCD issued a decision stating that discrimination occurred in the schools, and urging the school to initiate the desegregation process.

91 Access to Education for Disadvantaged Groups. See inception and interim reports of Phare RO 2004/016-772.01.01.02, available at: <http://www.acces-la-educatie.edu.ro> (22 October 2007).

92 Report produced by the Open Society Institute, EU Monitoring and Advocacy Program, Education Support Program, Roma Participation Program, in 2007. According to the report, Roma appear more likely to drop out of school than their non-Roma peers, and a much higher percentage of Roma over the age of ten have not completed any level of schooling. Segregation is a persistent and pervasive issue; the separation of Roma settlements from majority communities has led to the growth of Roma-only schools serving these settlements and neighbourhoods. Available at: <http://www.eumap.org/topics/romaed> (20 October 2007).



Lack of identification documents acts as a significant barrier to school enrolment. The report finds that the costs for maintaining a child in school are not affordable for most Roma families: a clear connection exists between the economic status of Roma and the educational attainment of their children. Widespread geographical segregation in Romania has led to a high proportion of Roma children living in Roma-majority settlements and neighbourhoods, often at a distance from majority communities and infrastructure, including schools. According to the report, some Roma children are still placed by their parents in special schools to take advantage of meals and accommodation benefits.<sup>93</sup>

A 2008 study conducted by Romani CRISS monitoring the implementation of measures against segregation of Roma pupils in Romanian schools found cases of segregation of Roma pupils in 67 per cent of the schools monitored (90 schools), either at school or at classroom level.<sup>94</sup> The study also assessed the proximity of Roma communities with segregated and mixed schools and concluded that in cases of discrimination caused by segregation of Roma pupils the usual excuses of the perpetrators regarding the alleged isolation of Roma communities or their geographical proximity with the segregated schools are not always correct.<sup>95</sup> The results of the report came in the context of systematic measures taken by the specialised department in the Ministry of Education to map out and prevent segregation in education and of petitions regarding segregation in education filed both with the NCCD and with the courts of law by Roma NGOs.

Education of pupils and students with disabilities is accommodated according to the Education Law and the special legislation on the rights of persons with disabilities. Article 15 of Law 448/2006 on special protection for persons with disabilities guarantees the right to education of the child with disabilities (not distinguishing between the different types or categories of disabilities) in the form chosen by the child, his parents or guardians.<sup>96</sup> Article 15 (2) guarantees the right to permanent education and continuing education of persons with disabilities.

Access to education can be realised according to Article 16 in one of the following forms:

- a. special educational units,
- b. individual integration in regular educational institutions,
- c. special groups or classes within regular educational institutions,
- d. educational services through visiting teachers,
- e. home schooling up to the end of high school studies but not later than turning 26,
- f. education in the hospital, during hospitalisation,
- g. educational alternatives.

93 Open Society Institute, EU Monitoring and Advocacy Program, Education Support Program, Roma Participation Program, <http://www.eumap.org/topics/romaed> (20 October 2007).

94 Laura Surdu, Romani CRISS with the support of UNICEF, Monitorizarea aplicarii masurilor impotriva segregarii scolare in Romania [Monitoring the implementation of measures against school segregation in Romania]. The report used a sample of 134 schools from 9 counties (Alba, Botosani, Brasov, Dolj, Galati, Hunedoara, Iasi, Neamt and Salaj), as well as from Bucharest.

95 The report carefully assessed the impact of segregation on the quality of education and the general environment for schooling (18 per cent of segregated schools do not have running water, 57 per cent do not have central heating, 56 per cent do not have a specialty lab, in 87 per cent there are no medical labs, in 37 per cent there are no school libraries and in 67,5 per cent the teaching personnel is not qualified, the success rate of pupils from segregated schools for the capacity exam was of 14 per cent and in 28 per cent of the segregated schools the success rate was zero percent).

96 Art. 17, Law on the protection and promotion of the rights of persons with a handicap, (06 December 2006).





The Education Law provides in Article 41 for the possibility of organising home schooling for children with special educational needs who are unable to move as long as education is mandatory.<sup>97</sup> The Education Law fails to address the issue of children dropping out as a result of discrimination and harassment on grounds of disability and is establishing fines for the parents who fail to make sure that the children go to school but there is no sanction for harassment inducing drop outs. Also, the Education Law does not provide for sanctions for the schools or school inspectorates which refuse to create the appropriate schooling solutions for children.

Integration and the chance to equal opportunities in social life are recognised as critical needs in subsequent legislation. Thus, the Law on the protection of the rights of the child establishes an 'obligation for central and local public authorities to initiate projects and provide the funding to develop services targeted to satisfy the needs of children with disabilities in conditions observing their dignity, autonomy and active participation in the life of the community.'<sup>98</sup> Law 272/2004 on the protection of the rights of the child mentions that 'the child with disabilities has the right to education, recuperation, compensation, rehabilitation and integration, adapted to the own possibilities, in view of his or her personality.'<sup>99</sup> Law 272/2004 fails to provide an implementation mechanism that would allow its enforceability.

In the particular case of children living with HIV/AIDS, their right to education is provided for in Article 3 of Law 584/2002, the framework law for the protection of persons living with HIV/AIDS which is stating that 'the persons infected with HIV or living with AIDS are entitled to social protection and non-discriminatory treatment in regard of their right to education.'<sup>100</sup> Law 584 does not include an enforcement mechanism or correlative sanctions.

### **3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)**

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

In regard of access to and supply of goods and services, Article 10 of the Anti-discrimination Law lists the different types of services and goods.

Different from the Directives, the 2000 Law allows for limitations when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary. Law does not distinguish between private and public actors:

97 Art. 15. 10, Law No. 268/2003 from June 13 2003, on amending and completing Education Law 84/1995 (13 June 2003). See also, Art. 17, Law No. 519/2002 of July 12, 2002 on approving the Emergency Ordinance 102/1999 on special protection and the employment of persons with disabilities, (29 July 2002).

98 Art.46.4, Law 272/2004 on the protection and promotion of the rights of the child, (21 June 2004).

99 Art.46.2, Law 272/2004 on the protection and promotion of the rights of the child, (21 June 2004).

100 Art. 3, Law No. 584/2002 of October 29, 2002 on measures to prevent the spread of AIDS in Romania and to protect persons infected with HIV or suffering from AIDS, (29 October 2002).





Art.10: ‘Under the ordinance herein, the following deeds shall constitute an offence, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, gender or sexual orientation:

- a) the refusal to ensure legal and administrative public services.
- b) denying the access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services)
- ...
- d) the refusal to grant a bank credit or to conclude any other kind of contract, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- e) refusal of access for a person or a group to services offered by theatres, movie theatres, libraries, museums, exhibitions, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- f) refusal of access for a person or a group to services offered by stores, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- g) refusal of access for a person or a group to services provided for by public transportation companies – plane, ship, train, subway, bus, trolley, tram, cab, or any other means of transportation, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;
- (h) refusal to grant the rights or benefits to a person or a group of persons.

b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

Provision of financial services might be limited under Article 10 d). The Anti-discrimination Law does not mention the specific grounds of age and disability but it is introducing a legitimacy and proportionality test:

- d) the refusal to grant a bank credit or to conclude any other kind of contract, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary;



The legal provision does not include an assessment of risk and types of data to be taken into consideration when issuing the assessment of the risk.

### 3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

The Anti-discrimination Law covers selling as well as renting a plot of land or a building for housing purposes, as well as illegal forced evictions and deportations on any of the grounds protected.

In infringement of Directive 2000/43, the 2000 Romanian Law allows for exemptions when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary:

Art.10: ‘Under the ordinance herein, the following deeds shall constitute an offence, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, gender or sexual orientation:

(c) the refusal to sell or rent a plot of land or building for housing purposes, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.’

Art. 16 - (1) Any threats, constraints, use of force or any other means of assimilation, colonisation or forced movement of persons with a view to modify the ethnic, racial or social composition of a region or of a locality shall constitute an offence.

(2) According to the ordinance herein, any behaviour consisting in forcing a person belonging to a race, nationality, ethnic group or religion, or a community, respectively, to unwillingly leave their residence, deportation or lowering their living standards with a view to determine them to leave their traditional residence shall constitute an offence. Forcing a group of persons belonging to a national minority to leave the area or regions where they live or a group belonging to the majority population to settle in areas or regions inhabited by a population belonging to national minorities shall both represent violations of the ordinance herein.

Art. 17 - (1) Any behaviour aiming to determine a persons or group of persons to move away from a building or neighbourhood or aiming to chase them away on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, on account of their beliefs, gender or sexual orientation, shall constitute an offence.



(2) The provision above shall not be interpreted as a restriction of the authorities' right to enforce urbanism plans, as long as the movement is effected under the law, with fair compensation, and the measure is not determined by the person's or group's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, by their beliefs, gender or sexual orientation.

The Housing Law does not mention any prohibition on discrimination in the area of housing.<sup>101</sup>

There are no official statistics on racist incidents and discrimination in housing against Roma; media and NGOs report cases of institutional violence against and assaulting of Roma, such as police raids and evictions taking place in Roma communities, without providing them with alternative accommodations.

The high prices of urban private rent and deficit of social housing as well as the high cost of public utilities is disproportionately affecting Roma and the main cases of discrimination (evictions, demolitions, spatial segregation) are concentrated at the level of Roma communities. A report on Roma situation in Romania released in August 2006, includes an annex with cases of eviction, exclusion or marginalisation of Roma, including regarding housing rights.<sup>102</sup>

A study financed by the World Bank provides relevant data for a typology of Roma communities affected by poverty with a clear focus on the spatial exclusion: 2/3 of Roma being situated at the periphery.<sup>103</sup> According to the author 23 per cent of the communities have severe problems with the infrastructure, 11 per cent are situated in the vicinity of a garbage pit, and 10 per cent are affected by a chronic lack of water.

A study conducted by the University of Architecture and Urbanism in 2006, Housing and Extreme Poverty. The Roma Communities' Case describes the typology of housing with examples of spatial discrimination. Cases exemplified by the study: the Dorohoi case is used to exemplify an attempt of the authorities to separate, using a fence, a Roma community of 48 families living in the historical centre; Valea Rece – Târgu Mureş, for the chronic lack of water (one source of water for 1600 people); and Cantonului street, Pata Rât, Cluj, for the placement of evicted people on an improper piece of land, near a railway.

The Open Society Foundation undertook in October 2006 a survey concluding that Roma have poor housing conditions, lack access to new social housing and are residentially segregated. More than a fourth of Roma households did not have a valid tenancy contract or ownership for the house they reside in.<sup>104</sup>

101 Romania/Housing Law, Law.114/1996 republished (11 October 1996).

102 See Romania/ Agenția de Dezvoltare Comunitară Impreună, Romania/ Romani CRISS, Overview of the Roma Situation in Romania: for European Commission consideration at the 2006 Country Report, joint submission for the European Commission, August 2006, on file with the author.

103 See the World Bank, Roma Social Mapping. Targeting by a Community Poverty Survey.

104 Rughiniș Cosima, 2007, 'Excluziunea formală a cetățenilor de etnie romă' [Formal exclusion of Roma citizens], in: Roma Inclusion Barometer, Open Society Foundation, Bucharest (p.44).



