



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

**COUNTRY REPORT 2011**

**ROMANIA**

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**State of affairs up to 1<sup>st</sup> January 2012**

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## TABLE OF CONTENTS

<b>INTRODUCTION .....</b>	<b>3</b>
0.1 The national legal system .....	3
0.2 Overview/State of implementation .....	7
0.3 Case-law .....	10
<b>1 GENERAL LEGAL FRAMEWORK .....</b>	<b>34</b>
<b>2 THE DEFINITION OF DISCRIMINATION .....</b>	<b>36</b>
2.1 Grounds of unlawful discrimination .....	36
2.1.1 Definition of the grounds of unlawful discrimination within the Directives .....	38
2.1.2 Assumed and associated discrimination .....	43
2.2 Direct discrimination (Article 2(2)(a)) .....	44
2.2.1 Situation Testing .....	46
2.3 Indirect discrimination (Article 2(2)(b)) .....	47
2.3.1 Statistical Evidence .....	51
2.4 Harassment (Article 2(3)) .....	55
2.5 Instructions to discriminate (Article 2(4)) .....	57
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78) .....	59
2.7 Sheltered or semi-sheltered accommodation/employment .....	69
<b>3 PERSONAL AND MATERIAL SCOPE .....</b>	<b>71</b>
3.1 Personal scope .....	71
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) .....	71
3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43) .....	71
3.1.3 Scope of liability .....	72
3.2 Material Scope .....	73
3.2.1 Employment, self-employment and occupation .....	73
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? .....	75
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c)) .....	77
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)) .....	79
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)) .....	81
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43) .....	82
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43) .....	83

3.2.8	Education (Article 3(1)(g) Directive 2000/43)	84
3.2.9	Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	91
3.2.10	Housing (Article 3(1)(h) Directive 2000/43)	92
<b>4</b>	<b>EXCEPTIONS</b>	<b>97</b>
4.1	Genuine and determining occupational requirements (Article 4)	97
4.2	Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)	97
4.3	Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)	100
4.4	Nationality discrimination (Art. 3(2))	102
4.5	Work-related family benefits (Recital 22 Directive 2000/78)	102
4.6	Health and safety (Art. 7(2) Directive 2000/78)	104
4.7	Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)	105
4.7.1	Direct discrimination	105
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	108
4.7.3	Minimum and maximum age requirements	108
4.7.4	Retirement	109
4.7.5	Redundancy	113
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)	114
4.9	Any other exceptions	115
<b>5</b>	<b>POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)</b>	<b>116</b>
<b>6</b>	<b>REMEDIES AND ENFORCEMENT</b>	<b>121</b>
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	121
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	127
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)	131
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	133
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	133
<b>7</b>	<b>SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)</b>	<b>136</b>
<b>8</b>	<b>IMPLEMENTATION ISSUES</b>	<b>146</b>
8.1	Dissemination of information, dialogue with NGOs and between social partners	146
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	147
<b>9</b>	<b>CO-ORDINATION AT NATIONAL LEVEL</b>	<b>149</b>
	<b>ANNEX</b>	<b>151</b>
	<b>ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION</b>	<b>152</b>
	<b>ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS</b>	<b>157</b>



## 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 among 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 or GO 137/2000).<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 for the last time and significantly improved.<sup>4</sup> In order to comply with the requirement to have a specialised equality body at the national level, the Anti-discrimination Law provides for the establishment of the *Consiliul Național pentru Combaterea Discriminării* [the National Council for Combating Discrimination (NCCD)]. In 2010, the provisions of the Law came under attack as by the end of the year a draft law diluting the provision of burden of proof before the national equality body and modifying the procedures for appointing new members in the Steering Board of the national equality body was in the Chamber of Deputies after being adopted by the Senate. After receiving a positive assessment from the Human Rights Committee and being further amended by the Equal Opportunities Committee in the Chamber of

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

<sup>2</sup> 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 Art. 114 and Art. 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.

<sup>3</sup> Romania/ Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 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 (31.01.2002); 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, (30.08.2003); 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 (11.04.2004). See also 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).

<sup>4</sup> 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).



Deputies in February 2011, the draft was not discussed any further for the rest of the year as it was not perceived as a priority.

The grounds of unlawful discrimination as well as the material scope of protection of the Romanian Anti-discrimination Law go beyond the requirements of the Directives. However, 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 (CCR)] which limited both the mandate of the NCCD,<sup>5</sup> and of the civil courts in relation to cases of discrimination generated by legislative provisions.<sup>6</sup>

As a part of the same ongoing conflict between magistrates and the Ministry of Justice regarding salary related rights, in which the magistrates invoked the provisions of the Anti-discrimination Law, Bacău Court of Appeal filed a reference for a preliminary ruling with the Court of Justice of the European Communities requesting an interpretation of Art. 15 of Directive 2000/43/EC and Art. 17 of Directive 2000/78/EC given the interpretation of the decisions of the Romanian Constitutional Court ruling that the mandate of the courts to find and sanction discrimination when triggered by legislative acts it is not constitutional as it clashes with the principle of separation of powers.<sup>7</sup> The Court of Justice decided that the

<sup>5</sup> Romania/Curtea Constituțională/Decision 997 from 7.10.2008 concluding that the interpretation of Art. 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. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20.02.2009).

<sup>6</sup> Romania/Curtea Constituțională/Decisions 818, 819 and 820 from 3.07. 2008. In these three decisions, the Constitutional Court has concluded that the dispositions of Art. 1(2) letter e) and of Art. 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 Anti-discrimination Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that during its application, 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> (20.02.2009).

<sup>7</sup> Case C-310/10: Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:234:0027:0027:EN:PDF>. In the reference for preliminary ruling the following questions had been raised:

1. Do Art. 15 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ( 1 ) and Art. 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2) — both transposed into national law by OG (Ordonanța Guvernului (Government legislative decree)) No 137/2000, as republished and amended — preclude national legislation or a judgment of the Curtea Constituțională (Constitutional Court) prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong (see, to that effect, judgments of the Curtea Constituțională No 1325 of 4 December 2008 and No 146 of 25 February 2010)?





reference for a preliminary ruling from the Curtea de Apel Bacău is inadmissible. In reaching that conclusion, the judgment underlined that the situation at issue in the main proceedings does not fall within the scope of Directives 2000/43 and 2000/78 as ‘the discrimination at issue in the main proceedings is not based on any of the grounds thus listed in those directives, but operates instead on the basis of the socio-professional category, within the meaning of national legislation.’ The Court of Justice also stated that ‘the order for reference does not contain sufficiently precise information from which it can be inferred that, by making infringements of rules prohibiting discrimination under Directives 2000/43 and 2000/78 and infringements of rules prohibiting discrimination under national law alone subject to one and the same compensation scheme, the national legislature intended, as regards infringements of the national rules, to refer to the content of provisions of European Union law or to adopt the same solutions as those adopted by those provisions.’<sup>8</sup>

A 2008 Emergency Ordinance approved by the Government quashed the mandate of the national equality body in relation to discrimination in the area of salary related rights and benefits of civil servants and established specific venues for addressing such complaints.<sup>9</sup> The law for the ratification of the Emergency Ordinance 75/2008 adopted in April 2009, however repealed this limitation, hence the NCCD and the regular courts remain responsible for dealing with potential cases of discrimination also in relation to salary-related rights of civil servants.<sup>10</sup>

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2. If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law — and/or a change in the case-law of the Curtea Constituțională — which are, ex hypothesi, contrary to the provisions of Community law, or are the courts required to apply Community law, as interpreted by the Court of Justice of the European Union, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Curtea Constituțională which is contrary to the provisions of Community law?

<sup>8</sup> Judgment, Case C-310/10: Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others. Available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=310/10&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docdecision=docdecision&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocno=alldocno&docnrec=docnrec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher> (11.07.2011).

<sup>9</sup> Romania/ Emergency Ordinance 75 from 11 .07.2008 regarding measures taken to solve financial issues in the area of justice-related work published in the Official Gazette 462 from 20.07.2008. The Emergency Ordinance provides that the Anti-discrimination Law will be amended with the following provision: Art. 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.

<sup>10</sup> Romania/Law 76 /2009 for the approval of the Emergency Ordinance 75 from 11.07.2008 regarding measures taken to solve financial issues in the area of justice-related work (1.04.2009).



As a positive development, in 2008, the Romanian Constitutional Court seized the chance to clarify the legal status of the NCCD in a case challenging the constitutionality of Arts. 16-25 of the Anti-discrimination Law, articles which establish the mandate of the NCCD. The CCR 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 Art. 124 of the Constitution on administration of justice and Art. 126 (5) prohibiting the establishment of extraordinary courts of law.’<sup>11</sup> In a similar case in 2009, the Constitutional Court reaffirmed the role of the national equality body as an autonomous specialised public administrative body with a mandate in combating discrimination. The decision of the CCR clearly spells out the role of the NCCD as an administrative body with a jurisdictional mandate which enjoys the independence entailed by an administrative-jurisdictional activity.<sup>12</sup>

The 2000 Anti-discrimination Law is enforceable nation-wide and it is complemented by relevant provisions found in ground-specific legislation such as legislation regarding the rights of persons with disabilities<sup>13</sup> or in legislation regulating particular areas such as laws on equal opportunities for men and women,<sup>14</sup> the Criminal Code,<sup>15</sup> and the Labour Code.<sup>16</sup> Beginning with 2008, according to the Emergency Ordinance for the implementation of the principle of equal treatment between women and men in relation to access to and provision of goods and services and provision of goods and services transposing the provisions of Directive 2004/113, the NCCD is

<sup>11</sup> Romania/ Curtea Constituțională/Decision 1096 (15.10.2008). The Court maintained the constitutionality of Arts. 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> (20.02.2009).

<sup>12</sup> Romania/ Curtea Constituțională/Decision 444 (31.03.2009). The plaintiff based his complaint on Art. 20 alin.(1) and (2) on international treaties and human rights, Art. 75 alin.(1), (4) and (5) on the legislative procedures in adopting legislation, Art. 117 alin.(3) on establishment of autonomous administrative authorities, Art. 140 alin.(1) on the Court of Audit, and Art. 126 alin.(5) on the prohibition to establish extraordinary courts of law and the conditions for establishing specialized courts, maintaining that the national equality body is an extraordinary court established by means of delegated legislation and that the fact that the Ministry of Finances issues an advisory opinion on the budget of the NCCD is infringing the independence of this institution as a pre-requirement for a quasi-judicial body. The Constitutional Court found that the complaint against Art. 2 is not a constitutional challenge but merely a complaint as to the interpretation of the law; that the challenge against Art. 16 is ill-founded and also ill founded is the complaint against Art. 20 alin.(8), (9) and (10). Consequently, the Constitutional Court rejected the objection as to the constitutionality of the provisions of the Anti-discrimination Law regarding the quasi-judicial mandate of the national equality body.

<sup>13</sup> Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>14</sup> Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25.07.2006).

<sup>15</sup> Romania/ Criminal Code, Law 278/2006 (4 July 2006).

<sup>16</sup> Romania/ Labour Code (24.01.2003).



also mandated with monitoring this area.<sup>17</sup> In case of conflicting provisions of different relevant pieces of legislation, the 2000 Anti-discrimination Law would prevail as *lex specialis*.

In order to comply with the requirement to have a specialised equality body at the national level, the Anti-discrimination Law provides for the establishment of the *Consiliul Național pentru Combaterea Discriminării* [the National Council for Combating Discrimination (NCCD)].<sup>18</sup> The national equality body has as a mandate 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>19</sup> The Romanian national equality body features elements both of a promotional body and of a tribunal type body.

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 and the locus standi and burden of proof provisions are tailored by the anti-discrimination legislation.

## 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.*

*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 (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

<sup>17</sup> Romania/Emergency Ordinance 61/2008 for the implementation of the principle of equal treatment between women and men in relation to access to goods and services and provision of goods and services (14.05.2008).

<sup>18</sup> Romania/ Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)]. The official website of the institution is available at: <http://www.cncd.org.ro> (10.01.2011).

<sup>19</sup> 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) (06.05.2008).





*Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.*

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

- a. In the case of direct discrimination in the areas of housing, access to services (including financial services) and access to goods, the 2000 Anti-discrimination Law allows for exceptions, 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>20</sup> The possibility to allow justifications of direct discrimination in the fields of housing and access to services and goods is in breach of Directive 2000/43, which does not foresee such possibilities.
- b. 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>21</sup> and of the civil courts in relation to discrimination generated by legislative provisions,<sup>22</sup> created a gap in the effective protection against discrimination. As the Constitution provides for limited standing and specific conditions for constitutional review and the Constitutional Court is the only entity able to assess and decide when a legal provision conflicts with the equality principle enshrined in the Constitution, the mandate of the NCCD should be adequately amended to include the possibility to automatically seize the Constitutional Court in cases of discrimination triggered by laws or ordinances, in accordance with Art. 146 letter d) of the Constitution which is currently providing for this capacity only in relation to the *Avocatul Poporului* [the Ombudsman]. Otherwise, the national court or the national equality body faced with a legal provision falling outside the scope of European Union law, which is incompatible with the anti-discrimination principle does not have a mechanism allowing it to decline to apply that particular legal provision as provided by the European Court in *Seda Kucukdeveci v. Swedex GmbH & Co.KG* C-555/07 from 19.01.2010.
- c. None of the definitions of harassment from the different relevant norms (Anti-discrimination Law, Equal Opportunities Law, Criminal Code) are in complete compliance with the definition of harassment spelled out in Art. 2 (3) of the

<sup>20</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, (20.07.2006).

<sup>21</sup> Romania/Curtea Constituțională/Decision 997 from 7.09.2008 finding that Art. 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions is unconstitutional.

<sup>22</sup> Romania/Curtea Constituțională/Decisions 818, 819 and 820 (3.07.2008). The Constitutional Court has concluded that the dispositions of Art. 1(2) letter e) and of Art. 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.



- Directives as the Romanian provisions fail to sanction as harassment unwanted conduct with the purpose of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and sanction only harassment having the effect of violating the dignity of a person.
- d. The provisions on the burden of proof are not in full compliance with the Directives and are under a threat of being further diluted. The Romanian 2006 amendments to the Anti-discrimination Law introduced the concept of 'sharing the burden of proof' by which '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>23</sup> The NCCD's interpretation of this provision is not always in compliance with the Directives as proved by its case law. Judicial interpretation also varied as some courts interpreted this concept as placing an unreasonable burden on the victim, thus conflicting with the provisions of the Directives. A draft bill amending the Anti-discrimination Law, including amendments to the burden of proof before the national equality body, had been approved by the Senate in 2010 and was pending before the Chamber of Deputies at the end of 2011. The proposed wording maintained the duty of the person interested in providing evidence leading to a presumption of discrimination but wiped out the duty of the defendant and turned it in an option.<sup>24</sup>
  - e. 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 and the effective, proportional and dissuasive character of the sanctions issued.
  - f. The institutional paralysis of the NCCD between the summer of 2009 and April 2010 caused by the failure of the Parliament to appoint new members in the Steering Board of the NCCD due to a political standstill, as well as the NGO protests following the nominations of six new members in April 2010, some of them without compliance with the legal criteria of expertise, indicated that the solution of appointment of the NCCD Steering Board members by the Parliament, as a guarantee of the institutional independence, proved to be, in practice, a hindrance. The NGOs working together as an informal Anti-discrimination Coalition claimed that the nomination process lead to the NCCD paralysis and politicization instead of enhanced expertise.<sup>25</sup> The politicization of

<sup>23</sup> Art. 20 (6) of the Governmental Ordinance 137/2000.

<sup>24</sup> The legislative history of the proposed draft is available here:

<http://webapp.senat.ro/sergiusenat.proiect.asp?cod=15091&pos=0&NR=L462&AN=2010> (11.11.2010).

<sup>25</sup> Due to the expiration of the mandates of the Steering Board members beginning with May 2009 and the delays and failure in making new appointments, the NCCD was unable to issue decisions in the last part of 2009 and first trimester of 2010 as no simple majority could be reached (decisions can be taken with a majority of five out of nine votes and beginning with November 2009, the Steering Board had only four members, and since January 2010 it had only three members, thus being de facto impossible to issue a decision).



the Steering Board was visible in several areas: demise of effective remedies in favour of recommendations lacking any legal power, quality of legal reasoning, number of decisions of the NCCD maintained by the courts after being appealed.

- g. The budget of the NCCD ranged from less than EUR 200,000 in 2002, its first year of functioning, with a gradual increase until 2008 when the NCCD budget reached EUR 1.7 million and a significant decline beginning with 2009, when the budget was reduced with 30 per cent. Another budgetary cut by ten per cent was applied in 2010. According to the NCCD no new staff were recruited in the institution due to the budgetary cuts and due to a general ban of hiring in the public system issued as a part of the reform package in response to the financial crisis. Also, some of the activities of the NCCD had been affected by the lack of funds or delays in making funds available due to difficult financial procedures (e.g. investigations or awareness campaigns).

Romanian Anti-discrimination legislation applies to an open-list of criteria of protection 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 and, most importantly, the emphasis on 'the right to dignity' in combating discrimination, 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 Anti-discrimination Law. The 'right to dignity' had been invoked in cases when the legal provisions were not complete enough, such as it was the case of the segregating wall separating the Roma community in Baia Mare.<sup>26</sup>

### 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).

→ 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 (also beyond employment on the grounds of

<sup>26</sup> NCCD Decision No. 439 from 15.11.2011 in file no. 4A/2011 *ex officio* v. Cherecheș.



Directive 2000/78/EC), 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.

The presentation of the case-law will be done by:

- a. Cases of the national equality body
- b. Cases of the domestic courts, including appeals against decisions of the NCCD
- c. Cases of the Constitutional Court
- d. Relevant cases of the European Court of Human Rights
- e. Brief conclusions regarding trends and patterns, including cases brought by Roma and Travellers

#### **a. Cases of the national equality body NCCD**

##### 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, Traian Băsescu was recorded when 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.<sup>27</sup>

The NCCD decided that the expression ‘filthy Gypsy,’ is ‘discrimination according to Arts. 2(1) and 4 of the GO 137/2000...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 of the public 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:

<sup>27</sup> The video recording and the press Art. s 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.



- 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 Arts. 2(1) and Art. 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.

A group of human rights and Roma NGOs v. The Minister of Foreign Affairs Teodor Baconschi

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

**Date of decision:** 24 November 2010

**Name of the parties:** ACCEPT, CRL, ECPI and Romani CRISS v. Teodor Baconschi

**Reference number:** NCCD Decision 366/2010 file 70/2010;

**Brief summary:** In February 2010, the Romanian Minister of Foreign Affairs, Mr. Teodor Baconschi declared after the meeting he had with the French State Secretary for European Affairs, Mr. Pierre Lellouche: 'We have some natural, physiological problems, of criminality within some of the Romanian communities, especially among the communities of the Romanian citizens of Roma ethnicity.'<sup>28</sup> The declarations were considered racist by a number of NGOs who filed a complaint to the NCCD against the Minister and the Ministry of Foreign Affairs.

On 24 November 2010, the NCCD decided that the declarations of Mr. Baconschi amount to discrimination. However, the NCCD did not sanction Mr. Baconschi with an administrative penalty (written warning or administrative fine as provided by the law in Art. 26 of GO137/2000.

Instead NCCD issued a 'recommendation' stating: 'because the respondent's intention to discriminate was not substantiated, the (NCCD) decision was to adopt a recommendation for him so that in the future he should pay more attention to aspects related to equality and anti-discrimination.'<sup>29</sup> The NGOs appealed against the decision of the NCCD.

<sup>28</sup> Following the public outcry, parts of the statement have been removed from the press declaration from the Ministry's website, available at:

<http://www.mae.ro/index.php?unde=doc&id=42249&idlnk=2&cat=4> (29.09.2010). The complete statement was however presented to the National Council for Combating Discrimination.

<sup>29</sup> National Council for Combating Discrimination, Press Release of 26.11.2010, available at <http://cncd.org.ro/noutati/Comunicate-de-presa/Precizare-privind-solutionarea-dosarului-in-cazul-Baconschi-95/>.





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 Art. 9 of the Anti-discrimination Law and assessed both the legitimacy of the aim pursued and the methods used. The defendant alleged that the purpose of ensuring services to minorities in their mother tongue was legitimate and 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. 535/2008,

**Brief summary:** The NCCD found that the persons with hearing or speaking impairments 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 Arts. 2 (1) and (3) corroborated with Art. 1(2)c) and Art. 10 h) of the Anti-discrimination Law and issued a warning recommending the Romanian Public Television to take necessary measures to ensure access of persons with hearing and speaking impairments. 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 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. 605/2008,

**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 Art. 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.

IPP v. Greater Romania Magazine

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

**Date of decision:** 13 January 2009

**Name of the parties:** Institutul pentru Politici Publice v. Revista România Mare

**Reference number:** NCCD Decision 17 from 13.01.2009, Institutul pentru Politici Publice v. Revista România Mare

**Brief summary:** The NGO Institutul pentru Politici Publice [Institute for Public Policies] filed a petition against the România Mare magazine, following the publication of an article entitled 'Țiganiada-2008' [Gypsy country 2008] on 3.10.2008. The unsigned article contained racist and xenophobic language, promoting a



behaviour infringing the right to dignity and creating a degrading, humiliating and offensive environment, targeting the Roma minority. The NCCD found that the article infringes the right to dignity guaranteed by the Anti-discrimination Law and promotes a public behaviour that is degrading, humiliating and offensive as it associated a criminal conduct to the Roma minority. The NCCD invoked the jurisprudence of the ECHR in balancing the freedom of speech against the right to dignity and applied the test of the ECHR when analyzing the limitation of the free speech invoked and used the interpretation of Art. 3 of the European Convention on Human Rights in assessing the impact of the statements present in the magazine article. The NCCD found that discrimination occurred and issued an administrative warning against the magazine România Mare.

### Baia Mare segregation wall decision

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

**Date of decision:** 15 November 2011

**Name of the parties:** ex officio case NCCD v. Cătălin Cherecheș

**Reference number:** Decision of the National Council for Combating Discrimination No. 439 from 15.11.2011 in file no. 4A/2011

**Brief summary:** In July 2012, the erection of a concrete wall of height of 1.8 -2 meters and long of approximately 100 meters between a Roma neighbourhood and the main road in the northern Romanian city Baia Mare has led human rights groups to accuse the mayor Cătălin Cherecheș of trying to set up a ghetto. In response, the mayor claimed that the wall was designed to prevent traffic accidents and carried on with his plans in spite of wide media outcry and a field visit and press releases issued by the president of the national equality body who went to Baia Mare in early July when the first statements regarding the separation wall were made. The NCCD started an investigation ex officio and soon petitions were filed also by the NGO Centrul Creștin al Romilor as well as by the Ministry of Regional Development and Tourism (Ministerul Dezvoltării Regionale și Turismului).

