

European network of legal experts in
gender equality and non-discrimination

Country report

Non-discrimination

Hungary

2016

Including summaries in
English, French and
German



EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

Hungary

András Kádár

Reporting period 1 January 2015 – 31 December 2015

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

This document has been prepared for the European Commission however it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2016

PDF ISBN 978-92-79-47002-8

doi:10.2838/629917

DS-04-16-682-3A-N

© European Union, 2016

CONTENTS

EXECUTIVE SUMMARY	5
RÉSUMÉ	12
ZUSAMMENFASSUNG	20
INTRODUCTION	28
1 GENERAL LEGAL FRAMEWORK	30
2 THE DEFINITION OF DISCRIMINATION	31
2.1 Grounds of unlawful discrimination explicitly covered	31
2.1.1 Definition of the grounds of unlawful discrimination within the directives	31
2.1.2 Multiple discrimination	32
2.1.3 Assumed and associated discrimination	33
2.2 Direct discrimination (Article 2(2)(a))	34
2.2.1 Situation testing	37
2.3 Indirect discrimination (Article 2(2)(b))	39
2.3.1 Statistical evidence	40
2.4 Harassment (Article 2(3))	45
2.5 Instructions to discriminate (Article 2(4))	46
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	46
3 PERSONAL AND MATERIAL SCOPE	56
3.1 Personal scope	56
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)	56
3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)	56
3.2 Material scope	58
3.2.1 Employment, self-employment and occupation	58
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))	58
3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	59
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))	60
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))	60
3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	61
3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)	61
3.2.8 Education (Article 3(1)(g) Directive 2000/43)	62
3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)	69
3.2.10 Housing (Article 3(1)(h) Directive 2000/43)	70
4 EXCEPTIONS	74
4.1 Genuine and determining occupational requirements (Article 4)	74
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	75
4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)	78
4.4 Nationality discrimination (Article 3(2))	79
4.5 Work-related family benefits (Recital 22 Directive 2000/78)	80
4.6 Health and safety (Article 7(2) Directive 2000/78)	80

4.7	Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	81
4.7.1	Direct discrimination	81
4.7.2	Special conditions for young people, older workers and persons with caring responsibilities	83
4.7.3	Minimum and maximum age requirements	84
4.7.4	Retirement	85
4.7.5	Redundancy	89
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)	89
4.9	Any other exceptions	90
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	92
6	REMEDIES AND ENFORCEMENT	94
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	94
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	100
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)	103
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	105
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	105
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	110
8	IMPLEMENTATION ISSUES	116
8.1	Dissemination of information, dialogue with NGOs and between social partners	116
8.2	Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	118
9	COORDINATION AT NATIONAL LEVEL	120
10	CURRENT BEST PRACTICES	121
11	SENSITIVE OR CONTROVERSIAL ISSUES	122
11.1	Potential breaches of the directives (if any)	122
11.2	Other issues of concern	122
12	LATEST DEVELOPMENTS IN 2015	124
12.1	Legislative amendments	124
12.2	Case law	124
ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION...		129
ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS		131

EXECUTIVE SUMMARY

1. Introduction

Hungary is a country of 10 million. 15 years after the political transition from a Socialist one-party system into democratic pluralism, Hungary became a member of the European Union. The creation of democratic laws and institutions has been paralleled by an increasing awareness of the principle of equal treatment and non-discrimination, but the issue of discrimination came to the limelight in connection with the debates generated by the process leading to the adoption of a comprehensive anti-discrimination law in late 2003 (ETA).¹ The law (which covers all the grounds covered by Article 19 TFEU) establishes the Equal Treatment Authority – an organ responsible for combating discrimination in all sectors and with regard to all grounds. The activity of the Authority as well as strategic litigation cases taken by NGOs have further raised awareness concerning the issue and the situation of the groups most exposed to discrimination.

The most vulnerable group from the point of view of discrimination is that of the Roma. The only 'visible' ethnic minority in Hungary constitutes 4%–7% of the country's population. Despite some positive legislative changes and significant amounts spent on integration programs, the Roma still face deeply rooted discrimination in education, employment, health care, housing and access to goods and services. They are greatly over represented among the poorest layers of society. At present the most heated political debate in relation to non-discrimination concerns segregation in education. In spite of the detailed legislative framework, segregation of Roma pupils in different forms is still widespread in Hungary in three common patterns: 'auxiliary schools' established for children with mental disabilities predominantly attended by Roma students; segregated 'Gypsy schools' the distribution of which often reflects segregation in housing; and segregated classes (or even buildings) within 'mixed' schools, usually of a lower standard in terms of teaching materials and quality.

A case bringing the issue into the limelight again was that of a school – located in a Roma part of town – which was closed by the municipality to end segregation, however after some years, it was reopened as a denominational school. While lower instance courts concluded that this was a case of segregation, the Curia overturned the decisions in April 2015, and while it accepted that the majority of the pupils in the school are Roma, and that segregation is a disadvantage in itself, it concluded that the separation could be exempted, since the parents were aware that the education in the school would be committed to the Greek Catholic faith and they have the opportunity to enrol their children in the secular school within the catchment area of which they live. In coming to this conclusion, the Curia did not however consider that in the absence of a school bus service (which was terminated by the local council) the voluntariness of the parents' choice is highly questionable, and that the religion based exemption may not be raised when only a small minority of the parents indicated the school's faith as the reason for their choice.²

Another series of relevant cases concerned the practices of the municipality of Miskolc apparently aimed at driving out of town the – mostly Roma – residents of its most indigent neighbourhoods. Although the Curia, the Equal Treatment Authority and the Ombudsman have all established that certain aspects of the local legislation and policies violate the right to equal treatment, to date the problem of the Roma of Miskolc has not been reassuringly settled.

Similarly, despite a relatively detailed and seemingly progressive legal framework, persons with disabilities also face discrimination (including the failure to guarantee accessibility and

¹ Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities.

² Curia, Decision Pfv.IV.20.241/2015/4, 22 April 2015, http://ccf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf.

reasonable accommodation of their specific needs) in many areas of life, such as education, employment and access to services.

2. Main legislation

Hungary has ratified almost all the major international instruments combating discrimination, with the exception of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the country has signed but not yet ratified.

The corner stone of the regulation is the general anti-discrimination clause of the Fundamental Law of Hungary adopted in 2011. The general ban on discrimination set forth by this constitutional provision is detailed by the ETA (amended on numerous occasions since 2003). Sectoral laws (civil law, labour law, the laws on health care, education and so on) invoke the provisions of the ETA in all discrimination-related instances, thus creating consistency within the system. The ETA covers all five grounds included in the directives and in some respect (e.g. grounds covered and material scope) go beyond the requirements of the directives.

As to the system of sanctions, the protection provided by the ETA is amplified by the Civil Code,³ which lists the right to non-discrimination among so-called 'inherent rights' and prescribes specific sanctions for the infringement of such rights, and by a number of other laws (e.g. the law on consumer protection), whereas the institutional framework set up by the ETA is amplified by a number of statutes regulating the operation of institutions with certain functions in the combat against discriminatory acts (e.g. the Commissioner for Fundamental Rights).

Regarding the practical enforcement of the laws, it can be said that despite victims' willingness to come forth with complaints, and a growing number of NGOs involved in strategic litigation, jurisprudence evolves slowly, and there are still some inconsistencies in the judicial application of the ETA and uncertainties about the contents and application of the EU acquis.

3. Main principles and definitions

The ETA contains the definition for both direct and indirect discrimination. The definitions are greatly but not fully based on the concepts used by the directives. Harassment, instruction to discriminate and victimisation are defined and outlawed in the Hungarian system.

The ETA distinguishes between three types of exceptions: (i) a general objective justification; (ii) special exceptions; and (iii) positive action.

The general objective justification clause makes a distinction on the basis of the right the differentiation concerns. If this right is a fundamental one (such as the right to education), the differentiation may only be exempted if its aim is the enforcement of another fundamental right, provided that the differentiation is absolutely necessary, suitable for achieving the aim and proportionate with the aim. When the differentiation concerns a right that is not deemed to be fundamental, it is allowed by the law if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation. This general exemption is paralleled by special exempting rules related to different sectors, such as employment (a version of the "genuine and determining occupational requirement" rule) or education (e.g. a provision allowing for setting up of separate classes for boys and girls).

³ Act V of 2013 on the Civil Code.

In this regard it needs to be noted that during the year 2012, legislative changes exempting organisations based on a religious ethos (such as denominational schools) were adopted, which may go beyond what can be regarded as an appropriate transposition of Directive 2000/78 due to the fact that they allow for unqualified and unconditional differentiation by religious organisations (e.g. in the recruitment of employees) without any requirement concerning a legitimate aim.

The third exception from the requirement of equal treatment is positive action. The ETA does not use the concept of reasonable accommodation.

Discrimination on all of the grounds listed in Article 19 TFEU is expressly prohibited but Hungarian national law covers other grounds of discrimination as well. The ETA sets forth an open ended enumeration of the protected grounds. The 19-item list includes – among others – sex, racial origin, national or ethnic origin, mother tongue, disability, state of health, religious or other similar philosophical conviction, political or other opinion, sexual orientation, sexual identity, motherhood (pregnancy), age, and financial status. Furthermore, the list is non-exhaustive, so grounds not explicitly identified are also covered (which also solves the problem of discrimination by association).

Harassment, instruction to discriminate and victimisation are clearly outlawed. Neither the instruction to discriminate, nor discrimination by association is expressly defined, but case law shows that the concepts are applied. E.g. in a case before the Equal Treatment Authority the complainant claimed that her employer had terminated her contract during the probation period, because she had to take a leave of absence because of her 2-year old child's illness. The employer tried to exempt himself by referring to the law that both parties can terminate the contract without justification during the probation period. The Authority concluded that the employer could not give a reasonable ground for his decision on the complainant's dismissal, and established that discrimination has taken place on the ground of 'health status', thus it employed the notion of discrimination by association.⁴

The concept of multiple discrimination is not known in the Hungarian legislation, and there are no plans to adopt specific regulations addressing this issue separately, neither is there case law on the issue.

4. Material scope

The ETA approaches the issue of scope from the personal, instead of the material aspect. It prohibits any discrimination in all spheres of the public sector, so in this respect its scope is in fact broader than that of the equality directives.

In the private sector, only four groups of actors fall under the ETA's scope: (i) those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender; (ii) those who provide services or sell goods at premises open to customers; (iii) self-employed persons, legal entities and organisations without a legal entity receiving state funding in respect of their legal relations established in relation to the usage of the funding; and (iv) employers with respect to employment (interpreted broadly).

Although it is not easy to identify a field listed in the directives, where a private actor who falls under the personal scope of the directives in a given field does not fall under the personal scope of the Hungarian legislation, and although the European Commission closed infringement procedures against Hungary concerning Directives 2000/43/EC and 2000/78/EC, such discrepancies may arise (e.g. with regard to harassment by colleagues).

⁴ Case no. EBH/23/2011 of the Equal Treatment Authority.

5. Enforcing the law

When there is a case of discrimination, victims may choose from among a number of options to seek remedy, depending partly on the field where the discrimination has occurred. They can turn to (i) the civil court; (ii) the labour court (if discrimination occurs in connection with employment); (iii) the Equal Treatment Authority; (iv) the administrative bodies authorised to sanction discrimination in their specific fields (e.g. the consumer protection inspectorate); (v) to the regional Governmental Office (in order to initiate a petty offence procedure in education).

It is possible for a victim of discrimination to initiate the procedure of the Equal Treatment Authority, or any other administrative organ before bringing a lawsuit based on the Civil Code or the Labour Code.⁵ If however, one starts a case before an ordinary or a labour court, administrative organs, including the Equal Treatment Authority will have to suspend their proceedings and base their decision on facts as established by the court sentence.

In the relationship between the procedures of the different public administrative authorities the key principle is that it is for the victim to decide which authority he/she wishes to turn to.

The sanctions that may be imposed by the Authority do not provide the victim with compensation (the fine imposed by the Authority on discriminators is paid to the State), so if a complainant wishes to be granted damages as well, he/she still needs to go to court.

Before the coming into force of the ETA, Hungarian law did not fully guarantee the right of associations with a legitimate interest to engage, either on behalf or in support of victims of discrimination in judicial or administrative procedures. The method used by most human rights NGOs to circumvent this problem was to have permanent contracts with attorneys, who are under the Hungarian law authorised to provide assistance and representation to parties before any court or authority.

The ETA has significantly changed the situation by claiming that any non-governmental and interest representation organisation with a legitimate interest, as well as the Equal Treatment Authority may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Furthermore, non-governmental and interest representation organisations are entitled to the rights of the concerned party in administrative proceedings initiated due to the infringement of the requirement of equal treatment.

Another instrument in the hands of associations is the possibility to launch an *actio popularis* claim. If the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by any non-governmental and interest representation organisation (as well as the Public Prosecutor and the Equal Treatment Authority), provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.

This instrument has been resorted to in a number of cases, the very first one initiated by a gay and lesbian rights protection organisation against a denominational university issuing a declaration on the exclusion of homosexual students from theological education,⁶ and other ones launched by a foundation aimed at the desegregation of education against local councils failing to take measures against the segregation of Roma pupils in their schools.⁷

⁵ Act I of 2012 on the Labour Code.

⁶ Decision of the Supreme Court published as leading judgment no. BH 2006. 14.

⁷ See for instance Decision no. Pfv.IV.20.936/2008/4. of the Supreme Court (19 November 2008) on the Hajdúhadház case, in which the non-Roma and Roma pupils were segregated between the well-equipped

In this regard it shall be noted that while most of the desegregation lawsuits have been successful in the sense that the existence of segregation is established and the school maintainers and the schools are banned from future violation under the Civil Code, courts have repeatedly refused to prescribe concrete desegregation measures, in the absence of which segregation has continued in most of the schools concerned by these cases.

Cases are more and more often brought to the attention of the public. In this regard there has been a significant improvement in the past few years. Before the coming into force of the ETA, the shift of the burden of proof in discrimination cases existed only in the field of labour law. The ETA extended this legal institution to all discrimination cases but at the same time somewhat restricted the criteria of its application.

The ETA has not made the system of sanctions much more consistent. Different fields (such as education, access to goods and services) still operate with different sanctions that may be applied by the specific administrative organs of the given field (e.g. the consumer protection inspectorate). Some degree of consistency is provided by the Equal Treatment Authority that may impose a fine in cases of discrimination regardless of the sector, where it occurs, and by the civil courts which have a general competence to oblige discriminators to pay non-pecuniary and pecuniary damages to the victims.

NGOs have for a long time used matched pair testing to substantiate cases of individual victims, however, in the interpretation of numerous judges, the result of testing performed days after the incident complained about may not be taken into account as evidence concerning the original infringement. In this situation the statutory acknowledgment of situation testing by first a government decree on the proceedings of the Equal Treatment Authority and now in the ETA was an extremely important development, as the relevant provision expressly authorises the Equal Treatment Authority to conduct testing in the course of its investigations and to take its result into regard as a piece of evidence when making a decision. In a number of cases, testing has served as evidence of discrimination, e.g. in relation to the complaint of a job seeker who was rejected when he revealed during the phone conversation that he was of Roma origin. In its decision finding for the claimant, the Authority relied on phone calls made by two testers, one using a typical Roma name. While the Roma tester was not provided with any detail of the job, the non-Roma tester was informed at length about the task, payment and other relevant circumstances.⁸

The ETA allows for positive action (on the basis of acts of parliament, decrees of government and collective agreements), and positive measures have indeed been launched (e.g. preferential treatment of Roma and persons with disabilities in education, quotas for persons with disabilities in employment).

Dialogue with NGOs and social partners on discrimination related matters is primarily conducted by the Equal Treatment Authority. A series of trainings, workshops and conferences were held in the framework of a four-year program supported by the European Commission and the Hungarian state. However, the intensity of the dialogue could not be sustained without the extra funding the program that ended in 2014 provided for the authority.

6. Equality bodies

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin (Equal Treatment Authority) started its operation on 1 February 2005. The Authority is an autonomous public administrative body with the overall responsibility to ensure compliance with the principle of equal treatment.

central building and the substandard supplementary buildings, where no gymnasium, library, computers or specialised class rooms could be found.