Law 448 from 2006 provides for preferential access to public housing for persons with disabilities in Article 20 and persons certified with a serious disability can receive a supplementary room and have a minimal rent when granted public housing according to Article 20(2), however no data is available to assess the level of implementation of these provisions.



## 4. EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

The Anti-discrimination Law uses the exemption of occupational requirements in the context of access to labour though the wording of Article 9 of the Anti-discrimination Law is not identical with the language of Article 4 of Directive 2000/43/EC leaving the future jurisprudence of the NCCD and of the courts to ascertain whether the two concepts are fully compatible:

‘the provisions of Articles 5-8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse hiring a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.’

As the grounds covered by the Romanian Anti-discrimination Law are broader than the protected grounds of the two Directives, the differences of treatment in case of determining occupational requirements can be based not only on the five grounds mentioned in the Directives, but on all protected grounds.

### 4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

*a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

The Anti-discrimination Law does not include specific provisions on an exemption for employers with an ethos based on religion or belief to comply with Article 4(2) of Directive 2000/78, but the provisions of Article 9 on determining occupational requirements which are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted as to allow for ethos or religion based exceptions:

Art. 9 - None of the provisions of articles 5-8 shall be interpreted as a restriction of the employer’s right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

Lacking relevant jurisprudence developed either by the courts or by the NCCD in application of such exceptions for ethos or religion based associations, it is still early to assess the tests used in analysing the conditions under which these exceptions will be accepted.

The Law on religious freedom and the general status of religious denominations includes provisions on labour relations taking place within state recognised religious denominations - Law 489/2006 established a three tier system with traditional religious denominations being granted the status of state recognised religious denominations (*culte*), religious associations (*asociații religioase*) and religious groups (*grupuri religioase*) which do not meet the strict criteria established by the law or choose not to register as legal persons.<sup>105</sup>

According to Articles 23-26 of the 2006 Law on religious freedom and the general status of religious denominations, state recognised religious denominations have the right to select, appoint, hire and discipline their own employees, a practice already in force in 2000 when the Anti-discrimination Law was adopted. Issues of internal discipline are solved according to bylaws and internal provisions by the religious courts of each denomination. Theoretically, the legal regime established in this chapter only to religious personnel of recognised denominations should be extended to religious personnel of other entities the ethos of which is based on religion or belief (associations and religious groups) according to the legal principle that where the reason behind a normative provision is the same, the norm applied should be the same accordingly.

b) *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

The Anti-discrimination Law and the Law on religious freedom and the general status of religious denominations fail to address the issue of potential conflicting regimes between the two or between the religious autonomy as granted by Law 489/2006 and the Labour Code.

In the case P.M.G. v.I.S. and Episcopia D., decision 16/18 January 2005,<sup>106</sup> adopted prior to the adoption of Law 489/2006, the NCCD chose to focus on the issue of individual responsibility and avoided discussing internal labour relations within the church. This decision is the only case of discrimination in employment, in the context of a religious denomination acting as employer and being accused of discriminating against one of its employees on grounds of suspected sexual orientation.<sup>107</sup>

105 Romania/Law 489/2006 Law on Religious Freedom and the General Status of Religious Denominations (8 January 2007).

106 Two NGOs ACCEPT and CRL filed a complaint on behalf of the victim who worked as a singer in the church choir of Biserica Adormirea Maicii Domnului, Braila County. After the religious service, the local priest presented a local newspaper with an announcement of a young gay man seeking a partner, claiming that the announcement belonged to PMG. PMG complained to the Bishop but the priest started spreading rumors in the community that PMG "goes after men" and convened a local council to investigate the private life of PMG. The NCCD found that the deeds of the priest had as effect excluding PMG from the local community and from his position as singer in the choir of the church and that he spread rumors with the effect of restricting the right to privacy and the right to dignity. See also Section 0.3 for a full presentation of the case.

107 NCCD case, decision 16/18 January 2005, Mr. P.M.G. v.I.S. & Episcopia D. The case was filed by two human rights NGOs following the complaint of a choir singer who reported being harassed by the local priest on ground of his alleged sexual orientation.





The NCCD noted that the discriminatory statements of the defendant (a priest) were issued in *nome proprio*, after the religious service, and did not represent the position of the Orthodox Church, noting that the hierarchy of the church tried to intervene and mediate the conflict between the priest and the plaintiff.<sup>108</sup> The defendant was fined with an administrative fine of 10,000,000 ROL (EUR 300).

No other case-law is reported to indicate trends in balancing the guarantee for religious autonomy (only for state recognised denominations) against the general prohibition of discrimination.

#### **4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)**

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

The Anti-discrimination Law does not include specific provisions to comply with Article 3(4) and Recital 18 of the Directive 2000/78 but the general exemptions for a legitimate objective provided for in Article 9 can be invoked in relation to age and disability requirements for armed forces:

Art. 9 - None of the provisions of articles 5-8 shall be interpreted as a restriction of the employer's right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

National defence institutions are exempted from the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to hire persons with disabilities in a percentage of at least four per cent of the total amount of employees, according to Article 78(4) of Law 488/2006.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

No specific provisions to comply with Recital 18 of the Directive 2000/78 are included in the Governmental Ordinance 137/2000 (the Anti-discrimination Law), but the general exemptions for a legitimate objective provided for in Article 9 can be invoked in relation to occupational requirements relating to employment in the police, prison or emergency services.

Public institutions dealing with public order and national security are exempted from the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to hire persons with disabilities in a percentage of at least four per cent of the total amount of employees, according to Article 78(4) of Law 488/2006.

<sup>108</sup> In the dissenting opinion, it was underlined that the priest acted as a representative of the Orthodox Church which considers homosexuality as a sin and that the priest is under a religious oath all the time.



- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

The Education Law, Law 84/1995<sup>109</sup> provided that Romanian public schools teach Religion as a standard subject on confessional grounds. Article 9 of the Education Law of 1995 provides that parents and tutors of pupil and students older than 10 can either choose the state recognised religion to be studied during Religion classes according to their religious affiliation—or choose not to attend such classes. The Ministry of Education is under a duty to make all arrangements to facilitate access for religious teachers of the 18 state-recognised religious denominations according to the needs of the pupils. Under this system, the curriculum for religious education is set by the state recognised religious denomination and approved by the Ministry of Education.<sup>110</sup> The confessional model of teaching religion has a negative impact on the legal regime applicable to teaching personnel which is *de facto* in a dual relation of subordination, having to observe both internal religious norms and the general provisions on educational personnel.<sup>111</sup>

The Education Law and the Status of the Educational Personnel do not include provisions on the right of the state recognised religious denomination to select, hire or dismiss teachers of religion. However, the Law on religious freedom and the general statute of religious denominations provides in Article 32. (2) that the state recognised denominations have wide powers in training, selecting, approving and dismissing the teaching personnel for Religion classes:

- 2) The religion-teaching staff in public schools shall be appointed in agreement with the denomination they represent, under the law.
- 3) In case a teacher commits serious violations of his denomination's doctrine or morals, that denomination can withdraw its agreement that he teach religion, which will lead to the termination of that person's labour contract.
- 4) On request, in the situation where the school cannot provide teachers of religion who are members of the denomination the students are members of, such students can produce evidence of studies in their respective religion that is provided by the denomination they are members of.

The wide competency of state recognised denominations in selecting, approving or dismissing educational personnel teaching Religion classes is conflicting with the principles established by the Labour Code and by the Status of the Educational Personnel and arbitrarily places the educational personnel teaching Religion classes in a burdensome situation.

109 Education Law 84 of 1995, published as amended by Law 151/1999, republished in Monitorul Oficial, No. 370/August 3, 1999.

110 Id. at Art. 9.5.

111 Promovarea interesului superior al copilului în educația religioasă. Monitorizarea educației religioase în școlile publice din România, Coordinator: Smaranda Enache, Editura Pro Europa, Târgu-Mureș 2007, available at [http://www.proeuropa.ro/norme\\_si\\_practici.html#juridic](http://www.proeuropa.ro/norme_si_practici.html#juridic) (10 February 2008)

So far, no cases were reported by the NCCD or by the courts of complaints from teachers of Religion dismissed from their positions in public schools after not being deemed acceptable due to infringement of doctrinal requirements (e.g.: divorce in the case of Catholic education, single mothers or people living in consensual relations or homosexuality in the case of Orthodox education, women not willing to wear the hijab in the case of teaching Islam).

The Law on the status of the educational personnel, Law 128/1997 provides in Article 136 the conditions for employment of Religion teachers, on the basis of agreements between the Ministry of Education and the state recognised religions (not other religious denominations). Such agreements concluded under the domestic law provide for the structure of religious education, including the requirements for religion teachers. The law allows for cultic personnel, which graduated higher religious education or the theology seminaries, with an work experience of at least five years in the field, to teach Religion for undergraduate classes; such personnel would be paid by the Ministry of Education as teachers under the requirement of passing an exam as established by the Education Law (Art.68).

#### 4.4 Nationality discrimination (Art. 3(2))

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).*

- a) *How does national law treat nationality discrimination? Does this include stateless status?*  
*What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?*  
*Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)*

The Romanian Anti-discrimination Law does not include specific provisions or exceptions on differences of treatment based on nationality, including stateless status according to Article 3(2) of the Directives. The Anti-discrimination Law spells out the right to be free from discrimination on grounds of nationality in general, without further describing the notion of nationality or listing exemptions.

As the 2000 Law and the case-law do not mention any definition of ‘nationality’, ‘race or ethnic origin’ it is impossible to assess how the NCCD is using these notions, or the practice of the national equality body in cases of potential overlapping between discrimination on grounds of nationality and ethnicity. In practice, for its own data gathering purposes the NCCD informally categorises under ‘ethnic origin’ all cases regarding Roma, under ‘nationality’ cases filed by any of the 18 national minorities recognised under the Romanian legislation as well as by other minorities or foreigners and under ‘race’ cases lodged by persons of African or Asian descent thus avoiding potential overlap.

- b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

There are no exceptions in the Romanian Anti-discrimination Law or other pieces of legislation relying on Article 3(2) of the Directives.



#### 4.5 Work-related family benefits (Recital 22 Directive 2000/78)

*Some employers, both public and private, provide benefits to employees in respect of their partners.*

*For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner.*

*Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

- a) *Does national law permit an employer to provide benefits that are limited to those employees who are married?*

Romanian legislation does not mention any provision on the right of employers to provide benefits solely to a certain category of employees (married, with children etc.). The general prohibition from Articles 6 and 8 of the Anti-discrimination Law would apply:

Art. 6 –According to the ordinance herein, the following constitute offences: discrimination on account of the race, nationality, ethnic group, social status, disadvantaged group one belongs to, respectively on account of one's beliefs, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

...

- c) granting of social rights other than the wages;

...

Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, mother tongue, ethnic background, religion, sex, social status, sexual orientation or beliefs shall constitute an offence.

Partnerships are not recognised under the Romanian Law, either in the case of heterosexual couples or in the case of same sex couples of Romanian citizens.<sup>112</sup> However, Ordinance 30/2006 includes a definition of partnership for citizens of EU Member States for the purposes of free movement and residence in Romania, which defers to the legislation of the country of origin.<sup>113</sup> The partners of EU citizens have free access to the Romanian territory if their partnership is valid in the Member State of origin.<sup>114</sup>

112 FRALEX. Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Romania, [http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgs0-NR\\_RO.pdf](http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgs0-NR_RO.pdf) (09 January 2009).