In its decision 439 from 15.11.2011, the NCCD discussed the impact of segregation for a community and sanctioned it as harassment provided for by Article 2(5) of the Anti-discrimination Law in conjunction with Article 15 on the infringement of human dignity. In rebutting the allegations of the defendant who claimed that the erection of the wall was necessary due to public safety concerns, the NCCD looked at the objective and reasonable justification, the legitimacy of the aim as well as at the proportionality of the measure issued. The NCCD noticed that based on the information provided by the local police, the relevant area of Horea Street is not the place with the highest rate of traffic accidents in the city and that „the justification cannot be accepted as objective; even if the aim (avoiding accidents) is a legitimate one, the method is not adequate (as there are quite a number of adequate measures for reducing the number of traffic accidents, such as reducing the speed of autovehicles by inserting bumpers).” The NCCD decided that the erection of a separating concrete wall between the area with social housing predominantly



occupied by Roma and the rest of the neighbourhood “is a very serious deed which negatively affects the life of the entire Roma community.” Subsequently, the NCCD decided to impose a fine of RON 6,000 (approx. €1,500) and to recommend the demolishing of the concrete wall. The decision was appealed before the Court of Appeal.

The concurring opinion of the president of the NCCD in this case is probably the first NCCD decision citing the Preamble and Article 1 of the Charter of Fundamental Rights of the EU.

### Agenția Impreună and ACCEPT v. Romanian Academy - Definition of “Gypsy”

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

**Date of decision:** 15 June 2011

**Name of the parties:** Agenția de Dezvoltare Comunitară Impreună, Asociația ACCEPT and Asociația Romilor Egalitate de Șanse v. the Romanian Academy (Academia Română) and the Linguistics Institute (Institutul de Lingvistică Iorgu Iordan)

**Reference number:** Decision 230 from 15.06.2011 of the National Council for Combating Discrimination

**Brief summary:** On 09.02.2011, Agenția de Dezvoltare Comunitară Impreună, Asociația ACCEPT and Asociația Romilor Egalitate de Șanse filed a complaint with the NCCD against the Romanian Academy (Academia Română) and the Linguistics Institute (Institutul de Lingvistică Iorgu Iordan), the research institute subordinated to the Romanian Academy in charge with producing and updating the official dictionary of Romanian language *Dicționarul Explicativ al Limbii Române*. In their complaint, the plaintiffs, all human rights NGOs, challenged one of the definitions provided for the word *Țigan* (Gypsy) as: “epithet for a person with an ugly outlook or bad habits.” The plaintiffs argued that this definition, endorsed by the Romanian Academy, in the most important scientific explanatory document, promotes discriminatory identification and racial stereotypes and it is in itself infringing human dignity due to the lack of a clear specification that such a definition is pejorative and might lead to discrimination. As the Dictionary provides that “Gypsy” and “Roma” are synonyms, the plaintiffs further argued that the definition provided for the term “Gypsy” denies the right to self-identification of the Roma minority in Romania and it is also triggering an association between Roma ethnicity and criminality or anti-social behavior.

In its Decision 230 from 15.06.2011, the NCCD issued an ambiguous decision holding that the complaint fell outside its jurisdiction and rejected it while, however, making recommendations for adequate changes in the Dictionary as the current definition “might be interpreted” as discriminatory due to the omission of specifying the pejorative character of the definition. In supporting this statement, the NCCD defined anti-discrimination law as a form of administrative law which requires “guilt” as pre-requirement in order to trigger an administrative sanction and defined “guilt” as meeting two factors: “an intellectual factor, meaning knowing the social



significance and the potential outcome of the deed, and a volitional factor, meaning the freedom to deliberate and decide of the perpetrator.” The NCCD argued that from the perspective of the subjective element – intellectual and volitional – it cannot find “a deed which was perpetrated with guilt which might lead to discrimination under Art. 2 (1) corroborated with Art. 2 (5) and Art. 15 of the GO 137/2000” due to the specificity of the action, that is determining the meaning of a word and the quality of the active subject – “members of the highest national fora for scientific and cultural acknowledgement.” Awkwardly, the decision claims that “the quality of experts of the researchers involved in developing the dictionary excludes the psychological attitude for a deed of discrimination or the volitional attitude to induce such a deed of discrimination.” This is why, the NCCD decided that the complaint does not fall under the provisions of Art. 2 (1) corroborated with Art. 2 (5) and Art. 15 of the GO 137/2000. In spite of the solution provided, the NCCD however argues in favour of a reading of its own institutional mandate as allowing the national equality body to issue non-binding recommendations in order to prevent discrimination. From this perspective, the NCCD follows up with some “considerations” and finds that “(from) the failure in expressly specifying the depreciatory and pejorative character of the subsidiary meaning of the word “Gypsy” in comparison with other words...might be interpreted that a differentiation is induced between analogous or comparable situations, basically a potential infringement of the principle of equality.” The NCCD follows up by stating that “it becomes extremely relevant and advisable that the pejorative meaning of some terms defining national or ethnic minorities, such as the word “Gypsy” be provided accurately and expressly, because the failure to specify such associated understandings might ultimately lead, in some conditions, to hurting the members of these communities of persons.”

#### L Rausch v. S.C. Elaine S.R.L.

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

**Date of decision:** 14 September 2011

**Name of the parties:** NCCD and L Rausch v. S.C. Elaine S.R.L

**Reference number:** Decision 365 from 14.09.2011 of the National Council for Combating Discrimination, NCCD and L Rausch v. S.C. Elaine S.R.L. (owner of Heaven Club from Timișoara)

**Brief summary:** Lavinia Rausch is affected by a physical disability being immobilized in a wheelchair. She was refused entry in a night club due to her disability. The club representatives justified their decision by arguing that the place is crowded and it is not accessible for a person in a wheelchair. However, the refusal was repeated in a different night when the club was almost empty. In its defence, the respondent stated that the logistical conditions at the club make it difficult for persons with disabilities to enter and that even if there is a ramp, only the prior announcement of a visit would ensure that the staff is aware and might take all measures for access into the club; that the plaintiff was invited to stay on the terrace which is physically accessible and that the bodyguard who refused Ms. Rausch is not the employee of the club but of a security company and the club is no longer working with this bodyguard. The plaintiff





has never had a direct contact with an actual employee or representative of the club. The NCCD issued four separate administrative fines for two different situations, each violating two distinct articles of the Anti-discrimination Law when it found direct discrimination in access to public services and discrimination affecting the right to human dignity of the person on the ground of disability. The NCCD sanctioned the company owning the bar with a total of RON5,000 (€1,100), reportedly the highest sanction issued so far. In its decision, the NCCD clarifies the conditions for engaging responsibility of a private company for actions of its contractors (the body guard hired by the protection services) and discusses the subordination relations between the contracting party and its contractor, by stating the obligation of private companies to include in their internal regulations provisions about equality and non-discrimination and provisions referring to the management of discrimination cases.

## b. Cases of the courts

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:** Inalta 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 Art. 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 Art. 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 Art. 2 paras. (1) and (4).



Consequently, even if the affirmation of Traian Băsescu 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 Băsescu 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.

### Discrimination of Roma pupil by teacher

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

**Date of decision:** 19 May 2010

**Name of the parties:** Ciurescu Pompiliu v. Daba Lenuța

**Reference number:** Judicial decision, File 8011/101/2009 of Curtea de Apel Craiova, decided on May 19<sup>th</sup>, 2010

**Brief summary:** The defendant, a teacher at the school, refused to allow a young Roma pupil to join her classes so that the daughter of the plaintiff was unable to attend school for two-three weeks and was severely traumatized. Only the intervention of the local school inspectorate and of the local media lead to allowing the pupil to attend school. The father of the pupil filed a criminal complaint, including a request for damages on grounds of the torts clauses of the Civil Code (Arts. 998, 999 and 1000) as well as a complaint with the national equality body. Within the criminal investigation, the Prosecutor of Judecătoria Strehaia applied a RON 100 (approx. EUR 25) administrative fine for abuse in service damaging the individual interest on grounds of Art. 246 of the Criminal Code. The national equality body dismissed the case on grounds of lack of sufficient evidence.

Before the civil courts, the court of first instance, Judecătoria Strehaia, decided in January 2009 in favour of the plaintiff and decided that the defendant together with the local school inspectorate will have to pay RON 1,500 (approx. EUR 360) as moral damages. The plaintiff as well as the defendants appealed. The Mehedinti Tribunal as court of second instance increased the award to EUR 5,000 in February 2010.

The Court of Appeal Craiova decided to apply to the case the provisions of the Anti-discrimination Law in conjunction with the Civil Code general provisions and found that: an illegal deed occurred as evidenced by the refusal of allowing the pupil in the classroom and the offending language used by the teacher in addressing the pupil. This situation lead to infringing the right to education of the plaintiff and to correlated damages. The court maintained that the quantum of damages should be reasonably proportionate to the damage caused to the right infringed and that the trauma caused to the minor by her marginalization and rejection as well as the fact that due to the teacher's behaviour the educational process had been severely hindered, justifies



higher damages. Consequently, the Court of Appeal awarded EUR 10,000 to the plaintiff. The decision is final and irrevocable.

### DZ v. Distringaz Sud

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

**Date of decision:** 01 August 2007

**Name of the parties:** DZ v. Distringaz 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 Bucureşti).

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 mimicking homosexual sexual relations. 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 Pieţe, Agrement şi Salubritate Oradea

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

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

**Reference number:** Sentinţa Civilă [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:** 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 court decided that 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 required compensation. The court also ordered payment of RON 3,000<sup>30</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.

#### Craiova school segregation case

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

**Date of decision:** 15 January 2009

**Name of the parties:** Romani CRISS and Amaro Suno

**Reference number:** Decision 4759/2/2008 of Bucharest Court of Appeal of January 15<sup>th</sup> 2009 in the appeal filed by Romani CRISS against the decision of the NCCD.

**Brief summary:** In 2006, two Roma NGOs, Romani CRISS and Amaro Suno, filed a complaint with the NCCD indicating that the Roma pupils from grades one, three and five in School No. 19 from Craiova had been segregated. The investigation team sent by NCCD did not hear all interested parties and the NCCD found that the facts presented in the complaint did not amount to discrimination without providing a rationale for the decision (statistics, hearings, testimonies). (NCCD Decision No. 395 from 14.01.2008).

The applicants appealed against the decision of the NCCD and requested for the decision to be quashed and for the file to be sent back to NCCD with the request to

<sup>30</sup> On 1.07.2005 a process of denominationalization took place. Subsequently ROL 10,000 became RON 1.



conduct an effective and impartial investigation, to analyze the “ethnic unbalance” in the distribution of the children in classes, to apply the principle of sharing the burden of the proof and use statistical data and to analyze the impact of ethnic segregation on the quality of education. The Court of Appeal accepted the arguments of the plaintiffs, quashed the decision of the NCCD No 395 from 14.01.2008 and required the NCCD to conduct a new investigation in the case.

A group of human rights and Roma NGOs v. The Minister of Foreign Affairs Teodor Baconschi

**Name of the court:** Curtea de Apel București, secția a VIIIa Contencios administrativ și fiscal

**Date of decision:** 28 November 2011

**Name of the parties:** A number of six human rights NGOs v. NCCD

**Reference number:** Sentința civilă 7125 from 28.11.2011;

**Brief summary:** In February 2010, the Romanian Minister of Foreign Affairs, Mr. Teodor Baconschi declared after the meeting he had with the French State Secretary for European Affairs, Mr. Pierre Lellouche: ‘We have some natural, physiological problems, of criminality within some of the Romanian communities, especially among the communities of the Romanian citizens of Roma ethnicity.’<sup>31</sup> The declarations were considered racist by a number of NGOs who filed a complaint to the NCCD against the Minister and the Ministry of Foreign Affairs. On 24 November 2010, the NCCD decided that the declarations of Mr. Baconschi amount to discrimination. However, the NCCD did not sanction Mr. Baconschi with an administrative penalty (written warning or administrative fine as provided by the law in Art. 26 of GO137/2000. Instead NCCD issued a ‘recommendation’ stating: ‘because the respondent’s intention to discriminate was not substantiated, the (NCCD) decision was to adopt a recommendation for him so that in the future he should pay more attention to aspects related to equality and anti-discrimination.’<sup>32</sup> The NGOs appealed against the decision of the NCCD invoking the provisions of the Anti-discrimination law as well as Art. 15 of the Racial Equality Directive, Directive 2000/43/EC. The Court of Appeal maintained the decision of the NCCD and considered as legal the decision of the NCCD of finding that discrimination was perpetrated by the former Minister (and not the Ministry of Foreign Affairs as institution) without applying any sanction and issuing a recommendation. The Court of Appeal noted that the NGOs plaintiffs in the case did not prove that “the entire public activity of the former minister” or “the statements” had as goal infringing the dignity or creating an intimidating, hostile, degrading, humiliating or offending

<sup>31</sup> Following the public outcry, parts of the statement have been removed from the press declaration from the Ministry’s website, available at:

<http://www.mae.ro/index.php?unde=doc&id=42249&idlnk=2&cat=4> (29.09.2010). The complete statement was however presented to the National Council for Combating Discrimination.

<sup>32</sup> National Council for Combating Discrimination, Press Release of 26.11.2010, available at <http://cncd.org.ro/noutati/Comunicate-de-presa/Precizare-privind-solutionarea-dosarului-in-cazul-Baconschi-95/>.





atmosphere, against a person, a group or a community and linked to their belonging to a race, nationality, ethnicity..." The Court acknowledged that the recommendation is not a sanction and defined it as an "administrative measure warning" which was made possible by the large mandate the NCCD has in preventing discrimination, such a warning being aimed at "preventing similar statements in the activity of the former/future ministers." The decision of the Court of Appeal was challenged by the NGOs before the High Court of Justice and Cassation.

### c. Cases of the Constitutional Court

**Name of the court:** Curtea Constituțională [Constitutional Court]

**Date of decision:** 15 October 2008

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

**Reference number:** Decision 1096/2008 of the Romanian Constitutional Court

**Brief summary:** ALRO Slatina, a private entity against whom the NCCD issued a decision for discriminatory treatment, challenged the constitutionality of Arts. 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 tribunals. 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 Art. 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 Art. 124 and Art. 126 (5) on the prohibition of establishing extraordinary tribunals.

**Name of the court:** Curtea Constituțională [Constitutional Court]

**Date of decision:** 03 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 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 Arts. 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 Art. 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.'

**Name of the court:** Curtea Constituțională [Constitutional Court]

**Date of decision:** 07 October 2008

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

**Reference number:** Decision 997/2008 of the Romanian Constitutional Court

**Brief summary:** In Decision 997 of 7.10.2008, the Romanian Ministry of Justice challenged the constitutionality of Art. 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD.<sup>33</sup> 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 Art. 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 [Constitutional Court]

**Date of decision:** 04 December 2008

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

**Reference number:** Decision 1325/2008 of the Romanian Constitutional Court

**Brief summary:** In Decision 1325 from 04 December 2008, the Romanian Ministry of Justice challenged the application of Art. 27 of the Anti-discrimination Law by the courts which invoked the provisions of the Anti-discrimination Law when declaring

<sup>33</sup> Art. 20 (3) reads: 'In the complaint filed according to Art. 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).'



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. 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.'

**Name of the court:** Curtea Constituțională [Constitutional Court]

**Date of decision:** 31 March 2009

**Name of the parties:** G.A.B.v. NCCD

**Reference number:** Decision 444 from 31.03.2009 of the Romanian Constitutional Court

**Brief summary:** The case was triggered by the objection as to the constitutionality of the provisions of the Anti-discrimination Law brought up by a person sanctioned by the NCCD during the appeal proceedings before the Court of Appeal. The complaint challenged both substantive and procedural provisions of the Anti-discrimination Law: Art. 2, Art. 16, Art. 20 (8), (9) and (10), Art. 23(1) and (2), and Art. 30 of the Anti-discrimination Law challenged as per their compliance with Art. 20(1) and (2), Art. 75(1), (4) and (5), Art. 117(3), Art. 140(1), and Art. 126(5) of the Romanian Constitution.

The decision of the Constitutional Court in Decision 444 from 31.03.2009 is reaffirming the role on the national equality body as an autonomous specialized public administrative body with a mandate in combating discrimination. The decision of the CCR clearly spells out the role of the NCCD as an administrative body with a jurisdictional mandate which enjoys the independence entailed by an administrative-jurisdictional activity.

**Name of the court:** Curtea Constituțională [Constitutional Court]

**Date of decision:** 15 December 2010

**Name of the parties:** Constitutional challenge filed by 66 deputies against the Law on the unitary system of pensions

**Reference number:** Decision 1612/2010 of the Romanian Constitutional Court

**Brief summary:** In February 2010, the Government adopted a draft for the *Lege privind sistemul unitar de pensii* [Law on the unitary system of pensions] as a part of the package negotiated with the international financial institutions in response to the ongoing economic crisis. The Law was adopted by the Parliament but its provision introducing an equal retirement age for men and women of 65 -Art. 53(1), was challenged before the Constitutional Court. The Constitutional Court upheld the law in question on 6 October 2010 by stating that equalizing the retirement age of men and women does not infringe the constitutional provisions on equality and that opposing such equalization would be tantamount to an opposition against an international trend. However, the Romanian President later refused to sign the law



and, on 7 October, sent it back to the Parliament stating that he could not agree with the equal retirement age of 65 for both men and women.

The President requested the Parliament to consider introducing a differentiated retirement age of 63 for women and 65 for men due to the socio-economic realities entailing a more difficult situation for women.<sup>34</sup> Consequently, the Chamber of Deputies as decisional chamber adopted the Law on the unitary system of pensions on 7 December, including an amendment regarding the differential retirement age for men and women. The amendment however did not introduce a differential period of contribution as requested by the opposition. The bill was adopted as Law 263/2010 on December 16 2010. A group of 66 Members of the Parliament filed a new case with the Constitutional Court on December 8<sup>th</sup> alleging a potential discrimination between men and women due to the differentiated system of contributing to the retirement scheme, leading to lower net pensions for women. Similarly, on December 10<sup>th</sup>, the Members of the Parliament belonging to the Social Democrat Party filed a complaint both on grounds of irregularities in the adoption procedure alleging that the required majority was not actually present and on substantive grounds due to the potential infringement of the equality clause embedded in the Romanian Constitution.

On December 15<sup>th</sup>, the Constitutional Court analysed the constitutional complaints and decided to uphold Law 263/2010 in its current form including the differentiated treatment of women and men as proposed by the President. The decision of the Constitutional Court is final and binding and the Law was published as Law 263/2010 on 16 December 2010. The law enters into force on January 1<sup>st</sup> 2011, excepting several provisions which enter into force on January 1<sup>st</sup> 2012.

#### d. European Court of Human Rights

##### 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:** The case entailed the killing of a Roma man, arson, destruction of properties and failure in ensuing investigations. The Court found:

<sup>34</sup> Law 19/2000 on the public pension system and other social security rights establishes the general age for retirement. Art. 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).



- continuing violation of Art. 8 (right to respect for private and family life and home) of the European Convention on Human Rights;
- violation of Art. 3 (prohibition of inhuman or degrading treatment) of the Convention;
- no violation of Art. 6 § 1 (access to court);
- violation of Art. 6 § 1 (right to a fair hearing) on account of the length of the proceedings;
- violation of Art. 14 (prohibition of discrimination) taken in conjunction with ArtS. 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 Hădăreni 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 some activities. Local trainings with teachers, policemen, local authorities as well as awareness raising activities had been carried out by NCCD which also commissioned a feasibility study in order to assess housing and infrastructural needs for further intervention.

Within the enhanced monitoring procedures before the Committee of Ministers of the Council of Europe for the implementation of ECtHR decisions *Moldovan and others v. Romania* (Nos. 1 and 2), *Kalanyos and others v. Romania*, *Gergely v. Romania* and *Tănase and others v. Romania*, the Romanian Government assumed in June 2011 an action plan related to the Hădăreni community but not the remaining communities





- Cașinul Nou and Plăieșii de Sus (Harghita county) and Bolintin Deal (Giurgiu county).<sup>35</sup>

**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 Art. 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 Art. 3 of the Convention concerning the lack of an effective investigation;
- no violation of Art. 13 (right to an effective remedy);
- violation of Art. 14 (prohibition of discrimination) taken in conjunction with Art. 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 Art. 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 the commitment of the Romanian government to adopt relevant measures. The Governmental Decision 1283 from 8.10.2008 for the approval of the educational programme for combating Roma discrimination in the villages Cașinul Nou and Plăieșii de Sus, locality Plăieșii de Jos, Harghita county provided for the responsibilities of the NCCD in developing educational programs and taking relevant measures in the two villages. After the NCCD finished its educational programmes in the two localities, no other activities were carried out and there was no following up on the concrete measures identified as required in the NCCD study.<sup>36</sup>

<sup>35</sup> Bilan et plan d'action. Groupe d'affaires *Moldovan et autres contre Roumanie (no 1 et no 2)*- Communication from Romania to the Secretariat of the Committee of Ministers of the Council of Europe, 15 June, 2011 (DH-DD(2011)503F).

<sup>36</sup> National Council for Combating Discrimination, "*The educational programme for combating Roma discrimination in the localities Cașinul Nou and Plăieșii de Sus, commune Plăieșii de Jos, Harghita county to be implemented in the period 2008-2009*" Report.



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

**Date of decision:** 26 May 2009

**Name of the parties:** Tănase and Others v. Romania

**Reference number:** Application no. 62954/00.

**Brief summary:** The applicants are 24 Romanian nationals of Roma origin whose properties at the village of Bolintin Deal, Giurgiu had been destroyed in April 1991, when a crowd of more than two thousand non-Roma inhabitants attacked the Roma population and burnt their houses, the entire Roma community fleeing and being left homeless for a month and eventually did not return to the village.

The case concerned the applicants' complaint about their living conditions following the attack and destruction of their property as well as the length and unfairness of the ensuing proceedings to claim compensation. The plaintiffs alleged violations of Arts. 3 (prohibition of inhuman or degrading treatment), 6 § 1 (right to a fair hearing within a reasonable time), 8 (right to respect for private and family life), 13 (right to an effective remedy) and Art. 1 of Protocol No. 1 (protection of property) due to their Roma ethnicity, in violation of Art. 14 (prohibition of discrimination).

In spite of the reluctance of the victims caused by their negative assessment of the impact of prior friendly settlements in similar cases as unsatisfactory, the ECtHR strongly supported the opportunity of reaching a settlement as offered by the Romanian government. In August 2011, the victims in the Bolintin case sent a letter to the ECtHR complaining against the lack of involvement of the Romanian state in implementing the ECtHR decision and asking for the re-opening of the case and for damages.