⁸ Case no. EBH/180/2006 of the Equal Treatment Authority.

The Authority deals with discrimination based on any of the characteristics protected under the ETA, but its activities are limited to ensuring equal treatment.

The Authority is entrusted with all the powers required by the Racial Equality Directive. The Authority – among others – may/shall:

- conduct complaint-based or ex officio investigations to establish whether the principle of equal treatment has been violated, and – if necessary – apply sanctions on the basis of the investigation;
- initiate lawsuits with a view to protecting the rights of persons and groups whose rights have been violated;
- review and comment on drafts of legal acts concerning equal treatment;
- make proposals concerning governmental decisions and legislation pertaining to equal treatment;
- regularly inform the public about the situation concerning the enforcement of equal treatment;
- provide information to those concerned and offer assistance in acting against the violation of the principle of equal treatment;
- prepare an annual report to the Parliament on the activity of the Authority and its experiences obtained in the course of the application of ETA.

The legal framework guaranteeing the Authority's formal independence has been step by step put in place (the last important measure being the amendment of the status of the Authority's president to make sure that he/she may not be dismissed at any time without justification by the Prime Minister), and after a significant cut in 2010, the financial situation of the Authority has been stabilised again from 2013 on.

Despite its understaffing and uneven financial situation, the Authority has done a significant amount of work since the commencement of its operation. It has placed emphasis on cooperation with the civil sector and on disseminating information related to non-discrimination. The Authority has also delivered some important decisions that may serve as guidelines for the future implementation of the ETA.

7. Key issues

In the author's view, the domestic legal framework is not fully in line with the directives in some areas. The most important problems may be summarised as follows:

- Due to the comprehensive material scope of the ETA, the requirement of equal treatment as set forth by the ETA applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the directives, the Hungarian law may be in breach of the *acquis*, as it does not impose on all persons of the private sector the obligation of non-discrimination. (e.g. fellow employees may not be called to account for harassment under the ETA).
- The ETA allows for objective justification in certain cases of direct discrimination.
- Depending on judicial interpretation, some provisions of the new law on churches and religion⁹ and the National Public Education Act may cause a contradiction between domestic and EU law in relation to organisations with a religious ethos, as they provide such organisations with the absolute, unqualified and unconditional rights to make differentiations in relation to recruitment.
- The exclusion of workers of the pensionable age from a severance payment may be in violation of the relevant CJEU jurisprudence.
- The obligation of reasonable accommodation has not been unambiguously transposed into the Hungarian law. The problem is especially acute with regard to employing

⁹ Act CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.

people with disabilities, in spite of an amendment to the RPD Act, which – if interpreted from a strict grammatical point of view – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure (i.e. primarily the job interview), but does not prescribe that reasonable efforts shall be made to adapt the workplace to the special needs of persons with disabilities to promote their actual employment.

Further issues of concerns are the following:

- In the segregation case described in the Introduction, the Curia applied the ETA in a way which poses the danger that religious education will be abused to exempt the segregation Roma pupils, i.e. denominational schools opened in segregated Roma neighbourhoods and thus creating segregated Roma schools will be allowed by the courts.
- As it was outlined above, the reluctance of courts to prescribe concrete desegregation measures in judgments establishing the existence of segregation may render civil law sanctions ineffective in segregation cases.
- Accessibility of public premises and services is still far from complete, although the obligation to provide an accessible environment has been in place for over a decade.
- The number of cases in which the Equal Treatment Authority establishes discrimination and in which a friendly settlement is achieved is still very low compared to the overall number of complaints to the body (in 2015 the combined number was 50 for about 900 complaints). The most probable explanation for this phenomenon is a low level of awareness among the population about the non-discrimination area and what the Authority's scope of activity is, and also the fact that many of the potential complainants come from marginalised groups with low levels of ability to assert their rights. While the Authority's network of regional referees has definitely extended the Authority's outreach, further efforts are needed to achieve a significant increase in numbers.
- In relation to the Equal Treatment Authority it needs to be pointed out that – mostly due to the lack of necessary staffing – it carries out very few ex officio procedures (which is problematic exactly due to the above mentioned low level of awareness and assertiveness on the part of the victims), and with the end of the four-year programme providing the body with substantial extra funding and enabling it to carry out surveys and organise training and workshops for state employees, NGOs and social partners, it is doubtful whether it can maintain some of these very important core functions.

RÉSUMÉ

1. Introduction

La Hongrie est un pays de 10 millions d'habitants devenu membre de l'Union européenne quinze ans après une transition politique marquant le passage d'un régime socialiste à parti unique au pluralisme démocratique. Si la création d'institutions et de lois démocratiques s'est accompagnée d'une sensibilisation croissante au principe de l'égalité de traitement et de non-discrimination, ce sont les débats autour du processus ayant conduit à l'adoption fin 2003 d'une loi antidiscrimination générale (loi sur l'égalité de traitement)¹⁰ qui ont mis la problématique de la discrimination sous les feux des projecteurs. Cette loi, qui couvre tous les motifs visés par l'article 19 TFUE, institue l'Autorité pour l'égalité de traitement – instance chargée de lutter contre les discriminations dans tous les secteurs et par rapport à tous les motifs. L'activité de l'Autorité, de même que les recours stratégiques intentés en justice par des ONG ont renforcé davantage encore une prise de conscience quant à la problématique de la discrimination et à la situation des groupes qui y sont les plus exposés.

Les Roms constituent à cet égard le groupe le plus vulnérable. Il s'agit de la seule minorité ethnique «visible» de Hongrie, qui représente 4 à 7 % de la population. En dépit de certains changements législatifs positifs et des sommes considérables allouées aux programmes d'intégration, les Roms restent confrontés à une discrimination profondément ancrée en matière d'éducation, d'emploi, de soins de santé, de logement et d'accès aux biens et aux services. Ils sont en forte surreprésentation parmi les groupes les plus pauvres de la société. Le débat politique actuellement le plus animé en matière de non-discrimination concerne la ségrégation dans l'enseignement. En dépit de l'existence d'un cadre législatif précis, différentes formes de ségrégation des élèves roms restent courantes en Hongrie et s'articulent autour de trois axes communs: des «écoles auxiliaires» qui, instituées pour des enfants souffrant de troubles mentaux, sont fréquentées surtout par des élèves roms; des «écoles tziganes» séparées dont la localisation reflète souvent une ségrégation au niveau du logement; et des classes séparées (voire des bâtiments séparés) au sein d'école «mixtes», le niveau de ces classes étant généralement moindre en termes de matériel pédagogique et de qualité d'enseignement.

Une affaire a mis une nouvelle fois cette problématique en lumière: en l'espèce une école située dans un quartier rom et fermée par la municipalité pour mettre fin à une ségrégation, a été réouverte après quelques années en tant qu'établissement confessionnel. Alors que les juridictions inférieures ont considéré qu'il s'agissait de ségrégation, la Cour suprême a infirmé leurs décisions en avril 2015 et conclu, tout en admettant que la majorité des élèves de l'école en question sont roms et que la ségrégation constitue un désavantage en soi, que cette séparation peut faire l'objet d'une dérogation étant donné que les parents sont au courant que l'enseignement de cet établissement relève d'un engagement dans la foi grecque-catholique et qu'ils ont la possibilité d'inscrire leurs enfants dans une école laïque dans la circonscription où ils habitent. En concluant de la sorte, la Cour suprême a cependant omis de tenir compte qu'en l'absence de service de transport scolaire (supprimé par le conseil municipal), le caractère volontaire du choix des parents est très discutable, et que l'exonération fondée sur la religion ne peut être invoquée lorsque seule une petite minorité de parents mentionnent la confession de l'école en tant que motif de leur choix.¹¹

Une autre série d'affaires pertinentes concernent les pratiques de la municipalité de Miskolc apparemment destinées à ce que les habitants des quartiers les plus pauvres, roms pour la plupart, quittent la ville. Bien qu'il ait été établi à la fois par la Cour suprême, l'Autorité pour l'égalité de traitement et le Médiateur que certains aspects de la législation et des

¹⁰ Loi CXXV de 2003 sur l'égalité de traitement et la promotion de l'égalité des chances.

¹¹ Cour suprême, arrêt Pfv.IV.20.241/2015/4 du 22 avril 2015, http://ccf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf.

politiques locales enfreignent le droit à l'égalité de traitement, le problème des Roms de Miskolc n'est, à ce jour, toujours pas réglé de façon rassurante.

De même, en dépit d'un cadre juridique relativement précis et apparemment progressiste, les personnes handicapées se heurtent elles aussi à une discrimination (en ce compris l'absence de garanties en matière d'accessibilité et d'aménagement raisonnable prenant en compte leurs besoins spécifiques) dans de nombreux domaines de vie tels que l'enseignement, l'emploi et l'accès aux services.

2. Législation principale

La Hongrie a ratifié la plupart des instruments juridiques internationaux de lutte contre la discrimination hormis le protocole n° 12 à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, qu'elle a signé mais qu'elle n'a pas encore ratifié.

La clause générale antidiscrimination de la loi fondamentale de la Hongrie adoptée en 2011 constitue la pierre angulaire de la réglementation en la matière. L'interdiction générale de discrimination énoncée par cette disposition constitutionnelle est détaillée par la loi sur l'égalité de traitement, laquelle a été amendée à plusieurs reprises depuis 2003. Les lois sectorielles (le droit civil, le droit du travail, les lois sur les soins de santé, l'éducation, etc.) invoquent les dispositions de la loi sur l'égalité de traitement dans tous les cas liés à une discrimination, créant ainsi une forte cohérence au sein du système. La loi sur l'égalité de traitement couvre les cinq motifs visés par les directives et va à certains égards (motifs protégés et champ d'application matériel notamment) au-delà des exigences de celles-ci.

En ce qui concerne le régime des sanctions, la protection assurée par la loi sur l'égalité de traitement est complétée par le Code civil,¹² lequel inclut le droit à la non-discrimination parmi les «droits inhérents» et prévoit des sanctions spécifiques pour la transgression de ceux-ci, ainsi que par plusieurs autres lois (loi sur la protection des consommateurs notamment); le cadre constitutionnel fixé par la loi sur l'égalité de traitement est complété pour sa part d'un certain nombre de règlements régissant le fonctionnement d'institutions dotées de compétences pour lutter contre les actes discriminatoires (le Commissaire des droits fondamentaux, entre autres).

Sur le plan de la mise en application pratique des lois, on peut dire qu'en dépit de la volonté des victimes de porter plainte et du nombre croissant d'ONG engageant des poursuites stratégiques, la jurisprudence évolue lentement et que certaines incohérences subsistent dans l'application judiciaire de la loi sur l'égalité de traitement, de même que des incertitudes quant au contenu et à l'application de l'acquis de l'UE.

3. Principes généraux et définitions

La loi sur l'égalité de traitement contient une définition à la fois de la discrimination directe et de la discrimination indirecte. Ces définitions se fondent largement, mais pas intégralement, sur les concepts utilisés par les directives. Le système hongrois définit et interdit le harcèlement, l'injonction de discrimination et les rétorsions.

La loi sur l'égalité de traitement distingue trois types d'exceptions: (i) une justification objective générale; (ii) des exceptions particulières; et (iii) l'action positive.

La clause relative à la justification objective générale établit une distinction selon le droit concerné par la différenciation. S'il s'agit d'un droit fondamental (tel que le droit à l'éducation), la différenciation peut uniquement faire l'objet d'une exemption lorsqu'elle vise à faire appliquer un autre droit fondamental et pour autant qu'elle soit absolument

¹² Loi V de 2013 sur le Code civil.

nécessaire, adaptée à la réalisation de l'objectif et proportionnée à celui-ci. S'il s'agit d'un droit non considéré comme fondamental, la différenciation est autorisée par la loi à condition de pouvoir établir de façon objective qu'elle répond à un motif raisonnable et directement lié à la relation juridique concernée. Cette exemption générale s'accompagne de règles d'exemption spéciales relatives à différents secteurs tels que l'emploi (une version de la règle de «l'exigence professionnelle véritable et déterminante») ou l'éducation (une disposition permettant d'organiser des classes séparées pour les garçons et les filles, par exemple).

Il convient de préciser à cet égard que des modifications législatives ont été adoptées durant l'année 2012 pour exempter les organisations fondées sur une éthique religieuse (écoles confessionnelles notamment), et que ces modifications pourraient bien aller au-delà de ce qui peut être considéré comme une transposition adéquate de la directive 2000/78 du fait qu'elles autorisent une différenciation inconditionnelle et sans réserve de la part des organisations religieuses (en ce qui concerne le recrutement de personnel, par exemple) sans aucune exigence quant au but légitime.

La troisième exception à l'exigence d'égalité de traitement concerne l'action positive. La loi hongroise sur l'égalité de traitement n'utilise pas le concept d'aménagement raisonnable.

La discrimination fondée sur l'ensemble des motifs visés à l'article 19 TFUE est explicitement interdite, mais le droit national hongrois protège également d'autres motifs de discrimination. La loi sur l'égalité de traitement contient une liste ouverte de motifs protégés, les dix-neuf cités étant notamment le genre, l'origine raciale, l'origine ethnique ou nationale, la langue maternelle, le handicap, l'état de santé, la conviction religieuse ou toute autre conviction philosophique similaire, l'opinion politique ou autre, l'orientation sexuelle, l'identité sexuelle, la maternité (grossesse), l'âge et la situation financière. La liste ne se veut pas exhaustive, de sorte que les motifs qui ne sont pas explicitement recensés sont également couverts (ce qui résout également le problème de la discrimination par association).

Le harcèlement, l'injonction de discriminer et les rétorsions sont clairement interdits. Ni l'injonction de discriminer ni la discrimination par association ne sont expressément définies, mais la jurisprudence atteste de l'application de ces concepts. C'est ainsi par exemple que, dans une affaire dont l'Autorité pour l'égalité de traitement a été saisie, la plaignante affirmait que son employeur avait résilié son contrat durant sa période d'essai du fait qu'elle avait dû prendre congé parce que son enfant de deux ans était malade. L'employeur a tenté de s'exonérer en invoquant la loi selon laquelle les deux parties peuvent mettre fin au contrat sans justification pendant la période d'essai. L'Autorité a conclu que l'employeur ne pouvait avancer de motif raisonnable quant à sa décision de licencier la plaignante, et elle a établi l'existence d'une discrimination fondée sur «l'état de santé» – appliquant ainsi la notion de discrimination par association.¹³

Le concept de discrimination multiple est inconnu de la législation hongroise et il n'existe aucun projet d'adoption de réglementation spécifique traitant séparément de cette question ni aucune jurisprudence en la matière.

4. Champ d'application matériel

La loi sur l'égalité de traitement approche la question du champ d'application dans la perspective personnelle plutôt que matérielle. Elle interdit toute discrimination dans le secteur public de sorte qu'à cet égard son champ d'application est, en réalité, plus large que celui des directives en matière d'égalité.

¹³ Autorité pour l'égalité de traitement, affaire n° EBH/23/2011.

Dans le secteur privé, quatre groupes d'acteurs seulement relèvent du champ d'application de la loi sur l'égalité de traitement: (i) ceux qui font une offre publique d'attribution de contrat (pour la location d'un appartement, par exemple) ou qui lancent un appel d'offres public; (ii) ceux qui fournissent des services ou vendent des biens dans des lieux ouverts au public; (iii) les personnes exerçant une activité indépendante, les personnes morales et les organisations sans personnalité juridique bénéficiaires de subventions de l'État pour ce qui concerne leurs relations juridiques établies en rapport avec l'utilisation des fonds; et (iv) les employeurs, en ce qui concerne l'emploi (au sens large).

Bien qu'il ne soit guère aisé d'identifier un domaine cité par les directives dans lequel un acteur privé relevant du champ d'application personnel des directives dans un domaine donné ne relève pas du champ d'application personnel de la législation hongroise, et bien que la Commission européenne ait clôturé les procédures d'infraction engagées contre la Hongrie à propos des directives 2000/43/CE et 2000/78/CE, de telles divergences sont susceptibles de survenir (en ce qui concerne le harcèlement par des collègues notamment).