113 Romania/Law 500/2006 on amending and approving Ordinance 30/2006 (28 December 2006).

114 LGBT partners of EU citizens have the right to freely move and reside on Romanian territory according to Art.2 (1)7 of Law 500/2006 which introduces the concept of partnership in the Romanian legislation. Art.3 of Romania/Governmental Ordinance 102/2005 on the freedom of movement and of residence of EU citizens (14 July 2005).



The proposed draft of Civil Code submitted to the Parliament might generate restrictions in relation to access to certain social benefits given the definition of family Article 197 is introducing: ‘family is based on the free marriage between a man and a woman, their equality, as well as the right and the duty of the parents to ensure the upbringing and education of their children.’

Aimed to be a conservative measure to prevent calls for recognition of same sex partnerships, the definition is affecting mono-parental families currently entitled to special social support as well as unmarried couples living as families.

*b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

There is no provision on the right of employers to provide benefits solely to employees with opposite-sex partners. Same-sex partnership is not recognised under the Romanian legislation. The general prohibition from Articles 6 and 8 of the Anti-discrimination Law would apply.

#### **4.6 Health and safety (Art. 7(2) Directive 2000/78)**

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

The Anti-discrimination Law does not provide for specific exceptions in relation to disability in the context of health and safety regulations similar to the provisions of Article 7(2) of Directive 2000/78. However, the general exception of objective and justified limitation, allowed by Article 9 of the Ordinance would be applicable:

Art. 9 - None of the provisions of Articles 5-8 shall be interpreted as a restriction of the employer's right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

The Anti-discrimination Law does not mention exceptions relating to health and safety law in relation to any other grounds. Similarly, the legitimacy and proportionality test indicated in Article 9 of the Anti-discrimination Law would be applicable for exceptions based on dressing codes or religious tenants.



## 4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)

### 4.7.1 Direct discrimination

- a) *Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Romanian legislation does not mention specific exceptions regarding discrimination on the ground of age, under the wording of Article 6 of the Directive 2000/78.

Discrimination on the ground of age might be justified under Article 9 of the Anti-discrimination Law stating ‘the employer’s right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as ...the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.’

The Romanian 2000 Law allows for discrimination in employment relations, including on the ground of age, under the specific test established in Article 9 of the Ordinance 137/2000 (the Anti-discrimination Law). The wording of the test is compliant with the test provided by Article 6, Directive 2000/78.

Art. 9 - None of the provisions of articles 5-8 shall be interpreted as a restriction of the employer’s right to refuse to hire a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this ordinance, and the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary.

It is up for future case-law to confirm compliance of the Romanian test in assessing whether discriminatory measures are objectively and reasonably justified by a legitimate aim, including a legitimate employment policy (such as the objective of encouraging professional reinsertion of senior workers), labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

In its decision no.42 from 09 January 2008, in the file 498/2007, in the case F.K v. Ministerul Educației, Cercetării și Tineretului [Ministry of Education], Inspectoratul Școlar Județean M. [M. county school inspectorate], the NCCD noted that the refusal to allow the plaintiff to participate in a competition for the position of school director because he had less than four years before reaching the pensionable age amounts to discrimination. The refusal was based on an Order of the Ministry of Education<sup>115</sup> which provided that ‘at the date of the competition, candidates should have an age with at least four years less than the standard pensionable age.’

<sup>115</sup> Ordinul Ministrului Educației și Cercetării nr. 5617 (14 November 2006).



The NCCD considered that the refusal to allow the plaintiff to participate in the competition for a position of school director is discriminatory and recommended to the Ministry of Education to modify the criteria for the competitions for the position of school director.<sup>116</sup>

In a 2006 decision, I.N. v. Administrația Națională a Penitenciarelor [National Administration of Penitentiaries], the NCCD found that the age limit of less than 35 established for taking the exam in the case of penitentiary agents was discriminatory and recommended to the Ministry of Justice and to the National Administration of Penitentiaries to modify this requirement, in spite of claims of the authorities that a lower age is required in order to secure 'dynamism, flexibility and optimism.'<sup>117</sup>

b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

The Romanian Anti-discrimination Law does not include any specific provision allowing for differences in treatment based on age for any activities within the material scope of the Directives.

The Labour Code provides for specific protective measures in relation to employees under 18 who have a work program of six hours/day and 30 hours/week (Article 109), cannot work supplementary hours (Article 121) or during the night shift (Article 125), have a lunch break of at least 30 minutes (Article 130), have a supplementary vacation of three days (Article 142).

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

The Romanian Anti-discrimination Law does not include any specific provision on the right of occupational pensions schemes to fix ages for admission to the scheme or for entitlement to benefits as allowed by Article 6(2) of Directive 2000/78. The Law 411/2004 on private pensions makes participation in private pension schemes mandatory for people under 35.

The special law on pensions, Law 19/2000 on the public pension system and other social security rights<sup>118</sup> establishes the general age for retirement which will be progressively increased by 2014 to reach the ceiling of 60 for women, 65 for men (current age for retirement calculated for 2008 is 58 years and six months for women and 63 years and six months for men). The Law also established the required number of years of contribution to the pension schemes (at least 30 years of participation for women and 35 for men). Law 19/2000 provides for different criteria of calculation in special cases (work in the nuclear sector, pilots, mining etc.). The law established a unified public pension system, integrating the majority of former independent systems; the only system left outside is the pension system for militaries.

<sup>116</sup> NCCD, decision no.42 from 09 January 2008, in the file 498/2007, in the case F.K v. Ministerul Educației, Cercetării și Tineretului [Ministry of Education], Inspectoratul Școlar Județean M. [M. county school inspectorate].

<sup>117</sup> NCCD, decision I.N. v. Administrația Națională a Penitenciarelor [National Administration of Penitentiaries], (11 May 2006).

<sup>118</sup> Romania/ Law 19/2000 Law on the public pensions system and other social benefits. (17 March 2000).



#### 4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

The Anti-discrimination Law does not mention special conditions for younger or older workers or persons with caring responsibilities.

The Labour Code provides for specific protective measures in relation to employees under 18 who have a work program of six hours/day and 30 hours/week (Article 109), cannot work supplementary hours (Article 121) or during the night shift (Article 125), have a lunch break of at least 30 minutes (Article 130), have a supplementary vacation of three days (Article 142).

Employers might receive fiscal facilities if they hire students during the vacation or fresh graduates, according to Law 76/2002.<sup>119</sup> Article 80 of Law 76/2002 provides that employers who hire young graduates for at least three years, are exempted from paying the fiscal contributions for the unemployment public fund, for the graduates hired for 12 months and receive a monthly contribution from the state which can be the minimum average income or higher depending on the education of the employee. According to Article 85 of the Law 76/2002, employers hiring unemployed people who are over 45, or unemployed persons who are with caring responsibilities (sole parent) receive similar facilities. The employers are under a duty to maintain the work relation for at least two years.

The Labour Code as modified by Law 371/2005 provides an exception from the general prohibition against individual labour contract on a determined period of time, an allows such contracts in Article 81 d) in the case of a person who is looking for employment and who will reach the standard pensionable age in five years.

#### 4.7.3 Minimum and maximum age requirements

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

There are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment. The Labour Code established the minimum age in relation to access to employment, which is of 16, according to Article 13 of the Labour Code, or 15, with the approval of the parents or of the guardians, 'if the health, and professional development are not jeopardised.' Employment of children under 15 is prohibited.<sup>120</sup>

<sup>119</sup> Romania/Law 76/2002 on the system of funds for unemployment and encouraging occupation.

<sup>120</sup> Romania/ Codul Muncii [Labour Code] (24 January 2003).



#### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

*For these questions, please indicate whether the ages are different for women and men.*

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

The Law 19/2000 on the public pension system and other social security rights<sup>121</sup> establishes the general age for retirement. Article 41(2) of the Law 19/2000 establishes that 'the standard retirement age is of 60 for women and 65 for men, and the standard retirement age will be reached in 13 years from the adoption of the law[by January 1<sup>st</sup> 2014], by gradually increasing the pensionable age, starting with 57 for women and 62 for men.' Besides the standard retirement age, potential pensioners are required to fulfil a number of years of contribution to the pension schemes (at least 30 years of participation for women and 35 for men).

According to Law 19/2000 the pensions are calculated based on an announced formula, using points and taking into account the employee's contribution and the contribution period; one pension point is equal with 45 per cent from the average gross salary paid in Romania; the pay-as-you-go (PAYG) system become a combined one: defined benefits for minimum stage of contribution and defined contribution for the rest.<sup>122</sup>

The individuals who reach the pensionable age but want to work longer, can carry on their activities if the employers agree. After retiring, pensioners can work under an individual work contract or under a civil convention (a contract ruled by civil law provisions and not by the Labour Code which has as object providing services)- in such a case, the relation is no longer regulated by the strict provisions of the Labour Code and it is merely a civil contract having as object an obligation to do (undertake a certain activity) . In this case, the pensioners can collect both the pension and the salary received for their professional activity, no matter the amount collected. There are limitations provided in relation to the number of hours pensioners can work: minimum two hours/day or eight hours/day.

The individuals who retired before reaching the statutory age, for medical reasons, cannot work while collecting the pension.

<sup>121</sup> Romania/ Law 19/2000 Law on the public pensions system and other social benefits.(17 March 2000).

<sup>122</sup> The pension is calculated using a points system: the employee receives a maximum of three credit points per full years of earnings at or above the average economy-wide wage. The pension points are calculated as the ratio of the individual's monthly gross wages and other compensation to the national average monthly gross wage for that year. The employee's pension is determined by multiplying the pension points with the pension point value, which is laid down in the social security budget law every year. The system aims to ensure a pension of 45% of the average wage in the year of retirement for an employee with a full career. By 2015, the full old age pension will be payable to men aged 65 with 35 years of service and women aged 60 with 30 years of service. Early retirement of up to 5 years is possible if the full service period has been fulfilled. See, OECD Report: Romania, <http://www.oecd.org/dataoecd/13/30/38708660.pdf> (06 May 2008).

In the case dr. D.M., dr. I.G., dr. V.O., dr. D.A., dr. L.P. v. Colegiul Medicilor [the College of Medical Doctors] from 27 June 2006 the NCCD found that the different retirement age for men and women established by the Law 95/2006 regarding the reform in the public health system is discriminatory and recommended to the Ministry of Health to make adequate changes.<sup>123</sup>

The NCCD noted that ‘the different pensionable age for men and women was intended to be an affirmative measure but it is *de facto* a discriminatory provision, meaning that for a similar type of work, under the same category and the same number of years of contribution, women have to retire earlier than men.’

The NCCD indicated that ‘such a provision could be perceived as an affirmative measure if the retirement of women at 60 would be optional and not a legal obligation.’

b) *Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

In addition to the public PAYG pension, a mandatory personal accounts system was introduced at the beginning of 2007. A system of voluntary pension schemes also started operating in 2007.