#### **e. Trends and patterns including cases brought by Roma**

In general, 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 reported that out of the 4.260 petitions received from its establishment until August 2010, 823 complaints (approximately 20 per cent) were on grounds of racial or ethnic discrimination falling under the scope of Directive 2000/43/EC (however, the scope of the Romanian legislation goes beyond the material scope of the Directive).<sup>37</sup>

The same report of the NCCD mentions that, for the same period, it received '528 complaints on grounds of ethnic origin, 242 complaints on grounds of nationality, 46

<sup>37</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).



complaints on grounds of language of national minorities and approximately seven complaints on grounds of race.<sup>38</sup>

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) were 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>39</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, six on grounds of sexual orientation, 24 on grounds of age, 55 on grounds of disability, four on grounds of chronic non-contagious illness, seven on grounds of positive (HIV) status, 22 on grounds of belonging to a vulnerable group and 159 on other grounds. The largest number of petitions is on access to employment (409), access to public services (213), right to dignity (100).<sup>40</sup>

The 2009 activity report mentions that out of the 528 complaints received 11,74 per cent were on grounds of ethnicity. According to the 2009 NCCD activity report, the number of complaints on grounds of ethnicity increased in 2009 from 7,40 per cent of the total complaints to 11,74 per cent of the complaints, with most complaints regarding access to employment. The same report mentions that the NCCD started ex officio investigations in six cases on grounds of ethnicity out of the 15 cases started ex officio. The NCCD sanctioned with fines in seven cases, the total amount of the fines being of RON 14,000 (EURO 3,000).

The 2010 activity report of the NCCD mentions that out of the 478 petitions received, 55 were filed on the criterion ethnicity, one on race, 42 on nationality, 16 on language, 43 on disability and 3 on HIV/AIDS status and 2 on chronic non-contagious

<sup>38</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).

<sup>39</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2007.

<sup>40</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2008.



disease, 9 on age, 6 on religion and 4 on beliefs, 4 on sexual orientation. The majority of petitions (193) were filed on the criterion “social category” understood as meaning belonging to a socio-professional group. The report concludes that in the last three years the percentage of petition on significant grounds remains similar: between 7,41 -11 per cent for ethnicity, 1,70-3,82 per cent for gender, 6,57-9,28 per cent for disability, 40-44 per cent for socio-professional category. Most petitions filed in 2010 remain in access to employment and access to public services. Out of the 463 decisions issued by the NCCD 300 were cases rejected, 113 cases quashed due to the lack of mandate and 68 decisions finding that discrimination happened (14 per cent of the decisions). The NCCD issued 29 recommendations in cases when discrimination was found and 2 recommendations in cases when no discrimination was found, issued 32 warnings and 7 fines in a total quantum of RON 30400 (approx. EURO 7600).<sup>41</sup>

The activity report of the NCCD for 2011 was not published by June 15<sup>th</sup> 2012, thus no statistical data was available for 2011 but the cases reported from 2011 indicate that most petitions regarding Roma refer to the right to dignity, including discriminatory statements made in the media, access to public goods and services, segregation and denial of access to education, segregation by raising a wall separating social housing where Roma lived or evacuation of a Roma community and its isolation on the landfill area of the city.

### Evolution of complaints filed with the NCCD by criterion 2002-1 August 2010 compiled by the NCCD

Ground: Chronic non-contagious disease, Sexual orientation, Language, Beliefs, Religion, Disfavoured group, Age, Gender, nationality, Disability, Ethnicity, Others, Race, Social category.<sup>42</sup>

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Ground									
Non-contagious chronic disease	0	0	6	2	3	2	4	2	0
Sexual orientation	1	5	6	9	6	7	6	6	3
HIV/AIDS	0	1	15	10	5	3	7	1	2

<sup>41</sup>Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).

<sup>42</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale in Romania pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Language	0	2	1	2	2	7	11	13	8
Beliefs	4	12	23	19	8	10	14	13	3
Religion	2	9	9	11	8	12	15	6	3
Vulnerable group	2	0	10	6	4	26	22	9	2
Age	6	11	14	17	10	10	24	10	8
Gender	3	14	13	9	11	22	32	9	13
Nationality	1	12	21	39	20	39	54	28	28
Disability	3	31	18	21	20	70	55	49	25
Ethnicity	34	66	45	85	69	82	62	62	23
Others	52	184	108	61	132	32	159	96	42
Race	0	0	1	1	2	0	0	2	1
Social category	26	126	63	90	132	514	372	222	124
<b>Total</b>	<b>134</b>	<b>473</b>	<b>353</b>	<b>382</b>	<b>432</b>	<b>836</b>	<b>837</b>	<b>528</b>	<b>285</b>

**Evolution of complaints and findings of discrimination falling under the personal and material scope of Directive 2000/43 by the NCCD between 2002 - August 2010**

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of complaints	35	80	68	127	93	128	127	105	60
Number of decisions	-	22	9	27	12	8	22	20	9
percentage		27.5 %	13.23 %	21.25 %	12.90 %	6.25 %	17.32 %	19.04 %	15%

**Criteria of discrimination in the cases finding that discrimination occurred in the area of Directive 2000/43 between 2002-August 2010 by NCCD <sup>43</sup>**

(Roma, Hungarians, Jews, Lipovan Russians, Muslim Turks-Tatars, Romanians, Language of minorities, Race/colour)

Ground	2002	2003	2004	2005	2006	2007	2008	2009	2010
Roma		22	5	18	9	8	13	13	9
Hungarian		0	1	2	1	0	0	2	0
Jew		0	1	1	0	0	3	2	0
Lipovan		0	0	1	0	0	0	0	0

<sup>43</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).





Russian									
Lipovan Ukrainian		0	0	0	1	0	0	0	0
Tatar- Turkish- Moslem		0	0	0	0	0	1	0	0
Romanian		0	1	2	0	0	2	0	0
Language minorities		0	1	2	0	1	3	3	0
Race/colour		0	0	1	1	0	00	0	0
TOTAL		22	9	27	12	8	22	20	9



## 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 Arts. 1.(3), 4.(2), 6 and 16.<sup>44</sup>

- Art. 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.'
- Art. 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.'
- Art. 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.
- Art. 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.'

<sup>44</sup> The Constitution of Romania of 1991 was amended 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).



- Art. 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>45</sup>

The material scope of the constitutional equality clause covers all fundamental rights thus going beyond the material scope covered by the Directives. The equality and non-discrimination clause applies to citizens. The 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. Equality on grounds of religion as provided in Art. 4 of the Constitution should be read in conjunction with Art. 29 providing for freedom of conscience phrased as freedom of thought, opinion, and religious beliefs.

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 and mentions protection against discrimination on the additional 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 Art. 6 (2) is specific to national minorities only, though nor the Constitution or the subsequent legislation define national minorities and a draft Statute on National Minorities is blocked in the Parliament since 2005.

*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 in relation to all types of actors.

<sup>45</sup> The Constitution of Romania of 1991 amended 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).



## 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.*

Art. 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>46</sup>

Art. 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 (identity) 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 exemplifying list 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 mentioning 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 to be the most challenging in cases when discrimination was not based on any of the criteria spelled out in the law turning the anti-discrimination principle in a broad equality principle.

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 as compared to 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

<sup>46</sup> The official English translation of the Ordinance 137/2000 had been referred to, unless the terminology used needed more clarifications.



category and were considered to be discriminated against on grounds of their belonging to such a group.<sup>47</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>48</sup> 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 for employment, having 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 during employment procedures 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>49</sup>

The NCCD found in 2008 that the inadequate standards of treatment in relation to persons with mental health problems 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>50</sup>

<sup>47</sup> NCCD Decision, Cluj County Council case, 2005.

<sup>48</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.

<sup>49</sup> NCCD Decision 117 from 27.02.2008, ex officio case against the firm E SRL.

<sup>50</sup> NCCD Decision 350 from 16.06.2008, Asociația Increderea v. the Ministry of Public Health.





In another 2008 case, the NCCD sanctioned with a fine of RON 1,000 (EUR 250) and a fine of RON 500 (EUR 125) 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>51</sup>

In a 2009 case started *ex officio*, the NCCD found that the advertising of the defendant, the company SC CuponPRO SRL, who specifically required candidates for the position of promoter to be over 1.65 meters tall and 'good looking' was discriminatory on grounds of height and recommended to the defendant, in the future, to pay attention to such advertising which might trigger 'unjustified differentiations'.<sup>52</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 at the 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 provide definitions of racial or ethnic origin, religion or belief, age or sexual orientation.

In its data collection, the NCCD 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. Notably, disability is not specifically mentioned as protected ground in the special clauses defining prohibition of discrimination in employment (Arts. 5-8), access to public services (Art.10), education (Art.11), forced displacement (Art. 13), access to public places (Art.14). This is an omission of the law which is however repaired in practice by the NCCD by corroborating these articles with the general definitions of discrimination including the full list of protected grounds from Art.2.

<sup>51</sup> NCCD Decision 337 from 04.06.2008, D.I. v B.V.

<sup>52</sup> NCCD Decision 395 from 22.07.2009, NCCD v. SC CuponPRO SRL.



There are no reported decisions of the NCCD or of the courts elaborating on the concept of disability. In its case law, the NCCD does not require a proof of disability when investigating and analysing complaints and even if it also takes into consideration the Chacón Navas understanding of the concept of disability, the NCCD goes beyond by looking also at interconnected concepts such as “the non-contagious chronic disease” and “belonging to a disadvantaged category.”<sup>53</sup>

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>54</sup>

Though Romania signed and ratified in November 2010 the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, the legislation was not amended subsequently to ensure compliance.<sup>55</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’ for the purposes of freedom of religion, or what is a “disability” sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

‘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>56</sup> In its jurisprudence, the Romanian Constitutional Court referred to the interpretation of the European Court of Human Rights in deciding cases involving religious education.<sup>57</sup> The Law 489/2006 on Religious Freedom and the General Status of Religions introduces

<sup>53</sup> NCCD Decision 126 from 07.07.2010 in file no. 487/2009 petition 10645 from 04.12.2009, Plaintiff v. The National Union of Insolvency Practitioners [Uniunea Națională a Practicienilor în Insolvență].

<sup>54</sup> Art.3 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>55</sup> UN Treaties Collections, Convention on the Rights of Persons with Disabilities, status information available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (20.02.2011). Romania/ Law 221 ratifying the UNCPRD (11.11.2010).

<sup>56</sup> Romania/ Law 489/2006 on Religious Freedom and the General Status of Religions, (8.01.2007).

<sup>57</sup> Romania/Curtea Constituțională/ Decision 72 (18.07.1995) in which the Court clarified that ‘the right to choose might include the possibility of not making a religious choice.’



however a strict distinction between “state recognised religious denominations” (*culte*), religious associations and religious groups.<sup>58</sup>

‘Disability’ is not defined in the 2000 Anti-discrimination Law and the special legislation on protection of the rights of persons with disabilities is not using the concept of ‘disability’ using instead the concept of ‘handicap’.<sup>59</sup> The scope of the protection against discrimination of persons with disabilities under the Romanian Anti-discrimination Law has a broader scope of application than the one of Directive 2000/78/EC.<sup>60</sup>

The disability-specific legislation, distinct from the non-discrimination law, still uses the concept of ‘handicap’ – thus persons with disabilities had been defined until September 2010 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>61</sup> This definition of persons with disabilities was amended by the Emergency Ordinance 84/2010 in September 2010 as ‘persons whose social environment hinders completely or limits their access to equal opportunities in the life of society, requiring protective measure for supporting their integration and social inclusion, as the social environment it is not adapted to their physical, sensorial, psychological, mental and/or associated impairments’.<sup>62</sup> This recent definition goes beyond the definition of disability used by the European Court of Justice in case C-13/05, Chacón Navas as it puts the accent on the duty to secure accessibility and on the intertwining of socio-medical elements in disability.

<sup>58</sup> According to Law 489/2006 there are two categories of entities which undergo different recognition procedures as state recognized religious entities (*culte*): the 18 religious denominations recognised by the State prior to 2006 undergo a simplified recognition procedure, while newcomers have to observe a strict set of criteria in order to ensure guarantees of ‘sustainability, stability and public interest.’ Art. 18 of Law 489/2006 establishes demanding membership criteria, a high numerical threshold of 0.1 per cent of the population (approximately 22,000 people) to qualify for ‘religious denomination’ status, as well as a strict time-requirement of a 12-year waiting period. See, Romanița Iordache, The New Romanian Law on Religious Denominations and Religious Freedom: High Expectations, Sober Returns, in Institut für Rechtsphilosophie, Religions- und Kulturrecht Rechtswissenschaftliche Fakultät der Universität Wien, November 2007. The state recognized religions according to the Law are the same 18 religions that had this status prior to 2006: the Romanian Orthodox Church, Orthodox Serb Bishopric of Timisoara, Roman Catholic Church, Greek Catholic Church, Old Rite Russian Christian (Orthodox) Church, Reformed (Protestant) Church, Christian Evangelical Church, Romanian Evangelical Church, Evangelical Augustinian Church, Lutheran Evangelical Church, Unitarian Church, Baptist Church, Pentecostal Church, Seventh-day Adventist Church, Armenian Church, Judaism, Islam, and Jehovah's Witnesses.

<sup>59</sup> See 2.1.1.a).

<sup>60</sup> Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>61</sup> Art.2 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>62</sup> Romania/ Emergency Ordinance 84/2010 on amending Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(20.09.2010).



The disability specific legislation further maintains the definition of disability (*handicap*) in Art. 5 (16) which was not amended following the September 2010 changes. Handicap is defined 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>63</sup>

The two definitions of “disability” (*handicap*) and “persons with disabilities” (*persoane cu handicap*) have a different approach to disability and it will be up to the courts, the national equality body and the policy makers to further embrace the more recent socio-medical approach to disability over the mainly medical approach. The co-existence of two rather conflicting definitions in the same piece of law will probably cause difficulties in the enforcement of both the disability legislation and in the non-discrimination legislation.

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 provided for 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, though both legitimate and commendable, was not likely to be achieved and that this restriction infringed the principle of equality. The NCCD found that the means used were not appropriate as they limited the free access to the profession of junior notary public and infringed the free exercise of the profession. The NCCD issued an administrative warning against the Notary Public Union.<sup>64</sup>

<sup>63</sup> Art.3 (16) of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>64</sup> NCCD, L.D. v. Uniunea Notarilor Publici [Notary Public Union], from 20.01.2004.



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 from participating in the selection competition. No pecuniary or administrative sanction was issued but the NCCD recommended to the party to reconsider its eligibility criteria.<sup>65</sup> The NCCD does not have a mechanism to monitor observance of its decisions and there is no way to monitor whether the party enforced the recommendation.

- 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 the 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. Art. 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>66</sup>

Data on cases of multiple discrimination is contradictory. The NCCD reported sanctioning multiple discrimination falling under the scope of Directive 2000/43 in seven cases in 2002 and in two cases in 2004 but no cases subsequently.<sup>67</sup> However, in a 2011 response to a request of public information, the NCCD reported 12 cases in 2003, one case in 2004, 18 cases in 2005, four cases in 2006, six cases in 2007, eight cases in 2008, one case in 2009, four cases in 2010 and one case in 2011.

In the case against the Romanian President, Decision 92 from 23 May 2007, in which the plaintiffs sought a harsher sanction on grounds of the aggravating circumstances

<sup>65</sup> NCCD, Decision 386 from 08.07.2008, Uniunea Democrat Creștină v. Cozmin Gușă.

<sup>66</sup> 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).

<sup>67</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale in Romania pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).





of multiple discrimination (the expressions used by Traian Băsescu in relation to the journalist being ‘birdie’ a pejorative with sexual connotations 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. 19 TFEU 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 perception or presumption of certain characteristics. The NCCD discussed the concept in the interpretation of the law and considered such aspects in its case law, especially 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 develop it in its reasoning.<sup>68</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 enforcement in line with the ECJ judgment in Coleman v Attridge Law and Steve Law.<sup>69</sup> However, the practice of the courts is not unitary.

<sup>68</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>69</sup> Case C-303/06 Coleman v Attridge Law and Steve Law.



In a 2007 case, D.Z v. Distrigaz Sud, Decision 4222, from 01.08.2007, 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) when paying the monthly utilities at the offices of the defendant. The defendant was ordered to pay EUR 1,000 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>70</sup>

In a 2006 case however, the High Court of Cassation and Justice found that the NCCD wrongly issued a warning sanctioning as discrimination an advertising targeting future mothers and encouraging them to undertake pre-natal screening by showing the difficulties of mothers with children with disabilities.<sup>71</sup> As the Romanian legislation allows for protection against discrimination including on grounds of belonging to a 'social group' (such as mother of children born with disabilities), the NCCD sanctioned the social campaign following the request of organizations of persons with disabilities which deemed the message offensive and discriminatory. The NCCD defined the mothers of children with disabilities as a social group and not as a group deserving protection against discrimination based on association with persons with disabilities. However, the High Court considered that the subject of the advertising are 'mothers raising their children born ill, persons for whose situation the Law does not provide for a criterion of discrimination and it cannot be accepted... that these mothers might constitute a "social category" as provided by Art.2(1) of the Ordinance... From the evidence provided it is above any doubt that in the particular advertising there are no children or adults with disabilities, and the NCCD takes into consideration mothers raising their children who were born ill.' This reasoning of the court, which was not changed by subsequent jurisprudence contradicts the ECJ judgment in *Coleman v Attridge Law and Steve Law*.

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

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

Art. 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

<sup>70</sup> Romania/Judecătoria sectorului 4 București; [court of first instance No.4, Bucharest], DZ v. Distrigaz Sud, Decision 4222, from 01.08.2007, Decision 4222 in File no.710/4/2006.

<sup>71</sup> Romania/Înalta Curte de Casație și Justiție, CAN v.CNCD, Decision 3866/2006, from 9.11.2006, file no. 34843/2/2005 available at: <http://www.iccj.ro/cautare.php?id=37568>.



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 vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).*

Discriminatory statements as well as discriminatory announcements for job vacancies amount to discrimination under Art. 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>72</sup>

As early as 2003, the NCCD issued an Instruction regarding the discriminatory restrictions promoted by the media advertisements in the field of employment.<sup>73</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 provide for any general exemption or justification of direct discrimination in relation to particular grounds (including in the case of age). However, in the case of direct discrimination in relation to housing, access to services and goods (Art. 10 of GO 137/2000), justifications 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>74</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.

<sup>72</sup> NCCD Decision 117 from 27.02.2008, ex officio case against the firm E SRL.

<sup>73</sup> NCCD, Instruction regarding the discriminatory restrictions promoted by the media advertisements in the field of employment, published in the Official Journal nr. 235/ 7.04.2003.

<sup>74</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, (20.07.2006) stating: “Under the ordinance herein, the following deeds shall constitute a contravention, 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 (of the legal person) to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, sex or sexual orientation: .... g) denying 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.” (translation of the author).



- 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 specific definition of discrimination on grounds of age and does not provide for comparables in the case of age discrimination.

### 2.2.1 Situation Testing

- a) *Does national law clearly permit or prohibit the use of 'situation 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? If the law is silent please indicate.*

The Romanian 2000 Anti-discrimination Law does not include any provisions on situation 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. The 2006 amendments to the Anti-discrimination Law make video and audio recordings admissible in cases of discrimination both before the NCCD and before the domestic courts, this is an exception from ordinary civil procedure norms.

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

Based on NGO and NCCD reports, situation testing has not been used frequently. As a part of the European Testing Night, in March 2011, Romani CRISS and several other Roma NGOs carried out simultaneous testing in four different cities in order to test access of Roma to clubs and bars and in nine out of the ten clubs tested the group of young Roma were not allowed to enter.<sup>75</sup> 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 filed complaints with the NCCD and reported the cases to the media. There were plans by the same NGO to use testing in cases of access to employment and access to health services on grounds of ethnic background. In the past, Roma NGOs coordinated with the NCCD in testing cases of denial of access to various facilities by organising joint teams for the testing/investigations after the NGOs filed petitions with the NCCD.

<sup>75</sup> Information available at: <http://www.romanicriss.org/index.php?mylang=english> (9.03.2011).



- c) *Is there any reluctance to use situation 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)?*

In its recent practice, the NCCD did not use testing. It is unclear if this was an internal 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 challenge of scarce human and material resources the NCCD has to deal with.

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

In a 2006 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>76</sup>

In a 2008 case, the NGO Romani CRISS tested the denial of access to services on grounds of Roma ethnicity in a club by sending different groups of young people with darker complexion, followed by groups with whiter skin complexion. In its decision 509 from 03.09.2008, the NCCD found that discrimination in access to services occurred and fined the defendant with RON 1,000 (approx. EUR 250).

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

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

Art. 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>77</sup>

In practice, the enforcement of the prohibition of indirect discrimination is problematic.

<sup>76</sup> NCCD, *ex officio* case, decision 01.08. 2006.

<sup>77</sup> 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, (20.07.2006).





In its report assessing the implementation of the Racial Equality Directive, the NCCD mentions that between 2002 and 2010, it sanctioned nine cases of indirect discrimination.<sup>78</sup> However, not all the cases mentioned as indirect discrimination are clear cut. For example, in its Decision 222 from 07.04.2005, the NCCD found that the insisting demands of the local mayor against the appointment of the plaintiff as deputy director of the school on grounds of his being Romanian and the advocacy in favour of hiring a Hungarian deputy director, amounts to indirect discrimination. In deciding so, the NCCD stated that it took note of the apparently neutral justifications of the school (the position of deputy director was cancelled) and of the fact that the cancelling of the position disadvantaged persons in a comparable situation (the Romanian community) and sanctioned the defendant with a warning. The jurisprudence of the NCCD is blurring the lines between direct and indirect discrimination also in a 2006 case regarding discrimination in education. In the case, the NCCD reacted ex officio based on media reports on separate classrooms for Roma pupils or classes with a higher percentage of Roma in a school in Tulcea. The NCCD found in Decision 75 from 02.03.2006 that indirect discrimination consisted in 'placing Roma children in separate classes or in classes with disproportional percentages of Roma' and sanctioned with a warning the school leadership.

In a 2009 case, the NCCD found in Decision 291 from 14.05.2009 that indirect discrimination occurred on grounds of nationality, based on a petition of the Union of Hungarian Teachers complaining against the annual educational plan of the Mureş county school inspectorate. The inspectorate decreased the number of classes in Hungarian language not observing the proportional presence and the options of Hungarian speaking pupil and was sanctioned with a fine of RON 600 (EUR 150).