5. Mise en application de la loi

Les victimes de discrimination ont le choix entre plusieurs options pour tenter d'obtenir réparation, la voie de recours étant partiellement liée au domaine dans lequel la discrimination en cause s'est produite. Elles peuvent se tourner vers: (i) les juridictions civiles; (ii) les juridictions du travail (si la discrimination est liée à l'emploi); (iii) l'Autorité pour l'égalité de traitement; (iv) les organes administratifs habilités à sanctionner la discrimination dans leurs domaines respectifs (inspection de la protection du consommateur, par exemple); (v) le Bureau régional du gouvernement central (afin d'initier une procédure pour délit mineur dans le domaine de l'éducation).

Il est possible pour une victime de discrimination d'engager une procédure devant l'Autorité pour l'égalité de traitement ou tout autre organe administratif avant d'intenter un procès en invoquant le Code civil ou le Code du travail.¹⁴ Toutefois, lorsqu'une affaire est portée devant une juridiction ordinaire ou du travail, les organes administratifs, dont l'Autorité pour l'égalité de traitement, devront suspendre leur propre procédure et baser leur décision sur les faits établis par la décision judiciaire.

Le grand principe régissant la relation entre les procédures des différentes instances de l'administration publique veut qu'il appartient à la victime de décider vers quelle instance elle souhaite se tourner.

Les sanctions qui peuvent être imposées par l'Autorité n'offrent pas d'indemnisation à la victime (l'amende infligée par l'Autorité aux auteurs d'actes discriminatoires est payée à l'État), de sorte qu'une partie plaignante également désireuse d'obtenir des dommages et intérêts doit encore aller en justice.

Avant l'entrée en vigueur de la loi sur l'égalité de traitement, la législation hongroise ne garantissait pas pleinement le droit des associations y ayant un intérêt légitime d'engager des procédures judiciaires ou administratives, que ce soit en leur propre nom ou à l'appui de victimes de discrimination. La méthode utilisée par la plupart des ONG de défense des droits de l'homme pour éluder ce problème a consisté à conclure des contrats permanents avec des avocats, qui, selon le droit hongrois, sont autorisés à fournir aux parties une assistance et une représentation devant tout tribunal ou toute juridiction.

La loi sur l'égalité de traitement a sensiblement modifié la situation en affirmant que toute organisation non gouvernementale ou représentative d'intérêts qui y a un intérêt légitime, de même que l'Autorité pour l'égalité de traitement, sont habilitées à engager en leur propre nom ou au nom de la victime des poursuites pour non-respect de l'obligation

¹⁴ Loi I de 2012 sur le Code du travail.

d'égalité de traitement. Les organisations non gouvernementales et représentatives d'intérêts sont habilitées en outre à exercer les droits de la partie concernée dans la cadre de poursuites administratives intentées pour violation de l'obligation d'égalité de traitement.

Les associations ont la possibilité d'utiliser un autre instrument, à savoir l'action publique ou *actio popularis*. Si le principe de l'égalité de traitement est violé ou s'il existe un risque direct qu'il le soit, des poursuites pour violation des droits inhérents ou des poursuites devant une juridiction du travail peuvent être engagées par toute organisation non gouvernementale ou représentative d'intérêts (ainsi que par le ministère public et l'Autorité pour l'égalité de traitement) pour autant que la violation du principe de l'égalité de traitement ou le risque direct d'une telle violation soient fondés sur une caractéristique constituant une particularité essentielle de la personne et que la violation affecte un groupe de personnes plus large qui ne peut être déterminé avec précision.

Cet instrument a été utilisé dans un certain nombre d'affaires – la toute première ayant été initiée par une organisation de protection des droits des gays et des lesbiennes contre une université confessionnelle qui, dans une déclaration, excluait les étudiants homosexuels de l'enseignement théologique;¹⁵ d'autres, initiées par une fondation œuvrant à la déségrégation de l'enseignement, s'attaquaient à des conseils municipaux qui n'avaient pris aucune mesure pour lutter contre la ségrégation des élèves roms au sein de leurs écoles.¹⁶ Il convient de signaler à cet égard qu'alors que la plupart des actions engagées en justice pour déségrégation sont parvenues à leurs fins dans la mesure où l'existence d'une ségrégation a été constatée et que les responsables scolaires et les écoles elles-mêmes sont interdits de toute violation future aux termes du Code civil, les juridictions ont refusé à de multiples reprises de prescrire des mesures concrètes de déségrégation – avec pour conséquence que, faute de telles mesures, la ségrégation se poursuit dans la plupart des écoles concernées par ces affaires.

Des affaires sont de plus en plus souvent portées à l'attention du public, des progrès significatifs ayant été accomplis à cet égard ces dernières années.

Avant l'entrée en vigueur de la loi sur l'égalité de traitement, le renversement de la charge de la preuve dans des affaires de discrimination existait exclusivement en matière de droit du travail. La loi sur l'égalité de traitement a étendu ce mécanisme juridique à tous les cas de discrimination, mais a quelque peu restreint, dans le même temps, les critères requis pour son application.

La loi sur l'égalité de traitement n'a pas rendu le régime des sanctions beaucoup plus cohérent. Différents domaines (tels que l'enseignement et l'accès aux biens et aux services) fonctionnent toujours avec des sanctions différentes pouvant être appliquées par les organes administratifs propres au domaine concerné (inspection de la protection du consommateur, par exemple). Un certain degré de cohérence est assuré par l'Autorité pour l'égalité de traitement, qui peut imposer des amendes en cas de discrimination indépendamment du secteur dans lequel celle-ci se produit, et par les juridictions civiles qui jouissent d'une compétence générale les habilitant à obliger les auteurs de discrimination à des indemnités pécuniaires et des réparations morales aux victimes.

Les ONG recourent de longue date au test basé sur l'appariement pour étayer le dossier de victimes individuelles mais, selon l'interprétation de nombreux juges, le résultat de tests effectués plusieurs jours après l'incident visé par la plainte ne peut être pris en compte en tant que preuve de l'infraction initiale. Dans ce contexte, la reconnaissance officielle du

¹⁵ Arrêt de principe n° 2006.14 de la Cour suprême.

¹⁶ Voir notamment l'arrêt n° Pfv.IV.20.936/2008/4 du 19 novembre 2008 de la Cour suprême dans l'affaire Hajdúhadház portant sur la séparation des enfants non-roms et des enfants roms entre le bâtiment central et des bâtiments d'appoint ne répondant pas aux normes et ne comprenant ni salle de gymnastique, ni bibliothèque, ni ordinateurs, ni classes spécialisées.

test de situation – tout d’abord par un décret ministériel relatif aux procédures de l’Autorité pour l’égalité de traitement et aujourd’hui par l’Autorité elle-même – a été une étape extrêmement importante dans la mesure où la disposition pertinente autorise expressément l’Autorité pour l’égalité de procéder à des tests lors de ses enquêtes et à considérer les résultats de ceux-ci comme des éléments de preuve lorsqu’elle prend ses décisions. Dans un certain nombre d’affaires, les tests ont servi de preuve de discrimination, notamment dans le cas d’une plainte déposée par un demandeur d’emploi dont la candidature avait été rejetée lorsqu’il avait révélé au cours de la conversation téléphonique qu’il était d’origine rom. Dans sa décision en faveur du plaignant, l’Autorité s’est appuyée sur les appels téléphoniques effectués par deux «testeurs», dont l’un a utilisé un nom typiquement rom. Alors qu’aucune précision n’a été communiquée au «testeur» rom à propos de l’emploi à pourvoir, des informations exhaustives ont été fournies au testeur «non rom» à propos de la fonction, de la rémunération et d’autres conditions.¹⁷

La loi sur l’égalité de traitement autorise l’action positive (basée sur des actes parlementaires, des décrets ministériels et des conventions collectives) et des mesures de ce type ont effectivement été initiées (traitement préférentiel des Roms et des personnes handicapées dans l’enseignement et quotas de personnes handicapées dans l’emploi, par exemple).

Le dialogue avec les ONG et les partenaires sociaux sur les questions liées à la discrimination est principalement organisé par l’Autorité pour l’égalité de traitement. Une série de formations, d’ateliers et de conférences ont eu lieu dans le cadre d’un programme de quatre ans soutenu par la Commission européenne et l’État hongrois. L’intensité du dialogue n’a cependant pu être maintenue sans le financement supplémentaire alloué à l’Autorité au titre de ce programme, qui s’est clôturé en 2014.

6. Organismes de promotion de l’égalité de traitement

L’organisme spécialisé de promotion de l’égalité de traitement sans distinction de race ou d’origine ethnique (l’Autorité pour l’égalité de traitement) est opérationnel depuis le 1^{er} février 2005. Il s’agit d’un organe administratif public ayant pour responsabilité générale de faire respecter le principe de l’égalité de traitement.

L’Autorité traite de la discrimination fondée sur toute caractéristique protégée en vertu de la loi sur l’égalité de traitement, mais son action se limite à garantir l’égalité de traitement.

L’Autorité est investie de toutes les compétences requises par la directive relative à l’égalité raciale. Elle est donc notamment habilitée à :

- mener des enquêtes d’office ou par suite d’une plainte, afin d’établir si le principe de l’égalité de traitement a été violé, et appliquer, s’il y a lieu, des sanctions sur la base de l’enquête menée;
- engager des poursuites en vue de protéger les droits des personnes et des groupes dont les droits n’ont pas été respectés;
- examiner et commenter les projets d’actes législatifs portant sur l’égalité de traitement;
- formuler des propositions concernant les décisions gouvernementales et la législation en matière d’égalité de traitement;
- informer régulièrement le public de la situation relative à la mise en application de l’égalité de traitement;
- fournir des informations aux personnes concernées et offrir une assistance dans le cadre d’actions contre la violation du principe de l’égalité de traitement; et

¹⁷ Autorité pour l’égalité de traitement, affaire n° EBH/180/2006.

- préparer à l'intention du Parlement un rapport annuel sur l'activité de l'Autorité et l'expérience acquise par cette dernière au fil de l'application de la loi sur l'égalité de traitement.

Le cadre juridique garantissant l'indépendance formelle de l'Autorité a été progressivement mis en place (la dernière mesure importante étant la modification du statut du président/de la présidente de l'Autorité afin de veiller à ce qu'il/elle ne puisse être démis(e) de ses fonctions par le Premier ministre à tout moment et sans justification) et, après avoir connu une réduction importante en 2010, son budget est à nouveau stable depuis 2013.

Malgré sa dotation insuffisante en personnel et l'instabilité de sa situation financière, l'Autorité a déjà beaucoup à son actif depuis le démarrage de ses activités. Elle a mis l'accent sur la coopération avec le secteur civil et sur la diffusion d'informations liées à la non-discrimination. Elle a également rendu plusieurs décisions importantes susceptibles de servir d'orientations pour la mise en œuvre future de la loi sur l'égalité de traitement.

7. Points essentiels

De l'avis de l'auteur, il existe un certain nombre de points sur lesquels le cadre juridique national n'est pas totalement conforme aux directives. Les problèmes les plus importants peuvent être récapitulés comme suit:

- le caractère global du champ d'application matériel de la loi sur l'égalité de traitement fait que l'exigence d'égalité de traitement formulée par cette loi s'applique uniquement à un cercle restreint d'acteurs privés. Il se pourrait donc que la législation hongroise soit, en ce qui concerne les secteurs relevant du champ d'application matériel des directives, non conforme à l'acquis dans la mesure où elle n'impose pas l'obligation de non-discrimination à toutes les personnes du secteur privé (il se pourrait par exemple que des collègues ne puissent, en vertu de la loi sur l'égalité de traitement, être tenus responsables de harcèlement);
- la loi sur l'égalité de traitement admet une justification objective dans certains cas de discrimination directe;
- selon l'interprétation judiciaire, plusieurs dispositions de la nouvelle loi sur les Églises et la religion¹⁸ et de la loi sur l'éducation nationale publique pourraient être cause de contradiction entre le droit national et le droit de l'UE en rapport avec les organisations ayant une éthique religieuse, étant donné que ces dispositions confèrent aux dites organisations le droit absolu, inconditionnel et sans réserve de procéder à des différenciations en matière de recrutement;
- l'exclusion de travailleurs en âge de prendre leur retraite du bénéfice d'une indemnité de départ pourrait être incompatible avec la jurisprudence de la CJUE en la matière;
- l'obligation d'aménagement raisonnable n'a pas été transposée sans équivoque en droit interne hongrois. Un problème se pose tout particulièrement dans le cadre de l'emploi de personnes handicapées, en dépit de l'amendement apporté à la loi relative aux droits des personnes handicapées qui – lorsqu'il est interprété d'un point de vue strictement grammatical – garantit uniquement l'obligation d'aménagement raisonnable en rapport avec la procédure de recrutement (à savoir essentiellement l'entretien d'embauche) sans stipuler que des efforts raisonnables seront déployés pour adapter le lieu de travail aux besoins spéciaux de personnes handicapées pour promouvoir l'emploi qu'ils occupent.

Il convient encore de mentionner les préoccupations suivantes:

- dans le cas de ségrégation décrit dans l'introduction, la Cour suprême a appliqué la loi sur l'égalité de traitement d'une manière qui porte le risque que l'éducation

¹⁸ Loi CCVI de 2011 sur le droit à la liberté de conscience et de religion ainsi que le statut juridique des Églises, des confessions religieuses et des communautés religieuses.

religieuse soit abusivement utilisée pour légitimer la ségrégation des élèves roms – autrement dit pour que des écoles confessionnelles soient ouvertes dans des «ghettos» roms – et que la création d'écoles roms séparées soit admise par les tribunaux;

- comme indiqué plus haut, la réticence des tribunaux de prescrire des mesures concrètes de déségrégation dans leurs arrêts établissant l'existence d'une ségrégation pourrait rendre les sanctions civiles inefficaces dans ce type d'affaires;
- l'accessibilité des lieux et des services publics est loin d'être totalement réalisée alors que l'obligation de prévoir un environnement accessible est en vigueur depuis plus de dix ans;
- le nombre de dossiers dans lesquels l'Autorité pour l'égalité de traitement constate une discrimination et dans lesquels un règlement amiable a été trouvé reste très faible par rapport au nombre total de plaintes dont elle est saisie (ce nombre étant de 50 sur 900 plaintes environ en 2015). L'explication la plus probable de ce phénomène est la méconnaissance du domaine de la non-discrimination et du champ d'activité de l'Autorité de la part de la population, et le fait que de nombreux plaignants potentiels appartiennent à des groupes marginalisés peu aptes à faire valoir leurs droits. La création de son réseau régional d'«arbitres» a certainement amélioré le rayonnement de l'Autorité, mais des efforts supplémentaires s'imposent pour faire réellement augmenter le nombre de ces dossiers;
- il convient de souligner à propos de l'Autorité pour l'égalité de traitement qu'en raison essentiellement d'un manque de personnel, elle engage peu de procédures d'office (ce qui pose problème en raison précisément du faible niveau de sensibilisation ou d'assurance de la part des victimes, évoqué plus haut); et qu'il est peu probable, étant donné l'arrivée à échéance du programme quadriennal qui lui assurait un important complément de fonds et lui permettait de réaliser des études et d'organiser des formations et des ateliers à l'intention de fonctionnaires, d'ONG et de partenaires sociaux, que l'Autorité pour l'égalité de traitement puisse continuer d'assumer ces fonctions absolument fondamentales.

ZUSAMMENFASSUNG

1. Einleitung

Ungarn hat 10 Millionen Einwohner. 15 Jahre nach dem Wandel vom sozialistischen Einparteiensystem zur pluralistischen Demokratie wurde das Land Mitglied der Europäischen Union. Die Schaffung demokratischer Gesetze und Institutionen ging mit einem zunehmenden Bewusstsein für den Grundsatz der Gleichbehandlung und Antidiskriminierung einher. In den Vordergrund der politischen Bühne rückte das Thema Diskriminierung jedoch erst durch die Debatten zur Verabschiedung des allgemeinen Antidiskriminierungsgesetzes (ETA) Ende 2003.¹⁹ Mit dem Gesetz (das alle in Artikel 19 des AEUV genannten Diskriminierungsgründe abdeckt) wurde auch die Gleichbehandlungsstelle eingeführt – ein Organ, das für den Kampf gegen Diskriminierung in allen Lebensbereichen und aus jedweden Gründen zuständig ist. Die Aktivitäten der Stelle sowie strategische Klagen einiger NRO haben das allgemeine Bewusstsein für diese Thematik und für die Situation der am meisten von Diskriminierung betroffenen Gruppen weiter geschärft.