Participation in pension schemes (*pensii private*) is compulsory for employees beginning with 2007, according to Law 411/2004 on private (universal) pension schemes. Any worker under the age of 35 should become a contributor to a private pension fund. The contributions are optional for the active workers between the ages 36-45. The retirement age is the same as for the social security pension, with the law providing the possibility to request retirement 5 years earlier if the participant has reached the full contribution period.

A voluntary system of contributions is established by Law 204 from May 2006 on facultative pension schemes<sup>124</sup> according to which the occupational pension schemes are considered facultative/ optional pension schemes proposed either by the employers or by the employers and the unions. Employees and the self-employed may participate in voluntary schemes. Participation is voluntary for employees. Employees can participate in as many occupational schemes as they wish and cumulate pension rights and benefits. The contribution can be shared between employer and employee in accordance with the scheme regulations or a collective agreement. Employees may at any time change the level of contributions or cease paying contributions altogether, but must notify the employer and the administrator. Participants can retire when they reach the age of 60 years (both men and women), under the condition of having made contributions for a period of at least 90 months.

123 Law 95/2006 regarding the reform of the public health system, amended the provisions of the Law 221/2005 which established the retirement age for medical doctors at 65, irrespective of gender, to establish that the retirement age for women medical doctors is 60 and for men is 65, excepting the situation of persons who have a Ph.D. in Medicine for whom the retirement age can be 65 for women and 70 for men. The amendments came as a reaction to social expectations, the differentiated retirement age on grounds of gender being one of the embedded legacies of the Communist legal system.

124 Romania/Law 204/2006 on Facultative Pensions Schemes (22 May 2006).



- c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

The state-imposed retirement age is not mandatory as the persons of pensionable age who want to carry on their activities, can do so, if their employers agree.

The Labour Code establishes the possibility in Article 61 (e) for the employer to ask for the termination of employment relations when the employee reached the standard pensionable age and has contributed the required number of years to the state contribution schemes, even if the employee did not file a request for retirement.

The law does not specify if the opposition of the employee triggers any effect. In practice, if the legal conditions are met the request of the employer is followed by the termination of the contract.

Special laws provide for limitations in certain sectors such as education. Article 128 of Law on the status of the educational personnel, Law 128/1997 establishes that undergraduate teaching personnel, proving extraordinary professional competencies, can be maintained on a tenure track for up to three years after the retirement age, with the approval of the council of teachers of that educational unit. Academics, who earned a Ph.D. degree can maintain their activity until they are 65 - in the case of individuals with exceptional professional competencies, upon request, the faculty senate can approve annually the continuation of their work, until they are 70, according to Article 129.

The National Collective Contract for 2007-2010, signed according to Article 10 of Law 130/1996 on collective labour contracts<sup>125</sup> provides in Article 24 that for certain sectors (difficult conditions of labour, dangerous, toxic or embarrassing/humiliating conditions), the employees can benefit of reductions of the pensionable age, according to special laws and special collective contracts concluded at the level of each sector of the economy.

- d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

The National Collective Contract for 2007-2010<sup>126</sup> allows for reductions in the pensionable age in certain sectors (difficult conditions of labour, dangerous, poisoning or embarrassing conditions), according to special laws and special collective contracts concluded at the level of each sector.

The standard pensionable age cannot be increased as Article 38 of the Labour Code provides that ‘the employees cannot give up on the rights recognised by law. Any transaction having as purpose the renouncement of rights provided for the employees in the law is null and void.’

<sup>125</sup> The National Collective Contract for 2007-2010, signed according to Art. 10 of Law 130/1996 (29 January 2007).

<sup>126</sup> The National Collective Contract for 2007-2010, signed according to Art. 10 of Law 130/1996 (29 January 2007).



Similarly, Article 238 of the Labour Code provides that the collective contracts cannot include clauses introducing less rights than those established in the collective contracts signed at the national or higher level. ‘Individual work contracts cannot include clauses establishing less rights than those guaranteed in the collective contracts.’

If discriminatory retirement ages would be established as a result of collective bargaining or individual contracts, the NCCD would sanction them as discriminatory treatment. An analogy can be drawn with the NCCD decision in the case Uniunea Sindicatelor Libere din Învățământul Preuniversitar [the Undergraduate Education Trade Union] v. Ministerul Educației și Cercetării [the Ministry of Education], from 16 April 2007, file no. 78/2007, in which the NCCD sanctioned the fact that teaching and auxiliary educational personnel, received a minimum gross salary lower than the minimum gross salary provided at the national level in the National Collective Contract for 2007-2010.

The NCCD recommended to the Ministry of Labour, Social Solidarity and Family to make relevant changes to ensure that the minimum gross salary – as a social protection measure – is the same for all categories of employees.<sup>127</sup>

e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

The general anti-discrimination law does not include any provisions on different treatment in relation to protection against dismissal on grounds of age.

The Labour Code protection against dismissal applies to all workers irrespective of age, including in the case of persons who reached pensionable age and choose to continue working with the approval of the employer. If the employee reached the standard pensionable age and has contributed the required number of years to the state contribution schemes, the employer can ask for the termination of employment relations, even if the employee did not file a request for retirement or opposes to the termination of the labour relations, according to Article 61 para. e).

The National Collective Contract for 2007-2010 provides for an exemption in the case of effective reductions of personnel.<sup>128</sup> According to Article 81 of the National Collective Contract, after reducing vacant positions, personnel reductions will be done under the following priority scheme, in descending order of priority:

- a. individual work contracts of those having two or more positions as well as of those collecting both a pension and a salary;
- b. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement but who did not requested to be retired;
- c. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement, upon their request.

<sup>127</sup> NCCD, case Uniunea Sindicatelor Libere din Învățământul Preuniversitar [the Undergraduate Education Trade Union] v. Ministerul Educației și Cercetării [the Ministry of Education], from 16 April 2007, file no. 78/2007.

<sup>128</sup> Effective reductions of personnel as provided for in the National Collective Contract involve funding made available from different budgetary sources than regular retirement schemes.





#### 4.7.5 Redundancy

a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

Age or seniority are not expressly taken into consideration in selecting workers for redundancy but Article 81 of the National Collective Contract, introduces the concept of pensionable age as after reducing vacant positions, personnel reductions should be done under the following scheme:

1. individual work contracts of those having two or more positions as well as of those collecting both a pension and a salary;
2. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement but who did not requested to be retired;
3. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement, upon their request.

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

There are no provisions on different levels of compensation for redundancy depending on the age of the worker in the anti-discrimination legislation or in labour legislation.

#### 4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

The Anti-discrimination Law does not include language mentioning that anti-discrimination measures should be taken without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Specific articles allow for exceptions when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary (Articles 9, 10 and 11 of the Anti-discrimination Law).

National defence institutions and public institutions dealing with public order and national security are exempted from the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to hire persons with disabilities in a percentage of at least four per cent of the total amount of employees, according to Article 78(4) of Law 488/2006.

#### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

No other exceptions are provided in the national law.



## 5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

Article 2(9) of the Governmental Ordinance 137/2000 (the Anti-discrimination Law) defines positive action as an exemption from the prohibition against discrimination stated in Article 2 as:

‘Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.’

The definition of positive action in the Romanian legislation is not limited to racial or ethnic origin, religion or belief, disability, age or sexual orientation and covers all protected grounds.

Positive action measures came under the attack of extreme-right groups such as *Noua Dreaptă* [New Right]<sup>129</sup> which filed petitions with the NCCD all of them being quashed. In a distinct case of the NCCD, the decision 433 from 05 November 2007, file number 448/2007, C.E v. C. where the denial of access to special measures in relation to a Roma student had been questioned, the NCCD cited the jurisprudence of the European Court of Justice in relation to the principle of equality which prohibits a different treatment for comparable situations, excepting the cases when the treatment has an objective justification. The NCCD stated that ‘the measures adopted by the Romanian authorities, in particular the Ministry of Education in relation to Roma pupils had the purpose of ensuring the equality of opportunities, resulting in the implementation of affirmative measures. Such affirmative measures, by their own nature, had as purpose progressive equalization of the situation of Roma children from the perspective of opportunities for chances in education, in order to bring them in the position of pupils in a similar analogous situation with other pupils. The Ministry of Education prepared specific procedures in order to implement such measures.’<sup>130</sup>

In its assessment of positive action, the NCCD stated that ‘employment of persons belonging to minority communities implies an affirmative measure in relation to that particular community. Such a measure can be maintained only until the objectives are reached and not afterwards.

129 Noua Dreaptă [New Right] is a non-governmental organisation registered in Romania. It acknowledges its descent from the interwar fascist movement of Legionari, whose head was Corneliu Zelea Codreanu – executed by the Romanian authorities during the operation to eliminate reactionary, undemocratic movements. See more information on the organisation’s website <http://www.nouadreapta.ro>.

130 NCCD, case C.E v. C decision no. 433 from 05 November 2007, file number 448/2007. The plaintiff complained that her son was not accepted on special places for Roma students in the institution of his choice as the application filed for her son under a particular procedure was set aside by his teachers being replaced with a fake application on his behalf. The NCCD found that the plaintiff did not observe the special requirements in filing the application to qualify for special places for Roma students and decided that discrimination took place as alleged by the plaintiff.

When the percentage of the employees from a community in a particular institution corresponds with the percentage of the respective community in the area of its location, affirmative measures cannot be maintained because they would create in themselves a situation of inequality.’<sup>131</sup>

*b) Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

Besides the definition of affirmative measures in the Anti-discrimination Law, specific legislation introduces affirmative measures in relation to particular groups: Roma, children and youth, particularly children and youth living with HIV/AIDS, persons with disabilities, single parents, unemployed, socially vulnerable or senior citizens.

The Law 488/2006, on the promotion and protection of the rights of persons with a disability introduces in Article 78(2) the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to hire persons with disabilities in a percentage of at least four per cent of the total amount of employees. The institutions which fail to hire persons with disabilities according to the law can choose between:

- a. monthly payment of an amount representing 50 per cent of the minimal average salary for each position they were supposed to open up for a person with disabilities and failed to;
- b. to use products and services from authorised protected units on the basis of a partnership, in the quantum of the amount owed to the state budget.

There are different categories of disability recognised under the Romanian law<sup>132</sup> and they are entitled to different affirmative measures as provided by Law 448/2006:

- free medical assistance, including free medication, reimbursement for supportive devices and disability-related equipment – Art.10;
- pupils with disabilities receive free meals and accommodation in school boarding - Art.16 (7);
- students with disabilities (serious and accentuated disability) receive upon request a waiver of 50% for meals and accommodation in school canteens and student dormitories – Art. 16(8);
- persons with disabilities have priority in being assigned public housing -Art.20;
- persons certified with a serious disability can receive an supplementary room and have a minimal rent in public housing -Art.20(2);

131 NCCD, decision A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita, [A.M. v. Harghita county Public Finances General Inspectorate], decision no. 43 from 09 January 2008, file number 353/2007.

132 The Romanian legislation provides for different categories of disability: 1) serious, 2) accentuated, 3) medium, 4) light, according to Article 86 of the Law 448/2006. The medical-psycho-social criteria for deciding the category of disability are established in joint orders of the Ministry of Public Health and of the Ministry of Labour, Family and Equal Opportunities at the recommendation of the National Authority for Persons with Disabilities.