A 2010 decision regarding denial of access to public places (a club) to Roma based on absence of a club membership card evidences a more nuanced approach. The plaintiffs C.N., I.G., S.A., P.M., C.A. were denied access to a club due to lack of a club membership card while this was not requested to other persons (non-Roma). The defendant claimed that a club membership card is required for access. In order to apply for a membership card, potential clients were requested a copy of the ID, a copy of the employment registry (official recording of labour relations), the original of the criminal record and the scan of the fingerprints. In its decision 67 from 19.05.2010, the NCCD stated that while requesting a membership card for access to a club is justified by a legitimate scope such as ensuring order and protecting property, the conditions imposed do not differentiate and disproportionately affect persons condemned for minor offences or persons who work as freelancers and do not have an employment registry. 'Lacking objective criteria regarding the requirements, the granting of the membership card becomes, in practice, arbitrary... if the different treatment is caused by arbitrary requirements, it cannot be decided that

<sup>78</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010 available at: <http://www.cncd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).



it is objectively justified and it is reasonable from the perspective of the principle of equality.’ The NCCD found that the situation amounted to indirect discrimination: “even if an apparently neutral criterion had been invoked, in practice, this led to disadvantaging two Roma as compared to other persons (Romanians), without an objective justification, and the means for achieving the objective were not adequate.”

A 2011 decision of the NCCD further evidences this confusion. The NCCD found that the condition of 12 years seniority imposed by Urziceni mayor for the position of hospital manager is an apparently neutral condition of recruitment but that the defendant did not produce the evidence to support an objective justification. However, instead of analysing the applicability of arguments regarding indirect discrimination, the NCCD stated that the discriminated group is actually the one of people who do not have 12 years seniority in a position of manager. In spite of the inconsistent reasoning, the NCCD finally concluded by sanctioning the defendant with a warning issued for indirect discrimination.<sup>79</sup>

- 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 case law, the NCCD extensively relies on the ECtHR and ECJ jurisprudence when discussing indirect discrimination and assessing legitimate aims, appropriate and necessary measures or the objective justification.

In a 2006 case filed by Romani CRISS against the Theoretic High School Dumbrăveni, the NCCD sanctioned indirect discrimination and in its legal reasoning assessed the legitimate aims as well as the measures taken in order to pursue the declared aims. The plaintiffs, a Roma NGO, complained against the practice of transferring Roma pupils from the Theoretic High School to the special school leading to almost 90 per cent presence of Roma pupils in the special school. The High School instituted a procedure of transferring pupils who were failing to promote the class more than two or three years and who were evaluated by a special commission established by law at the level of the local general directorate for the protection of the child and for social assistance. The special commission decided if the pupils had mental disabilities and if they needed special education. In its decision issued on 11.06.2008, the NCCD referred to the ECtHR decision in D.H. v. the Czech Republic from 13.11.2007 (57325/00), assessed the adverse effect of incentives granted in support of children with disabilities (gratuities in food, transportation, financial support etc.) and concluded that even if the procedure for transferring

<sup>79</sup> NCCD Decision 215 of 1.06.2011, *Ialomița Prefect Office v. Mayor of Urziceni Town*.



children to the special school observed the legal requirements, in practice they lead to discriminatory outcomes.

The NCCD decided that the case amounts to indirect discrimination and recommended the Ministry of Education to take all 'measures necessary in order to ensure implementation of the principle of equal opportunities in schools, and to take measures to redress the discriminatory treatment of Roma pupils who had been transferred from regular to schools to special schools based on socio-economic needs' (and not based on disability).

*c) Is this compatible with the Directives?*

The 2006 amendments to the definition of indirect discrimination brought this concept in line with the European standard. Further interpretation by the courts will prove if the definition is fully understood. The NCCD already uses the ECtHR and ECJ definitions in interpreting indirect discrimination though not all decisions prove a good grasping of the concept.

*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 potential 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 and in practice they usually trigger a higher scrutiny as potential indirect discrimination.

In a 2007 case, the NCCD started an *ex officio* investigation against the Mayoralty of Târgu Mureş and in decision 131 from 21.06.2007 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>80</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 09.01.2008, 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

<sup>80</sup> NCCD Decision 131 from 21.06.2007, ex officio case against the Mayoralty of Târgu Mureş.



provisions of Art. 9 of the Anti-discrimination Law stating that ‘the provisions of Arts.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 and cited the provisions of the Romanian Constitution, 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>81</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.

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 RON 1,000 (EUR 250).

### 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

<sup>81</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 09.01.2008, file number 353/2007.



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. The NCCD used statistical data in some of its cases. There were no particular requirements imposed for the assessment of the statistical data.

There are no reports regarding the use of statistical data before 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 (European strategic litigation issue)?*

There is scarce evidence of the use of statistical data in the past. A ground breaking NCCD case from January 2008 included 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>82</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 09.01.2008, 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.

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 250).

<sup>82</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 09.01.2008, file number 353/2007.





- d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out 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>83</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>84</sup> sexual minorities<sup>85</sup> or Roma.<sup>86</sup> The Presidential Commission for the Analysis of Social and Demographic Risks in its report, *Risks and Social Inequities in Romania*, also noted the need of clear statistical data in order to design public policies and initiate positive action measures.<sup>87</sup>

Theoretically, the collection of personal data is possible under certain conditions as provided by Art. 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

<sup>83</sup> Romania/Law 677 on the Protection of Persons in relation with Use of Personal Data (21.11.2001).

<sup>84</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>85</sup> FRALEX. Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Romania, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/334-FRA-hdgso-NR\\_RO.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/334-FRA-hdgso-NR_RO.pdf) (09.01.2009).

<sup>86</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>, (10.10.2007).

<sup>87</sup> Presidential Commission for the Analysis of Social and Demographic Risks, *Riscuri și inechități sociale în România – Risks and social inequities in Romania*, available at: [http://www.presidency.ro/?\\_RID=det&tb=date&id=11426&\\_PRID=](http://www.presidency.ro/?_RID=det&tb=date&id=11426&_PRID=) (22.09.2009).



- 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;
  - 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 regarding 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 his or her religion, in any relationship with public authorities or private-law legal entities.’<sup>88</sup>

When private or public operators make general statistical data available or when the National Institute for Statistics<sup>89</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 from 2001<sup>90</sup> or the December 2011 Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020<sup>91</sup> or the National Strategy for the Protection of the Rights of

<sup>88</sup> Art.5 (6) of Romania/ Law 489/2006 on Religious Freedom and the General Status of Religions, Romania (8.01.2007).

<sup>89</sup> 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/) (01.05.2008).

<sup>90</sup> Strategia Guvernului României de îmbunătățire a situației romilor, aprobată prin H.G. Nr.430/2001 [Government Strategy for improving the situation of Roma], available at <http://www.anr.gov.ro/> (01.05.2008).

<sup>91</sup> Hotărârea de Guvern pentru aprobarea Strategiei Guvernului României de incluziune a cetățenilor români aparținând minorității romilor pentru perioada 2012-2020 (Governmental Decision 1221/14<sup>th</sup> December 2011 –for approving the Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020).



the Child).<sup>92</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.*

Art. 2(5) of the Anti-discrimination Law 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.'

A specific definition of sexual harassment is provided by the Law on equal opportunities between men and women, in the context of employment relations in Art. 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>93</sup>

The 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>94</sup>

The new Criminal Code adopted on July 17<sup>th</sup> 2009, to enter into force at a later, announced as probably 2013, sanctions in Art. 223 on sexual harassment as

<sup>92</sup> Strategia națională pentru protecția copilului 2008-2013 [the National Strategy for the Protection of the Rights of the Child 2008-2013] available at <http://www.copii.ro/Files/Strategia%20Nationala%20in%20domeniul%20protectiei%20dreptu.pdf> (01.05.2008).

<sup>93</sup> Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25.07.2006).

<sup>94</sup> Art.223 of Romania/2004 Criminal Code republished, (12.04.2005).



‘requesting repeatedly favours of sexual nature within a work-related relation or a similar on, if the victim was intimidated in this way or was placed in a humiliating position’ with prison from three months to one year or with a fine.<sup>95</sup>

None of the definitions provided for are in complete compliance with the definition of harassment spelled out in the Directives as they fail to sanction the unwanted conduct related to any of the grounds perpetrated also with the purpose not only with the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

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

The Anti-discrimination Law specifically prohibits harassment in Art. 2 (5) and provides for the specific sanctions in Art. 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 100-1,000) 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 150-2,000).<sup>96</sup>

Lacking a specific prohibition of residential segregation in the law, in 2011, the NCCD defined as harassment the erection of a concrete wall of 1.8 -2 meters of height and long of approximately 100 meters which was placed between a Roma neighbourhood and the main road in the northern Romanian city Baia Mare. In response to media outcry, the wall was presented by the mayor of the city as designed to prevent traffic accidents. In its decision 439 from 15.11.2011, the NCCD discusses the impact of segregation for a community and sanctions it as harassment provided for by Article 2(5) of the Anti-discrimination Law in conjunction with Article 15 on the infringement of human dignity. The NCCD decided that the erection of a separating concrete wall between the area with social housing predominantly occupied by Roma and the rest of the neighbourhood “is a very serious deed which negatively affects the life of the entire Roma community.” Subsequently, the NCCD decided to impose a fine of RON 6,000 (approx. €1,500) and to recommend the demolishing of the concrete wall. The NCCD decision was challenged by the Mayor before the Court of Appeal.

*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 Art. 4 (c) in the employment related environment:

<sup>95</sup> Romania/Law 286/2009 on the Criminal Code, (17.07.2009).

<sup>96</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, (20.07.2006).



'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>97</sup>

The Romanian Criminal Code also sanctions sexual harassment in work related relations (the perpetrator should be in a position of power in relation to the victim) with prison from three months to one year or with criminal fine.<sup>98</sup> The new Criminal Code adopted on July 17<sup>th</sup> 2009, not in force yet and which probably will enter into force in 2013, prohibits in Art. 223 sexual harassment defined as 'requesting repeatedly favours of sexual nature within a work-related relation or a similar one, if the victim was intimidated in this way or was placed in a humiliating position' and sanctions it with prison from three months to one year or with a fine.<sup>99</sup>

## 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?*

Art. 30 (7) of the Constitution while providing for freedom of expression 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.'

Art. 2(2) of the Anti-discrimination Law regarding the prevention and the punishment of all forms of discrimination specifically prohibits instructions to discriminate: '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 Art. 3 of the GO 137/2000.

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). In decision 180 from 18.02.2008, the NCCD sanctioned the instruction to discriminate leading to denial of access to goods and services of a Roma. The

<sup>97</sup> Romania/ Law 340/2006 for the amendment and approval of Law 202/2002 regarding Equal Opportunities between Women and Men (25.07.2006).

<sup>98</sup> Art.223 of Romania/2004 Criminal Code republished, (12.04.2005).

<sup>99</sup> Romania/Law 286/2009 on the Criminal Code, (17.07.2009).





plaintiff H.C. complained against an announcement posted at the entrance of an internet café stating ‘beginning with date... Roma are not allowed in this internet café because we had a lot of problems with them, they are quarrelling and fighting every evening.’ The sanction issued both for direct discrimination and for instruction to discriminate was a fine of RON 600 (approx. EUR 150).

In its decision 365 from 14.09.2011, NCCD and L Rausch v. S.C. Elaine S.R.L.<sup>100</sup>. (owner of Heaven Club from Timișoara), the NCCD clarifies the conditions for engaging responsibility of a private company for actions of its contractors (the body guard hired by the protection services) and discusses the subordination relations between the contracting party and its contractor, by stating the obligation of private companies to include in their internal regulations provisions about equality and non-discrimination and provisions referring to the management of discrimination cases. In response to the petition of the plaintiff who was refused entry in a night club due to her disability, the respondent stated among others that the bodyguard who refused Ms. Rausch is not the employee of the club but of a security company and the club is no longer working with this bodyguard. The plaintiff has never had a direct contact with an actual employee or representative of the club. The NCCD issued four separate administrative fines for two different situations, each violating two distinct articles of the Anti-discrimination Law when it found discrimination in access to public services and discrimination affecting the right to human dignity of the person on the ground of disability. The NCCD sanctioned the company owing the bar with a total of RON5,000 (€1,250), reportedly the highest sanction issued so far.<sup>101</sup>

The new Criminal Code adopted in 2009 to enter into force probably in 2013, rephrased the definition of incitement to hatred or discrimination in Art. 369 by deleting the list of protected grounds and introducing the following language: ‘incitement of the public, by any means to hatred or discrimination against a category of persons is punished with prison from six months to three years or with fine.’<sup>102</sup> Art. 317 of the Criminal Code currently in force, sanctioning hate speech as incitement to discrimination mentions specifically that it protects all grounds of discrimination sanctioned by the Anti-discrimination Law and includes the list of protected grounds for clarification.<sup>103</sup>

<sup>100</sup> NCCD Decision 365 from 14.09.2011 of the National Council for Combating Discrimination, NCCD and L Rausch v. S.C. Elaine S.R.L. (owner of Heaven Club from Timișoara). See supra at page 24 full brief of the case.

<sup>101</sup> NCCD Decision 365 from 14.09.2011 of the National Council for Combating Discrimination, NCCD and L Rausch v. S.C. Elaine S.R.L. (owner of Heaven Club from Timișoara).

<sup>102</sup> Law 286/2009 on the Criminal Code (17.07.2009).

<sup>103</sup> Art.317 on incitement to hatred as modified by Law 278/2006 amending the Criminal Code mentions specifically discrimination on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, beliefs, wealth, social origin, age, disability, un-contagious chronic disease or HIV/AIDS status as being sanctioned with prison from six months to three years or a criminal fine.



## 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'. For example, 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>104</sup>

The special legislation on the promotion and protection of the rights of persons with disabilities provides for the duty to ensure reasonable accommodation in the workplace and for duties to facilitate accessibility in accessing various public and private services and facilities. 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>105</sup>

Reasonable accommodation in the work place is ensured both to persons with disabilities seeking a job and to those already hired according to Art. 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 or guidance as how the disability will be assessed and of what are the tests for reasonableness.

<sup>104</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).

<sup>105</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).



There is no sanction provided by Law 448/2006 in case of failure to comply but the general anti-discrimination provisions might be applied. There are no cases reported in courts or before the NCCD sanctioning direct discrimination in access to employment or access to services in which lack of reasonable accommodation was the cause though the failure to provide reasonable accommodation as stated by Art. 83 of the Law is mentioned among other arguments in a limited number of cases of the NCCD.<sup>106</sup>

In the specific area of employment, such decision would be issued also under the caveat of Art. 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.’

Existing NCCD and courts jurisprudence does not allow to assess if when sanctioning failure in providing reasonable accommodation the restrictive definition of disability from Law 448/2006 or the more comprehensive, quite general approach to disability used so far by the NCCD would be used. However the NCCD approach is still in need of crystallization as, so far, the national equality body was reluctant to clearly identify and sanction failure to ensure reasonable accommodation.

The wording “disproportionate burden” is not present in the legislation. There is no legal provision or legal 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)]. In a 2009 case, regarding a person with disabilities who was refused renewal of the labour contract with the justification of a no-hiring policy and a lack of vacant positions adequate for the working conditions of a person with an accentuated degree of disability, the NCCD rejected the arguments of the accused by mentioning inter alia the duty to provide reasonable accommodation as spelled out in the law and underlining that, given that the plaintiff worked for a long time on that specific position, it is reasonable to believe that there was no need for further accommodation.

<sup>106</sup> NCCD, decision Plaintiff v. Respondent[former employer] in petition no. 4918 from 12.05.2009, decision no. 463 from 02.09.2009, file number 210/2009.



The NCCD did not look into the specifics of what type of measures were required to comply with the duty of ensuring reasonable accommodation as it operated with a presumption that this was already observed due to prior work relations.<sup>107</sup>

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>108</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 and does not extend to other areas such as services etc.

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

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 (EUR750 -2.250). The authority in charge with finding and sanctioning such cases is the NAPD.<sup>109</sup> However, the NAPD had been revamped and re-established as department within the Ministry of Labour as a part of the institutional policies in response to the financial crisis, including downsizing of social assistance services.

The NCCD cases which could be relevant from the perspective of sanctioning failure to secure reasonable accommodation in areas outside employment do not mention specifically the concept of reasonable accommodation. This might be the case because it was easier for the NCCD to look at the specific provision on denial of access to services or because reasonable accommodation and accessibility are not defined in the Anti-discrimination Law.

<sup>107</sup> NCCD, decision Plaintiff v. ANIF R.A., Sucursala Teritorială Timiș [Plaintiff v. ANIF R.A, Timiș county office], decision no. 77 from 03.02.2009, file number 260/2008.

<sup>108</sup> Art.84 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>109</sup> Art.100 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).



- 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 Handicap does not include specific sanctions in case of 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 (Arts. 5-8), however, Art. 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. There is not jurisprudence in the courts or with the national equality body so far, but, theoretically, the Art. 9 exemption could be invoked in order to justify failure in securing reasonable accommodation.

In a 2007 case, the NCCD sanctioned as discrimination and issued an administrative warning against the defendant in the case 255 from 17.09.2007, 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 Art. 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>110</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.

Limited accommodation in respect of religion is spelled out in Art. 134 (1) letter 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 – a special procedure

<sup>110</sup> NCCD, decision M.E.R. v. dr. PG and Mayoralty of V., 17.10.2007.





established by Law 489/2006, the Law on Religious Freedom and the General Status of Religious Denominations.<sup>111</sup>

In an attempt to accommodate Moslem religious burial rituals, the Parliament adopted Law 75/2010 on Discharge from Hospitals or Morgues of Deceased Moslems.<sup>112</sup> The Law 75/2010 accommodates the current provisions on hospitalization and discharge from the hospital and from the morgues of the deceased with the Islamic tenants. In order to observe religious prescriptions, Law 75/2010 provides in Art. 1 that in the case of a practicing deceased belonging to Islam, upon the request of the family, the corpse is discharged in 24 hours after the death was established, in accordance also to Law 104/2003 regarding the manipulation of human corpses and removal of organs and tissues from corpses for transplant. The Ministry of Health had 30 days to propose adequate amendments to the Methodological Norms for the Implementation of Law 104/2003 regarding the manipulation of human corpses and removal of organs and tissues from corpses for transplant, approved in the Governmental Decision 451/2004.

e) *Does national law clearly provide 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 involving 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 most cases. However, there were cases when the burden of proof was imposed on the plaintiff only. The interpretation of the NCCD on the burden of proof is not unitary due to the unclear language of Art. 20(6) and the lack of clear internal guidelines clarifying the onus of the proof. This lack of clarity doubled by the lack of resources allowing the NCCD to conduct its investigations effectively lead in practice to cases when the onus of proof was interpreted as an obligation of the plaintiff to provide evidence.

In a 2007 case, the NCCD sanctioned with an administrative fine of RON 400 (EUR 100) the refusal to allow participation in a job competition due to physical disability. The NCCD found According to Art. 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 alleged without providing any evidence that the capacity of the plaintiff did not meet the requirements of the job.<sup>113</sup>

<sup>111</sup> Romanița Iordache, The New Romanian Law on Religious Denominations and Religious Freedom: High Expectations, Sober Returns, in Institut für Rechtsphilosophie, Religions- und Kulturrecht Rechtswissenschaftliche Fakultät der Universität Wien, November 2007.

<sup>112</sup> Romania/ Law 75/2010 on Discharge from Hospitals or Morgues of Deceased Moslems (6.05.2010).

<sup>113</sup> NCCD, Decision 256 from 17.10.2007, M.D. v. P.



In a 2009 case, the NCCD took a different view, however, on the burden of proof and, in a case regarding the denial of access to a mall of a young boy with a physical disability moving with the help of special equipment, the NCCD found that no discrimination occurred.<sup>114</sup> The defendant labelled as 'tricycle' the vehicle used by the plaintiff and noted an internal prohibition of allowing access in the Mall for toys and uncontrolled vehicles.

Without investigating the type of equipment used by the plaintiff or checking its certification by the specialized agency – the NAPD, the NCCD ruled that 'as long as the vehicle of locomotion was not adequate for persons with disabilities, we cannot talk about limiting the access of a person with disability using the adequate vehicle of locomotion in Vitan Mall.'

- 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 Art. 10 as discrimination the denial of access to services and facilities. The wording of Art. 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 ensure accessibility. The 2011 decision of the NCCD 365 from 14.09.2011, NCCD and L Rausch v. S.C. Elaine S.R.L. (owner of Heaven Club from Timișoara) cited above also discusses the obligation of public services of being disability-accessible.

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 Art. 62- 63(3). The sanction for failing to observe this duty is a fine of RON 3,000 -9,000 (EUR 750-2,250) which initially was decided by NAPD<sup>115</sup> and it is currently decided by the General Department for Social Inspection (*Direcția Generală pentru Inspecție Socială*).

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 December 31<sup>st</sup> 2010) and adapt all stations for public transportation.

<sup>114</sup> NCCD, Decision 216 from 08.04.2009, SL v. Mall Vitan.

<sup>115</sup> Art.100 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.006).



The sanction for failing to observe this duty is a fine of RON 3,000-9,000 (EUR 750-2,250). The authority in charge with finding and sanctioning such cases is the NAPD.<sup>116</sup> A draft to amend current legislation in order to secure adaptation of urban buildings in order to accommodate persons with disabilities is featured by the relevant agency as the subject of an inter-ministerial discussion which is in the final stage.<sup>117</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 448/2006 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. However, a 2010 decision of the NCCD suggests the pro-active approach of the institution and its understanding that securing accessibility involves taking measures by anticipation to adapt services to persons with disabilities.<sup>118</sup> The plaintiff R.V. was a person with visual impairments for whom the disability assessment commission agreed that he can live independently without requiring a personal assistant. He approached the defendant, a bank, to open a bank account and to have a debit card issued. The bank conditioned the opening of the account and the issuing of the card by R.V. either by appointing a proxy or by signing a statement assuming liability for all the consequences of transactions. The NCCD found that discrimination occurred and issued a recommendation for the bank to adequately consider the specificities of its clients and adapt its services to ensure their accessibility, irrespective of the type of disability. The NCCD stated that 'the bank should have considered that in fact it does not have to adapt its services because the degree of autonomy of the plaintiff, the possibility to dispose of his financial resources without a proxy, his own abilities to operate computer programs and applications on his own computer which is adapted to his visual impairment. The only measures needed for the bank to be adapted in this case were providing the contract and the confidential code in Braille, a measure that is adapted for persons with visual impairments. Such a requirement could not be considered disproportionate or unjustified for the defendant in relation with a person with a handicap of visual nature. Fulfilling rights in the benefit of a category of people implies not only legal measures, but also practical actions, having the aim of ensuring equal opportunities in accessing services.'

<sup>116</sup> Art.100 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>117</sup> Project to amend rule NP-051/2001 in order to adapt civil buildings and the urban space around them for the purposes of accommodating persons with disabilities (*Proiectul de modificare a Normativului NP-051/2001 pentru adaptarea clădirilor civile și spațiului urban aferent la exigențele persoanelor cu handicap*) available at: [www.anph.ro](http://www.anph.ro) (02.03.2012).

<sup>118</sup> NCCD Decision from 06.05.2010, R.V. v. Banca Transilvania and Agentia Grand Constanta.