Eine besonders stark von Diskriminierung betroffene Gruppe sind die Roma. Die einzig „sichtbare“ ethnische Minderheit Ungarns stellt nur 4-7 % der Bevölkerung des Landes. Trotz einer Verbesserung der Gesetzeslage und der hohen Beträge, die für Integrationsprogramme ausgegeben wurden, sind Roma in den Bereichen Bildung, Beschäftigung, Gesundheitswesen und Wohnraum sowie beim Zugang zu Gütern und Dienstleistungen weiterhin einer tief verwurzelten Diskriminierung ausgesetzt. In der ärmsten Bevölkerungsschicht sind sie stark überrepräsentiert.

Derzeit ist im Bereich Antidiskriminierung besonders das segregierte Bildungswesen heiß umstritten. Trotz eines detaillierten gesetzlichen Rahmens ist die Sonderbehandlung von Roma in der Schule in Ungarn immer noch weit verbreitet. Es gibt drei Modelle: in „Hilfsschulen“ für Kinder mit geistiger Behinderung werden vorwiegend Roma unterrichtet, es gibt segregierte „Zigeunerschulen“, deren Standorte oft den segregierten Wohnungsmarkt widerspiegeln, und es gibt gesonderte Klassen (oder sogar Gebäude) in „gemischten“ Schulen, die oft schlechter mit Unterrichtsmaterial und Lehrern ausgestattet sind, als reguläre Klassen.

Ein Fall, der das Thema wieder in den Vordergrund rückte, war der einer – in einem Roma-Viertel gelegenen – Schule, die von der Stadt geschlossen wurde, um die Segregation zu beenden, nach einigen Jahren als konfessionelle Schule jedoch wieder eröffnet wurde. Die Gerichte der unteren Instanzen kamen zu dem Ergebnis, dass es sich um einen Fall von Segregation handelte. Die Kuria hob diese Entscheidungen im April jedoch 2015 auf. Sie räumte zwar ein, dass der größte Teil der Schülerschaft in dieser Schule Roma waren und dass Segregation an sich eine Benachteiligung darstellt, entschied jedoch, die Abtrennung könne als Ausnahme gewertet werden, da den Eltern bekannt sei, dass der Unterricht in dieser Schule dem griechisch-katholischen Glauben verpflichtet sei, und sie die Möglichkeit hätten, ihre Kinder auf die in ihrem Einzugsgebiet gelegene nicht-konfessionelle Schule zu schicken. Bei dieser Entscheidung ließ die Kurie jedoch außer Acht, dass angesichts des nicht vorhandenen Schulbusbetriebs (den die Stadt eingestellt hatte) die Freiwilligkeit der Entscheidung der Eltern sehr fraglich ist und dass die religiös begründete Ausnahme nicht herangezogen werden kann, wenn nur eine kleine Minderheit der Eltern die Konfession der Schule als Grund für ihre Entscheidung angegeben hat.²⁰

Eine Reihe weiterer einschlägiger Fälle betraf die Vorgehensweisen der Stadt Miskolc, die allem Anschein nach darauf abzielten, die Bewohner der ärmsten Viertel – überwiegend Roma – aus der Stadt zu vertreiben. Obgleich sowohl die Kuria als auch die

¹⁹ Gesetz CXXV von 2003 über Gleichbehandlung und die Förderung der Chancengleichheit.

²⁰ Kuria, Urteil Pfv.IV.20.241/2015/4, 22. April 2015, http://ccf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf.

Gleichstellungsbehörde und die Ombudsstelle konstatiert haben, dass bestimmte Aspekte der lokalen Vorschriften und Vorgehensweisen gegen das Recht auf Gleichbehandlung verstoßen, wurde das Problem der in Miskolc lebenden Roma bis heute nicht zufriedenstellend gelöst.

Ebenso sind Personen mit Behinderung – trotz relativ detaillierter und scheinbar fortschrittlicher Rechtsvorschriften – in vielen Lebensbereichen wie z. B. Bildung, Beschäftigung und Zugang zu Dienstleistungen mit Diskriminierung (Verstoß gegen das Recht auf Zugänglichkeit und angemessene Berücksichtigung ihrer spezifischen Bedürfnisse usw.) konfrontiert.

2. Wichtigste Gesetze

Ungarn hat fast alle wichtigen internationalen Rechtsinstrumente zum Kampf gegen Diskriminierung ratifiziert. Eine Ausnahme ist jedoch das 12. Protokoll zur Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten, das Ungarn zwar unterzeichnet, aber noch nicht ratifiziert hat.

Gesetzlicher Grundstein ist die allgemeine Antidiskriminierungsklausel im ungarischen Grundgesetz, die 2011 verabschiedet wurde. Dieses verfassungsrechtliche allgemeine Diskriminierungsverbot wird durch das ETA (das seit 2003 mehrmals überarbeitet wurde) dargelegt. Andere Gesetze (Zivilrecht, Arbeitsrecht, Gesetze zum Gesundheitswesen, Bildung usw.) verweisen in allen Fällen von Diskriminierung auf die Bestimmungen des ETA und gewährleisten so die Einheitlichkeit des Systems. Das ETA deckt alle fünf in den Richtlinien genannten Diskriminierungsgründe ab und geht in einigen Punkten (z. B. Diskriminierungsgründe und sachlicher Geltungsbereich) über die Vorgaben der Richtlinien hinaus.

Was die Sanktionen angeht, wird der im ETA vorgesehene Schutz durch das Zivilgesetzbuch²¹ verstärkt, das das Recht auf Gleichbehandlung zu den so genannten „unveräußerlichen Rechten“ zählt und für die Verletzung dieser Rechte besonders schwere Sanktionen vorsieht. Auch andere Gesetze (z. B. das Verbraucherschutzgesetz) erweitern den Diskriminierungsschutz des ETA. Der durch das ETA eingerichtete institutionelle Rahmen wiederum wird durch zahlreiche Verordnungen gestärkt, die die Tätigkeit von Institutionen zur Bekämpfung von diskriminierenden Handlungen regulieren (z. B. die Tätigkeit des Kommissars für Grundrechte).

Im Hinblick auf die praktische Durchsetzung der Gesetze sind zwar immer mehr Opfer bereit, ihre Beschwerden öffentlich zu machen und zahlreiche NRO haben strategische Klagen angestrengt, doch die Rechtsprechung entwickelt sich nur langsam. Das ETA wird immer noch nicht einheitlich angewendet und es herrscht Unsicherheit über Inhalt und Anwendung des Besitzstands der EU.

3. Wichtigste Grundsätze und Begriffe

Das ETA definiert sowohl unmittelbare als auch mittelbare Diskriminierung. Die Definitionen stimmen zum größten Teil, jedoch nicht vollkommen mit denen der Richtlinien überein. Belästigung, Anweisung zur Diskriminierung und Viktimisierung werden definiert und sind nach ungarischem Recht verboten.

Das ETA unterscheidet zwischen drei Ausnahmeregründen: (i) allgemeine objektive Gründe, (ii) spezielle Ausnahmen und (iii) positive Maßnahmen.

Im Falle von allgemeinen objektiven Gründen sieht das Gesetz eine weitere Unterscheidung nach dem Recht vor, das eingeschränkt werden soll. Handelt es sich um ein Grundrecht

²¹ Gesetz V von 2013 über das Zivilgesetzbuch.

(z. B. das Recht auf Bildung) ist eine Ungleichbehandlung nur dann erlaubt, wenn sie das Ziel hat, ein anderes Grundrecht zu schützen und wenn die Ungleichbehandlung absolut notwendig, zweckmäßig und verhältnismäßig ist. Sofern die Ungleichbehandlung ein Recht betrifft, das nicht als Grundrecht gilt, ist sie gesetzlich erlaubt, wenn sie bei objektiver Betrachtung einen angemessenen Grund hat, der sich direkt auf das betreffende Rechtsverhältnis bezieht. Diese allgemeine Ausnahme wird ergänzt durch Sonderausnahmeregelungen für bestimmte Sektoren, z. B. Beschäftigung (einer Version der Ausnahmeregel für „wesentliche und entscheidende berufliche Anforderungen“ oder Bildung (z. B. eine Bestimmung, die getrennte Klassen für Jungen und Mädchen erlaubt).

In diesem Zusammenhang ist zu beachten, dass im Jahr 2012 eine Gesetzesänderung eingeführt wurde, die Organisationen mit einem religiösen Ethos (z. B. konfessionelle Schulen) vom Verbot befreit. Dieses Gesetz geht über eine angemessene Umsetzung der Richtlinie 2000/78 hinaus, weil sie eine uneingeschränkte und bedingungslose Ungleichbehandlung seitens religiöser Organisationen (z. B. bei der Auswahl von Mitarbeitern) erlaubt, ohne dass damit ein rechtmäßiges Ziel verfolgt werden muss.

Die dritte Ausnahme vom Gleichbehandlungsgebot betrifft positive Maßnahmen. Das ETA verwendet nicht den Begriff der „angemessenen Vorkehrungen“.

Diskriminierung aus allen in Artikel 19 AEUV genannten Gründen ist ausdrücklich verboten, das ungarische Recht deckt jedoch auch andere Diskriminierungsgründe ab. Das ETA enthält eine unvollständige Aufzählung verbotener Diskriminierungsgründe. Zu den 19 Punkten dieser Liste gehören unter anderem Geschlecht, Rasse, nationale oder ethnische Herkunft, Muttersprache, Behinderung, Gesundheitszustand, religiöse oder philosophische Überzeugung, politische oder sonstige Meinung, sexuelle Ausrichtung, sexuelle Identität, Mutterschaft (Schwangerschaft), Alter und finanzieller Status. Die Aufzählung ist jedoch nicht abschließend, sodass auch nicht ausdrücklich genannte Gründe abgedeckt sind (dies löst auch das Problem der Diskriminierung aufgrund von Assoziierung).

Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind eindeutig verboten. Weder Anweisung zur Diskriminierung, noch Diskriminierung aufgrund von Assoziierung sind ausdrücklich definiert, die Rechtsprechung zeigt aber, dass diese Begriffe angewendet werden. So reichte z. B. eine Klägerin bei der Gleichbehandlungsstelle eine Beschwerde ein und gab an, ihr Arbeitgeber habe ihren Arbeitsvertrag während der Probezeit gekündigt, weil sie sich wegen der Krankheit ihres zwei Jahre alten Kindes frei genommen hatte. Der Arbeitgeber berief sich auf das Recht beider Parteien, den Vertrag während der Probezeit ohne Angabe von Gründen zu kündigen. Die Stelle kam aber zu dem Urteil, dass der Arbeitgeber keinen vernünftigen Grund für die Kündigung der Angestellten angeben konnte und dass es sich damit um Diskriminierung aufgrund des „Gesundheitszustands“ handelt. Damit wandte die Stelle das Konzept der Diskriminierung aufgrund von Assoziierung an.²²

Der Begriff der Mehrfachdiskriminierung ist im ungarischen Recht nicht bekannt und es gibt weder Pläne, spezielle Gesetzesvorschriften zu diesem Thema einzuführen, noch eine einschlägige Rechtsprechung.

4. Sachlicher Anwendungsbereich

Das ETA grenzt seinen Anwendungsbereich nicht nach sachlichen Aspekten ab, sondern nach persönlichen. Das Gesetz verbietet Diskriminierung in allen öffentlichen Bereichen, sodass sein Anwendungsbereich hier weiter gefasst ist als in den Gleichbehandlungsrichtlinien.

²² Fall Nr. EBH/23/2011 der Gleichbehandlungsstelle.

In der Privatwirtschaft fallen nur vier Gruppen von Akteuren unter das ETA: (i) Personen, die einen Vertrag (z. B. den Mietvertrag für eine Wohnung) oder einen Auftrag öffentlich anbieten bzw. ausschreiben, (ii) Personen, die Dienstleistungen anbieten oder in öffentlich zugänglichen Räumen Waren verkaufen, (iii) Selbständige, juristische Personen und Organisationen ohne eigene Rechtspersönlichkeit, die staatliche Mittel erhalten in Bezug auf ihre Rechtsbeziehungen, die sich auf die Verwendung der staatlichen Mittel beziehen und (iv) Arbeitgeber in Bezug auf Beschäftigungsverhältnisse (breit gefasst).

Es ist nicht leicht, einen Fall zu finden, in dem eine Privatperson unter den Anwendungsbereich der Richtlinien, jedoch nicht unter den persönlichen Anwendungsbereich der ungarischen Gesetze fällt. Auch hat die Europäische Kommission die Vertragsverletzungsverfahren gegen Ungarn bezüglich der Richtlinien 2000/43/EG und 2000/78/EG eingestellt. Dennoch sind hier Lücken möglich (z. B. in Bezug auf Belästigung von Kollegen).

5. Rechtsdurchsetzung

Im Falle von Diskriminierung kann das Opfer auf unterschiedlichen Wegen seine Rechte durchsetzen, die zum Teil davon abhängen, in welchem Bereich das Opfer diskriminiert wurde. Das Opfer kann sich an folgende Stellen wenden: (i) ein Zivilgericht, (ii) ein Arbeitsgericht (wenn die Diskriminierung im Zusammenhang mit einem Arbeitsverhältnis steht), (iii) die Gleichbehandlungsstelle, (iv) die behördlichen Stellen, die befugt sind, gegen Diskriminierung in ihrem Zuständigkeitsbereich vorzugehen (z. B. das Verbraucherschutzamt), (v) das Regierungsbüro (um ein Ordnungswidrigkeitsverfahren im Bereich Bildung einzuleiten).

Opfer können ein Beschwerdeverfahren bei der Gleichbehandlungsstelle oder einer anderen behördlichen Stelle anstrengen, bevor sie auf der Grundlage des Zivilgesetzbuches oder des Arbeitsgesetzes Klage einreichen.²³ Sobald jedoch ein Verfahren vor einem Zivil- oder Arbeitsgericht begonnen hat, müssen behördliche Stellen, einschließlich der Gleichbehandlungsstelle, ihre Verfahren aussetzen und bei ihrer Entscheidung das Urteil des Gerichts berücksichtigen.

Bei der Zuständigkeit der unterschiedlichen staatlichen Stellen gilt das Grundprinzip, dass das Opfer selbst entscheiden kann, an welche Stelle er/sie sich wenden möchte.

Die von diesen Stellen verhängten Strafen gehen nicht als Schadensersatz an das Opfer (von den Stellen verhängte Geldbußen werden an den Staat gezahlt), d. h. wenn ein Beschwerdeführer zusätzlich eine Entschädigung möchte, muss er/sie zusätzlich vor einem Gericht klagen.

Vor dem Inkrafttreten des ETA waren Vereinigungen mit einem rechtmäßigen Interesse an der Bekämpfung von Diskriminierung nach ungarischem Recht nicht in jedem Fall berechtigt, sich zur Unterstützung oder im Namen des Opfers an Gerichts- oder Verwaltungsverfahren zu beteiligen. Die meisten Menschenrechtsorganisationen umgingen das Problem durch Dauerverträge mit Anwälten, die nach ungarischem Recht berechtigt sind, Parteien vor jedem Gericht und jeder Behörde zu beraten und zu vertreten.

Das ETA hat die Situation entscheidend verbessert, weil es festlegt, dass jede nichtstaatliche Organisation und Interessenvertretung, die ein legitimes Interesse hat, und auch die Gleichbehandlungsstelle, sich im Namen des Opfers an Verfahren beteiligen kann, die aufgrund einer Verletzung des Gleichbehandlungsgrundsatzes angestrengt wurden. Außerdem können nichtstaatliche Organisationen und Interessenvertretungen in Verwaltungsverfahren, die Verstöße gegen das Gleichbehandlungsgebot betreffen, als betroffene Partei auftreten.

²³ Gesetz I von 2012 über das Arbeitsgesetz.

Ein weiteres Instrument für Vereinigungen ist die Einreichung einer Popularklage. Sofern der Gleichbehandlungsgrundsatz verletzt wird oder werden kann, können nichtstaatliche Organisationen und Interessenvertretungen (sowie die Staatsanwaltschaft und die Gleichbehandlungsstelle) eine Klage wegen der Verletzung unveräußerlicher Rechte oder ein arbeitsrechtliches Verfahren einleiten, sofern der Verstoß gegen den Gleichbehandlungsgrundsatz aufgrund einer Eigenschaft begangen wurde, die ein wesentliches Merkmal von Personen ist und die Verletzung einen größeren Personenkreis betrifft, der nicht genau bestimmt werden kann.