- persons with a serious or accentuated disability have free transportation on all venues in urban public transportation, this benefit applies also to assistants of persons with serious disability, assistants of children with accentuated disability, assistance of persons with accentuated hearing and mental disabilities, based on a social inquiry conducted by a social assistant from the local mayor's office, personal assistants of persons with a serious disability and professional assistants of persons with a serious or accentuated disability – Art.23;
- persons with a serious or accentuated disability are entitled to fiscal facilities according to Art.26 (see section 2.4.6.h);
  1. adults with a serious or accentuated disability can receive a credit and the interest will be paid from the state budget in case of acquiring a vehicle or adapting a house according to personal access needs – Art.27;
  2. persons with a disability owing cars adapted to their disability are exempted from paying the fees for using the national roads – Art.28;
  3. the adult with a disability receives monthly indemnity as well as a monthly personal complementary budget no matter what income the person has, depending on the category of disability according to Art. 58(4) (see section 2.4.6.h);
- any person with a disability who wants to be integrated and work, has access to free evaluation and professional counselling, no matter what age, type or category of disability he or she has – Art. 72;

The Housing Law, Law 114/1996 provides for access to social housing for families with a low income, youth below 35, youth coming from social protection institutions who are more than 18, persons with disabilities, retired persons, veterans and widows of war veterans.

In the particular case of Roma, the National Strategy for Improving the Situation of Roma<sup>133</sup> provides for obligations to establish positive measures in rather general terms:

- Affirmative action regarding the employment of Roma in central and local administration;
- Designing and implementing special programs for training and professional reconversion for Roma;
- Adopting legislative measures to support Roma with the purpose of ensuring facilities in the field of education for Roma and from the perspective of promoting Roma in administration of educational institutions;
- Increasing fiscal facilities for legal persons hiring employees coming from families with many children and without adequate means;
- Increasing the number of medical personnel of Roma ethnicity by establishing special Roma places for Roma students in public medical schools;
- Designing and implementing specific programs for funding income-generating activities and micro businesses for Roma families and communities, including Roma women;
- Reducing Roma unemployment rate and combating discrimination in employment by establishing facilities for employers hiring Roma;

<sup>133</sup> See Romania/ Government Decision 522/2006, regarding the modification and adjustment of the Government Decision 430/2001 regarding the Romanian Government's Strategy on the Improvement of the Roma Situation, (19 April 2006), available at: <http://www.anr.gov.ro/strategia-anr/>



- Supporting small businesses belonging to Roma entrepreneurs by providing preferential credits;
- Hiring Roma personnel in child protection institutions;
- Establishing facilities and financed places for young Roma who want to undertake graduate education;
- Attracting Roma youth towards institutions training civil servants and personnel for public institutions (Social Assistance, Public Administration, Medical faculties, military and police academies).

Though there is no comprehensive analysis of the implementation of the National Strategy for Improving the Situation of Roma,<sup>134</sup> many of these provisions were defined as merely declarative intentions, lacking follow up implementing measures, with the outstanding exception of the area of education where quotas are established every year for most universities and for high schools. The October 2007, annual report on the state of education in Romania/ Starea învățământului din România of the Minister of Education, Research and Youth<sup>135</sup> mentions between 2-3000 special places set aside for Roma students who have completed the 8<sup>th</sup> grade to transfer to the 9<sup>th</sup> grade in upper secondary education, and 454 special places in 2007 in universities as well as 422 scholarships granted in 39 universities for Roma students. Internal regulations of universities establish the procedures for accessing such special places, most requiring a letter from a Roma NGO or a community leader indicating ethnicity, a procedure gradually rejected by some institutions due to reported cases of abuse in establishing Roma ethnicity, particularly in relation to access to scholarships for Roma students.

134 There are isolated reports and evaluations of the National Strategy (e.g. see EUMAP).

135 Report available at: <http://www.edu.ro/index.php/articles/8907> (20 October 2007).



## 6. REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

*In relation to each, of the following questions please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

*Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.*

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

In case of an alleged act of discrimination, the victim of discrimination or any person interested can choose between filing a complaint with the NCCD, and/or filing a civil complaint for civil damages with the court of law, unless the act is criminal and in such a case the Criminal Code provisions apply. A limitation was introduced by the Emergency Ordinance 75/2008 which restricted the mandate of the NCCD in cases of discrimination in the area of salary related rights and benefits of civil servants, only the Courts of Appeal acting as courts of first instance being granted jurisdiction in such cases.

The two venues (NCCD and civil case) are not mutually exclusive and the plaintiff can choose to use them simultaneously, which in practice creates problems for the parties, the NCCD and the judiciary. Also, the action before the NCCD does not have a suspensive effect regarding the prescription of the civil action. The complaint with the NCCD might result in an administrative sanction (administrative warning or fine), while the civil case results in civil damages payable to the victim of discrimination, re-establishing *staus quo antes*, the situation as prior to the act of discrimination occurred or nullifying the situation established as a result of the discrimination, in accordance to civil law provisions on torts.

The Curtea Constituțională [the Romanian Constitutional Court] in a series of decisions issued in 2008 limited both the mandate of the NCCD<sup>136</sup> and of the civil courts in relation to discrimination generated by legislative norms.<sup>137</sup> Subsequently, the protection against discrimination in cases when the discrimination is triggered by legislative norms (laws or ordinances), it is limited and depends on the willingness of the Ombudsman to seize the Constitutional Court which is the only institution able to quash discriminatory norms.

#### a.1. NCCD as preferred venue in tackling discrimination

<sup>136</sup> Romania/Curtea Constituțională/Decision 997 from 7 October 2008 finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions is unconstitutional.

<sup>137</sup> Romania/Curtea Constituțională/Decision 818, 819, 820 (3 July 2008) published in the Official Gazette 537 from 16 July 2008. The Constitutional Court has concluded that the dispositions of Article 1(2)e and of Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20 February 2009).



Any individual or any legal entity with an interest can file a complaint with the NCCD within one year of the event of alleged discrimination or from the date when that person could have known about the discrimination. According to Article 19 of the Anti-discrimination Law, the NCCD can also initiate cases *ex officio* and it used this mandate in many cases reported by the media. The NCCD has 90 days to investigate the case, organise hearings and sub poena all parties and decide whether anti-discrimination provisions were breached.

The NCCD rules on the existence of a discriminatory act and issues an administrative sanction while compensation claims for discrimination can be decided only in the civil court. The NCCD findings of discrimination and its sanctions can be appealed before the administrative courts in 15 days after their communication, by any of the parties. In 2006, for example, the decisions of the Council had been appealed before the courts of law in 46 cases out of the 376 decisions issued by the NCCD (approximately eight per cent) and the courts maintained the decisions of NCCD in 34 cases and quashed the decisions of the NCCD in six cases – the provisional statistics offered by the NCCD do not distinguish between the different types of cases.<sup>138</sup> In 2008, only ten per cent of the decisions of the NCCD had been appealed.<sup>139</sup>

The NCCD can try to solve the conflict by using mediation, or can issue administrative sanctions: administrative warnings (which are mere written findings of discrimination with recommendations for redress and carrying no pecuniary penalty) and fines.<sup>140</sup>

The NCCD has informally developed a practice of adopting recommendations carrying no financial damages when the perpetrators are central governmental agencies or public actors (e.g. discrimination is triggered by a minister's orders or the internal regulations of central public administration).<sup>141</sup>

Cases brought before the NCCD or before the courts of law under the Anti-discrimination Law are exempted from judicial taxes according to Article 27 of the Anti-discrimination Law.

Access to the NCCD is fairly easy, no legal representation being required and the burden of proof is shared between the victim and the defendant. The presence of a lawyer is not necessary before the NCCD, as the institution provides minimal legal guidance. It is up to the parties to hire a lawyer if they want to.

#### a.2. Civil courts as preferred venue in tackling discrimination

The 2006 amendments of the Anti-discrimination Law underlined the optional character of the administrative procedure for sanctioning discrimination before the NCCD.<sup>142</sup>

138 Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2006, [Report 2006].

139 Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2008, [Report 2008].

140 The amount of the fines differs: when the victim is only one individual, the amount varies from 400 RON to 4,000 RON (EUR 114-1,114) when the victims are a group or a community (e.g.: ethnic minority or the LGBT community as a group), the fine ranges between 600 and 8,000 RON (EUR 170-2,285).

141 See NCCD Decision 260, ACCEPT v. the Ministry of Health (29 August 2007)

142 See Article 21 of Romania/ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, amended (20 July 2006).

According to Article 27 of the Anti-discrimination Law, the person who considers him or herself discriminated against has three years to file a complaint for civil damages, requesting moral and pecuniary damages, or re-establishing *status quo antes* or, nullifying the situation established as a result of the discrimination, according to civil law. Such cases are based on the general torts clauses, Articles 998-999 of the Civil Code on liability for damages but are exempted from judicial taxes.

The procedure before the civil courts entails several modifications as the Anti-discrimination Law introduces the concept of sharing the burden of proof -‘the interested party has the obligation to prove the existence of facts which allow the existence of direct or indirect discrimination to be presumed, and the party against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’ Also, the 2006 amendment of the Anti-discrimination Law allowed as means of proof for acts of discrimination any type of evidence, including audio and video recordings, as well as statistical data.<sup>143</sup>

The courts of law can also decide according to Article 27 of the Anti-discrimination Law that the public authorities will withdraw or suspend the authorisation of functioning of legal persons who caused significant damage as a result of discriminatory action or who repeatedly infringed the provisions of the anti-discrimination legislation.

Courts decide independently, but, if the NCCD has issued a decision prior to the civil case, the NCCD decision has the benefit of a strong presumption of legality and such a decision can be used before the civil court in proving discrimination, liability and the existence of damages. This presumption in favour of the NCCD decision is not, however, absolute and the defendant can challenge the legality of the decision by the NCCD and submit evidence which would lead the civil court to pass over the NCCD decision.

### a.3. Criminal cases

Victims of discrimination can invoke the provisions on insult and slander in the Criminal Code. The law of July 2006 amending the Criminal Code<sup>144</sup> introduced hate speech, as incitement to discrimination based on any of the grounds of discrimination sanctioned by the anti-discrimination law.<sup>145</sup> This broadened the scope of application of an earlier provision which criminalised only ‘national and xenophobic propaganda’ and incitement to racist and nationalistic hatred. The 2006 amendments of the Criminal Code also introduced the legal aggravating circumstance for any criminal offence conducted with discriminatory motivation on any ground mentioned by the Anti-discrimination Law,<sup>146</sup> and expanded the list of grounds protected in the case of two criminal offences already existing in the Criminal Code: abuse in the exercise of power by a civil servant (Article 247) and incitement to hatred (Article 317).<sup>147</sup>

143 See Article 19-5 para. (6) and Article 21 para.4 of the Romania/ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, amended (20 July 2006).

144 Romania/Law 278/2006 on the amendment and completion of the Criminal Code, and on the amendment and completion of other laws (04 July 2006).