- 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?*

Though Romania signed and ratified the UN Convention of the Rights of Persons with Disabilities, there was no attempt to harmonize the legislative provisions with the Convention.<sup>119</sup> 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 persons with disabilities, 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. The law was significantly modified in 2010 by means of emergency delegated legislation, Emergency Ordinance 84/2010 and new procedures for evaluating the type of disability had been established in order to respond to official allegations that the system of social assistance for persons with disabilities is severely abused.<sup>120</sup> In spite of criticisms from disability and human rights groups emphasizing that delegated legislation such as the emergency ordinance could not revoke rights guaranteed by law, the Emergency Ordinance 84/2010 significantly reduced the social services persons with disabilities were entitled to previously, for example the special protection measure of “personal assistant” (*asistent personal*) is no longer guaranteed (Arts.1 and 3).

The law 448/2006 defines four different categories of disability depending on the gravity of the impairment: light, medium, accentuated and serious according to Art. 86 (1) and the Law 448/2006 lists various types of disability in Art. 86 (2): physical, visual, hearing, somatic, mental, psychical, HIV/AIDS, rare diseases and/or associated disability (not defined by the law and used in practice to indicate associated impairments leading to establishing a certain degree/category of disability).

<sup>119</sup> Romania/ Law 221 ratifying the UNCRPD (11.11.2010).

<sup>120</sup> Romania/ Emergency Ordinance 84/2010 on amending Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(20.09.2010).



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.<sup>121</sup>

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.

The benefits provided for persons with disabilities depending on the degree of disability recognized, in Law 448/2006 downsized significantly following the adoption of the Emergency Ordinance 84/2010. Such benefits still include:

- 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;
- 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 disability owing cars adapted to their disability are exempted from paying the fees for using the national roads – Art.28;
- 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 less than 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 monthly an indemnity and a personal complementary budget – Art. 58(4):

<sup>121</sup> Romania/ Joint Order 205 of the Ministry of Health and of the Ministry of Labour, Family and Equal Opportunities approving the medical and social criteria for assessing the degree of disability (27.02.2008).





- 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 according to Art. 72.

The 2010 Law on the Unitary System of Pensions operates with the concept of invalidity for the purposes of retirement. Art. 68 of Law 263/2010 provides the categories of persons who benefit of an invalidity pension due to the fact that they have lost completely or partially their capacity of working due to: a) work accidents and professional diseases as provided by law, b) neoplasm, schizophrenia and AIDS, c) regular illness and accidents which were not work accidents.<sup>122</sup> Depending on how reduced is the work capacity of the person, the Law 263/2010 defines different categories of invalidity in Art. 69:

- first degree – complete loss of work capacity and of the capacity of taking care of self;
- second degree - total loss of work capacity while maintaining capacity of taking care of self;
- third degree – losing at least one half of work capacity, the person can carry on a professional activity corresponding to maximum one half of the regular working time.

The assessment of the working capacity in order to establish the type of invalidity is conducted upon request by a specialized doctor working for the mandated body, *Casa Națională de Pensii Publice* [National Public Pensions Agency].

Law 263/2010 which established a new retirement age also includes in Art. 58 special provisions in significantly reducing the standard retirement age for persons with disabilities who continued working.<sup>123</sup> For example, blind persons can benefit of retirement for meeting the standard retirement age, if they have carried out at least one third of the duration established by the law of mandatory contributions while being blind.<sup>124</sup>

The Law 151/2010 on Special Integrated Services of Health, Education and Social Support for Persons with the Diagnosis of Autism and Associated Mental Health Disorders provides for a general framework for the diagnosis and care.<sup>125</sup> Law 151/2010 establishes measures which should be taken for the early diagnosis of autism in children up to three years. The law provides that children with autistic and associated disorders must enjoy free access to integrated health, education and social services as described by the law. The competencies of the different actors in

<sup>122</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).

<sup>123</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).

<sup>124</sup> Art. 59 of /Law 263/2010 on the Unitary System of Pensions (16.12.2010).

<sup>125</sup> Romania/ Law 151/2010 on Special integrated services of health, education and social support for persons with the diagnosis of autism and associated mental health disorders (12.07.2010).



charge with supporting persons with autism or associated disorders are also established by law. The law came into force in January 2011.

## 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 Art. 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>126</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>127</sup> Sheltered units receive the following benefits according to Art. 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. The Ministry of Labour, Family and Social Protection approves the procedure for authorising sheltered units according to its Order no.

<sup>126</sup> Art.5 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).

<sup>127</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 (3.05.2007).



1372 from 29.09.2010.<sup>128</sup> This Order provides for authorities and public institutions, public or private legal persons to acquire products or services from authorised sheltered units in a total amount which can equal the debt of that entity towards the state budget.

*b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination 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>129</sup> All these forms constitute employment and are protected by the Labour Code and by the Anti-discrimination Law.

<sup>128</sup> Ministry of Labour, Family and Social Protection, Order approving authorizing procedures for special units (*Ordinul nr. 1372 din 29 Septembrie 2010 al Ministerului Muncii, Familiei și Protecției Sociale privind aprobarea procedurii de autorizare a unităților protejate*) (29.09.2010).

<sup>129</sup> Art.79 of Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap(06.12.2006).



### 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?*

Art. 1(2) of the Anti-discrimination Law guarantees the principle of equality among citizens and provides for the prohibition of discrimination in the same context. The limitation is triggered by the constraints of Art. 1 (3) of the Romanian Constitution which guarantees fundamental rights in relation to citizens only. However, the comprehensive definition of discrimination provided in Art. 2 (1) of the Anti-discrimination Law does not include any residence, citizenship or nationality requirements to qualify for protection as proved also by the case law of the NCCD.<sup>130</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 Art. 26: if the victim is an individual, the amount of the fine ranges from RON 400 to 4,000 (EUR 100-1,000) when the victims are a group or a community, the fine ranges between RON 600 - 8,000 (EUR 150-2,000).<sup>131</sup>

Art. 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 Art. 1(2), and, subsequently, Art. 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;

<sup>130</sup> See for example NCCD case D. v. N. and Șofronea swimming pool, case no. 221 from 21.09.2005, in which the victim of discrimination was an Egyptian national.

<sup>131</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, (20.07.2006).



- 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.'

### 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 identifies 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>132</sup>

In its decision 365 from 14.09.2011 in the case NCCD and L Rausch v. S.C. Elaine S.R.L. (owner of Heaven Club from Timișoara), a case concerning denial of access to public services to a person with disability, the NCCD discussed at length the conditions for engaging responsibility of a private company for actions of its contractors (the body guard hired by the protection services) and discusses the subordination relations between the contracting party and its contractor, by stating the obligation of private companies to include in their internal regulations provisions about equality and non-discrimination and provisions referring to the management of discrimination cases. (See section 0.3)

The New Civil Code mentions in Art. 219 the regime of liability for legal acts specifying that 'licit or illicit facts perpetrated by the bodies of a legal person create an obligation for the legal entity itself, but only if they are related with the mandate or with the scope of the responsibilities assigned. (2) Illicit acts trigger also the personal joint liability of those who perpetrated them both in relation with the legal entity and with third persons.' Art. 220 on liability of members of the bodies of the legal person provide that 'the decision-making body can decide with the legally required majority if

<sup>132</sup> Romania/Tribunalul Bihor [Bihor County Tribunal] Sentinta Civila [Civil Judgement] No.620/L.M./2007, File No.6094/111/2006; 01.10.2007. 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).





it will take action against administrators, censors, directors and other persons who acted as members of the bodies of the legal person, for damages caused by such persons when infringing their duties as assigned.'

## 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?*

*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.*

Arts. 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, civilian or military, secular or religious).

The Labour Code, as amended and republished in 2011 and into force since May 2011, provides for a specific prohibition of discrimination in relation to labour relations, in Art. 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;
- 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.<sup>133</sup>

Furthermore, Art. 59 of the Labour Code prohibits firing of employees

<sup>133</sup> Romania/ Law 40/2011 for amending and completing Law 53.2003, the Labour Code, Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 (31.03.2011).



- 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 rights.<sup>134</sup>

There is no jurisprudence available to indicate whether the labour courts interpret the prohibition of discrimination on grounds of religion strictly as belonging to a state-recognized religious faith or to a religious association duly registered according to Law 489/2006 or in light with the understanding promoted in the jurisprudence of the European Court of Human Rights which was also referred to by the Romanian Constitutional Court in its decisions.<sup>135</sup>

While discrimination is prohibited, the Labour Code does not offer guidance in the case of employees dismissed or sanctioned when they are not available or competent to do their job due to a family situation or disability and no labour law jurisprudence could be identified on this issue.

The Criminal Code includes specific provisions applicable only to civil servants guilty of discrimination in the form of abusing their official position. Art. 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.’

The new Criminal Code adopted in 2009, to enter into force reportedly in 2013, sanctions under Art. 297, the abuse in the exercise of authority, the action of the civil servant who during the exercise of work-related tasks, limits the exercise of a right of a person or creates a situation of inferiority on grounds of age, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political membership, beliefs, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS which is punishable with prison from two to seven years and the prohibition to take a public position.

<sup>134</sup> Art. 59 of Romania/ Law 40/2011 for amending and completing Law 53.2003, the Labour Code, Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 (31.03.2011).

<sup>135</sup> Romania/Curtea Constituțională/Decision 72 (18.07.1995).



### **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 also age<sup>136</sup> and disability),<sup>137</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:

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 category, on one's beliefs, gender or sexual orientation, age or on one's belonging to a disadvantaged group shall constitute a contravention.<sup>138</sup>

Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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.

<sup>136</sup> For example, NCCD. Decision 2707 of the National Council on Combating Discrimination, from 20.01.2004.

<sup>137</sup> For example, NCCD. Decision P/0797 of the National Council on Combating Discrimination, from 06.04.2006

<sup>138</sup> Unofficial translation.



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 or disadvantaged group, beliefs, age, gender or sexual orientation shall constitute a contravention, 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, social status or disadvantaged group, age, 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 a contravention.

(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, religion, 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, ethnic origin, religion, social category or disadvantaged group or age, gender, social status, sexual orientation or beliefs shall constitute a contravention.

Art. 9 - None of the provisions of Art s. 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 27.07.2006, G.T. v. the Ministry of Health, the NCCD sanctioned as discriminatory the Order 1.000/2005 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>139</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 from 2008) 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 997/2008), there is a de facto difference between the public and the private sector in relation to justiciability of discrimination regarding conditions for access to employment. Also, following this line of jurisprudence, the national court or the national equality body faced with legal provisions incompatible with the anti-discrimination principle, does not have a mechanism allowing it to decline to apply that particular legal provision as provided by the Court in C-555/07 Seda Kucukdeveci.

### 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.*

Discrimination in employment and working conditions, including pay, social benefits other than wages and dismissal is specifically mentioned by the Anti-discrimination Law in Arts. 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 category, on one's beliefs, gender or sexual orientation, age or on one's belonging to a disadvantaged group shall constitute a contravention.<sup>140</sup>

<sup>139</sup> NCCD, decision G.T. v. the Ministry of Health (27.07.2006).

<sup>140</sup> Unofficial translation.





Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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 or disadvantaged group, beliefs, age, gender or sexual orientation shall constitute a contravention, 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, social status or disadvantaged group, age, 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 a contravention.

(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, religion, gender or sexual orientation of applicants for a job or any other private information shall be confidential.



The lists of grounds from Arts. 5, 6 and 7 would be read as including all grounds protected by Romanian legislation, including disability not specifically mentioned. The NCCD confirmed this interpretation in its jurisprudence.

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 relation to granting social rights other than salary-related rights.

The Law on the Unitary System of Pensions replacing Law 19/2000 and adopted on 16.12.2010 maintains the principle of equality in Art.2 d) without further detailing on prohibitions against discrimination or including any sanctions in this regard.<sup>141</sup>

Law 204/2006<sup>142</sup> on Facultative Pension Schemes provides in Art. 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 ...’ Art. 51 (4) provides:

No person wishing to become a participant (in a facultative pension scheme can be discriminated against and can 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. 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 courses?*

Though not using expressly the wording of the Art. 3(1)(b) of the Directive 2000/43, the Anti-discrimination Law mentions specific 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:

<sup>141</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).

<sup>142</sup> Romania/Law 204/2006 on Facultative Pensions Schemes (22.05.2006).



Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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;

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, age, gender or sexual orientation, shall constitute an contravention.

(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, nationality, ethnic group, religion, social category or to a disadvantaged category, by his/her beliefs, age, 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 contravention.'

The lists of grounds from Art. 6 would be read as including all grounds protected by Romanian legislation, including disability though not specifically mentioned.



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

Still, both 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 specifically mentions trade unions in the context of the prohibition to discriminate in restricting the right to join the trade unions:

Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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;

The lists of grounds from Art. 6 should be read as including all grounds protected by Romanian legislation, including disability not specifically mentioned.

Further protection was ensured in the 2011 legislation on social dialogue<sup>143</sup> and in the Labour Code which clearly spell 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 – Art. 59.b) of the Labour Code.<sup>144</sup>

*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.*

<sup>143</sup> Romania/Law 54 /2003 Trade Unions Law (24.01.2004) had been abrogated and replaced by Art. 224 of the Law 62/2011 on Social Dialogue (10.05.2011).

<sup>144</sup> Romania/ Law 40/2011 for amending and completing Law 53.2003, the Labour Code, Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 (31.03.2011).



### 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:

Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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, ethnic origin, religion, social status or disadvantaged group, age, gender, sexual orientation or beliefs shall constitute an contravention.'

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

'Under the ordinance herein, the following deeds shall constitute a contravention, 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, age, 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 lists of grounds from Arts. 6, 7 and 8 would be read as including all grounds protected by Romanian legislation, including disability though not specifically mentioned.

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 Art. 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 to people because of their employment or residence status, for example 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 Art. 6 and in Art. 8 without distinguishing between the different types of benefits and social advantages private or public actors might grant to their employees:

Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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, ethnic origin, religion, social status or disadvantaged group, age, gender, sexual orientation or beliefs shall constitute an contravention.

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 Art. 10 (h) of the Anti-discrimination Law:



Under the ordinance herein, the following deeds shall constitute a contravention, 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, age, gender or sexual orientation:

(h) refusal to grant the rights or benefits to a person or a group of persons.

Though not mentioned specifically, disability would be also a protected ground in case of access to services, interpreted under the general concept of “disadvantaged group” and in light of the general definition of discrimination from Art. 2(1) which lists as protected grounds both disability and age.

### 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.*

Art. 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, age, gender or sexual orientation, shall constitute a contravention.

(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 a contravention. 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, nationality, ethnic group, religion, social category or to a disadvantaged group, by his/her beliefs, age, 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 group in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute a contravention.'

Not specifically mentioned in Article 11 but also protected is the ground of disability.

The requirement from Art. 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 Art. 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, țigani 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 Art. 11 of the Ordinance and sanctioned Glina school with an administrative warning.<sup>145</sup> In its decision, the NCCD mentioned the ECHR jurisprudence on Art. 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

<sup>145</sup> NCCD, Glina segregation case, in the file 22A Bis/2006. (27.08.2007).



Council of Ministers of the Council of Europe, ECRI Recommendation no. 3. The case file 22A Bis/2006 predated the Grand Chamber decision in *D.H. and Others v. CZECH REPUBLIC* (13 November 2007) and does not reflect upon the findings of the ECtHR in that case. Similarly, the NCCD found against schools segregating Roma pupils in a series of cases mainly brought by a Roma NGO.<sup>146</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.

In 2010, the Ministry of Education issued Notification 28463 regarding Segregation in Education of Roma which regulates the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the educational system and includes some measures regarding study in minorities' languages.<sup>147</sup> The Notification is an internal norm targeting school inspectorates, kindergarten and school headmasters, as well as teachers, to specifically deal with the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the educational system. The Notification also includes some measures regarding study in minorities' languages.

The Notification 28463 from March 3<sup>rd</sup>, 2010 is triggered by complaints received by the Ministry regarding tendencies of segregating Roma pupils or attempts of interrupting education in minorities' languages. The Notification includes very specific recommendations regarding registration in the education system of Roma pupils, re-configuration of classes to avoid segregation of Roma pupils, maintenance of the study in mother tongue or of classes of maternal language and/as well as classes on

<sup>146</sup> Romani CRISS filed on 25.01.2007 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 High school 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> (20.10.2007). In a similar case, on 07.02.2007, 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.

<sup>147</sup> Romania/ Ministry of Education, Research, Youth and Sports, Notification 28463/2010 available <http://www.edu.ro/index.php/legaldocs/13466> (16.03.2010).



history and traditions of the minorities, maintenance the positions of school mediators who are in the position of support Roma pupils, mandatory inclusion of all children aged between 6 and 16 in the educational system, including through alternative forms of education.

The Notification 28463/2010 does not mention specific sanctions for non-observance of the recommendations, the Labour Code provisions would be however applicable. It is mentioned that the compliance with the requirements of the Notification will be monitored on permanent basis by school inspectors in charge with educational problems of Roma/minorities, together with the school inspectors responsible with pre-school, primary school and secondary school education.

The new Education Code, Law 1/2011 provides in Art.2(4) that the state 'grants equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, for all citizens of Romania, without any form of discrimination.'<sup>148</sup> Thus, the previous prohibition of discrimination regardless of 'race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, belonging to a vulnerable group category as well as any other criterion' mentioned in Art.9 of the prior draft was replaced by a more vague principle of equity defined as absence of discrimination in general in access to education. Only discrimination in tertiary education is prohibited expressly in Art.118 and in Art. 202.

While the previous 1995 Education Law<sup>149</sup> defined segregation in education in Art. 5(48) and in Art. 8, such provisions disappeared from the current law.<sup>150</sup> In Art. 3, the Education Code provides as defining principle 'the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity' as well as the principle of 'ensuring equal opportunities.' Notably, Art. 50 provides that "abusive diagnostic assessment of children based on criteria of race, nationality, ethnicity, language,

<sup>148</sup> Romania/ Law 1/2011 Education Code, *Legea Educației Naționale*. (10.01.2011).

<sup>149</sup> Education Law 84 of 1995, published as amended by Law 151/1999, republished in Monitorul Oficial, No. 370/August 3, 1999.

<sup>150</sup> The draft 2009 Education Code which was declared unconstitutional for procedural flaws defined segregation in education in Art. 5(48) as 'a serious type of discrimination consisting in physical separation, with or without intention, of minority children and youth from the rest of the children and youth, in groups, classes, buildings, educational institutions and other accommodation facilities used for education, so that the percentage of minority children and youth out of the total of children/youth in that particular educational institution/ classroom/ group is disproportionate when compared to the percentage of minority children and youth of that particular age out of the total population of the same age in that particular administrative-territorial unit (village or city).' The Code added in Art. 8 that 'the organizing, functioning and content of education cannot be structured based on exclusivist, segregationist and discriminatory criteria on grounds of ideology, politics, religion or ethnicity' and in Art.8(6) specifically prohibited segregation without providing for a specific sanction. 'Organizing the educational process so that to allow teaching of mother tongue and/or other/all courses in mother tongue, as well as similar cases expressly provided in the law, are not considered as segregation.'





belonging to a disadvantaged category, or any other criterion, which leads to their inclusion in special education needs groups, shall be punished.” However, there are no specific sanctions included in the law

Segregation of Roma pupils remains as problem as evidenced by the 2007 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<sup>151</sup>, and in 31 schools there were segregated classes.<sup>152</sup> Research supported by UNICEF in 2011 found that almost 60% of the Roma children who attend preschool go to segregated kindergartens (that is, where over 50% of the children are Roma), and 11.7% of the Roma children are in all-Roma kindergarten groups.

‘Equal Access to Quality Education for Roma, Romania’ a report produced by the Open Society Institute in 2007<sup>153</sup> identified 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, 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.

<sup>151</sup> Surdu, L. (coord.) (2011) *Participare, absenteeism școlar și experiența discriminării în cazul romilor în România*, Participation, educational absenteeism and experience of discrimination in the case of Romanian Roma, București, Vanemonde. The survey was conducted in December 2009-January 2010. Study available in Romanian at: <http://www.romanicriss.org/PDF/RC%202011%20-%20Participare,%20absenteism%20școlar%20și%20experiența%20discriminării%20%28ro%29.pdf> (10.02.2011).

<sup>152</sup> 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> (22.10.2007).

<sup>153</sup> 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> (20.10.2007).



A 2011 study produced by Agenția de Dezvoltarea Comunitară Împreună for UNICEF, found that more than 70 percent of the pupils dropping out from schools are Roma and the causes for their leaving the educational system are poverty as well as the low quality of education and the lack of human and material resources in educational institutions.<sup>154</sup>

*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 are favoured and supported.*

Education of pupils and students with disabilities is accommodated according to the Education Code and the special legislation on the rights of persons with disabilities. Art. 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>155</sup> Art. 15(2) guarantees the right to permanent education and continuing education of persons with disabilities.

Access to education can be realised according to Art. 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.

The 2011 Education Code provides in Arts. 48-56, the provisions regarding special and integrated education. Special education can be organised in special schools and in mainstream schools which integrate special groups or individual students in mainstream groups. As a novelty, Art. 50 of the Code provides that: ‘Abusive diagnostic assessment of children based on criteria of race, nationality, ethnicity, language, belonging to a disadvantaged category, or any other criterion, which leads to their inclusion in special education needs groups, shall be punished.’ However, no specific sanctions are provided.

<sup>154</sup> Ivasiuc, A, Duminiță, G (2010) *O școală pentru toți? Accesul copiilor romi la o educație de calitate*, A School for Everybody? Access of Roma children to quality education, București, Vanemonde The research used a mixed qualitative and quantitative approach and was carried out in April 2009-May 2010. The report is available at: [http://www.agentiaimpreuna.ro/files/O\\_scoala\\_pentru\\_toti.pdf](http://www.agentiaimpreuna.ro/files/O_scoala_pentru_toti.pdf) (14.06.2011).

<sup>155</sup> Art. 17, Law on the protection and promotion of the rights of persons with a handicap, (06.12.2006).



The Education Law fails to address the issue of children dropping out as a result of discrimination and harassment on grounds of disability and while it establishes fines for the parents who fail to make sure that the children go to school, it does not include any 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>156</sup> There is no subsequent legislation further defining this obligation and the mechanism for its implementation.

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>157</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 Art. 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>158</sup> Law 584/2002 does not include an enforcement mechanism or correlative sanctions.

In a 2009 decision, the NCCD sanctioned with a fine of RON 600 (EURO 125) the initiative of a teacher to collect signatures with the purpose of excluding a pupil from the class because of disability. This was deemed as discrimination affecting the right to education and besides the fine, the NCCD issued a warning and recommended 'initiating courses for the educational personnel of the school on topics such as the respect for human rights and the principle of equality to prevent such cases in the future.'<sup>159</sup>

<sup>156</sup> Art.46.4, Law 272/2004 on the Protection and Promotion of the Rights of the Child, (21.06.2004).