Dieses Instrument wurde schon in zahlreichen Fällen eingesetzt. Der erste war die Klage einer Organisation zum Schutz der Rechte von Schwulen und Lesben gegen eine konfessionelle Universität, die homosexuelle Studenten von einem Studium der Theologie ausschließen wollte²⁴. Auch eine Stiftung, die die Segregation des Bildungswesens bekämpft, hat das Instrument genutzt, um Stadträte zu verklagen, weil sie keine Maßnahmen ergreifen, um die Ungleichbehandlung von Roma in ihren Schulen zu verhindern.²⁵ In diesem Zusammenhang muss betont werden, dass die meisten Klagen gegen Segregation zwar in dem Sinne erfolgreich waren, dass eine Segregation bestätigt und den Schulträgern und Schulen verboten wird, künftig gegen das Zivilgesetzbuch zu verstoßen. Allerdings weigern sich die Gerichte häufig, konkrete Integrationsmaßnahmen vorzuschreiben, weshalb die Segregation in den meisten betroffenen Schulen weiterhin fort dauert.

Immer mehr dieser Fälle werden öffentlich bekannt. In diesem Bereich gab es in den letzten Jahren große Fortschritte.

Bevor das ETA in Kraft trat, galt die umgekehrte Beweislast nur bei Diskriminierungsfällen im Arbeitsleben. Das ETA weitete dieses Rechtsprinzip auf alle Diskriminierungsfälle aus, verschärfte aber gleichzeitig die Kriterien für dessen Anwendung.

Das ETA hat das Sanktionssystem nicht wesentlich vereinheitlicht. In jedem Bereich (Bildung, Zugang zu Gütern und Dienstleistungen usw.) gibt es weiterhin spezielle Sanktionen, die von den zuständigen Verwaltungsstellen verhängt werden (z. B. dem Verbraucherschutzamt). Eine gewisse Einheitlichkeit bietet die Gleichbehandlungsstelle, die in Diskriminierungsfällen unabhängig vom Sektor Geldbußen verhängen kann, sowie die Zivilgerichte, die Personen, die andere diskriminieren, generell zur Entschädigung der immateriellen und finanziellen Schäden des Opfers verurteilen können.

Seit längerem verwenden NRO Situationstests als Beweise für konkrete Diskriminierungsfälle. Allerdings sind viele Richter der Ansicht, dass das Ergebnis von Tests, die Tage nach dem Vorfall, auf den sich die Klage gründet, durchgeführt werden, sich nicht als Beweis für die ursprüngliche Diskriminierung eignen. In diesem Zusammenhang ist die gesetzliche Anerkennung von Situationstests durch eine Regierungsverordnung über die Verfahren der Gleichbehandlungsstelle und später im ETA eine extrem wichtige Entwicklung, weil die betreffende Bestimmung die Gleichbehandlungsstelle ausdrücklich dazu berechtigt, im Rahmen ihrer Untersuchungen Tests durchzuführen und deren Ergebnisse bei ihrer Entscheidung als Beweis zu berücksichtigen. In einer Reihe von Fällen dienten Situationstests als Beweise für Diskriminierung, z. B. bei der Beschwerde eines Arbeitssuchenden, der abgelehnt wurde, weil er in einen Telefongespräch erwähnte, dass er Roma ist. Die Stelle gab dem Beschwerdeführer Recht und berief sich dabei auf die Telefonanrufe zweier Testpersonen, von denen eine einen für Roma typischen Namen angab. Während die Roma-Testperson keinerlei Angaben zur Stelle bekam, erhielt die andere Testperson ausführliche

²⁴ Urteil des Obersten Gerichtshofs, veröffentlicht als Grundsatzurteil Nr. BH 2006. 14.

²⁵ Siehe zum Beispiel das Urteil Nr. Pfv.IV.20.936/2008/4 des Obersten Gerichtshofs (19. November 2008) zum Fall Hajdúhadház, wo Nicht-Roma im gut ausgestatteten Zentralgebäude und Roma in minderwertigen Nebengebäuden ohne Sporthalle, Bibliothek, Computer oder Labore unterrichtet wurden.

Informationen über Aufgabenbereich, Bezahlung und andere relevante Angaben zur Stelle.²⁶

Das ETA erlaubt positive Maßnahmen (auf der Grundlage von Gesetzen, Verordnungen und Tarifvereinbarungen) und es wurden auch schon positive Maßnahmen eingeführt (z. B. die Bevorzugung von Roma und von Menschen mit Behinderung bei der Bildung oder Quoten für Mitarbeiter mit Behinderung für Unternehmen).

Den Dialog mit NRO und den Sozialpartnern zum Thema Diskriminierung führt vorwiegend die Gleichbehandlungsstelle. Im Rahmen eines von der Europäischen Kommission und dem ungarischen Staat geförderten vierjährigen Programms fanden zahlreiche Schulungen, Workshops und Konferenzen statt. Ohne die zusätzlichen Mittel für die Gleichbehandlungsstelle aus dem Programm, das 2014 auslief, konnte der Dialog jedoch nicht mit der gleichen Intensität fortgeführt werden.

6. Gleichbehandlungsstellen

Die Fachstelle für die Förderung der Gleichbehandlung unabhängig von Rasse oder ethnischer Zugehörigkeit (Gleichbehandlungsstelle) nahm am 1. Februar 2005 ihre Arbeit auf. Die Stelle ist eine unabhängige staatliche Verwaltungsstelle, die ganz allgemein für die Einhaltung des Gleichbehandlungsgrundsatzes zuständig ist.

Die Stelle befasst sich mit Diskriminierung aufgrund aller der durch das ETA verbotenen Diskriminierungsgründe, sie ist aber nur für die Durchsetzung der Gleichbehandlung zuständig.

Sie verfügt über alle von der Antirassismusrichtlinie geforderten Befugnisse. Die Gleichbehandlungsstelle kann bzw. muss unter anderem:

- aufgrund von Beschwerden oder von Amts wegen Untersuchungen durchführen, um zu prüfen, ob der Gleichbehandlungsgrundsatz verletzt wurde und – wenn nötig – entsprechende Sanktionen aussprechen,
- Klagen einreichen, um die Rechte von Personen oder Gruppen zu schützen, deren Rechte verletzt wurden,
- Gesetzesentwürfe, die die Gleichbehandlung betreffen, prüfen und kommentieren,
- die Regierung zu Maßnahmen und Gesetzen mit Bezug zur Gleichbehandlung beraten,
- die Öffentlichkeit regelmäßig über den Stand bei der Durchsetzung des Gleichbehandlungsgrundsatzes informieren,
- Betroffene beraten und bei der Durchsetzung ihres Rechts auf Gleichbehandlung unterstützen,
- dem Parlament einen Jahresbericht über ihre Tätigkeit und die Erfahrungen mit der Umsetzung des ETA vorlegen.

Der Rechtsrahmen, der die Unabhängigkeit der Stelle garantiert, wurde schrittweise eingeführt (die letzte wichtige Maßnahme betraf den Status des Vorsitzenden; mit ihr wurde gewährleistet, dass er/sie nicht jederzeit ohne Angabe von Gründen durch den Ministerpräsidenten abberufen werden kann). Nach einem starken Einschnitt im Jahr 2010 hat sich die finanzielle Lage der Gleichbehandlungsstelle seit 2013 wieder stabilisiert.

Obwohl sie unterbesetzt und nicht durchgehend ausreichend finanziert ist, hat die Stelle wichtige Arbeit geleistet, seit sie ihre Tätigkeit aufgenommen hat. Besonderen Wert legt sie auf die Zusammenarbeit mit der öffentlichen Hand und auf die Veröffentlichung von Informationen über Antidiskriminierung. Außerdem hat die Stelle wichtige Urteile gefällt, die als Richtlinien für die künftige Umsetzung des ETA dienen können.

²⁶ Fall Nr. EBH/180/2006 der Gleichbehandlungsstelle.

7. Wichtige Punkte

Nach Ansicht des Autors setzt das ungarische Rechtssystem die europäischen Richtlinien in einigen Bereich nicht zu hundert Prozent um. Im Folgenden werden die wichtigsten Probleme aufgeführt:

- Trotz des breiten sachlichen Anwendungsbereichs des ETA gilt das Gleichbehandlungsgebot des Gesetzes nicht für alle privatwirtschaftlichen Akteure. Deshalb verstößt das ungarische Recht in den Bereichen, die unter den sachlichen Anwendungsbereich der Richtlinien fallen, möglicherweise gegen den Besitzstand der EU, weil es nicht alle Personen im privaten Sektor zur Nichtdiskriminierung verpflichtet (z. B. können Kollegen auf der Basis des ETA nicht wegen Belästigung zur Rechenschaft gezogen werden).
- Das ETA erlaubt in bestimmten Fällen eine unmittelbare Diskriminierung aus objektiven Gründen.
- Je nach rechtlicher Auslegung könnten einige Bestimmungen des neuen Gesetzes über Kirchen und Religion²⁷ und des Gesetzes über das staatliche Bildungswesen zu einem Widerspruch zwischen ungarischem Recht und EU-Recht führen, weil sie Organisationen mit einem religiösen Ethos das absolute, uneingeschränkte und bedingungslose Recht zusprechen, Bewerber bei der Einstellung ungleich zu behandeln.
- Der Ausschluss von Arbeitnehmern im Rentenalter von Abfindungszahlungen verstößt möglicherweise gegen die einschlägige Rechtsprechung des EuGH.
- Die Pflicht zu angemessenen Vorkehrungen wurde noch nicht widerspruchsfrei in ungarisches Recht umgesetzt. Dieses Problem ist besonders akut bei der Beschäftigung von Menschen mit Behinderungen. Trotz einer kürzlichen Änderung des RPD-Gesetzes verpflichtet das Gesetz – bei einer streng grammatikalischen Auslegung – Arbeitgeber nur beim Einstellungsverfahren (d. h. vor allem beim Bewerbungsgespräch) zu angemessenen Vorkehrung, schreibt jedoch nicht vor, dass der Arbeitsplatz selbst an die besonderen Bedürfnisse von Menschen mit Behinderungen angepasst werden muss, um ihre Einstellung zu ermöglichen.

Ebenfalls Sorgen bereiten die folgenden Punkte:

- Die Auslegung des ETA durch die Kuria in dem oben beschriebenen Segregationsfall birgt die Gefahr, dass religiöse Bildung als Entschuldigung für die Segregation von Roma missbraucht wird, d. h. dass die Eröffnung von konfessionellen Schulen in Roma-Vierteln und damit de facto von gesonderten Schulen für Roma durch die Gerichte erlaubt wird.
- Wie oben erwähnt, schreiben die Gerichte in Urteilen, in denen ein Fall von Segregation festgestellt wird, kaum jemals konkrete Integrationsmaßnahmen vor, was zivilrechtliche Urteile zu einem unwirksamen Rechtsmittel gegen Segregation im Bildungsbereich macht.
- Bei weitem nicht alle öffentlichen Gebäude und Dienstleistungen sind barrierefrei zugänglich, obwohl bereits seit über einem Jahrzehnt die Verpflichtung besteht, den Zugang zu öffentlichen Räumen zu gewährleisten.
- Die Fälle, in denen die Gleichbehandlungsstelle eine Diskriminierung feststellt und die Parteien zu einer gütlichen Einigung bringt, sind relativ wenige, gemessen an der Gesamtzahl der Beschwerden, die bei der Stelle eingehen (2015 waren es 50 Fälle bei rund 900 Beschwerden). Die wahrscheinlichste Erklärung für dieses Phänomen ist die Tatsache, dass die Bevölkerung wenig über das Thema Diskriminierung und den Aufgabenbereich der Stelle weiß und außerdem viele Opfer aus marginalisierten Gruppen kommen, die ihre Rechte nur schlecht durchsetzen können. Zwar hat die Stelle durch ein Netzwerk regionaler Schiedsrichter ihre Reichweite inzwischen

²⁷ Gesetz CCVI von 2011 über die Gewissens- und Religionsfreiheit und die Rechtsstellung von Kirchen, Konfessionen und religiösen Gemeinschaften.

erweitert, aber es sind weitere Anstrengungen nötig, um die Zahl der behandelten Fälle wesentlich zu erhöhen.

- Die Gleichbehandlungsstelle führt sehr wenige Verfahren von Amts wegen durch – vor allem aufgrund fehlender Mitarbeiter. Dies ist ein Problem, weil die Opfer, wie oben erwähnt, ihre Rechte oft nicht kennen oder durchsetzen können. Auch fehlen nach Ende des vierjährigen Finanzierungsprogramms nun die Mittel, um Befragungen sowie Schulungen und Workshops für Angestellte der öffentlichen Hand, NRO und Sozialpartner durchzuführen. Daher muss bezweifelt werden, ob die Stelle diese äußerst wichtigen Kernaufgaben in Zukunft erfüllen kann.

INTRODUCTION

The national legal system

The Hungarian legal system is a continental legal system following primarily German legal traditions. It is governed by a strict statutory hierarchy, in which lower level statutes shall not be in contradiction with higher ranking statutes.

The most important principles are laid down by the Fundamental Law and the constitutional rules are expounded by laws, while detailed regulation is provided by government and ministerial decrees. The coherence of the system is guarded by the Constitutional Court (CC), which may annul any statute that is in contradiction with the Fundamental Law (with the exception of legislation relating to certain issues, such as the state budget).

The system is structured into legal fields (criminal law, civil law, labour law, administrative law and so on) with most fields having their own procedural codes.

The judicial system has two levels (first instance and appeal level), however extraordinary remedies (such as review by the Curia, Hungary's Supreme Court) are also available. (In criminal proceedings, in certain cases an ordinary third instance appeal is also available). The judicial review of administrative decisions is possible.

While international human rights treaties are integrated into the domestic legal system through their promulgation in the form of Acts of Parliament, courts as a rule refuse to apply them directly. They are at times applied as points of reference if concurring interpretation of domestic law is possible.

List of main legislation transposing and implementing the directives

- The Fundamental Law of Hungary (Article XV) – date of adoption: 25 April 2011, entry into force: 1 January 2012, latest amendments: 1 October 2013, grounds covered: all (not specified), material scope: non-discrimination in the provision of fundamental rights;²⁸
- Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (ETA) – date of adoption: 28 December 2003, entry into force: 27 January 2004, latest amendments: 1 January 2016, grounds covered: all (open ended list), material scope: all (not specified);²⁹
- Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (RPD Act) – date of adoption: 1 April 1998, entry into force: 1 January 1999, latest amendments: 1 January 2016, grounds covered: disability, material scope: health care, education, employment, culture and sports, housing, transportation, access to public services, accessible environment, accessible communication;³⁰
- Act I of 2012 on the Labour Code (Labour Code) – date of adoption: 6 January 2012, entry into force: 1 July 2012, latest amendments: 1 January 2016, grounds covered: all, material scope: employment;³¹

²⁸ Hungary, the Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV.

²⁹ Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

³⁰ Hungary, Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról), 1 April 1998, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV.

³¹ Hungary, Act I of 2012 on the Labour Code (2012. évi I. törvény a munka törvénykönyvéről), 6 January 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV.

- Act V of 2013 on the Civil Code (Civil Code) – date of adoption: 26 February 2013, entry into force: 15 March 2014, latest amendments: 1 January 2016, grounds covered: all (not specified), material scope: all (not specified).³²

³² Hungary, Act V of 2013 on the Civil Code (*2013. évi V. törvény a Polgári Törvénykönyvről*), 26 February 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300177.TV.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Hungarian constitution includes the following articles dealing with non-discrimination:

Article XV is a general clause, containing an open ended list of protected grounds. Not all the grounds listed in the directives are explicitly included (age and sexual orientation are missing from the list), but – also taking into account CC jurisprudence – it can be concluded that – at least – implicitly all the directive grounds are included.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives – in the sense that it is not specified. The provision states that Hungary shall ensure fundamental rights to every person without any discrimination. This shall be so in all the areas concerned by the directives, and beyond, however the provision only stipulates the requirement of non-discrimination in relation to the guaranteeing of rights that are regarded as fundamental.