145 Article 317 of the Criminal Code.

146 Article 75. (1), point c<sup>1</sup> of Romania/ Criminal Code amended in 2006.

147 Article 247 and Article 317 of Romania/ Criminal Code amended in 2006.



The enforceability of criminal provisions remains limited as showed by the scarce official data reported for 2006<sup>148</sup> and in 2007.<sup>149</sup>

*b) Are these binding or non-binding?*

The decisions of the NCCD as well as the decisions of courts are binding.

*c) Can a person bring a case after the employment relationship has ended?*

The anti-discrimination Law specifies in Article 20 that any individual or any legal entity with an interest can file a complaint with the NCCD within one year of the event of alleged discrimination or from the date when it was reasonable to expect that the person knew about the discrimination. The steps of solving a petition are spelled out by the internal procedures adopted in April 2008.<sup>150</sup> The case before the civil courts can be filed in maximum three years from the event. There is no requirement of continuing employment relationship while bringing a case on employment both in the private or in the public sector.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

*Please list the ways in which associations may engage in judicial or other procedures*

*a) in support of a complainant*

Article 28 of the Romanian Anti-discrimination Law creates legal standing for NGOs with an interest in combating discrimination:

- 1) Human rights non-governmental organisations can appear in court as parties in cases involving discriminations pertaining to their field of activity and which prejudice a community or a group of persons.
- 2) The organisations provided in the above paragraph can also appear in court as parties in cases involving discrimination that prejudice a person, if the latter delegates the organisation to that effect

148 OSCE, ODHIR, Hate Crimes in the OSCE Region: Incidents and Responses - annual report for 2006, available at: [http://www.osce.org/publications/odhr/2007/09/26296\\_931\\_en.pdf](http://www.osce.org/publications/odhr/2007/09/26296_931_en.pdf) (10 October 2007).

149 OSCE, Hate Crimes In The OSCE Region – Incidents And Responses Annual Report for 2007, available at [http://www.osce.org/publications/odhr/2008/10/33850\\_1196\\_en.pdf](http://www.osce.org/publications/odhr/2008/10/33850_1196_en.pdf) (10 January 2009). The report provided the following data: “Inspectorate-General of the Police did not register any cases related to hate crimes. The Supreme Council of Magistracy identified nine cases of “in-service abuse”. Two individuals were sentenced to jail, while in seven cases the sentence was suspended. Nine cases were recorded under Government Emergency Ordinance No. 31/2002, which prohibits fascist, racist, or xenophobic organizations and symbols and the promotion of cults. In three cases, exemption from criminal investigation was recorded, while the remaining six cases were dropped.”

150 Romania/ORDIN nr. 144 din 11 April 2008 privind aprobarea Procedurii interne de soluționare a petițiilor și sesizărilor, Consiliul Național Pentru Combaterea Discriminării, Monitorul Oficial nr. 348 din 6 May 2008. NCCD Order approving the internal procedure in solving petitions.

Trade unions are not specifically mentioned as having legal standing but the NCCD and the courts interpreted Article 28 as applying to trade unions as well.<sup>151</sup>

*b) on behalf of one or more complaints (please indicate if class actions are possible)*

As an exception from the norms of civil procedure, NGOs having a legitimate interest in anti-discrimination may engage, either on behalf of the victim or in support of the plaintiff, in any judicial and/or administrative discrimination procedures based on the request or the delegation issued by the victim.<sup>152</sup> When the discrimination concerns a community or a group of people, the Romanian Anti-discrimination Law provides legal standing for NGOs even without the approval of the alleged victims of discrimination.

Class actions are not allowed under Romanian law. Association having as mandate protection of human rights and combating discrimination can file complaints on their own behalf when the target of discrimination is a group or a community and can intervene on behalf of one individual if the victim delegated the association. Not mentioned specifically by the law but accepted in the practice of the NCCD is to allow associations to submit amicus briefs in support of a complainant. The internal procedures of the NCCD mention the possibility of *amicus curiae* from NGOs with expertise in a particular field.<sup>153</sup>

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

The 2006 amendment to the Romanian Anti-discrimination Law introduced the concept of ‘sharing the burden of proof.’ According to Article 20 (6) and Article 27 (4) of the Anti-discrimination Law:

‘the person interested has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’

The wording of the provision on the burden of proof mentions cases of direct and indirect discrimination, but the NCCD used the definition of direct discrimination in cases concerning different types of discrimination (including harassment, victimisation or segregation).

151 NCCD, Decision *Uniunea Sindicatelor Libere din Învăţământul Preuniversitar v. Ministerul Educaţiei şi Cercetării* [the Free Trade Union in Undergraduate Education v The Ministry of Education and Research], file no. 78-2007, 16 April 2007. See also NCCD, Decision *Sindicatul Liber al Sticlarilor din cadrul SC STIPO SA Dorohoi v. SC STIPO SA Dorohoi* [the Free Union of Glass Workers from STIPO SA v. the company STIPO SA], file no. 282+2006, 13 March 2007.

152 The concept ‘upon the person’s request’ was interpreted as the simple written request of the alleged victim of discrimination to the NGO as being enough evidence to achieve legal standing before the court or the NCCD. No mandate signed before a public notary is required.

153 Romania/ Consiliul Naţional Pentru Combaterea Discriminării Ordin nr. 144 din 11 aprilie 2008 privind aprobarea Procedurii interne de soluţionare a petiţiilor şi sesizărilor, NCCD Order approving the internal procedure in solving petitions.

Though not completely complying with the provisions of Article 8 Directive 2000/43 and Article 10 Directive 2000/78, the provisions on the burden of proof are a novelty in the context of an extremely conservative Romanian civil procedure under which only written documents and witnesses are allowed as means of proof and the general rule is that the proof is incumbent on the applicant.

During the parliamentary debates for the amendment of the anti-discrimination law in view of introducing the principle of the shift in the burden of proof, the representatives of the national equality body had to use the argument of the EU accession in order to convince the deputies to agree with such a radical change.

While the NCCD's interpretation of this provision was to comply with the Directives, judicial interpretation varied and some courts interpreted it as placing an unreasonable burden on the victim, in contradiction of the substantive provisions of the Directives.<sup>154</sup>

In the case M.D. v. Palatul National al Copiilor, decision no. 256 from 17 September 2007 in file no. 380/2007, regarding the complaint of M.D. against the institution which refused to hire him as teacher on grounds of his being certified as having an accentuated disability,<sup>155</sup> the NCCD applied the shifting in the burden of proof and noted that the plaintiff as person interested proved that he was rejected from being hired and that he had the competencies required for the position, while the defendant failed to prove that the refusal to hire the plaintiff did not amount to discrimination according to Article 20 (6) and sanctioned the employer, through its legal representative with an administrative fine of RON 400 (EUR 111).<sup>156</sup>

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)*

Article 2 (7) of the Anti-discrimination Law defines as discrimination 'any adverse treatment triggered by a complaint in general or by a case lodged with the courts of law regarding the infringement of the principle of equal treatment and non-discrimination.' The protection against victimisation is not limited by the Romanian law to the complainant but also to the witnesses. As the law does not distinguish, victimisation is prohibited not only in relation to complaints file with the NCCD but also in relation to any other public or private institution (labour inspectorate, consumers' protection office etc.).

154 Judges participating in training sessions on combating discrimination within the National Institute for Magistrates declared that they will have difficulties in applying them to practical cases with respect to prima facie evidens. These statements were made within four sessions of training on the issue of combating discrimination organized within the National Institute for Magistrates, in cooperation with the NGO Center for Legal Resources, during the year 2006 (February, July, October).

155 There are four different categories of disability depending on the gravity of the infliction: light, medium, accentuated and serious according to Art.86 (1) of Law 448/2006.

156 NCCD, M.D v. Palatul National al Copiilor, decision no. 256 from 17 September 2007 in file no. 380/2007.





## 6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

When finding that discrimination occurred, the NCCD can issue administrative sanctions: administrative warnings and fines.

The amount of the fines varies: when the victim is only one individual, the amount of the fine varies from 400 RON to 4,000 RON (EUR 114-1,114); if the victims are a group or a community, the fine ranges between 600 and 8,000 RON (EUR 170-2,285). A downside in NCCD practice is that when the perpetrators are central or local governmental agencies or public actors, the NCCD has informally developed a custom of sanctioning them with administrative warnings or of issuing recommendations carrying no financial damages.

In the case of a civil complaint for damages, the plaintiff can request pecuniary and moral damages and other types of sanctions (withdrawal or suspension of license for private entities providing services). The courts of law can decide that the public authorities will withdraw or suspend the authorisation to operate of legal persons who caused significant damage as a result of discriminatory action or who repeatedly infringed the provisions of the anti-discrimination legislation according to Article 27 of the Anti-discrimination Law.

Also in labour conflicts brought before the labour courts (labour law specialised sections within civil courts), the plaintiffs can request moral damages, including on grounds of discrimination. The Labour Code has been amended in 2007 to include ‘moral liability:’ a specific obligation for the employer to pay both moral and material damages to the employee, to compensate the employee for loss, injury or any harm suffered during employment, or in connection with work activities.<sup>157</sup>

- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

Compensations can be awarded solely by the courts of law. There are no ceilings established for the amount of compensation awarded in a civil case for damages on grounds of discrimination but the courts are rather reluctant in granting moral damages.

- c) *Is there any information available concerning:*
- *the average amount of compensation available to victims*
  - *the extent to which the available sanctions have been shown to be - or are likely to be effective, proportionate and dissuasive, as is required by the Directives?*

There is no data available on the average amount awarded to victims filing civil complaints in cases of discrimination. No studies assessed the impact of the sanctioned issued by the NCCD or by the courts in cases of discrimination.

<sup>157</sup> Romania/Law 237/2007 amending the Labour Code (12 July 2007).





Though the Ordinance 137/2000 (the Anti-discrimination Law) mentions in Article 19 letter d) the monitoring of discrimination deeds among the functions of the NCCD, in practice, there is no mechanism which would allow adequate monitoring of the compliance with the decisions issued by the NCCD and the NCCD is not active in relation to this part of its mandate. In practice, the monitoring of the enforcement of the sanctions or recommendations depends on the interest of the member of the NCCD Steering Board in charge with the file.

When requested information on this issue, the NCCD wrote that after issuing a decision on an administrative fine, both the NCCD and the courts of law communicate to local public fiscal authorities the decision.

In theory, the person fined by the NCCD or by the courts has a duty to send a proof for paying the fine (copy of the receipt) – there is no information available if such communication ever occurred and whether the NCCD compiles this type of information.<sup>158</sup>

The lack of adequate monitoring in the enforcement of the sanctions issued by the NCCD infringes on the effectiveness and on the dissuasive and educational nature such sanctions are supposed to have.

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<sup>158</sup> NCCD, Official communication no. 6082 from 22 April 2008. Also communication from NCCD sent from 25 February 2009 as a response to the request of information 1216 from 30 January 2009.

## 7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

Though Article 23 of Ordinance 137 from August 2000 (the Anti-discrimination Law) provided that a national equality body would be established within 60 days of the law being published, it took more than a year for the government to issue a decision establishing the NCCD.<sup>159</sup> After a rather slow start in its first years of functioning, the NCCD gradually became a proactive actor, engaging in a multitude of projects and establishing itself as a serious voice in combating discrimination.