<sup>157</sup> Art.46.2, Law 272/2004 on the Protection and Promotion of the Rights of the Child, (21.06.2004).

<sup>158</sup> 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, (29.10.2002).

<sup>159</sup> NCCD, Decision 101 from 17.02.2009.



### 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, Art. 10 of the Anti-discrimination Law lists the different types of services and goods. The Law does not distinguish between goods and services available to the public and those which are private. Art. 3 of the Anti-discrimination Law specifies that the provisions of the Law apply to individuals and legal persons, public and private, as well as public institutions, including in the field of services in general, access to goods and services (Art. 3 c).

Different from the Directives, the 2000 Law allows for exceptions from the prohibition of discrimination 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 a contravention, 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, age, 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) denying 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) denying 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) denying 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.

Though disability is not specifically spelled out as a protected grounds in Art. 10, it should be granted protection as being covered by the general term “disadvantaged group.”

- 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 Art. 10 d). While the introductory clause of Art.10 fails to mention specifically disability, the practice showed that it is considered as protected ground by corroborating Art.10 with the general definition in Art. 2(1) or 2(2).

The Anti-discrimination Law does not mention the specific grounds of age and disability to allow differences of treatment but it is introducing a legitimacy and proportionality test which could be applied irrespective of the grounds protected:

‘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 mention 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 against 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. However, the law does not prohibit segregation as proved by a 2011 case which attracted a lot of media attention. In sanctioning the wall segregating Roma social housing from the rest of Baia Mare, the NCCD had to rely on the prohibition of harassment and on the right to dignity as protected by the Anti-discrimination Law.<sup>160</sup>

Infringing the provisions 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 a contravention, 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, age, 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. 12 - (1) Any threats, pressure, constraints, use of force or any other means of assimilation, deportation or colonisation of persons with the purpose to modify the ethnic, racial or social composition of a region or of a locality shall constitute a contravention.

(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 a contravention. Forcing a group of persons belonging to a minority to leave the area or regions where they live or forcing 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. 13 - (1) Any behaviour aiming to force a person or group of persons to move away from a building or neighbourhood or aiming to

<sup>160</sup> NCCD Decision 439 from 15.11.2011 in file no. 4A/2011, ex officio case v. Cătălin Cherecheș.



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, age, gender or sexual orientation, shall constitute a contravention.

(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, on account of their beliefs, age, gender or sexual orientation.

The Housing Law does not mention any prohibition on discrimination in the area of housing.<sup>161</sup> Roma are not expressly mentioned as one of the social groups provided for in Arts. 42-43 of the Housing Law as entitled to social housing.<sup>162</sup> More worrying is that the criteria established for access to social housing include an exclusionary clause regarding those who lived illegally at some point and this provision can deprive many Roma of access to social housing.

The 2002 National Action Plan on Social Inclusion<sup>163</sup> mentions housing as one of the priority lines and includes Roma as a particularly vulnerable group without effectively following up in this direction. Roma as vulnerable group are not explicitly mentioned in the Law for Preventing and Combating Social Marginalization.<sup>164</sup> The Presidential Commission for the Analysis of Social and Demographic Risks in its 2009 report *Risks and Social Inequities in Romania*, identified the increased vulnerability of Roma in relation to housing and provided dire data but there was no policy or legislative follow up to these findings.<sup>165</sup>

<sup>161</sup> Romania/Housing Law, Law.114/1996 republished (11.10.1996).

<sup>162</sup> Art. 43 of the Housing Law provides for the beneficiaries as decided by local authorities according to annually established criteria, and in the order of priority as established by the law they can be: persons and families evicted, or who are to be evicted from the houses returned to former owners, young people up to 35 years old, young people coming from social protection institution who have turned 18, people with physical disabilities of degree I and II, 'handicapped' persons, pensioners, war veterans and widows, the beneficiaries of the Law 341/2004 for the recognition of martyr-heroes and fighters who have contributed to the victory of the Romanian revolution from December 1989 as well as of the persons who have sacrificed their life and have suffered as a consequence of the workers' anti-Communist revolt from

Brasov 1987 and of Law 118/1990 (persons who have suffered for political reasons during Communism), and other persons or families which might be entitled to right to housing.

<sup>163</sup> Romania/ Government Decision for the approval of the National Plan Against Poverty and for Promoting Social Inclusion (31.07.2002).

<sup>164</sup> Romania/ Law for Preventing and Combating Social Marginalization, Law 116/2002 (21.03.2002)

<sup>165</sup> Presidential Commission for the Analysis of Social and Demographic Risks, *Riscuri și inechități sociale în România – Risks and social inequities in Romania*, available at: [http://www.presidency.ro/?\\_RID=det&tb=date&id=11426&\\_PRID=](http://www.presidency.ro/?_RID=det&tb=date&id=11426&_PRID=) (22.09.2009).



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. A report prepared by the Center for Legal Resources in 2009 found that ‘the first and only Government driven and funded initiative in the area of housing for the Roma came in 2008 through Government Decision 1237/2008 which provided for the building of a maximum of 300 houses for the Roma.’<sup>166</sup> The report produced an analysis of patterns affecting the right to housing of Roma communities and concludes that given the lack of clear guarantees against forced evictions and the tedious legal regime applicable to buildings and housing in the Romanian legislation, Roma are victims of indirect discrimination.

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 2011 report issued by Amnesty International, *Romania: Mind the legal gap: Roma and the right to housing in Romania*, concludes that the Roma minority in Romania lacks legal protection from forced evictions, and that Roma families are often left in sub-standard housing conditions with no chance for redress.<sup>167</sup> The report identifies gaps in the protection of the right to housing and highlights that ‘remedies available under the existing legislation for evictions are mainly available to tenants or owners and do not adequately cover other groups of people, such as people living on public land.’ Further, the report argues that ‘the Romanian government has so far failed to introduce an effective system that would hold local authorities accountable for non-compliance with human rights treaties to which Romania is a state party’ and concludes that even if the courts or the national equality body should provide Roma with a means of redress, these systems lack the power to hold the government accountable.

Law 448 from 2006 provides for preferential access to public housing for persons with disabilities in Art. 20 and persons certified with a serious disability can receive a supplementary room and have a minimal rent when granted public housing according to Art. 20(2). However, no data is available to assess the level of implementation of these provisions. In 2009, the Parliament adopted a Law providing for exemptions for

<sup>166</sup> Romania RAXEN National Focal Point, *Thematic Study Housing Conditions of Roma and Travellers* March 2009 available at: [http://www.crj.ro/userfiles/editor/files/RAXEN-Roma%20Housing-Romania\\_en.pdf](http://www.crj.ro/userfiles/editor/files/RAXEN-Roma%20Housing-Romania_en.pdf) (10.09.2011).

<sup>167</sup> Amnesty International, *Romania: Mind the legal gap: Roma and the right to housing in Romania*, issued on 23 June 2011. Report available at: <http://www.amnesty.org/en/news-and-updates/report/romania-legal-system-condemning-roma-poor-housing-2011-06-23> (25.06.2011).



paying rent for public housing or housing provided by county authorities which are used by persons with a serious disability.<sup>168</sup>

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<sup>168</sup> Romania/Law 359/2009 providing for exemptions for paying rent for public housing or housing provided by county authorities which are used by persons with a serious disability (20.11.2009).



## 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 Art. 9 of the Anti-discrimination Law is not identical with the language of Art. 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 Arts. 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 apply not only for 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 as provided by Art. 4(2) of Directive 2000/78, but the provisions of Art. 9 on determining occupational requirements which are recognised as exemptions under a clear legitimacy and adequacy test can be interpreted as allowing for ethos or religion based exceptions:

Art. 9 - None of the provisions of Arts. 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.<sup>169</sup> Law 489/2006 established a three tier system with traditional religious denominations being granted the status of state recognised religious denominations (*culte*) under very strict requirements, religious associations (*asociații religioase*)<sup>170</sup> 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>171</sup> According to Arts. 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 in relation to religious personnel of recognised denominations could be extended to religious personnel of other entities the ethos of which is based on religion or belief (such as registered religious associations) according to the legal principle that where the reason behind a normative provision is the same, the norm applied should be the same accordingly. There is no reported jurisprudence developed in this field so far.

- 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.

<sup>169</sup> The 2006 Law on religious freedom and the general status of religious denominations recognizes the same 18 religions that had this status prior to its adoption.

<sup>170</sup> Art. 40 of Law 489/2006 provides that entities seeking registration as religious associations have to meet a higher threshold than other types of association (at least 300 members exclusively Romanian citizens or residents in Romania while secular non-for-profit associations need at least three members).

<sup>171</sup> Romania/Law 489/2006 Law on Religious Freedom and the General Status of Religious Denominations (8.01.2007).



- c) *Are there cases where religious institutions are permitted to 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)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both?*

The Education Code, Law 1/2011<sup>172</sup> maintains Religion is a subject for primary and secondary and vocational education in the case of the 18 state-recognized religions, and it is guaranteed irrespective of the number of pupils willing to take the subject. The Code maintains in Art. 18 the current procedure according to which the parents or the legal guardian can file a written request so that the student will not take the class. Only the 18 state-recognized religious denominations can sign partnerships with the Ministry of Education to secure teaching of classes of Religion as solicited by the pupils, a mechanism which was contested in the past.

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>173</sup>

The 2011 Education Code does 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 Art. 32. (2)-(4) that 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.

<sup>172</sup> Romania/ Law 1/2011 Education Code, *Legea Educației Naționale*. (10.01.2011).

<sup>173</sup> 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) (10.02.2008).



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.

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 Art. 136 the conditions for employment of Religion teachers, on the basis of agreements between the Ministry of Education and the 18 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 religious personnel, which graduated higher religious education or the theology seminaries, with a 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 Code.

#### **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 Art. 3(4) and Recital 18 of the Directive 2000/78 but the general exemptions for a legitimate objective from Art. 9 can be invoked in relation to age and disability requirements for armed forces:

Art. 9 - None of the provisions of Arts. 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.



Law 80/1995 on the Statute of Military Personnel includes an age limit in Art. 36 mentioning that active officers might become: 'e) active military sub-officers (non-commissioned officers NCOs), licensed graduates of higher tertiary education with a similar profile to the military units who are maximum 35 years old.'<sup>174</sup>

National defence and public order 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 Art. 78(4) of Law 488/2006. Such an absolute exemption introduced by Art. 78(4) is unjustified and might be challenged as unconstitutional.

*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, but the general exemptions for a legitimate objective provided for in Art. 9 can be invoked in relation to occupational requirements relating to employment in the police, prison or emergency services. For example, Art.20 of the Order of the Ministry of Interior 665 from 28.11.2008 regarding human resources management in the units of the Ministry of Interior, mentions as general conditions only the fact that the applicants need to be at least 18 and be declared "able" by a special commission checking medical, physical and psychic conditions. The Order also specifies that depending on the particularity of the professional activity, specific recruitment criteria might be established.

Law 360/2002 on the Statute of the Policeman provides in Art.10 that for the entrance exams in the educational units of the Ministry of Interior or in the cases of direct employment of specialists 'any person has access, irrespective of race, nationality, gender, religion, wealth or social origin,' who complies with the general requirements for civil servants and with other specific requirements listed in the law.<sup>175</sup> Such specific requirements listed by Art. 10 include being declared "medically, physically and psychically able/fit." Age is not mentioned in the list.

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 Art. 78(4) of Law 488/2006, an exemption which in itself leads to discrimination and can be challenged as unconstitutional.

<sup>174</sup> Romania/ Law 80/1995 on the Statute of the Military Personnel, Lege privind Statutul cadrelor militare (11.07.1995).

<sup>175</sup> Romania/Law 360/2002 on the Statute of the Policeman, Lege privind Statutul politistului, (6.06.2002).



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

*Both the Racial Equality Directive and the Employment Equality 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 (i.e. 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 Art. 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 defining the concept 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. 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 Art. 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 employees and their partners. 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) *Would it constitute unlawful discrimination in national law if an employer provides 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 Arts. 6 and 8 of the Anti-discrimination Law would apply:

Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, 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, ethnic origin, religion, social category or disadvantaged group or age, gender, social status, sexual orientation or beliefs shall constitute a contravention.

Notably, the Romanian legislation did not include any legal provision on same sex marriage or partnership until 2009, so private employers providing benefits on grounds of marriage could invoke the absence of a legal regulation.<sup>176</sup>

The new Civil Code adopted in 2009,<sup>177</sup> which entered into force in 2011, includes in Art. 277 an express prohibition of same-sex partnership and marriage, including also a prohibition to recognize partnerships and same-sex marriages registered in other countries even if they were legally registered.<sup>178</sup> The new Civil Code also mentions that the legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force - the 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>179</sup> However, the new Civil Code provisions fail to clarify the conflict between the express provisions recognising the marital status of the EU citizens as granted by their countries mentioned in the legislation transposing Directive 2004/38/EC (Ordinance 30/2006)

<sup>176</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) (09.01.2009).

<sup>177</sup> Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

<sup>178</sup> Art. 277 of Romania/ Law 289/2009 on the Civil Code (17.07.2009). 'same-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognized in Romania.' Similarly, the new Civil Code mentions that same-sex or opposite-sex civil partnerships registered or contracted abroad by Romanian citizens or foreigners are not recognized in Romania.

<sup>179</sup> Romania/Law 500/2006 on amending and approving Ordinance 30/2006 (28.12.2006).



and the recent general prohibition of recognition of same-sex marriages or partnership entered into abroad by same-sex couples.<sup>180</sup>

- b) *Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?*

Both heterosexual and same-sex partnerships are not recognised by Romanian legislation. Due to the open list of protected grounds, allowing the NCCD and the courts to define as a protected groups heterosexual couples or same-sex partners, a decision to provide benefits limited to employees with opposite-sex partners might be challenged as discriminatory.

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

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

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 Art. 7(2) of Directive 2000/78. However, the general exception of objective and justified limitation, allowed by Art. 9 of the Ordinance would be applicable:

Art. 9 - None of the provisions of Arts. 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.'

- b) *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 mention exceptions relating to health and safety law in relation to any grounds. Similarly, the legitimacy and proportionality test indicated in Art. 9 of the Anti-discrimination Law would be applicable for exceptions based on dressing codes or religious tenants.

<sup>180</sup> Romania/Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006) defines as a partner 'a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.'



## 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 Art. 6 of the Directive 2000/78/EC.

Discrimination on the ground of age may be justified under Art. 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 wording of the test is compliant with the test provided by Art. 6 of Directive 2000/78.

The Romanian 2000 Law also allows for difference in treatment in the area of housing and access to services and access to goods, including on the ground of age, under the specific test established in Art. 10 which allows for difference in treatment which is objectively justified by a legitimate aim and given that the methods pursued are adequate and necessary.

It is up to 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 09.01.2008, 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>181</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.' The NCCD considered that the refusal to allow the plaintiff to participate in the competition for a position of school director was discriminatory and recommended to the Ministry of

<sup>181</sup> Ordinul Ministrului Educației și Cercetării nr. 5617 (14.11.2006).



Education to modify the criteria for the competitions for the position of school director.<sup>182</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 was required in order to secure 'dynamism, flexibility and optimism'.<sup>183</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 (former Art. 109 renumbered as Art. 112), cannot work supplementary hours (Art. 121 renumbered as Art. 124) or during the night shift (Art. 125 renumbered as Art. 128), have a lunch break of at least 30 minutes (Art. 130 renumbered as Art. 133), have a supplementary vacation of three days (Art. 142 renumbered as 147 (2)).<sup>184</sup>

c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, 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 Art. 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>185</sup> in force until the end of December 2010 established the general age for retirement which should be progressively increased by 2014 to reach

<sup>182</sup> NCCD, decision no.42 from 09.01.2008, 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>183</sup> NCCD, decision I.N. v. Administrația Națională a Penitenciarelor [National Administration of Penitentiaries], (11.05.2006).

<sup>184</sup> Romania/ Labour Code (24.01.2003) modified by Law 40/2011 .

<sup>185</sup> Romania/ Law 19/2000 Law on the Public Pensions System and Other Social Benefits (17.03.2000).



the ceiling of 60 for women, 65 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). The law established a unified public pension system, integrating the majority of former independent systems; the only system left outside was the pension system for militaries.

Law 19/2000 was replaced by the Law on the Unitary System of Pensions which entered into force in 2011.<sup>186</sup> The initial draft of the law on the unitary system of pensions was challenged because its provision introducing an equal retirement age for men and women of 65 in Article 53(1). The Constitutional Court upheld the draft in its decision from 6.10.2010 by stating that equalizing the retirement age of men and women does not infringe the constitutional provisions on equality and that opposing such equalization would be tantamount to an opposition against an international trend. However, the Romanian President later refused to sign the Law and sent it back to the Parliament stating that he could not agree with the equal retirement age of 65 for both men and women. The President requested the Parliament to consider introducing a differentiated retirement age of 63 for women and 65 for men due to the socio-economic realities entailing a more difficult situation for women.<sup>187</sup> Consequently, the Parliament adopted the Law on Unitary Pension System on 7.12.2010, including an amendment regarding the differential retirement age for men and women. The amendment however did not introduce a differential period of contribution as requested by the opposition parties.

The Constitutional Court was approached once again by a group of parliamentarians alleging a potential discrimination between men and women due to the lack of a differentiated system of contributing to the retirement scheme, leading to lower net pensions for women. On December 15<sup>th</sup>, 2010, the Constitutional Court analysed the constitutional complaints and decided to uphold the Law on Unitary Pensions System in its current form including the differentiated retirement age for women and men as proposed by the President without a mechanism addressing the disparate impact of the different contribution periods. The bill was adopted as Law 263/2010 on 16.12.2010 and entered into force on January 1<sup>st</sup> 2011, with the exception of several provisions which enter into force on January 1<sup>st</sup> 2012.

<sup>186</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).

<sup>187</sup> Law 19/2000 on the Public Pension System and Other Social Security Rights 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).





#### 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 (former Art. 109 renumbered as Art. 112), cannot work supplementary hours (Art. 121 renumbered as Art. 124) or during the night shift (Art. 125 renumbered as Art. 128), have a lunch break of at least 30 minutes (Art. 130 renumbered as Art. 133), have a supplementary vacation of three days (Art. 142 renumbered as 147 (2)).<sup>188</sup>

Employers might receive fiscal facilities if they hire students during the vacation or recent graduates, according to Law 76/2002.<sup>189</sup> Art. 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 Art. 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 provides for an exception from the general prohibition against individual labour contract on a determined period of time, and allows such contracts in Art. 81 d) renumbered as Art. 83 e) in the case of a person who is looking for employment and who will reach the standard pensionable age in five years.<sup>190</sup>

#### 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 allowing 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 Art. 13 of the Labour

<sup>188</sup> Romania/ Labour Code (24.01.2003) modified by Law 40/2011.

<sup>189</sup> Romania/Law 76/2002 on the System of Funds for Unemployment and Encouraging Occupation.

<sup>190</sup> Romania/ Labour Code (24.01.2003) modified by Law 40/2011.



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>191</sup> Art. 13(5) also provides that employment in difficult, damaging and dangerous conditions (as established in a governmental decision) can be done only in the case of persons over 18.

#### 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 actually 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 longer, or can a person collect a pension and still work?*

The Law 19/2000 on the Public Pension System and Other Social Security Rights<sup>192</sup> established the general age for retirement. Art. 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 were 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). The Law on the Unitary System of Pensions adopted in December 2010 introduced a new retirement age of 63 for women and 65 for men.<sup>193</sup> The law entered into force since January 1<sup>st</sup> 2011.

<sup>191</sup> Romania/ Labour Code (24.01.2003) modified by Law 40/2011.

<sup>192</sup> Romania/ Law 19/2000 Law on the public pensions system and other social benefits.(17.03.2000).

<sup>193</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).



The mechanism developed in Law 19/2000 and maintained by Law 263/2010 provided that the pensions were calculated based on an announced formula, using points and taking into account the employee's contribution and the contribution period; one pension point was 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>194</sup>

The individuals who reached the pensionable age but wanted to work longer, could carry on their activities if the employers agree. After retiring, pensioners could 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 was no longer regulated by the strict provisions of the Labour Code and it was merely a civil contract having as object an obligation to do (undertake a certain activity). In this case, the pensioners could collect both the pension and the salary received for their professional activity, no matter the amount collected.

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

*b) Is there a normal age when people 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 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 had to 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

<sup>194</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> (06.05.2008).



providing the possibility to request retirement five 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>195</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.

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

Law 263/2010 established a new retirement age of 63 for women and 65 for men in Art. 53.<sup>196</sup> 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 Art. 61 (e) renumbered as 56(c) 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 has 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. Art. 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

<sup>195</sup> Romania/Law 204/2006 on Facultative Pensions Schemes (22.05.2006).

<sup>196</sup> Romania/Law 263/2010 on the Unitary System of Pensions (16.12.2010).



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 Art. 129.

The National Collective Agreement for 2007-2010, signed according to Art. 10 of Law 130/1996 on Collective Labour Agreements<sup>197</sup> provided in Art. 24 that for certain sectors (difficult conditions of labour, dangerous, toxic or degrading 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. Both the National Collective Agreement and the Law 130/1996 had been abrogated and replaced by Law 62/2011 on Social Dialogue which do not include provisions in this regard.<sup>198</sup>

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 Agreement for 2007-2010<sup>199</sup> allowed for reductions of the pensionable age in certain sectors (taking into consideration difficult conditions of labour, dangerous, poisoning or embarrassing conditions), according to special laws and special collective contracts concluded at the level of each sector. This provision however has been abrogated and replaced by Law 62/2011 on Social Dialogue which do not include provisions in this regard.<sup>200</sup>

The standard pensionable age cannot be increased as Art. 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.'

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 Învăţământul Preuniversitar* [the Undergraduate Education Trade Union] v. *Ministerul Educaţiei şi Cercetării* [the Ministry of Education], from 16.04.2007, 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 Agreement for 2007-2010. The NCCD recommended to the Ministry of Labour,

<sup>197</sup> The National Collective Agreement for 2007-2010, signed according to Art. 10 of Law 130/1996 (29.01.2007).

<sup>198</sup> Romania/ Law 62/2011 on Social Dialogue (10.05.2011).

<sup>199</sup> The National Collective Agreement for 2007-2010, signed according to Art. 10 of Law 130/1996 (29.01.2007).

<sup>200</sup> Romania/ Law 62/2011 on Social Dialogue (10.05.2011).





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>201</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 specific 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 Art. 61 para. e) renumbered as Art. 56(c).

The National Collective Agreement for 2007-2010 provided for an exemption in the case of reductions of personnel.<sup>202</sup> The 2011 Law on Social Dialogue abolished the National Collective Agreement without including similar provisions.