The constitutional anti-discrimination provisions are not directly applicable, although recently there have been some judicial decisions related to other rights (e.g. the freedom of assembly versus the right to dignity), in which the courts have applied constitutional provisions directly.

It is debated whether the constitutional equality clauses can be enforced against private actors (as opposed to the State).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law (ETA, Article 8): a) sex, b) racial affiliation, c) colour of skin, d) nationality, e) belonging to a national or ethnic minority, f) mother tongue, g) disability, h) health condition, i) religion or belief, j) political or other opinion, k) family status, l) maternity (pregnancy) or paternity, m) sexual orientation, n) sexual identity, o) age, p) social origin, q) financial status, r) part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, s) belonging to an interest representation, t) any other situation, attribution or condition of a person or group.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Racial or ethnic origin

This term is not defined in national law on discrimination, and even the terminology used in the ETA and in other relevant legal norms is very diverse.

"Race" (*faj*) and "colour" (*szín*) are mentioned by the Fundamental Law, whereas the ETA uses "colour of skin" (*bőrszín*), "racial affiliation" (*faji hovatartozás*), "belonging to a national minority" (*nemzeti kisebbséghez való tartozás*) and "nationality" (*nemzetiség*) (not in the sense of citizenship).

There is a statutory definition of only one of these terms: national minority (*nemzeti kisebbség*), which is set forth in Article 1 of Act CLXXIX of 2011 on the Rights of Nationalities³³ (Act on Nationalities): "Under this law, a nationality is any ethnic group with a history of at least one century of living in the territory of Hungary, which represents a numerical minority among the citizens of the state, and is distinguished from the rest of the population by their own language, culture and traditions, and at the same time demonstrates a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history."³⁴ The other relevant terms have no legal definitions.

This uncertainty in terms is reflected in the case law as well, for instance in 2012, the Equal Treatment Authority in two identical cases (launched because Roma guest were not allowed to enter the respective bars) established the occurrence of discrimination on two different bases: in one on the basis of the colour of skin,³⁵ in the other on the basis of belonging to the Roma national minority.³⁶ (From 2013 on, the Authority has been consistently using the term "belonging to a national minority" in Roma discrimination cases.)

The main reason for this situation lies in the fact that due to the open ended nature of the list of protected grounds, no pressing need of providing definitions or interpreting the differences in these terms arises: for instance, the fact that national minorities have a statutory definition does not mean that persons affiliated with these 13 minorities, are in a more advantageous position from the point of view of the ETA's application than others: if a person not belonging to any of the legally acknowledged nationalities is discriminated against based on his/her racial or ethnic origin, the protection will be based on Article 8

³³ Hungary, Act CLXXIX of 2011 on the Rights of Nationalities (2011. évi CLXXIX. törvény a nemzetiségek jogairól), 19 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100189.TV.

³⁴ Under Annex 1, the Act on Nationalities itself recognises 13 nationalities. These are the following: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, Ukrainian.

³⁵ Equal Treatment Authority, EBH/50/2012, 5 January 2012, <http://egyenlobanasmod.hu/article/view/ebh-50-2012>.

³⁶ Equal Treatment Authority EBH/117/2012, 22 May 2012, <http://egyenlobanasmod.hu/article/view/ebh-117-2012>.

Point b) (racial affiliation) or c) (colour of skin), or maybe even t) (other characteristic) of the ETA.

Religion or belief

This term is not defined in national law on discrimination, but religious activities are defined by Article 6 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities³⁷ (Act on Churches). In terms of this definition, religious activities are activities linked to a worldview which is directed towards the transcendental, has a system of faith-based principles, the teachings of which are directed towards existence as a whole, and which embraces the entire human personality through specific requirements of conduct.

It needs to be added that this definition is provided in the context of church recognition, but not in that of the exercise of the freedom of religion. This however does not mean that the definition of religion or belief is expected to be different or broader in the anti-discrimination legal framework. In this context it must be emphasised again that as a result of the open ended list of the protected grounds in the ETA, anything that may not be regarded as coming under the term religion, can still be dealt with as "other characteristic", so definitions are not as important an issue in Hungary as in legal systems with a closed list of protected grounds. Therefore, the issue of what is to be regarded as religion under the ETA has not come up in the jurisprudence.

Disability

This term is not defined in national law on discrimination, but some equivalent terms are used and interpreted elsewhere in national law. For instance, one definition of disability is to be found in Article 4 of the RPD Act: persons with disabilities are those who have irreversible or long-term sensory, communication-related, physical, intellectual, psychosocial impairments or the accumulation thereof, which in interaction with significant environmental, societal or other barriers restrict or hinder their full and effective participation in society on an equal basis with others. (Laws on certain social benefits contain differing definitions of what constitutes disability for their purposes.) However, due to the fact that the list of protected grounds is open ended in the ETA (covering 'any other situation, attribution or condition') no problems of definition arise in the Hungarian jurisprudence, as any feature not expressly falling under the grounds protected by the directives or the ETA can qualify as falling under the prohibition of discrimination based on the 'any other characteristic' clause.

Age

This term is not defined in national law on discrimination or in any other legal norm.

Sexual orientation

This term is not defined in national law on discrimination or in any other legal norm.

2.1.2 Multiple discrimination

In Hungary, prohibition of multiple discrimination is not included in the law, and there is no information on any plans to adopt legislation on the issue.

In Hungary there is no case law dealing with multiple discrimination.

³⁷ Hungary, Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (2011. évi CCVI. törvény a lelkiismereti és vallásszabadság jogáról, valamint az egyházak, vallásfelekezetek és vallási közösségek jogállásáról), 31 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100206.TV.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Hungary, the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is.

Article 8 of the ETA expressly prohibits discrimination based on 'real or assumed' characteristics: It stipulates that 'direct discrimination shall be constituted by any action [including any conduct, omission, requirement, order or practice] as a result of which a person or group based on its *real or assumed* [emphasis added] sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, belonging to an interest representation, other situation, attribution or condition (hereinafter together: characteristics) is treated less favourably than another person or group is, has been or would be treated in a comparable situation.'

This prohibition is reinforced by Article 19 Paragraph (1) Point (b) of the ETA, which provides for the reversal of the burden of proof on the basis of both the victim's real protected characteristic or that 'assumed by the perpetrator'.

b) Discrimination by association

In Hungary, the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

Discrimination based on association with persons with particular characteristics is not prohibited expressly. Nonetheless, Article 8 point t) (other situation, attribution or condition) provides protection for those discriminated on the basis of association with members of a particular group.

An example is provided by case no. 72/2008 of the Equal Treatment Authority.³⁸ The applicants stated that they had been regularly charged a higher price than other customers in a bar because of their Roma origin, and – one of the applicants – because she shared an apartment with her Roma friend. In the latter case, the applicant stated that she was overcharged only after it had become known where she resided. The Authority established direct discrimination on the grounds of ethnic origin with regard to the Roma complainants and on the ground 'other characteristic' (association with a Roma person) in relation to the non-Roma applicant.

Guideline No. 288/2/2010. (IV.9.) TT. of the Equal Treatment Advisory Board recommends that in such cases the ground for discrimination should not be 'other characteristic', but the ground with which the victim is associated, and the Authority should expressly refer to the concept of discrimination by association.

The Authority takes this recommendation into account: for instance, in case no. EBH/23/2011,³⁹ the complainant claimed that her employer had terminated her contract during the probation period, because she had to take a leave of absence because of her 2-year old child's illness. The employer tried to exempt himself by referring to the labour laws according to which both parties can terminate the labour contract without any justification during the probation period. The Authority concluded that this defence had

³⁸ Equal Treatment Authority, EBH/72/2008, 25 April 2008, http://www.eqyenlobanasmod.hu/article/view/72_2008.

³⁹ Equal Treatment Authority, EBH/23/2011, date and link are not available.

amounted to a failure to meet the requirements set by the shifted burden of proof (as the employer could not give a reasonable ground for his decision on the complainant's dismissal), and established the violation of the equal treatment requirement. The Authority claimed that the basis for the discrimination was 'health status', thus it employed the notion of discrimination by association.⁴⁰

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

a) Prohibition and definition of direct discrimination

In Hungary, direct discrimination is prohibited in national law. It is defined.

As it was mentioned above, the definition of direct discrimination is set forth under Article 8 of the ETA: direct discrimination shall be constituted by any action [including any conduct, omission, requirement, order or practice] as a result of which a person or group based on its real or assumed sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, belonging to an interest representation, other situation, attribution or condition (hereinafter together: characteristics) is treated less favourably than another person or group is, has been or would be treated in a comparable situation.

b) Justification of direct discrimination

Article 7 Paragraphs (2) and (3) of the ETA contain the general exempting clause of the Hungarian system. Whether a general objective justification (for both direct and indirect discrimination) exists or not, depends on the ground concerned, whereas the conditions for such an exemption depend on the type of right concerned by the differentiating behaviour. The provision runs as follows.

(2) Unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if

a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or

b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation

(3) Paragraph (2) shall not be applied concerning differentiation based on points b)-e) of Article 8 [racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national or ethnic minority].

The explanation for the differentiation set forth by Paragraph (3) is that when the Hungarian legislators realised that Directive 2000/43 does not allow for a general objective justification in the case of direct discrimination based on racial or ethnic origin, they removed the relevant grounds from the scope of Article 7 Paragraph (2) of the ETA.

It needs to be pointed out however that the same has not been done with regard to the grounds listed in Directive 2000/78. By not doing so, the legislator maintained the situation whereby a general and objective justification exists in relation to direct discrimination based on age, disability, religion and sexual orientation.

⁴⁰ Equal Treatment Authority, EBH/23/2011, February 2011, <http://www.egyenlobanasmod.hu/jogesetek/hu/23-2011.pdf>.

Although the specific exempting clauses related to employment coincide to a great extent with the GOR and religious ethos provisions of Directive 2000/78, and therefore, it may be argued that in practice the general objective justification clause may not be applied in relation to employment (so the requirement set by the Directive is in fact met), it would have seemed to be a safer solution to fully take these grounds out of the scope of Article 7 Paragraph (2) of the ETA.

The differentiation between Points a) and b) of Paragraph (2) reflects the practice of the Hungarian Constitutional Court. After extending the Constitutional ban on discrimination to the whole legal system (and not only fundamental rights) in its decision No. 61/1992 (XI. 20.),⁴¹ it became necessary for the Court to set up different tests for discrimination concerning fundamental human rights on the one hand and other rights on the other. In the first case the Court applies the test of necessity and proportionality, while in the latter a test defined in Constitutional Court Decision No. 35/1994⁴² is applied: 'the unconstitutionality of a measure unfavourably discriminating between persons and not concerning fundamental rights may be established if the infringement is related to one of the fundamental rights – and thus ultimately to the general right to human dignity – and the discrimination or restriction does not have an objectively reasonable ground, i.e. it is arbitrary.'

This is why Hungarian legislators made a distinction on the basis of whether a certain differentiation concerns a fundamental right (such as the right to education) or a right that may not be regarded as such (e.g. access to services). In the former case the test is stricter (there has to be a legitimate aim, notably the enforcement of another fundamental right, and the test of necessity, suitability and proportionality is applied), while in the latter, the criterion is objective reasonability.

The difficulty of the application of this provision is illustrated by a case in which a visually impaired man sued the national bus company, claiming that the company's bus terminal was not accessible, which amounted to direct discrimination (his inability to access the travel service on equal footing with other passengers), and hence the violation of his human dignity. He lost the suit on both instances and his request for review by the Curia (Hungary's Supreme Court) was also rejected.

In its review decision no. Pfv.IV.20.104/2013/4 dated 19 June 2013, the Curia⁴³ concluded that while the failure to guarantee accessibility may indeed amount to discrimination, in the given case it can be justified on the basis of Article 7 Paragraph (2) of the ETA. Although there is a collusion between fundamental rights (the claimant's right to an accessible environment, and – more generally – to human dignity on the one hand and on the right to free movement of those wishing to use the services of the company on the other) stemming from the inevitable impediments caused by the reconstruction of the bus terminal, the issue shall not be assessed on the basis of Point a), but instead on the basis of Point b).

The Curia concluded that it was a publicly known fact that reconstructing the extremely busy bus terminal in order to make all its buildings and external areas accessible for persons with disabilities would require a substantial financial investment and longer time. Therefore – and also taking into account the fact that the deadlines set by the law for providing full accessibility had not expired – the respondent's failure to have solved all the accessibility problems raised by the claimant had a reasonable economic ground directly related to the given legal relationship. Therefore, the claim had to be rejected.

⁴¹ Constitutional Court, 61/1992 (XI. 20.) AB határozat, 20 November 1992, <http://public.mkab.hu/dev/dontesek.nsf/0/7F28814984A06851C1257ADA00526FCE?OpenDocument>.

⁴² Constitutional Court, 35/1994. (VI. 24.) AB határozat, 24 June 1994, <http://public.mkab.hu/dev/dontesek.nsf/0/5668A96A2701F0DBC1257ADA005276E5?OpenDocument>.

⁴³ Curia, Pfv.IV.20.104/2013/4, 19 June 2013, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

The Curia's stance seems to be based on a misinterpretation of Article 7 Paragraph (2). The two tests are not interchangeable: if the court comes to the conclusion that the failure to provide an accessible environment amounts to a restriction of the claimant's fundamental right, then it shall apply the test set forth by Point a), and can only apply the test of reasonability if no such restriction is involved in the case.

It also needs to be added that by acknowledging that financial considerations can be regarded as objective justification for differentiation based on protected grounds, the Curia diverted from the previous jurisprudence, which did not accept prospective economic loss (stemming from employing a Roma security guard, potentially deterring clients) or other financial difficulties (e.g. of altering the entrance of a court to make it accessible for wheelchair users)⁴⁴ as an objectively reasonable ground for differentiation.

The ETA contains some specific exemption clauses as well. Given that EU law provides an exemption solely in relation to employment, more in depth analysis is provided for this field in Section 4.1. The specific exemption clauses are the following.

With regard to employment – Article 22

- (1) The principle of equal treatment is not violated if
 - a) the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment; or
 - b) the differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.
- (2) When applying Article 21 Point f) [provision on equal pay], all instances of direct differentiation based on Article 8 Points a) – e) [sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national or ethnic minority] shall be deemed to violate the requirement of equal treatment.

With regard to education – Article 28

- (1) If the education is only organised for students of one sex, it does not violate the principle of equal treatment, provided that participation in such education is voluntary, and will not result in any disadvantages for the participants.
- (2) The principle of equal treatment is not violated if,
 - a) in elementary and secondary education, at the initiation and by the voluntary choice of the parents, or
 - b) in higher education by the students' voluntary participation, education based on religious or other ideological conviction, or education for national minorities is organised in a way that the goal or the curriculum of the education justifies the creation of separated classes or groups; provided that this does not result in any disadvantage for those participating in such education, and that the education complies with the requirements approved, laid down and subsidised by the State.

With regard to access to goods and services – Article 30

- (1) Entry into premises established for a group defined by characteristics listed in Article 8 for the purposes of preserving traditions or maintaining cultural and self-identity and open to the immediate public may be limited or subject to membership or specific conditions.

⁴⁴ See case 13/2006 of the Equal Treatment Authority at <http://www.egyenlobanasmod.hu/jogesetek/hu/zanza0307.pdf>.

(2) The limitation in accordance with paragraph (2) must be obvious from the name of the establishment and the circumstances of the use of the service; and this shall not be done in a manner that may be humiliating and defamatory to individuals who do not belong to the particular group, and furthermore it must not provide an opportunity for an abuse of this right.

Article 30/A

(1) In relation to insurance services and services based on the insurance principle – with the exception of group life-, casualty- and health insurances and unless the pertaining laws stipulate otherwise – differentiation based on gender infringes the principle of equal treatment if the service provider's measure results in gender based direct or indirect differentiation in relation to the fees to be paid by or the services provided to the concerned individuals.

(2) In relation to services referred to in Paragraph (1), costs related to pregnancy and maternity shall not lead to differences in relation to the fees to be paid by or the services provided to the concerned individuals.