The NCCD is a specialised body mandated to deal with all forms of discrimination on every ground, including race or ethnic origin, nationality, religion, disability, sexual orientation. Since September 2006, the NCCD became an autonomous public authority under the control of the Parliament. The NCCD remains independent in carrying out its mandate:

Art. 17 In exercising its mandate, the NCCD is carrying out its activity independently, without being hindered or influenced by other institutions or public authorities.

Art.18 (1) The Council is responsible for enforcing and controlling the observance of the provisions of this law, in its line of work, as well as for harmonising the provisions from normative or administrative act infringing the principle of non-discrimination.

(2) The Council develops and enforces public policies in the field of anti-discrimination. With this purpose, the Council will consult with public authorities, non governmental organisations, trade unions and other legal entities with a mission in protecting human rights or with a legitimate interest in combating discrimination.

Art. 19 With the purpose of combating discrimination, the Council will exercise its mandate in the following areas:

- a) preventing cases of discrimination;
- b) mediating in cases of discrimination;
- c) investigating, finding and sanctioning cases of discrimination;
- d) monitoring cases of discrimination;
- e) providing specialised assistance to victims of discrimination.

<sup>159</sup> Romania/ Government Decision 1194 from 2001 establishing the National Council on Combating Discrimination (12 December 2001).



(2) The Council is exercising its mandate upon request from an individual or a legal person or ex officio.

Different departments within the NCCD handle investigation, mediation and assistance for the victims, only the Steering Board of the NCCD is in charge with analysing the petitions and issuing decisions.

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

In September 2006, the NCCD became an autonomous public authority under the control of the Parliament but maintains its independence in carrying out its mandate. This change was intended to ensure the independence of the NCCD. With this came also a change in the procedure of appointing the members of the Steering Board (the governing body of the NCCD) and the risk of increased politicisation of the Steering Board as the Parliament tends to appoint on base of political algorithm.<sup>160</sup>

The NCCD is governed by a Steering Board of nine members ranking as Secretaries of State, managed by a President elected by the members of the Steering Board (Article 22). The Steering Board is a collegial body, responsible with enforcing the legal mandate of the NCCD (Article 23). The members of the Steering Board are proposed and appointed in a joint session of the Parliament by the two Chambers – Article 23 (2), with the requirement that at least two thirds of them are Law graduates. Any Romanian citizen can be appointed as member of the Steering Board under the following conditions:

1. has full legal capacity;
2. graduated university education with a diploma (*licența*)
3. does not have a criminal record and has a good reputation;
4. his/her activity in the field of protecting human rights and combating discrimination is well known;
5. did not collaborate with the Communist political police;
6. did not collaborate with the secret service.

Article 24 of the Anti-discrimination Law establishes the procedures for the appointment of the members of the Steering Board: the proposals are sent to the Permanent Bureaus of the two chambers at least 30 days prior to the date when the positions are vacated. The Permanent Bureaus publish the proposals with the candidates on their web sites and send the proposals to specialised committees for organising hearings in a joint session. The law provides for a period of 15 days when anybody can register written objections in relation to the candidates. Following the hearings of the candidates, the specialised committees issue a joint opinion which is presented to the chambers convened in a joint session. Candidates are approved with the majority of votes of deputies and senators present. The mandate of the members is of five years (Article 25).

<sup>160</sup> The amended law prescribes a special procedure of designating the candidates, their selection and appointment through vote by the plenum of the Parliament etc.

Since their number increased from seven to nine persons according to the 2006 amendments, in the autumn of 2007 the Parliament started the procedures for the appointment of two new members.

In this context, the NGOs publicly expressed their concerns that the appointments will only follow the political algorithm, and not the conditions requested by the law and proposed professional standards for the assessment of potential candidates.<sup>161</sup> Eventually, one of the appointments was political, while the other was of a human rights expert.

The NCCD presents annually its activity report for deliberation and approval to the two chambers of the Parliament according to Article 22(2). The budget of the NCCD is approved within the state budget.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The mandate of the NCCD includes preventing discrimination on all grounds via awareness raising and education campaigns, mediating between the parties, providing support for the victims of discrimination, investigating and sanctioning discrimination, including ex officio, monitoring discrimination, as well as initiating drafts to ensure harmonisation of legal provisions with the equality principle.<sup>162</sup>

Art. 19 -With the purpose of combating discrimination, the Council will exercise its mandate in the following areas:

- a) preventing cases of discrimination;
- b) mediating in cases of discrimination;
- c) investigating, finding and sanctioning cases of discrimination;
- d) monitoring cases of discrimination;
- e) providing specialised assistance to victims of discrimination.

One of the competences of the NCCD is to present to the Government draft laws in the field of combating discrimination and to initiate drafts to ensure the harmonisation of other legal provisions with the equality and non-discrimination principle.<sup>163</sup> In cases of petitions with respect to discriminatory situations generated by the legislation (laws or minister's orders) the NCCD recommended the authorities to amend the legal provisions so that they will comply with the principle of non-discrimination.

d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

161 Press release 09 October 2006 and letters of October 2006 and February 2007 signed by a number of twenty NGOs, available at: <http://www.antidiscriminare.ro/> (15 October 2006).

162 Romania/ Consiliul Național pentru Combaterea Discriminării, Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013) [National Strategy for the Implementation of Measures for Preventing and Combating Discrimination].

163 Art.18 of the GO 137/2000; also Article 2 para. (1) point (b), (c), (d) of the Romania/ Government Decision 1194/2001 regarding the organization and functioning of the National Council for Combating Discrimination, amended (17 November 2003).



The NCCD has the specific competences to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues:

Art. 19 -With the purpose of combating discrimination, the Council will exercise its mandate in the following areas:

- a) preventing cases of discrimination;
- d) monitoring cases of discrimination;
- e) providing specialised assistance to victims of discrimination.

In fulfilling its mandate, the activity of the NCCD is limited by the lack of adequate human and material resources. Due to the large number of complaints and the backlog of cases, the resources of the NCCD already strained are focused on investigating, finding and sanctioning cases of discrimination and less on preventing discrimination via awareness raising campaigns, researching various aspects of discrimination or creating an effective system of support for the victims of discrimination. The officials of the NCCD consider that the budget of the NCCD is insufficient for adequately fulfilling their mandate.

e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

According to Article 19 (2) and Article 21 the NCCD can exercise its mandate upon request from an individual or a legal person or *ex officio*.

Following the 2006 changes in the law, the NCCD must be sub poenaed as intervening party in all cases filed directly with the courts. This provision, spelled out under imperative terms in Article 27(3) of the law, further contributed to straining the already limited resources of the Council and generated a serious backlog.

The decision of the Constitutional Court in which the Court declared unconstitutional the capacity of the NCCD to find that a legislative provision triggered discrimination and to suspend it, raised the subsequent question of the possibility of the NCCD to intervene in such cases. As currently, the NCCD cannot petition the CCR, only by legislative amendments the mandate of the NCCD might be extended to include legal standing – the possibility of automatically seizing the Constitutional Court in cases of discrimination triggered by laws or ordinances, in accordance with Article 146 letter d) of the Constitution which is currently providing for this capacity only in relation to the Avocatul Poporului, the Ombudsman.

f) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

The NCCD is a specialised body and its role as a quasi-judicial institution was recognised by the Romanian Constitutional Court in its Decision 1096 from 15 October 2008 in which the CCR ruled in favour of the NCCD.



The Court affirmed the legality of the NCCD and its status of special administrative jurisdiction, an optional venue in addressing cases of discrimination and confirmed that the proceedings before the NCCD as provided by Article 21 (4) are constitutional. The Court found that the NCCD is an administrative body with jurisdictional mandate, which presents the elements of independence required for administrative-judicial activities and which observes the constitutional provisions of Article 124 and Article 126 (5) on the prohibition of establishing extraordinary tribunals.

The victims of discrimination or the NGOs can choose between filing a complaint with the NCCD or with the courts. The decision of the NCCD is an administrative sanction (fine or warning) which can be appealed before the courts of law. Absent a mechanism of monitoring compliance with NCCD decisions it is impossible to assess impact of the decisions of the institution. However, the visibility and prestige of the NCCD increased exponentially beginning with 2007 as the NCCD issued exemplary decisions against important politicians (eg. President Traian Băsescu, former Prime Minister Călin Popescu Țăriceanu, former Minister of Foreign Affairs Adrian Cioroianu, head of România Mare party Corneliu Vadim Tudor) and in a number of sensitive cases (decision of display of religious symbols in classrooms in public education, decision regarding blood safety in case of LGBT donors, decisions against discriminatory statements made by journalists or politicians, decisions on segregation in education in relation to Roma children or children and youth living with HIV/AIDS).

g) *Is the work undertaken independently?*

After the amendment of the Law in September 2006, the NCCD became an autonomous public authority under the control of the Parliament. The NCCD is defined as independent in carrying out its mandate 'without being hindered or influenced by other institutions or public authorities' according to Article 17. According to Article 18 of the Law, 'the Council is responsible for enforcing and controlling the observance of the provisions of this law [Antidiscrimination Law], in its line of work, as well as for harmonising the provisions from normative or administrative act infringing the principle of non-discrimination.'

The NCCD presents annually its activity report for deliberation and approval to the two chambers of the Parliament according to Article 22(2).<sup>164</sup> The budget of the NCCD is approved by the Parliament within the state budget as a distinct budget line but it was assessed as insufficient for the NCCD to adequately fulfill its mandate.

h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

Strategia Guvernului României de Îmbunătățire a Situației Romilor (2001-2010) [National Strategy for Improving the Situation of Roma]<sup>165</sup> provided that Roma will be represented in the Steering Board of the National Council on Combating Discrimination.

<sup>164</sup> Article 22 (1) Romania/ GO 137/200 regarding the prevention and combating of all forms of discrimination.

<sup>165</sup> Romania/ Government Decision 522/2006, regarding the modification and adjustment of the Government Decision 430/2001 regarding the Romanian Government's Strategy on the Improvement of the Roma Situation, (19 April 2006), available at: <http://www.anr.gov.ro/strategia-anr/>





Roma representation was achieved with the appointment of a Roma activist as member of the Steering Board but the 2006 changes in the appointment procedures, leaving to the Parliament the nomination and selection of the Board members makes further Roma appointments difficult, unless political support is secured.

The Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013)[National Strategy for the Implementation of Measures for Preventing and Combating Discrimination] published in October 2007 is spelling out the main principles, the priorities and the directions of intervention of NCCD for 2007-2013, and mentions Roma-related objectives without making Roma-related themes a priority of NCCD's work.<sup>166</sup>

The official position of the NCCD in relation to Roma is that 'from the NCCD statistics it comes out that Roma are the most frequent victims of discrimination in all areas of social life: access to education (cases of segregation), equality in the labour market (refusal to hire Roma), access to services and public places (refusal to provide certain services, to allow access in public places such as clubs, pubs, restaurants, internet cafes), right to dignity (public statements, hostile and degrading media articles). Consequently, the NCCD launched campaigns for combating racism and offered specialised training for relevant categories such as civil servants, teachers, policemen, magistrates as well as persons who can provide support to the victims of discrimination.'<sup>167</sup>

<sup>166</sup> Consiliul Național pentru Combaterea Discriminării (CNCD), Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013) [National Strategy for the Implementation of Measures for Preventing and Combating Discrimination] on file with the NFP.