#### 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 Agreement 2007-2010, introduced the concept of pensionable age, to the extent that ‘after the filling of

<sup>201</sup> NCCD, Uniunea Sindicatelor Libere din Învățământul Preuniversitar [the Undergraduate Education Trade Union] v. Ministerul Educației și Cercetării [the Ministry of Education], from 16.04.2007, file no. 78/2007.

<sup>202</sup> Reductions of personnel on grounds of efficiency as provided for in the National Collective Agreement involved funding made available from different budgetary sources than regular retirement schemes. According to Art. 81 of the National Collective Agreement, 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 request 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.



vacancies, selection for redundancies is to be carried out in the following descending order of priority:

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.

These differentiations were not maintained by the 2011 Law on Social Dialogue abolishing the National Collective Agreement.<sup>203</sup> Subsequent legislation will show if these principles are maintained.

*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 Employment Equality Directive?*

The Anti-discrimination Law does not include specific 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. Only the freedom of expression and the right to access to information are specifically mentioned in Art.2(8) which mentions that the provisions of the Anti-discrimination Law cannot be interpreted as to limit these rights. Specific articles allow for exceptions when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary in relation to employment, housing and access to goods and services (Arts. 9, 10 and 11 of the Anti-discrimination Law).

Special legislation creates such exemptions. For example, 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

<sup>203</sup> Romania/ Law 62/2011 on Social Dialogue (10.05.2011).



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.*

The Romanian Anti-discrimination Law does not provide for any exception based on a specific ground. However, Art. 10 of the Law allows for exceptions from the prohibition of discrimination in access to goods and services and housing which are contrary to the Directive 2000/43/EC.



## 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.*

Art. 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 Art. 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>204</sup> which filed petitions with the NCCD all of them being quashed. In a distinct case of the NCCD, the decision 433 from 05.11.2007, 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

<sup>204</sup> 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 in 1938. See more information on the organisation’s website <http://www.nouadreapta.ro>.



pupils. The Ministry of Education prepared specific procedures in order to implement such measures.<sup>205</sup>

In its assessment of an alleged case 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. 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>206</sup>

b) *Do measures for 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 five grounds, and 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 introduced 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. No positive actions were reported in relation to religious minorities.

The Law 488/2006, on the Promotion and Protection of the Rights of Persons with a Handicap introduced 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, however, there is no data official available regarding the number of persons hired following this provision or the number of employers complying with the requirement. The employers which fail to hire persons with disabilities according to the law can choose between:

<sup>205</sup> NCCD, case C.E v. C decision no. 433 from 05.11.2007, 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.

<sup>206</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 09.01.2008, file number 353/2007.





- 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>207</sup> and persons with disabilities were entitled to different affirmative measures as provided by Law 448/2006, however the list of benefits was significantly due to the downsizing of social services in response to the economic crisis.

- 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 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 disability owing cars adapted to their disability are exempted from paying the fees for using the national roads – Art.28;
- 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.<sup>208</sup> Roma are not expressly mentioned as one of the social

<sup>207</sup> 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.

<sup>208</sup> Romania/Housing Law, Law.114/1996 republished (11.10.1996).



groups provided for in Arts. 42-43 of the Housing Law as entitled to social housing.<sup>209</sup> More worrying is that the criteria established for access to social housing include an exclusionary clause regarding those who lived illegally at some point and this provision can deprive many Roma of access to social housing.

In the particular case of Roma, the National Strategy for Improving the Situation of Roma which expired in 2010<sup>210</sup> provided for obligations to establish positive measures in rather general terms. There is no comprehensive analysis of the implementation of the National Strategy for Improving the Situation of Roma. 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 new Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (Roma Inclusion Strategy) adopted in December 2011 remains extremely wide in its scope and rather thin in effective enforcement mechanisms.<sup>211</sup> Proposed policies are mostly underdeveloped and backward looking proposing superficial measures which had been criticized by civil society groups.<sup>212</sup> The Roma Inclusion Strategy lacks the specificity needed in order to be a clear policy framework, the actions and the responsibilities established are rather vague and the budgetary consequences are merely cursorily mentioned without specific financial considerations being included

<sup>209</sup> Art. 43 of the Housing Law provides for the beneficiaries as decided by local authorities according to annually established criteria, and in the order of priority as established by the law they can be: persons and families evicted, or who are to be evicted from the houses returned to former owners, young people up to 35 years old, young people coming from social protection institution who have turned 18, people with physical disabilities of degree I and II, 'handicapped' persons, pensioners, war veterans and widows, the beneficiaries of the Law 341/2004 for the recognition of martyr-heroes and fighters who have contributed to the victory of the Romanian revolution from December 1989 as well as of the persons who have sacrificed their life and have suffered as a consequence of the workers' anti-Communist revolt from Brasov 1987 and of Law 118/1990 (persons who have suffered for political reasons during Communism), and other persons or families which might be entitled to right to housing.

<sup>210</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, (19.04.2006), available at: <http://www.anr.gov.ro/strategia-anr/> (10.02.2011).

<sup>211</sup> Governmental Decision 1221/from 14<sup>th</sup> December 2011 –for approving the Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (Hotărârea de Guvern pentru aprobarea Strategiei Guvernului României de incluziune a cetățenilor români aparținând minorității romilor pentru perioada 2012-2020).

<sup>212</sup> Some of these criticisms are available at: Center for Legal Resources, *The Center for Legal Resources draws the attention upon the discriminatory provisions from the Draft Strategy of the Romanian Government for the Inclusion of the Romanian citizens belonging to the Roma minority (2011- 2020)*, 27.10.2011, available at: [http://www.crj.ro/\\*articleID\\_934-articles](http://www.crj.ro/*articleID_934-articles) or are available at: [http://www.romanicriss.org/PDF/Comentarii\\_Strategie\\_ONG-uri\\_FINAL%281%29.pdf](http://www.romanicriss.org/PDF/Comentarii_Strategie_ONG-uri_FINAL%281%29.pdf) - Proposals of amendment of the Draft Strategy of the Romanian Government for the Inclusion of Romanian Citizens Belonging to the Roma Minority, (*Propuneri de revizuire a proiectului strategiei Guvernului României de incluziune a cetățenilor români aparținând minorității romilor*), signed by 21 entities, most of them Roma NGOs but also representatives of UN bodies in Romania.



(the action plans developed for some of the priority areas include annual budgets for each actions, others do not). While substantively some of the actions identified in the Roma Inclusion Strategy are controversial, with some of the priority actions identified being challenged by NGOs as racist, in general, most sections lack specificity thus making difficult monitoring and evaluation of the results and indicators. The section on preventing and combating discrimination, sadly features less than two paragraphs referring to statistical data from a 2007 survey stating that “the intolerance of the majority population towards Roma decreased after 1990.” There is no discussion regarding current challenges for Roma, the typology of Roma discrimination cases filed with the national equality body or with the courts, there is no discussion of the role and challenges of the national equality body and of the courts when tackling discrimination against Roma, the text does not reflect upon the corresponding part of the NCCD Strategy. In the action plan annex however, the section F.2 on Justice and public order, which features responsibilities for the NCCD is one of the few sections where a concrete annual budget is included.

The new Strategy maintained measures included also in the previous Roma Inclusion Strategy such as:

- 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;
- reducing Roma unemployment rate and combating discrimination in employment by establishing facilities for employers hiring Roma;
- establishing facilities and financed places for young Roma who want to undertake graduate education;



## 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. The limitation introduced in 2008 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, was subsequently quashed by means of ratifying legislation.<sup>213</sup>

In a November 2009 decision, the Constitutional Court clearly stated that the NCCD is not an extraordinary court and confirmed the constitutionality of the mandate of the national equality body as administrative-jurisdictional entity. The Court noted that the NCCD is not a mandatory venue and that the victim has the possibility of opting between the two venues of enforcing his or her rights.<sup>214</sup>

The fact that the two venues (NCCD and civil case) are not mutually exclusive and the plaintiff can choose one of them or to use them simultaneously, 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 *status 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.

<sup>213</sup> Romania/Law 76 /2009 for the approval of the Emergency Ordinance 75 from 11.07.2008 regarding Measures Taken to Solve Financial Issues in the Area of Justice-related Work (1.04.2009).

<sup>214</sup> Romania/Curtea Constituțională/Decision 1470 from 10.11.2009.



The *Curtea Constituțională* [the Romanian Constitutional Court] in a series of decisions issued in 2008 limited both the mandate of the NCCD<sup>215</sup> and of the civil courts in relation to discrimination generated by legislative norms.<sup>216</sup> Subsequently, the protection against discrimination in cases when the discrimination is triggered by legislative norms (laws or ordinances), is limited and depends on the willingness of the Ombudsman to seize the Constitutional Court - the only institution able to declare unconstitutional discriminatory norms. In the cases when a legal provision is incompatible with the anti-discrimination principle, thus falling outside the scope of European Union law, the national courts or the national equality body faced with such provisions do not have a mechanism allowing them to decline to apply that particular legal provision as provided by the Court in *Seda Kucukdeveci v. Swedex GmbH & Co.KG* C-555/07 from 19.01.2010.

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

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 Art. 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 subpoena 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>217</sup> In 2008, only ten per cent of the decisions of the NCCD had been appealed.<sup>218</sup> In 2009, out of the 254 appeals filed with the courts against the

<sup>215</sup> Romania/Curtea Constituțională/Decision 997 from 7.10.2008 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>216</sup> Romania/Curtea Constituțională/Decision 818, 819, 820 (3.07.2008). 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>.

<sup>217</sup> Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2006, [Report 2006].

<sup>218</sup> Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2008, [Report 2008].





decisions of the NCCD, 165 had been rejected, 21 appeals had been accepted, the remaining 110 pending before different courts as reported by the annual report issued by the NCCD on 2009.<sup>219</sup> The 2010 NCCD report mentions that out of 193 cases, the courts maintained the decisions of the NCCD in 91 cases and in 9 cases the appeals against NCCD decisions had been accepted.<sup>220</sup>

The NCCD can try to solve the conflict by using mediation or it 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>221</sup>

The mediation provided by the NCCD can be described as taking note of the friendly settlements reached by the parties and not as a traditional mediation under the specific provisions of the Law 192 from 2006 regarding Mediation and the Establishment of Mediator as recognised profession.<sup>222</sup> Art. 80 of the NCCD Order 144 from 2008 regarding the internal procedure in solving petitions provides that 'during the period when the petition is solved, the parties can come, even without being summoned by the NCCD, to request the NCCD to issue a decision certifying their friendly settlement.' The parties can also ask the NCCD to take note of their agreement by sending a written statement to the NCCD without having to present themselves to the hearings. Subsequently, the friendly settlement will be communicated in writing and it will be included in the decision of the Steering Board of the NCCD.

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) or when the conditions established by the law are not fully met (for example in the cases when due to the statute of limitations no administrative sanction can be applied).<sup>223</sup> As the law does not specifically mention recommendations as remedies, the NCCD argues that they fall under its preventive mandate and are future-oriented while the NGOs criticize this practice as they argue that recommendations fail to provide effective remedies for cases of discrimination.

<sup>219</sup> Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2009, [Report 2009].

<sup>220</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).

<sup>221</sup> The amount of the fines differs: when the victim is only one individual, the amount varies from 400 RON to 4,000 RON (EUR 100-1,000) 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 150-2,000).

<sup>222</sup> Romania/ Law 192 regarding the Mediation (16.05.2006).

<sup>223</sup> NCCD Decision 260, ACCEPT v. the Ministry of Health (29.08.2007).



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

Access to the NCCD is fairly easy, no legal representation being required and the burden of proof is theoretically shared between the victim and the defendant though unclear provisions, limited interpretation and lack of resources to conduct investigations and have a pro-active approach lead in many cases to shifting the burden on proof actually on the plaintiffs. 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>224</sup>

According to Art. 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 as provided by Arts. 1351-1395 of the New Civil Code on liability for damages but are exempted from judicial taxes.

The Mediation Law as amended in 2009 provides that beginning with March 3<sup>rd</sup> 2010, the judges are under an obligation to inform parties to all civil cases regarding the possibility of using mediation and its advantages.<sup>225</sup> However, mediation remains optional. Given that in the case of discrimination complaints, the NCCD already has mediation as a part of its mandate, it is still unclear whether, in practice, such complaints will be submitted by the parties to mediation by the NCCD according to the Anti-discrimination Law, will be referred by the courts to the NCCD on grounds of the Anti-discrimination Law or to the mediators according to the Mediation Law.

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

<sup>224</sup> Art. 21 of Romania/ Government Ordinance 137/2000 regarding the Prevention and the Punishment of All Forms of Discrimination, amended (20.07.2006).

<sup>225</sup> Romania/Law 370/2009 amending Law 192/2006, on Mediation (26.11.2009).



means of proof for acts of discrimination any type of evidence, including audio and video recordings, as well as statistical data.<sup>226</sup>

The courts of law can also decide according to Art. 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 leave aside the NCCD decision.

There are no available statistics on the number of cases related to discrimination brought to justice before the courts of law. One indication regarding the extent to which this venue is used is offered by the 2008 NCCD Activity Report which mentions that, in 2007, the NCCD prepared 2,325 opinions for civil cases (complaints brought directly before the civil courts) and that in 2008, it prepared 2,490 such opinions.<sup>227</sup> The NCCD Activity Reports mentioned that the NCCD had been asked to participate in civil cases as expert in the field of non-discrimination in 1,543 cases in 2009<sup>228</sup> and in 1,196 cases in 2010.<sup>229</sup> The 2010 report mentions that 61 per cent of the cases initiated directly before the courts regard salary related rights and the remaining 39 per cent regarded labour conflicts, administrative acts, refusal to respond to requests etc.

### 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>230</sup> introduced hate speech, as incitement to discrimination based on any of the grounds of discrimination sanctioned by the Anti-discrimination Law.<sup>231</sup> This broadened the scope of

<sup>226</sup> See Art. 19-5 para. (6) and Art. 21 para.4 of the Romania/ Government Ordinance 137/2000 regarding the Prevention and the Punishment of All Forms of Discrimination, amended (20.07.2006).

<sup>227</sup> Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2008, [Report 2008].

<sup>228</sup> Consiliul Național pentru Combaterea Discriminării (CNCD) [the National Council on Combating Discrimination (NCCD)], Raport de activitate, 2009, [Report 2009].

<sup>229</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).

<sup>230</sup> Romania/Law 278/2006 on the amendment and completion of the Criminal Code, and on the amendment and completion of other laws (04.07.2006).

<sup>231</sup> Art. 317 of the Criminal Code.



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>232</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 (Art. 247) and incitement to hatred (Art. 317).<sup>233</sup>

The enforceability of criminal provisions regarding hate crimes in general remains limited as showed by the scarce official data reported by the Ministry of Justice to the OSCE in 2006,<sup>234</sup> in 2007,<sup>235</sup> as well as in 2008<sup>236</sup> and 2009.<sup>237</sup>

In its official communications the Ministry of Justice states that part of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law has already been transposed by the Government.<sup>238</sup> The transposition is supposed to be achieved currently through the Criminal Code which sanctions Instigation to discrimination (Art. 317) as the instigation to hatred on one of the protected grounds explicitly covered by the Anti-discrimination Law and includes a provision on aggravating circumstances in the current Art. 75 point c<sup>1</sup> of the Criminal Code which spells out the aggravating circumstance of perpetrating an offence having as motive hate or discrimination against a person on grounds of one of the explicitly protected criteria in the Anti-discrimination Law: race, nationality ethnicity, language, religion, sex, sexual orientation, opinion, political opinion, belief, wealth, social origin, age, disability, chronic non-contagious disease, HIV/AIDS infection.<sup>239</sup> In this regard, the Romanian legislation surpasses the Framework Decision though there are no reports on the actual number of cases in which Art. 75 point c<sup>1</sup> was enforced, on what grounds and in what types of crime.

<sup>232</sup> Art. 75. (1), point c<sup>1</sup> of Romania/ Criminal Code amended in 2006.

<sup>233</sup> Art. 247 and Art. 317 of Romania/ Criminal Code amended in 2006.

<sup>234</sup> OSCE, ODIHR, Hate Crimes in the OSCE Region: Incidents and Responses - annual report for 2006, available at: <http://www.osce.org/odihr/26759> (10.10.2007).

<sup>235</sup> OSCE, Hate Crimes in the OSCE Region – Incidents And Responses Annual Report for 2007, available at [http://www.osce.org/publications/odihr/2008/10/33850\\_1196\\_en.pdf](http://www.osce.org/publications/odihr/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."

<sup>236</sup> OSCE, ODIHR, Hate Crimes in the OSCE Region: Incidents and Responses - annual report for 2008, available at: <http://www.osce.org/odihr/40203?download=true> (12.01.2010).

<sup>237</sup> OSCE, ODIHR, Hate Crimes in the OSCE Region: Incidents and Responses - annual report for 2009, available at <http://www.osce.org/odihr/73636> (2.03.2011).

<sup>238</sup> Ministry of Justice, Response No. 71454/15.09.2011, ¶¶ 12, 14, p.5 on file with national expert.

<sup>239</sup> Romania/Criminal Code 2006 Amendment Act of 12.07.2006.



The other current provisions invoked are those of the Emergency Ordinance forbidding organizations and symbols having a fascist, racist or xenophobic nature. According to the Ministry of Justice, the full implementation will be achieved in the future, when the New Criminal Code will come into force (probably in 2013)<sup>240</sup> and the Draft law for the entering into force of the Criminal Code will be adopted by the Parliament.<sup>241</sup>

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

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

*c) What is the time limit within which a procedure must be initiated?*

The Anti-discrimination Law specifies in Art. 20 that any individual or any legal entity with an interest can file a complaint before 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>242</sup> The case before the civil courts can be filed in maximum three years from the event.

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

There is no requirement of continuing employment relationship while bringing a case on employment both in the private or in the public sector. The general time limits provided by the Anti-discrimination Law apply: one year for the complaint before the NCCD and three years for the civil complaint.

## **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) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association).*

Art. 28 of the Romanian Anti-discrimination Law defines legal standing before the NCCD and the courts for NGOs with an interest in combating discrimination:

<sup>240</sup> Romania/New Criminal Code of 24.07.2009.

<sup>241</sup> Draft law for the entering into force of the Criminal Code (PL-x nr. 100/2011, Proiect de Lege pentru punerea în aplicare a Codului penal și pentru modificarea și completarea unor acte normative care cuprind dispoziții penale).

<sup>242</sup> Romania/ NCCD Order approving the internal procedure in solving petitions (11.04.2008).





- (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.

Trade unions are not specifically mentioned as having legal standing but the NCCD and the courts interpreted Art. 28 as applying to trade unions as well.<sup>243</sup>

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>244</sup>

- b) *What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?*

According to Art. 28(2), NGOs can engage in proceedings on behalf of an individual victim(s) if the victim mandates the NGO. The mandate does not need to be in a particular form but it must be provided to the NCCD or to the courts.

NGOs can also engage in proceedings on their own, if the discrimination prejudices a community or a group of persons. In this case, according to Art. 28(1), the NGO must be a human rights NGO or an NGO active in that particular field. In order to certify this, the NCCD and the courts ask the NGOs to produce a copy of their by-laws in order to check the legal status of the NGO and its mandate. No requirement regarding the membership, residency or permanency is provided for.

<sup>243</sup> NCCD, Decision *Uniunea Sindicatelor Libere din Învățământul Preuniversitar v. Ministerul Educației și Cercetării* [the Free Trade Union in Undergraduate Education v The Ministry of Education and Research], file no. 78-2007, 16.04.2007. 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, 13.03.2007.

<sup>244</sup> Romania/ NCCD Order approving the internal procedure in solving petitions (11.04.2008)..



There is no requirement of legitimate interest to be proven in any of the two situations. The mere stating in the NGO by-law of protection of human rights and combating discrimination as objectives of the entity are enough.

- c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

When entities act on behalf of victims, they need to provide a document showing that the victim mandated them to represent him/her before the court or before the NCCD in that particular case. No other special provisions on victim consent are provided for.

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.

When the discrimination prejudices a community or a group of persons, the NGOs need to file only a copy of their by-laws to state their associational objective in protecting human rights, in combating anti-discrimination or in protecting a particular vulnerable group.

- d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

Action by NGOs is discretionary.

- e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

NGOs may engage both in proceedings before the courts and in proceedings before the national equality body according to Art. 28 of the Anti-discrimination Law.

- f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

There is no specific provision regarding the type of remedies associations may seek. The remedies provided for by the courts might be different however. In a 2006 case, DZ v. Distrigaz Sud, the plaintiff – the employee of an NGO working on LGBT rights harassed because of his association with the NGO- 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.’ 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.<sup>245</sup>

- g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

The same rules regarding the burden of proof apply when associations are engaged in proceedings.

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

According to Art. 28(2), associations having as mandate protection of human rights can file complaints on their own behalf both with the NCCD and with the courts when the target of discrimination is a group or a community. The same rules of procedure apply, the only additional requirement being that the NGOs must provide their by-laws in order to show that their declared associational objective is protecting human rights or combating discrimination.

There are no specific provisions regarding remedies sought or special rules, including on burden of proof.

- i) *Does national law allow associations to act in the interest of more than one individual victim (class action) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Class actions are not allowed under Romanian law. Multiple petitions of more than one individual victims arising from the same event would be annexed in one file both before the NCCD and the courts. If the NGOs would represent more than one

<sup>245</sup> Romania/ Judecătoria sectorului 4 București; [court of first instance No.4, Bucharest], Decision 4222 in File no.710/4/2006 from 10.08.2007.



individual according to Art. 28, declarations issued by each individual victim must be included. The procedures and remedies remain the same.

### 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 Art. 20 (6) and Art. 27 (4) of the 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.'

Though not completely complying with the provisions of Art. 8 Directive 2000/43 and Art. 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.

After failed attempts in 2002 and 2004, during the parliamentary debates for the amendment of the Anti-discrimination Law in view of introducing the principle of sharing the burden of proof, in 2006, 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. By the end of 2011, the provisions regarding the burden of proof before the national equality body were in the Chamber of Deputies after being amended by the Senate. The proposed amendment would dilute even more the sharing of the burden of proof and maintains as mandatory the duty of the plaintiff in providing information regarding the discrimination while making optional the correlative duty of the defendant.

While the NCCD's interpretation of this provision was to comply with the Directives in most cases, 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. However, not even the case law of the NCCD is fully complying with the acquis. Different from Art.8 of RED and Art. 10 of EED which mention that the plaintiff has "to establish facts" and that it is for the respondent "to prove that there has been no breach", the Romanian law creates "a duty for the plaintiff to prove the existence of facts". In practice, this seemingly innocuous terminological difference, lead to a great number of cases in which the NCCD ruled that there was not enough evidence submitted by the defendant to prove existence of discrimination. The



understanding of the burden of proof as entailing a preliminary obligation of the plaintiff to provide all facts indicating that discrimination occurred (as opposed to allowing a presumption that it did), coupled with the failure of the national equality body to proactively engage in investigations (as mandated by Art. 19 c) of the GO137/2000 as amended and consolidated in 2006, lead to decisions of the NCCD in which it concluded that no discrimination occurred, while the same case, tried before the court of law had the opposite result and discrimination was found and damages were granted accordingly.