The relation between the general justification and these special justification rules is based on the *lex specialis derogat legi generali* principle. I.e., the specific justification rules are to be regarded as specific legal provisions, which – in the respective fields – prevail over the general (and more lenient) exemption set forth by Article 7 Paragraph (2).

The Ministerial Comments attached to Act CIV of 2006 on the Amendment of the ETA⁴⁵ expressly state this: 'The law (...) states that a behaviour shall not be regarded as discriminatory if it meets the necessity-proportionality test in relation to fundamental rights and the rationality test in all other areas. (...) As [the ETA] sets forth special exempting rules in relation to employment, public education, and access to goods and services, Paragraph (2) of Article 7 may only be applied if the ETA does not prescribe (stricter or less strict) exempting rules.'

2.2.1 Situation testing

a) Legal framework

In Hungary, situation testing is clearly permitted in national law.

Article 15/A Paragraph (3) of the ETA claims that 'in relation to the behaviour, measure, condition, omission, instruction or practice (hereinafter jointly: action) of the alleged discriminator the Authority puts into an identical situation persons who are different from the point of view of a characteristic, feature or status (hereinafter jointly: characteristic) defined in Article 8 of the ETA but are similar from the point of view of other characteristics, and it examines the action of the alleged discriminator in respect of these persons from the point of view of the respect for equal treatment.'

Act III of 1952 on the Code of Civil Procedure⁴⁶ (CCP) regulating the procedural rules regulating civil lawsuits is silent about the issue of situation testing, but based on its Article 3 Paragraph (5) (which claims that 'the court may freely rely on any type of evidence that is useful for establishing the facts of the case') courts are not prevented from accepting this form of evidence, and – as outlined below – they indeed use evidence originating from situation testing.

⁴⁵ Hungary, Act CIV of 2006 on the Amendment of the ETA (2006. évi CIV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény módosításáról), 5 December 2006, <http://mkogy.jogtar.hu/?page=show&docid=a0600104.TV->.

⁴⁶ Hungary, Act III of 1952 on the Code of Civil Procedure (1952. évi III. törvény a polgári perrendtartásról), 6 June 1956, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV.

b) Practice

In Hungary, situation testing is used in practice.

Situation testing is primarily used by NGOs in Hungary, especially the Legal Defence Bureau for National and Ethnic Minorities (NEKI), which has also published a very detailed methodological guide on situation testing.⁴⁷ In some cases even the Equal Treatment Authority relied on the expertise and testers of NEKI.

There is no case law in which the theoretical questions of testing were addressed, however, in a case in which the method was used by NEKI the Supreme Court accepted the testimonies given by testers thus tacitly acknowledging the legitimacy of the method.

The case of the K.L. discotheque: After complaints from the Roma minority self-government, NEKI decided to conduct situation testing at the K.L. discotheque in D. In April 2000 D. M. and D. B. non-Roma and B. B. Roma volunteers travelled to the village.

The two non-Roma testers purchased two tickets at the entrance without any trouble and went inside. They ordered beverages and sat down at a table. Twenty minutes later an employee went up to them to ask whether they had membership cards. He then issued the cards to them and registered their names and addresses in a book. The employee also told the non-Roma volunteers, that 'the cards are necessary because it is the only way to prevent Gypsies from entering. Previously we had problems with the consumer inspection and the parliamentary commissioner'.

Thirty minutes later B. B., a Roma volunteer and P. M., a local Roma youth also wanted to buy two tickets at the door but were refused, as they did not have membership cards. They then asked how they could obtain the cards and were told to present a CV and recommendations from two members. B. B. then asked for the book of customers. He was told that it was not a discotheque but a club, therefore they did not have such a book. Fifteen minutes later three local Roma youths tried to get in, unsuccessfully.

In May 2000, represented by a lawyer paid by NEKI, two of the Roma youths who were not allowed to enter the disco filed a lawsuit against the company operating the place.

Both the court of first and second instance established the violation of the claimants' inherent right to dignity and non-discrimination, and the company was obliged to pay damages in the amount of EUR 330 (HUF 100,000) per claimant. The defendant submitted a request for extraordinary remedy to the Supreme Court. In its decision (published under the number EBH 2002.625),⁴⁸ the Supreme Court approved of the second instance decision and declared that the court of second instance established the facts of the case properly on the basis of the available evidence (including the testimonies of the testers).⁴⁹

Case 180/2006 of the Equal Treatment Authority:⁵⁰ In response to a newspaper advertisement, the complainant called a company which was recruiting painters. He met the requirements set by the employer, but when he informed the employer that he was of Roma origin, he was rejected.

The complainant sought help from NEKI, which conducted situation testing in order to substantiate the suspicion of discrimination.

⁴⁷ <http://dev.neki.hu/wp-content/uploads/2013/05/tesztelési-tanulmány.pdf>.

⁴⁸ Supreme Court, Pfv. IV. 21.269/2001, date and link not available.

⁴⁹ http://dev.neki.hu/wp-content/uploads/2013/05/390_ff2000.pdf.

⁵⁰ Equal Treatment Authority, EBH/180/2006, date not available, <http://egyenlobanasmod.hu/article/view/ebh-180-2006>.

Two testers called the employer, both of them claiming that they had the required skills and experience. Both of them assured the employer that they did not drink alcohol. The only difference was that one of the testers introduced himself as Kolompár (a typical Roma name in Hungary), while the other person used a Hungarian name. While the Roma tester was not provided with any detail of the job, the non-Roma tester was informed at length about the task, payment and other relevant circumstances. Based on the result of the testing, NEKI filed a complaint with the Equal Treatment Authority on behalf of the complainant.

Taking into consideration the result of the testing and other pieces of evidence (such as the itemised calling lists of an institution maintained by the local council, from where the complainant made the telephone calls) the Equal Treatment Authority found that the employer directly discriminated in breach of Article 8 ETA and imposed a fine of EUR 2 330 (HUF 700 000) on him.⁵¹

This was the first case in which the result of testing was taken into consideration as evidence substantiating an individual complaint that took place beforehand. In the judicial practice so far, the testimonies of testers have been accepted only if the testers actually witnessed the complainant's rights being violated.

Case EBH/17/2016 of the Equal Treatment Authority:⁵² Testing was also applied by the Hungarian Helsinki Committee and the City of Budapest in an actio popularis case filed against the Budapest Police Headquarters with the Equal Treatment Authority for disproportionately targeting homeless people in ID check practices. The testing showed that a homeless-looking person sitting in a public space has a significantly higher chance of being ID checked than a person in the same area with identical features with the exception of his/her perceived homelessness. The case was concluded with a friendly settlement between the complainants and the police.⁵³

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

a) Prohibition and definition of indirect discrimination

In Hungary, indirect discrimination is prohibited in national law. It is defined.

In terms of Article 9 of the ETA, 'A provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment is deemed as indirect discrimination if it puts individual persons or groups with characteristics specified in Article 8 in situation that is significantly disproportionately disadvantageous compared to the situation in which a person or group in a comparable position is, has been or would be.'

b) Justification test for indirect discrimination

The ETA makes no distinction between the justification of direct and indirect discrimination. Therefore, the same general and specific exempting clauses pertain to both types.

As was pointed out above, in terms of Article 7 Paragraph (2) of the ETA, 'unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable

⁵¹ http://dev.neki.hu/wp-content/uploads/2013/05/390_ff2000.pdf.

⁵² Equal Treatment Authority, EBH/17/2016, 20 January 2016, <http://egyenlobanasmod.hu/article/view/ebh-17-2016>.

⁵³ <http://egyenlobanasmod.hu/article/view/ebh-17-2016>, http://helsinkifigyelo.blog.hu/2015/07/13/hajlektalant_igazoltatni_rutin_rasszista_hoborgot_meg_szakmai_hiba.

for achieving the aim and proportionate with the aim, or b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation.'

As it was explained above, this means that if a constitutional right of the complainant is restricted through a distinction based on a protected ground, it can only be justified if it is done for the sake of the enforcement of another fundamental right, whereas if the distinction concerns a right that is not deemed to be fundamental, the justification of objective reasonability may be applied. Objective justification may not be applied if the basis for the distinction is racial or ethnic origin.

With regard to the point a) type of exemption, we can say that it is compatible with the directives, as the legitimate aim requirement (the enforcement of another fundamental right) as well as the criteria of 'appropriateness' and 'necessity' are in place.

With regard to the point b) types of exemption, it can be said that the 'objective reasonability' of the ground for differential treatment is obviously less strict a test than the one used by the directives. This terminology may be interpreted as corresponding to the requirement of a 'legitimate aim' (an aim that is found by objective consideration to have a reasonable ground can definitely be regarded as legitimate), however, the criteria of 'appropriateness' and 'necessity' are missing from the Hungarian legislation.

c) Comparison in relation to age discrimination

No special guidance with regard to comparison concerning age discrimination can be found in the Hungarian legislation.

2.3.1 Statistical evidence

a) Legal framework

In Hungary, there are national rules permitting data collection, but only in a restricted manner.

In terms of Article 3 of Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information⁵⁴ (Data Protection Act), 'personal data' shall mean any data relating to a specific person as well as any conclusion with respect to the data subject which can be inferred from such data. Under Article 4, in the course of data processing, such data shall be considered to remain personal as long as their relation to the data subject can be restored.

'Special data' constitute a special subcategory of personal data. Such data shall mean any personal data relating to (i) racial, or national or ethnic minority origin, political opinion or party affiliation, religious or ideological belief, or membership in any interest representing organisation, sexual life; (ii) state of health, pathological addictions, or criminal personal data.

Hence, data related to the ethnic or racial origin, disability, religion or belief or sexual orientation all belong to this special category. This bears significance, since in terms of Article 5 of the Data Protection Act, unless a written consent is provided by the data subject or an act (the highest ranking legal statute in the Hungarian hierarchy of legal norms) prescribes that records be kept of such data, data collection regarded protected grounds is not possible.

⁵⁴ Hungary, Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information (2011. évi CXII. törvény az információk önrendelkezési jogról és az információszabadságról), 26 July 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100112.TV.

The practical result of these strict data protection rules is that public authorities have fully stopped collecting data concerning the sensitive grounds. This is obviously very detrimental from the point of view of monitoring discrimination in different fields of life. For instance, the last official data concerning the numbers of Roma children in education are from 1993. Since that time, sociological researches have been the only source of information with regard to this crucial issue.⁵⁵

The Data Protection Act does not exclude the processing of personal data for scientific and statistical purposes. Under Article 12, personal data recorded or stored for the purposes of scientific research shall not be used for any other purpose. As soon as the research purpose allows it, personal data shall be made anonymous. Even before that, data that make it possible to identify the individual data subject shall be stored separately.

This however does not solve the problem, since due to the lack of systematic (or practically any) data collection by official authorities, there are no databases on which researchers and statistical experts may rely, so they need to take serious efforts to collect the data directly from data subjects.

This of course makes such researches very expensive and time consuming, so national surveys are very rare, which constitutes a severe obstacle in the way of assessing country-wide trends and problems, and designing positive measures.

This forces legislators to go around the problems created by the lack of data in different ways. An example is provided by the programme aimed at eliminating segregated residential areas. While it is common knowledge that these areas are primarily populated by Roma people, in the call for tender for 2013, it is not stated that the programme is a positive measure designed to promote the integration of the Roma, it is presented as targeting 'multiply disadvantaged persons of low or outdated levels of education struggling with social and financial difficulties' living in segregated areas (i.e. 'geographically adjacent and confinable areas in which at least 50% of the population of active age (years 15-64) does not have a regular income from employment and does not have more than eight years of elementary education').⁵⁶

This approach (where such measures are based on indigence instead of racial and ethnic origin) may be explained by the intention to generate as little social tension as possible, while achieving the same goal (on the basis that the Roma are highly over-represented among the poorest people in Hungary), but it is also a result of the lack of reliable statistics on sensitive data (whereas data on unemployment, and entitlement to social benefits are in place).

There are certain instances though, where sensitive data are officially collected. The most obvious being the regular censuses. The last census took place in 2011. In terms of Act CXXXIX of 2009 on the 2011 Census,⁵⁷ answering to questions concerning health status (including disability), religion, mother tongue and ethnicity was voluntary (answering was mandatory in relation to all other questions).

According to the results of the census, out of the ca. 9,938,000 citizens:

- ca. 8,314,000 declared themselves Hungarians, ca. 309,000 persons claimed affiliation with the Roma minority, and ca. 1,456,000 refused to answer;
- ca. 3,872,000 declared themselves Catholics, ca. 1,806,000 declared that they did not belong to any denominations, and ca. 2,700,000 refused to answer (this latter

⁵⁵ E.g. the research by the Institute for Educational Research involving 192 elementary schools. For details see: Havas, G. (2000), 'Kitörési pont: az iskola' (Breaking point: the school) *Beszélő*, vol. 11, no. 5.

⁵⁶ The document can be downloaded from: <https://www.palyazat.gov.hu/doc/3367>.

⁵⁷ Hungary, Act CXXXIX of 2009 on the 2011 Census (2009. évi CXXXIX. törvény a 2011. évi népszámlálásról), 15 December 2009, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0900139.TV.

- number had increased significantly, as in the 2001 census only ca. 1,035,000 persons refused to answer this question);
- ca. 456,600 stated that they lived with disabilities and ca. 1,648,400 claimed that they suffered from longer lasting illnesses.

It needs to be pointed out that data from censuses do not always give a reliable estimation concerning the number of certain minority groups. For instance, although during the 2011 census, Roma activists carried out a solid campaign to convince Roma people to declare their Roma ethnicity, and although there was a significant rise in the number of those who declared their affiliation with this national minority, the census numbers are still way below the estimated number of Roma in Hungary.

There are also certain special measures, positive actions, which make it necessary to do some degree of data collection. These are the following.

Ethnic origin in education: There is a complex system of minority education in Hungary. In terms of Article 22 (3) of the Act on Nationalities, based on the decision of their parents children belonging to a nationality may receive (i) education in the mother tongue, (ii) bilingual education, (iii) Hungarian language education in the framework of which his/her nationality language is taught, or (iv) Roma nationality education. The existence of these forms of education naturally creates statistics on the number of children participating in these forms of education. In the 2013/2014 school year 37 961 Roma, 49 721 German, 1 349 Romanian and 4 375 Slovak pupils participated in elementary minority education.⁵⁸

Another instance with regard to which ethnic data collection has been started recently is the placement of children with slight mental disabilities in special schools. The reason for this was that 'auxiliary schools' established for children with mental disabilities are often predominantly attended by Roma students, constituting a specific form of segregation. Experts have been claiming for a long time that part of the reason for this phenomenon is that the methods used for measuring the intellectual capacities of the children often do not take into account their specific socio-cultural background (for more details on this issue see Section 3.2.8). With the purpose of collecting data on this issue, Act CXC of 2011 on National Public Education⁵⁹ (National Public Education Act) was amended in July 2014 to authorise expert panels (deciding on the placement of the children in special schools) to collect data concerning the ethnic affiliation of the child (on the basis of the voluntary decision of the parent to answer this question) and on the educational institution the child attends [Article 41 Paragraph (4a)].⁶⁰

Ethnic origin for the purposes of minority elections: Annex 1 of the Act on Nationalities recognises 13 nationalities (*nemzeti kisebbség*). These have the right to form their local, regional and national self-governments, with wide-ranging rights in relation to the preservation of the language and traditions of the minority. Furthermore, local minority self-governments are foreseen by the law to have a say in all local issues concerning their respective minorities.

Under Articles 86-87 of Act XXXVI of 2013 on the Election Procedure⁶¹ (Election Procedure Act), any voter can request that he/she be registered as a minority voter by filing with the National Election Office a request containing (i) the national minority he/she is a member of; (ii) his/her statement that he/she is affiliated with that national minority; and (iii) his/her statement on whether he/she wishes to be regarded as a minority voter only in

⁵⁸ http://www.kormany.hu/download/c/48/50000/Oktat%C3%A1si_%C3%89vk%C3%B6nyv_2013_2014.pdf.

⁵⁹ Hungary, Act CXC of 2011 on National Public Education (2011. évi CXC. törvény a nemzeti köznevelésről), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100190.TV.

⁶⁰ This amendment emerged as part of an attempt to settle a desegregation case launched by the Chance for Children Foundation, in which the ministry responsible for education was one of the respondents.