<sup>167</sup> NCCD official position communicated on May 8th, 2008.



## 8. IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

*Describe briefly the action taken by the Member State*

- a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

In spite of a serious lack of human, financial and material resources and lack of solid institutional support from the political realm or from the Government, the visibility of the NCCD increased exponentially after 2006, also due to the way in which the NCCD understood to carry out its mandate in awareness raising.<sup>168</sup> The NCCD carried out national campaigns for awareness raising, organised cultural events, summer schools, courses and trainings, round tables discussing public policies and affirmative measures targeting children, students, teachers, civil servants, policemen, gendarmes, judges, lawyers, NGO representatives, medical doctors and medical personnel.<sup>169</sup>

- b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

The NCCD works closely with NGOs representing various vulnerable groups and consults with main NGOs in developing its programs on relevant areas.

- c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The governmental institutions do not have as an objective promoting dialogue with social partners to give effect to the principle of equal treatment within the workplace. There are however nongovernmental initiatives in this regard: under a Phare 2004 project ‘Angajat/ă European/ă= Angajat/ă Egal/ă!’ ‘European Employee=Equal Employee!’, the Center for Legal Resources and the Center Partnership for Equality carried on a qualitative research on ‘Combating Discrimination in the Workplace’ and subsequently developed a guide of good practices for companies and organised a training for 20 human resources managers from big companies on diversity management.

- d) to specifically address Roma and Travellers*

<sup>168</sup> Romania/ National Council for Combating Discrimination, Perceptions and Attitudes towards Discrimination, available at: <http://www.cncd.org.ro/studiiianalize.swf>. (20 January 2008). See also Romania/ National Council for Combating Discrimination, Direcția Relații Internaționale, Integrare Europeană, Politici Afirmative, Studii și Monitorizare, [Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring], Analiza de imagine a Consiliului Național pentru Combaterea Discriminării pentru primul semestru al lui 2006, available at: <http://www.cncd.org.ro/studiiianalize.swf>.

<sup>169</sup> Response of the NCCD from 04 March 2009 on file with FRALEX. See also annual reports from 2006, 2007 of the NCCD.

The General Secretariat of the Government implemented between October 2006-March 2008 a wide campaign S.P.E.R. – ‘Stop prejudecăților împotriva etniei romilor’[Stop the Biases against Roma!] which included a project on information and awareness raising focused on the problems of the Roma community and targeting both Roma and the general public.<sup>170</sup>

## 8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

As the principle of equality is clearly guaranteed in the Constitution, any contrary provisions would be unconstitutional and illegal under the Anti-discrimination Law as *lex specialis*. The constitutional provisions and the framework established by the Anti-discrimination Law prevail in relation to any clauses included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions.

- b) *Are any laws, regulations or rules contrary to the principle of equality still in force?*

Following the decisions of the Romanian Constitutional Court which limited both the mandate of the NCCD<sup>171</sup> and of the civil courts in relation to discrimination generated by legislative norms,<sup>172</sup> only the Constitutional Court might tackle norms containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specifically mentioned categories (courts of law or the Ombudsman), the Romanian legal framework registers currently a de facto gap in the protection against discrimination induced by legislative provisions.

In the past, the NCCD found that particular norms were contrary to the principle of equality and recommended to relevant authorities to amend the legislation, without an adequate follow up. Among relevant cases which were mediated:

- the two cases regarding restrictions applied to homosexual men in relation to donating blood. The measures proposed by the Ministry of Health (permanent exclusion of gay men from donating blood) were considered both inadequate and unnecessary but as the initial decisions and recommendations were not observed, a second petition was necessary and the issue was tabled even after a second decision.<sup>173</sup>

<sup>170</sup> <http://www.sper.org.ro/index.php?page=2> (08 May 2008)

<sup>171</sup> Romania/Curtea Constituțională/Decision 997 from 7 October 2008 finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions is unconstitutional.

<sup>172</sup> Romania/Curtea Constituțională/Decision 818 (3 July 2008) published in the Official Gazette 537 from 16 July 2008.

<sup>173</sup> Romania/CNCD/ ACCEPT v. the Ministry of Health for the National Institute of Haematology, Decision 337, from 21.11.2005) and Romania/CNCD/ ACCEPT v. the Ministry of Health, Decision 260, from 29 August 2007. A second case was made necessary due to the fact that the Ministry of Health did not comply with the recommendation of the NCCD.



- the NCCD Decision No. 323 from November, 21<sup>st</sup>, 2006, recommending to the Ministry of Education to draft a set of regulations to ensure the exercise of the right to education in equal conditions for all pupils, observe the right of parents and guardians to ensure the religious education of their children as they choose, observe the secular character of the State and the autonomy of religious denominations, ensure the freedom of religion and beliefs for all children equally and allow for the display of religious symbols only during classes of Religion or in places devoted to religious education. The decision was partially appealed and the NCCD recommendations were upheld by the Court in Appeal. Still, on June 11<sup>th</sup>, the High Court of Cassation and Justice accepted the final appeal submitted by the Ministry of Education and a coalition of religious associations and quashed the decision of the Court of Appeal – as the appeal regarded only parts of Decision 323, the decision of the High Court of Cassation and Justice is voiding only relevant recommendations and the Ministry of Education is supposed to enforce remaining recommendations but the Ministry refuses to do so and invokes the High Court Decision.



## 9. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

By law, the NCCD is responsible for all aspects regarding anti-discrimination in Romania. Conflicts of competences occurred, with the courts deciding in favour of the NCCD in two important cases: the Bucharest Court of Appeal decided that the NCCD and not the *Consiliul Național al Audiovizualului* [National Audiovisual Council] is competent to decide whether an advertising clip is discriminatory or not.

In July 2006, the Parliament adopted an amendment clarifying that the National Agency for Equal Opportunities<sup>174</sup> can only receive and forward the petitions on alleged discrimination on grounds of gender to the NCCD.<sup>175</sup> The NCCD is the competent body to decide on the existence of discrimination and to order the administrative sanctioning of the perpetrator.<sup>176</sup> However, when choosing the national implementation body for the Year 2007 – European Year of Equal Opportunities for All, the Government arbitrarily decided in favour of the National Agency for Equal Opportunities, in spite of prior preparatory work and a draft strategy prepared by the NCCD together with NGOs working in supporting vulnerable groups.<sup>177</sup> Also, when appointing the national implementation body for the Year 2008 – European Year of Intercultural Dialogue, the Government decided in favour of a newly created unit within the Ministry of Culture and Religious Denominations.<sup>178</sup>

174 The National Agency for Equal Opportunities is a department within the Ministry of Labour, Social Solidarity and Family dealing with preventive measures and policies with respect to ensuring equal opportunities on the ground of sex - The official website of the institution is available at: <http://www.anes.ro> (08 May 2008).

175 Art. 26 para. (1) point (i) of the Romania/ Law 202/2002 regarding equal opportunities between women and men, amended by Law 340/2006 for the modification and adjustment of the Law 202/2002 regarding equal opportunities between women and men (25 July 2006).

176 Art.50 para. (2) point (b) of the Romania/ Law 202/2002 regarding equal opportunities between women and men, amended (25 July 2006).

177 The decision was taken in the Government's meeting on the 6th of September 2006. See the complete documentation available at: <http://www.anes.ro> (05 May 2008).

178 Information available at: <http://www.dialog2008.ro/home> (09 May 2008).



## ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments



**ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**

Romania

Date

31 December 2008

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Legea nr. 324/2006 pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, (20.07.2006).]	August 2000	-race, -nationality, -ethnic origin, -language, -religion, -social status, -beliefs, -sex, -sexual orientation, -age, -disability, -chronic disease, -HIV positive status, -belonging to a disadvantaged group -or any other criterion	Administrative	Any field in general (going beyond fields listed in the two Directives)	Prohibition of direct, indirect and multiple discrimination, harassment, instruction to discriminate and victimisation. Establishing the specialised body, the National Council on Combating Discrimination ( <a href="http://www.cncd.org.ro">www.cncd.org.ro</a> )



<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
Lege 340/2006 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse între femei și bărbați [Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25.07.2006)	April 2002	Gender equality	Administrative	Employment relations, access to goods and services	Prohibition of direct, indirect discrimination in the context of equal opportunities between women and men and of sexual harassment. Establishing a body mandated to develop equal opportunities policies, the National Agency for Equal Opportunities Between Men and Women. (www.anes.ro )
Lege nr. 448/2006 privind protecția și promovarea drepturilor persoanelor cu handicap [Law on the protection and promotion of the rights of persons with a handicap] (06/12/2006)	January 2008	Disability	Administrative	Any field in general	Rights and duties of persons with disabilities. Obligations in relation to the accommodation of the needs of persons with disabilities. Establishing the National Authority for the Persons with a Handicap.



<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
					(www.anph.ro )
Codul Muncii [Labour Code] (24.01.2003)	February 2003	-gender, -sexual orientation, -genetic characteristics, -age, -national belonging, -race, -colour, -ethnicity, -religion, -political option, -social origin, -disability, -family situation or responsibility, -trade union membership or activity	Employment/administrative	Employment relations	-direct and indirect discrimination
Legea publicității [law on Advertising]	August 2000	-race, -sex, -language, -origin, -social origin, -ethnic identity or -nationality	Administrative	Advertising	Prohibition of discrimination in advertisement.
Codul Civil [Civil Code] (1.12.1865)	1866	No specific provision	Civil	Damages	-complaints for civil damages in cases of discrimination can be filed with civil courts



<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
					under general Civil Code liability provisions.
Codul Penal [Criminal Code, Law 278] (4.07.2006)	June 2006	All grounds covered by anti-discrimination legislation	Criminal	Specific crimes and crimes perpetrated with discriminatory motivation.	<ul style="list-style-type: none"> <li>-legal aggravating circumstance for any criminal offence conducted with discriminatory motivation (Art. 75. (1), point c<sup>1</sup>).</li> <li>-abuse in the exercise of power by a civil servant (Art. 247)</li> <li>-incitement to hatred (Art. 317)</li> </ul>

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Romania

Date 31 December 2008

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	Yes.	Yes.	No.	Yes.	Slow process of recognition of the relevant case law of the ECHR by the courts and legal profession.
Protocol 12, ECHR	Yes.	Yes.	No.	-	NTR.
Revised European Social Charter	Yes.	Yes.	No.	Ratified collective complaints protocol? No.	NTR.
International Covenant on Civil and Political Rights	Yes.	Yes.	Yes.	Yes. No interstate complaints (art.41)	NTR.
Framework Convention for the Protection of National Minorities	Yes.	Yes.	No.	-	NTR.
International Convention on Economic, Social and Cultural Rights	Yes.	Yes.	Yes.	-	NTR.

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Elimination of All Forms of Racial Discrimination	Yes.	Yes.	Yes.	Yes.	NTR.
Convention on the Elimination of Discrimination Against Women	Yes.	Yes.	No.	-	
ILO Convention No. 111 on Discrimination	Yes.	Yes.	No.	-	NTR.
Convention on the Rights of the Child	Yes.	Yes.	No.	-	NTR.
Convention on the Rights of Persons with Disabilities	Yes.	No.	NTR.	-	NTR.