In the case M.D. v. Palatul National al Copiilor, decision no. 256 from 17.09.2007 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>246</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 100).<sup>247</sup>

In a 2009 decision,<sup>248</sup> the NCCD extensively discussed the theoretical aspects of the burden of proof, referring to prior leading cases in which the NCCD stated that ‘the defined procedure for the shift in the burden of proof is more nuanced than the wording would suggest...and, in practice, the principle implies dividing the onus of the evidence and a transfer to the defendant of those elements related to him/her, in relation to the facts of the case.’<sup>249</sup> The NCCD added that ‘it cannot be interpreted that this is an absolute exemption from the procedural rules of *onus probandi incumbit actori*, reversing the burden of proof completely, as the very legal provision from Art.20 (6) specifies the duties of the parties by sharing the burden of proof between the plaintiff and the defendant.’

The Labour Code as modified and consolidated by Law 40/2011 mentions the regime of burden of proof in labour conflicts in Arts. 272-273.<sup>250</sup>

‘Art. 272 The burden of proof in labour conflicts falls on the employer who is obliged to submit the evidence in his defence until the first day of the hearings. Art. 273 The administration of the evidence is done observing the emergency regime, in case a party unduly delays administration of evidence, the court is entitled to repeal the benefit of submitting admitted evidence.’

<sup>246</sup> 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.

<sup>247</sup> NCCD, M.D v. Palatul National al Copiilor, decision no. 256 from 17.09.2007 in file no. 380/2007.

<sup>248</sup> NCCD, Decision 77 from 03.02.2009.

<sup>249</sup> NCCD, RomaniCRISS v. C.P.T., Decision 180 from 17.07.2007.

<sup>250</sup> Romania/ Law 40/2011 for amending and completing Law 53.2003, the Labour Code, Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 (31.03.2011).





The new provision the Labour Code introduces an automatic shift in the burden of proof in cases of discrimination in labour relations, with an obligation for the employer to submit the evidence before the first hearings. The provision seems to be in compliance with the phrasing of the burden of proof in the Directives. No relevant case law has been reported so far to allow assessment of the implementation.

#### **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 people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring 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 filed with the NCCD but also in relation to any other public or private institution (labour inspectorate, consumers’ protection office etc.).

#### **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. 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.

The amount of the fines varies: when the victim is only one individual, the amount of the fine ranges from 400 RON to 4,000 RON (EUR 100-1,000); if the victims are a group or a community, the fine ranges between 600 and 8,000 RON (EUR 150-2,000).

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 Art. 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>251</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 as a result of a long legal tradition of describing moral damages as unjust enrichment prior to 1989. A recent trend of granting higher moral damages in cases of discrimination became visible in 2010 when the Court of Appeal Craiova increased the damages granted in a case of discrimination in education of a Roma pupil to 10,000 EUR.<sup>252</sup>

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 required by the Directives?*

There is no reported data regarding the number of complaints filed with the civil courts, their outcomes or on the average amount awarded to victims filing civil complaints in cases of discrimination. No studies assessed the impact of the sanctions issued by the NCCD or by the courts in cases of discrimination.

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 each 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.

<sup>251</sup> Romania/Law 237/2007 amending the Labour Code (12.07.2007).

<sup>252</sup> Curtea de Apel Craiova, Judicial decision, File 8011/101/2009 of Curtea de Apel Craiova, decided on May 19<sup>th</sup>, 2010.



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>253</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>253</sup> NCCD, Official communication no. 6082 from 22.04.2008. Also communication from NCCD sent from 25.02.2009 as a response to the request of information 1216 from 30.01.2009.



## 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 correspond 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>254</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 (including religious or non-religious belief), disability, age, 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.

<sup>254</sup> Romania/ Government Decision 1194 from 2001 establishing the National Council on Combating Discrimination (12.12.2001).



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.

(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.

Other specialized institutions with had mandate in protecting the rights of specific groups, such as persons with disabilities (NAPD), women (NAEQ), children (NAPCR) did not have any role in addressing discrimination based on these specific grounds and had been all restructured as department within the Ministry of Labour following the 2010-2011 institutional reframing caused by financial constraints.<sup>255</sup>

- 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. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

In September 2006, the NCCD became an autonomous public authority under the control of the Parliament but it maintains its independence in carrying out its mandate. This change was intended to ensure the independence of the NCCD as provided in Art. 17 of the GO 137/2000. 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>256</sup>

The NCCD is governed by a Steering Board of nine members ranked as Secretaries of State, managed by a President elected by the members of the Steering Board (Art. 22). The Steering Board is a collegial body, responsible with enforcing the legal mandate of the NCCD (Art. 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.

<sup>255</sup> Romania/ Governmental Decision No.728/2010.

<sup>256</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.





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.

Art. 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 (Art. 25).

Since the number of Steering Board members 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>257</sup> Eventually, one of the appointments was political, while the other appointment was of a human rights expert.<sup>258</sup>

The NCCD encountered a stalemate between the Summer of 2009-early 2010 when due to the expiration of the mandates of the Steering Board members beginning with May 2009 and the delays and failure in making new appointments for six out of the nine members, the NCCD was unable to issue decisions in the last part of 2009 as no simple majority could be reached (decisions can be taken with a majority of five out of nine votes and beginning with November, the Steering Board had only four members, thus being de facto impossible to issue a decision). With only two positions of former members renewed and four new members, some of which lacked any prior

<sup>257</sup> Press release 09.10.2006 and letters of October 2006 and February 2007 signed by a number of twenty NGOs, available at: <http://www.antidiscriminare.ro/> (15 October 2006).

<sup>258</sup> An informal coalition of NGOs working with victims of discrimination filed eight complaints with the Permanent Bureaus of the Parliament in relation to the candidates proposed for the six available positions vacated by November 2009.



experience with human rights or discrimination in general, the new composition of the NCCD had been criticized by NGOs active in the field for being too political at the expense of the independence and professionalism of the institution.<sup>259</sup> NGOs protested that the procedural requirements were not observed in the case of some of the candidates and that some of the nominated candidates lacked the professional experience in the field of human rights as requested in the Anti-discrimination Law. These irregularities had been dismissed by the joint parliamentary committees which voted in favour of the six candidates backed by the political parties present in the Parliament, according to the political algorithm.<sup>260</sup> No independent candidate was appointed.

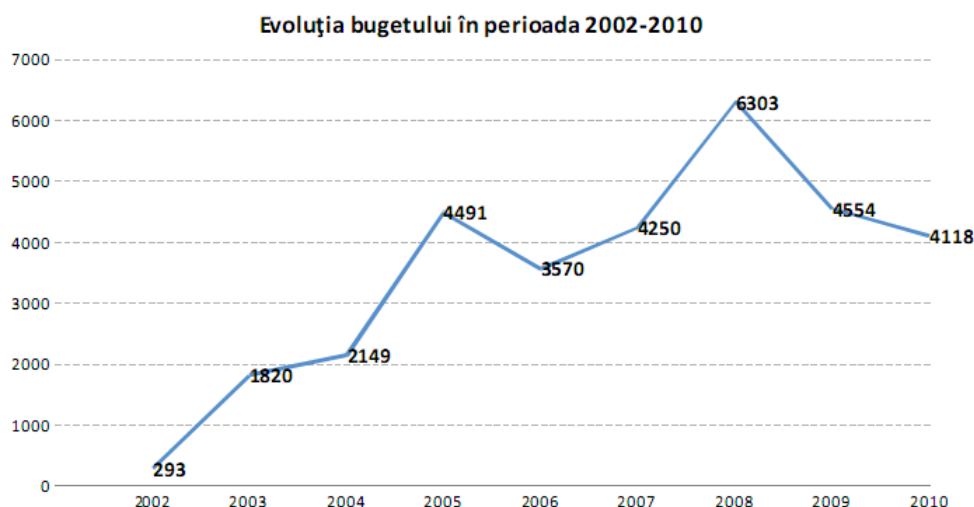
Following the resignation of one of the NCCD members in September 2011, no steps had been taken for appointing a new member.

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. The resources allocated to the NCCD gradually decreased in the last three years. The total figures of the budget vary in different official responses and reports and the amounts are approximate: 4.250.000 RON in 2007 (approx. 1.012.000 EURO), 6.303.000 RON in 2008 (approx. 1.500.000 EURO), 4.554.000 in 2009 (approx. 1.084.000 EURO). The allocated budget for 2010 was of 4.118.000 (approx. 980.000 EURO). The 2010 annual report provides the following evolution of the NCCD budget for the interval 2002-2010:<sup>261</sup> The NCCD did not publish its annual report for 2011 by June 15<sup>th</sup> 2012 hence no comparative data for 2011 was available.

<sup>259</sup> Press release 2010.

<sup>260</sup> Out of the 15 candidates, the six appointed represented various political groups in the Parliament: two appointees for the Social Democrat Party, one for the Liberal Party, one for the Democratic Hungarian Union, one for the Democrat Liberal Party and one for the group of minorities in the Parliament.

<sup>261</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).



The officials of the NCCD and the NGOs alike consider that the budget of the NCCD is insufficient for adequately fulfilling their mandate and manifest concerns regarding the gradual decrease of the 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>262</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.

<sup>262</sup> 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].



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>263</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.

In 2008, the Government adopted an Emergency Ordinance for the implementation of the principle of equal treatment between women and men in relation to access to and provision of goods and services and provision of goods and services transposing the provisions of Directive 2004/113 from December 13, 2004.<sup>264</sup> Art. 8 of the Emergency Ordinance 61/2008 provides that the NCCD, together with the National Agency for Equal Opportunities, will establish memorandums of cooperation with the monitoring agencies responsible for insurances, private pensions, financial services and services. No such partnership was signed so far.

The NCCD established two territorial offices in Buzău and in Târgu Mureş to increase its assistance services but the assistance as well as the investigation work is jeopardized by the limited resources available. For example in 2010 the NCCD conducted only 100 investigations.<sup>265</sup> Information for 2011 was not available as by June 15<sup>th</sup>, 2012 the NCCD did not publish its activity report for 2011.

*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?*

The NCCD has 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.

<sup>263</sup> Art.18 of the GO 137/2000; also Art. 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 (17.11.2003).

<sup>264</sup> Romania/Emergency Ordinance 61/2008 for the implementation of the principle of equal treatment between women and men in relation to access to goods and services and provision of goods and services (14.05.2008).

<sup>265</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).



In fulfilling its mandate, the activity of the NCCD is limited by the lack of adequate human and material resources. For example, in 2010 out of the 90 full time positions the NCCD needs, only 69 had been budgeted and by the end of the year only 66 were occupied.<sup>266</sup>

Due to the large number of complaints and the backlog of cases, the resources of the NCCD already strained are dispersed between 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.

- e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

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 Art. 17.

According to Art. 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.'

- f) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

According to Art. 19 (2) and Art. 21 the NCCD can exercise its mandate upon request from an individual or a legal person or *ex officio*. The NCCD does not have legal standing to bring a case before the courts independently of a person individually complaining.

Following the 2006 changes in the law, the NCCD must be sub poenaed as intervening party in all cases filed directly with the courts on grounds of the Anti-discrimination Law. This provision, spelled out under imperative terms in Art. 27(3) of the law, further contributed to straining the already limited resources of the Council and generated a serious backlog as the NCCD had to deal both with the complaints received *in nome proprio* but also to issue opinions in civil cases filed before the courts.

<sup>266</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)] Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010. Available at: [http://cncd.org.ro/files/file/RAPORT%202010\\_web1.pdf](http://cncd.org.ro/files/file/RAPORT%202010_web1.pdf) (4.04.2012).





The 2008 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 Art. 146 letter d) of the Constitution which is currently providing for this capacity only in relation to the Avocatul Poporului, the Ombudsman.

*g) 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 2006 amendments to the Law incorporated enhanced guarantees of independence by specifically mentioning that the NCCD became an autonomous public authority under the control of the Parliament which maintains its independence in carrying out its mandate. According to Art. 17, in exercising its mandate, the NCCD ‘carries out its activity independently, without being hindered or influenced by other institutions or public authorities.’<sup>267</sup>

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 Constitutional Court repeatedly 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 Art. 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 Arts. 124 and 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 under Administrative Law provisions. Absent a mechanism of monitoring compliance with NCCD decisions it is impossible to assess the 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

<sup>267</sup> Art 17 Romania/Ordonanta 137/2000 (16.07.2008), Ordonanta privind prevenirea si sanctionarea tuturor formelor de discriminare [Government Ordinance concerning the prevention and sanctioning of all forms of discrimination].



Tăriceanu, former Minister of Foreign Affairs Adrian Cioroianu, current Minister of Foreign Affairs Theodor Baconschi, 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).

**Sanctions issued by the NCCD between 2002 and August 2010 in the area of the Directive 2000/43 (fine, warning, recommendation, just finding that discrimination occurred without any sanction).<sup>268</sup>**

	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Fine</b>		7	-	16	4	-	5	3	-
<b>Warning</b>		13	9	12	6	4	11	5	6
<b>Recommendation</b>		-	-	2	4	5	5	13	4
<b>Just finding discrimination (no penalty)</b>		2	-	1	1	-	1	-	-

*h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

While the National Strategy for Improving the Situation of Roma 2001-2010 provided that Roma will be represented in the Steering Board of the National Council on Combating Discrimination,<sup>269</sup> the 2011 Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (Roma Inclusion Strategy) does not include similar provisions.<sup>270</sup>

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. In April 2010, a representative of the Roma Party, the entity representing the Roma minority in the Parliament was appointed in the Steering Board based on the political algorithm.

<sup>268</sup> Romania/Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)], Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010 available at: <http://www.ncnd.org.ro/noutati/Angajari/Raportul-privind-implementarea-Directivei-rasiale-in-Romania-pentru-perioada-2003-2010-101/> (20.01.2011).

<sup>269</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, (19.04.2006), available at: <http://www.anr.gov.ro/strategia-anr/> (10.02.2011).

<sup>270</sup> Governmental Decision 1221/from 14<sup>th</sup> December 2011 –for approving the Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (Hotărârea de Guvern pentru aprobarea Strategiei Guvernului României de incluziune a cetățenilor români aparținând minorității romilor pentru perioada 2012-2020).



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>271</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>272</sup>

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<sup>271</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].

<sup>272</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 significantly after 2006, also due to the way in which the NCCD understood to carry out its mandate in awareness raising.<sup>273</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>274</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, carries out joint projects 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. Codes of practice, codes of conduct, measures to ensure workforce monitoring and diversity management are not common in the Romanian context and the NCCD did not take up an active role in promoting these themes.

<sup>273</sup> Romania/ National Council for Combating Discrimination, Perceptions and Attitudes towards Discrimination, available at [http://www.cncd.org.ro/files/file/Sondaj\\_discriminare\\_2008\\_CNCD.pdf](http://www.cncd.org.ro/files/file/Sondaj_discriminare_2008_CNCD.pdf) (20.01.2008). See also Romania/ National Council for Combating Discrimination, Directia Relatii Internationale, Integrare Europeană, Politici Afirmative, Studii si 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/studii/analize.swf>.

<sup>274</sup> Response of the NCCD from 04.03.2009. See also annual reports from 2006, 2007, 2008, 2009 and 2010 of the NCCD.



d) *to specifically address the situation of Roma and Travellers.*

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>275</sup> The initiative was followed in 2009 with media campaigns targeting the majority, the Roma community, educational programs, surveys and analysis on Media and Roma, activities targeting some religious leaders as potential promoters of anti-discrimination messages.<sup>276</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 that are 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>277</sup> and of the civil courts in relation to discrimination generated by legislative norms,<sup>278</sup> only the Constitutional Court might review discriminatory norms containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specifically mentioned

<sup>275</sup> Information regarding the campaign available at: <http://www.sper.org.ro/index.php?page=2> (08.05.2008).

<sup>276</sup> Full information at: [http://sper.org.ro/despre\\_proiect.html](http://sper.org.ro/despre_proiect.html) (10.03.2010)

<sup>277</sup> Romania/Curtea Constituțională/Decision 997 from 7.10.2008 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>278</sup> Romania/Curtea Constituțională/Decision 818 (3 .07.2008).





categories (courts of law during proceedings or the Ombudsman), the Romanian legal framework registers currently a de facto gap in the protection against discrimination determined by legislative provisions which fall outside the scope of the EU acquis on anti-discrimination.

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>279</sup>
- 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 still supposed to enforce remaining recommendations but the Ministry refuses to do so and invokes the High Court Decision.
- The NCCD position regarding the three-tier recognition system for religious denominations established by the Law on Religious Freedom and the General Status of Religions which was deemed as discriminating against smaller or newer religious minorities.<sup>280</sup>

<sup>279</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 29.08.2007. A second case was made necessary due to the fact that the Ministry of Health did not comply with the recommendation of the NCCD.

<sup>280</sup> Romania/Law on Religious Freedom and the General Status of Religions, Law 489/2006 8.01.2007.



## 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 against the NCCD in cases regarding discriminatory language present in the media, thus the *Consiliul Național al Audiovizualului* [National Audiovisual Council] is competent to decide whether an advertising clip is discriminatory or not and take appropriate sanctions according to the Audio-visual Law which is considered *lex specialis* in relation to the Anti-discrimination Law.<sup>281</sup> The Governmental Decision 1194/2001 on organizing and functioning of the NCCD provides in Art. 2 for its mandate, including letter L) 'collaboration with similar entities, non-governmental human rights organizations from other countries as well as international organizations in the field.'<sup>282</sup>

However, the NCCD was bypassed when choosing the national implementation body for different programmes: for example in the case of 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>283</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>284</sup> However, in July 2010 NAEO was abolished due to budgetary cuts<sup>285</sup> and part of its competences were transferred to a newly created department within the Ministry of Labour, Family and Social Protection – the Department for Equal Opportunities between Women and Men (DEOWM) (*Direcția Egalitate de Șanse între Femei și Bărbați*) which has limited competencies.<sup>286</sup>

*Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.*

<sup>281</sup> Romania/Curtea de Apel București, Secția a VIII Contencios Administrativ și Fiscal, File 34845/2/2005 from 18.01.2006.

<sup>282</sup> Romania/ Governmental Decision on organizing and functioning of the NCCD, 1194/2001 from 12.12.2001.

<sup>283</sup> 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> (05.05.2008).

<sup>284</sup> Information available at: <http://www.dialog2008.ro/home> (09.05.2008).

<sup>285</sup> Romania/ Governmental Emergency Ordinance 68/2010, from 1.07.2010, Art.2.(1).

<sup>286</sup> Romania/ Governmental Decision No.728/2010.



The NCCD had a National Plan on Combating Discrimination 2002-2006.<sup>287</sup> The Plan included a presentation of the institution, its governing principles, its target audience the general objectives and measures taken. No assessment of the Plan is available and no other plan was adopted at the expiration of the 2002-2006 one.

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<sup>287</sup> Romania/CNCD/ Planul Național de Combattere a Discriminării, 2002-2006 [National Plan on Combating Discrimination] available at: [http://www.policy.hu/flora/Prez\\_CNCD.htm](http://www.policy.hu/flora/Prez_CNCD.htm) (2.03.2011)



## ANNEX

1. Table of key national anti-discrimination legislation
2. Table of international instruments

**ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**

Name of Country Romania

Date: 1 January 2012

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/month h/year</b>	<b>Date of entry in force from: Day/month/ year</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.					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	31.08. 2000	1 November 2000	race, nationality, ethnic origin, language,	Administrative	Any field in general (going beyond fields listed in the two Directives)	Prohibition of direct, indirect and multiple discrimination, harassment,



<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
sanționarea 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).]			religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion			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> )
Lege 340/2006 pentru modificarea și completarea Legii nr.	25.07. 2006	1 April 2002	Gender equality	Administrative	Employment relations, access to	Prohibition of direct, indirect discrimination in

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
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)					goods and services	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.
Lege nr. 448/2006 privind protecția și promovarea drepturilor persoanelor cu handicap [Law on the protection and	06.12. 2006	1 January 2008	Disability	Administrative	Any field	Rights and duties of persons with disabilities. Obligations in relation to the accommodation

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
promotion of the rights of persons with a handicap] (06.12.2006)						of the needs of persons with disabilities. Establishing the National Authority for the Persons with a Handicap. ( <a href="http://www.anph.ro">www.anph.ro</a> )
Codul Muncii [Labour Code] (31.03.2011)	31.03. 2011	1 April 2011	gender, sexual orientation, genetic characteris tics, age, national belonging, race, colour, ethnicity, religion, political option,	Employment/administ rative	Employment relations	direct and indirect discrimination

<b>Title of Legislation (including amending legislation)</b>	<b>Date of adoption: Day/mont h/year</b>	<b>Date of entry in force from: Day/month/ year</b>	<b>Grounds covered</b>	<b>Civil/Administrative/ Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
			social origin, disability, family situation or responsibili ty, trade union membershi p or activity			
Legea publicității [Law on Advertising] (26.07.2000)	26.07.200 0	1 August 2000	race, sex, language, origin, social origin, ethnic identity or nationality	Administrative	Advertising	Prohibition of discrimination in advertisement.

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: Romania

Date: 1 January 2012

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</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)	7.10.1993	20.06.1994	No.	Yes.	Slow process of recognition of the relevant case law of the ECHR by the courts and legal profession.
Protocol 12., ECHR	4.11.2000	17.07.2006	No.	-	Not relevant
Revised European Social Charter	14.05.1997	07.05.1999	No.	Ratified collective complaints protocol? No.	Not relevant
International Covenant on Civil and Political Rights	27.06.1968	9.12.1974	Yes.	Yes. No interstate complaints (art.41)	Not relevant

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</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>
Framework Convention for the Protection of National Minorities	01.02.1995	11.05.1995	No.	-	Not relevant
International Convention on Economic, Social and Cultural Rights	27.06.1968	9.12.1974	Yes.	-	Not relevant
Convention on the Elimination of All Forms of Racial Discrimination	N/A	15.09.1970	Yes.	Yes.	Not relevant
Convention on the Elimination of Discrimination Against Women	4.09.1980	07.01.1982	No.	-	Not relevant
ILO Convention No. 111 on Discrimination	N/A	11.05.1973	No.	-	Not relevant



<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Day/month/year</b>	<b>Date of ratification (if not ratified please indicate) Day/month/year</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 Rights of the Child	26.01.1990	28.09.1990	No.	-	Not relevant
Convention on the Rights of Persons with Disabilities	26.09.2007	11.11.2010	No.	-	Not relevant