⁶¹ Hungary, Act XXXVI of 2013 on the Election Procedure (2013. évi XXXVI. törvény a választási eljárásról), 18 April 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300036.TV.

relation to minority self-government elections or also in relation to the general elections (in which case he/she will not be eligible to vote on party lists at the general elections, only on the individual candidates and the minority lists). The National Election Office may not examine the genuineness of the affiliation, it may only reject the request if the given person has already been registered as a minority voter belonging to another national minority.

Disability for the purposes of benefits in employment: In terms of Article 23 of Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws,⁶² employers shall be obliged to pay a so called 'rehabilitation contribution' to the state budget if the number of their employees exceeds 25 and the proportion of persons with disabilities (persons with an altered ability to work) within the workforce is below five percent. This system naturally requires that record be kept of the disability of employees. Accordingly, Article 23 of Act CXCI of 2011 prescribes that employers employing persons with disabilities shall keep records containing – among others – the personal identification data of the employees with disabilities, the fact of the employee's disability, and the degree to which the employee's ability to work has been altered and his/her health status deteriorated. The employer shall also keep the copies of the documents proving these facts. Records and copies shall be preserved for five years after the end of the employment.

Data on other grounds: Apart from the census, no data are collected in any context on religion. Data on sexual orientation is not collected at all. On the other hand, age is not really seen in Hungary as sensitive data, so a lot of statistics can be found of age-related issues. This is the only ground on which data may be collected without any difficulty.

In Hungary, the use of statistical evidence is – implicitly – permitted by national law in order to establish indirect discrimination.

Pursuant to Article 3 Paragraph (5) of the CCP, the 'court may freely rely on any type of evidence that is useful for establishing the facts of the case.' Under Article 50 (4) of Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities⁶³ (GPSA), 'in the proceedings of authorities such evidence may be relied on which is useful for the enhancement of establishing the facts of the case.' This means that both courts and public administrative authorities are free to accept all types of evidence. The only criterion is that the evidence should be useful from the point of view of establishing the facts of the case, and enabling the court (authority) to come to a decision.

b) Practice

In Hungary, statistical evidence in order to establish indirect discrimination is used in practice.

Generally, there seems to be no reluctance to use statistical evidence, a decision by the Supreme Court in the Hajdúhadház case⁶⁴ has reassuringly settled the issue of whether statistical evidence may be used in segregation cases (see below). At the same time the use of such evidence may not be regarded as widespread, which may be related to the fact that very limited case law related to indirect discrimination exists.

⁶² Hungary, Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws (2011. évi CXCI. törvény a megváltozott munkaképességű személyek ellátásairól és egyes törvények módosításáról), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100191.TV.

⁶³ Hungary, Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities (2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól), 28 December 2004, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0400140.TV.

⁶⁴ Supreme Court, Pfv.IV.20.936/2008/4, 19 November 2008, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

Dismissal of civil servants: In the first case, civil servants dismissed from the regional office of a central administrative organ filed a complaint with the Equal Treatment Authority, claiming that the group reduction carried out by the administrative organ was discriminatory towards highly qualified, middle-aged employees. In a circular addressed to the regional offices on the conditions of the work force reduction, the central organ demanded that the persons to be dismissed shall be selected in a way that the average budgetary saving per dismissed person shall reach a certain monetary limit (EUR 490– HUF 147 600 – per month). In the view of the complainants, by determining the minimum saving to be achieved per person, the employer practically restricted the circle of potentially 'dismissible' persons to highly-qualified, middle-aged employees. (Civil servants' salaries are determined by their qualifications, and length of service, which is obviously connected to their age.)

The Equal Treatment Authority examined whether discrimination on each ground (qualification and age) may be established. The answer was negative on both issues. In the Authority's view, since the circular required an average per capita saving, it did not restrict the scope of persons to be dismissed to those whose salary was above this level.

With regard to age discrimination, the Authority requested the following statistical data from the employer: the numbers and age distribution of all civil servants employed before the reduction, and the numbers and age distribution of dismissed civil servants. Although all the dismissed civil servants were older than 31, the Authority did not hold that indirect discrimination had taken place, due to the fact that before the reduction, their proportion was very high in the work force (82.9 percent). The question may be raised, though on what basis the Authority drew the line at this age.

*The Rimóc case:*⁶⁵ in this case concerning complaints on police action disproportionately targeting the Roma, the Hungarian Helsinki Committee demonstrated through the statistical analysis of police fines that whereas the Roma amount to approximately 25% of the village's population, out of the 36 fines imposed for lack of bicycle accessories, 35 were imposed on persons who (based on their name, mother's name, address) were likely to be of Roma origin. This way, the organisation managed to substantiate that the police practice of imposing fines is ethnically disproportionate. The case ended with a friendly settlement, in the framework of which the police agreed to delegate officers to non-discrimination trainings and providing data on fines for two more years.

*The Hajdúhadház case:*⁶⁶ In an *actio popularis* case initiated by the Chance for Children Foundation (CFCF), statistical evidence was used and accepted by the court to prove segregation. The CFCF launched a claim against the local council of Hajdúhadház and the two elementary schools providing education in the city claiming segregation and direct discrimination. Both schools have three buildings: one central and two supplementary buildings. In the case of both schools the proportion of Roma pupils educated in the central building was relatively low (28 and 22 percent respectively), whereas in the supplementary buildings the proportion of Roma pupils was very high (86 and 96 percent in one school, and 100 percent in the other).

In the case of both schools, the central building was much more, well-equipped than the supplementary buildings, where no gymnasium, library, computers or specialised class rooms could be found.

The above proportions were established by a Roma education expert appointed by the Court upon the claimant's motion. The Court gave detailed instructions as to how the expert shall carry out the task. On the basis of the examination the expert was commissioned to define the number of Roma pupils or the smallest number of those whose Roma origin can

⁶⁵ Equal Treatment Authority, EBH/190/2012, <http://eqyenlobanasmod.hu/article/view/ebh-190-2012>.

⁶⁶ Supreme Court, Pfv.IV.20.936/2008/4, 19 November 2008, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

be established with certainty, as well as an estimation as to the remaining numbers of Roma pupils. The Court expressly called the expert to take into consideration those pupils as well who may be assumed to be Roma by the majority population.

The Court accepted the proportions provided by the expert, and based the establishment of segregation mainly on this piece of evidence. Although in its decision Pf.I.20.631/2007/8 delivered in December 2007 upon appeal,⁶⁷ the Debrecen Regional Appeals Court partly overturned the first instance decision, it did not question the validity of the statistical data established by the expert. The Supreme Court (which upon the claimant's request for review, overturned the second instance court's decision and established that segregation has taken place, as segregation does not require any intentional activity) expressly claimed that based on the expert's estimations the fact that the distribution of pupils between the different buildings was highly disproportionate may undoubtedly be established.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Hungary, harassment is prohibited in national law. It is defined.

Under Article 10 Paragraph (1) of the ETA, 'harassment is a sexually charged or other conduct violating human dignity related to the relevant person's characteristic defined in Article 8 with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment'.

In Hungary, harassment does explicitly constitute a form of discrimination.

Article 7 Paragraph (1) of the ETA enumerates the behaviours violating the requirement of equal treatment. These are the following: direct and indirect discrimination; harassment; segregation; victimisation; instruction to the above enumerated behaviours. Thus, harassment is expressly prohibited as a form of discrimination.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Hungary the employer and the employee are liable under certain conditions.

Co-workers do not fall under the personal scope of the ETA, so their liability will not be established under the ETA's provision on harassment. Liability on the basis of the ETA falls on the employer if he/she fails to react to a complaint of harassment by his/her employee. However, employees can also be held liable, notably under Article 2:42 of the Civil Code, which contains the general ban on the violation of inherent civil rights (including human dignity). This liability is however only restricted to the non-pecuniary sanctions foreseen by the Civil Code, since in terms of Article 6:540 of the Civil Code, employers and not workers can be held liable for damages caused by employees. Damages are to be sought from the employer, even if the employer played no role in the violation. This is preferential to the victim, who does not need to consider whether or not the employee acted upon an instruction or his/her own initiative.

While in theory, the employer may reclaim part of the damages paid to the complainant, in practice this rarely happens. However, harassing employees may face other legal consequences within the framework of labour law: they can be held liable at their work place in disciplinary proceedings (Article 56), or can be dismissed (Article 78).

⁶⁷ Debrecen Regional Appeals Court, Pf.I.20.631/2007/8, 13 December 2007, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Hungary, instructions to discriminate are prohibited in national law. Instructions are not defined.

Article 7 Paragraph (1) of the ETA specifies the instruction to discriminate (including instruction to harass, segregate and victimise) as a violation of the requirement of equal treatment.

In Hungary, instructions do explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Hungary, the instructor and the discriminator are liable.

Given that the instruction to discriminate is defined as a form of discrimination, sanctions available against other, more common forms of discrimination can be sought here too. If the person giving the instruction is known, then civil law sanctions for the violation of civil rights and sanctions that the Equal Treatment Authority has the power to impose are at hand (these latter only if the instructions come from someone who falls under the ETA's scope).

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

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Hungary, the duty to provide reasonable accommodation is included in the law, but the provision is not unproblematic. It is defined.

The term 'reasonable accommodation' expressly appears in the Labour Code, but in the author's opinion, with regard to very important aspects of access to employment, the duty of reasonable accommodation is still missing from the Hungarian system, while in relation to other aspects of the employment of people with disabilities, the obligation is more or less in place. Below a short summary is given of the relevant provisions to substantiate this stance.⁶⁸

Under Article 15 of the RPD Act, persons with disabilities shall if possible be employed in integrated employment, or, in lieu of this, in protected employment. (Integrated employment is when a person with disability is employed at a workplace where the decisive majority of his/her co-workers are not persons with disabilities.)

Under Paragraph (2) the employer employing a person with disability is under the obligation to provide to an extent necessary for the performance of the work, accommodation at the work place, i.e. in particular the appropriate refurbishment of tools and machines. Support from the central budget can be requested to cover the expenses incurred by refurbishment. The provision does not contain any reference to the issue of disproportionate burden.

The law speaks about the adaptation of the 'workplace environment' (*munkahelyi környezet*). If we interpret this term from a strict semantic point of view, this does not

⁶⁸ The European Commission seems to have a different view since on 28 January 2010 it closed infringement procedures against Hungary concerning Directive 2000/78/EC.

contain accommodations such as alternative procedures, reallocating tasks, transfer to another position etc.

It may not however be excluded that the labour courts would be willing to accept a wider interpretation including such forms of accommodation as well. However, there is no case law on the basis of which this question could be answered positively.

Furthermore, if the text is interpreted strictly grammatically, the conclusion shall be that if an employer does employ someone with a disability, he/she will be under the obligation to take measures aimed at reasonable accommodation, however, this duty falls on him/her only after the person with disability gets the job. With regard to access to employment, the RPD Act only says that persons with disabilities shall be employed in integrated workplaces, if possible.

The law does not impose an obligation on the employer to make employment accessible in the first place by reasonably adapting to the needs of the person with disability. The wording of the text implies that the need to make an accommodation can be a reason for not giving a disabled candidate a job, but this interpretation has not been confirmed through judicial interpretation.

Act CXXI of 2007 on the Amendment of Certain Social Laws⁶⁹ amended the RPD Act as of 1 January 2008, adding two paragraphs. Under Paragraph (3), in order to enhance the access to employment of persons with disabilities, the employer shall be obliged to provide an accessible environment in the course of the recruitment procedure.

Paragraph (4) states that this obligation shall be imposed on the employer if (a) he/she publicly advertised the vacancy; (b) when applying for the job, the person with disability states his/her special needs related to the job interview; and (c) the accommodation to those needs does not impose a disproportionate burden on the employer. The burden shall be regarded as disproportionate if compliance with this obligation would make the continued operation of the employer impossible.

To summarise the situation, the following can be said. If we interpret the text of the law strictly, there is an obligation to provide an accessible environment at the recruitment stage (e.g. for the interview), but not an obligation to provide an accessible environment to enable an applicant with a disability to do the job.

Therefore, a person could be qualified – in that they could perform the job if an accommodation was made – but the employer can reject them because they need the accommodation without which they cannot perform the job, and the employer does not wish to provide the accommodation. The law definitely does not regulate whether there is a limit beyond which the employer could refer to a disproportionate burden to reject employment on this basis, which seems to imply that the legislators envisaged the narrow interpretation (because otherwise we would have a situation in which the employers could be required to make any accommodation irrespective of the burden it poses on them).

The ambiguity has not been solved by the coming into force of the Labour Code either. Under Article 51 Paragraph (5) of the Code, 'when employing a person with disability, the employer shall guarantee conditions for reasonable accommodation'.

In any case, based on the indirect effect of the anti-discrimination directives, it would most likely be possible for a person with disability to act against a rejection that is based by the employer on the difficulties he/she would face because of the need to make a reasonable accommodation. However, it may in all cases be advisable to formulate the law in a way

⁶⁹ Hungary, Act CXXI of 2007 on the Amendment of Certain Social Laws (2007. évi CXXI. törvény egyes szociális tárgyú törvények módosításáról) 7 November 2007, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700121.TV.

that makes the reasonable accommodation obligation more explicit in relation to access to employment – e.g. by appropriately adapting Article 5 of the Directive 2000/78/EC.

Under Article 19 Paragraph (4) of Act XCIII of 1993 on Work Safety⁷⁰ (Work Safety Act), in relation to the creation of work places where employees with physical disabilities are employed, the physical environment (accommodation) has to suit the changes in the character of the human body.

The Work Safety Act does not impose an express duty on employers not yet employing workers with disabilities to create an accessible workplace.

Thus, the Hungarian legal framework contains the obligation to accommodate the needs of persons with disabilities in the course of the recruitment procedure, and also to adapt the working environment to the needs of the already employed employees with disabilities. However, it is not expressly stated that the employer shall be obliged to adapt the working environment to the special needs of a person with disability (e.g. move an office to the ground floor of the building to provide access to a person in wheel chair) with a view to that he/she could actually employ that particular person.

b) Practice

There is no publicly accessible judicial practice of the reasonable accommodation requirement.

c) Definition of disability and non-discrimination protection

Under Article 4 of the RPD Act, persons with disabilities are those who have irreversible or long-term sensory, communication-related, physical, intellectual, psychosocial impairments or the accumulation thereof, which in interaction with significant environmental, societal or other barriers restrict or hinder their full and effective participation in society on an equal basis with others. Since the provisions that are the most relevant from the point of view of reasonable accommodation are set out in the RPD Act, this seems to be the most likely definition of disability for the purposes of claiming reasonable accommodation.

It needs to be pointed out though that people with lesser degrees of impairment may still need an accommodation, which is an additional argument for adopting a new and clear set of norms in this regard. It also needs to be mentioned that persons with certain illnesses might not fall under the RPD Act's definition, so for them it might not be possible to claim reasonable accommodation, however, in the absence of accessible jurisprudence, it is difficult to assess what the approach of the courts would be.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Hungary, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field.

There are examples of reasonable accommodation duties in the area of education. Under Article 24 Paragraph (3) of Government Decree 423/2012 on the Admission Procedure of Universities,⁷¹ institutions of higher education are obliged to provide to applicants with disabilities the conditions for participation in the admission procedure. Paragraph (5) of the

⁷⁰ Hungary, Act XCIII of 1993 on Work Safety (1993. évi XCIII. törvény a munkavédelemről), 3 November 1993, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300093.TV.

⁷¹ Hungary, Government Decree 423/2012 on the Admission Procedure of Universities (423/2012. (XII. 29.) Korm. rendelet a felsőoktatási felvételi eljárásról), 29 December 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200423.KOR.

same Article prescribes that if the institution of higher education determines health related conditions or conditions for professional suitability as admission criteria, applicants with disabilities can request exemptions in accordance with the statutes of the particular educational institution. Paragraph (6) sets forth that such exemptions shall be tailored to the features of the particular disability, but may not mean a full exemption from fulfilling the fundamental educational requirements of the institution.

A special type of accommodation in education is the accommodation to be provided to so-called 'children with special educational needs', i.e. children who – under Article 4 of the National Public Education Act – 'are diagnosed by the specialised expert panel to have a locomotor, sensory, mental or speech disability, multiple disabilities, autism spectrum disorder or any other psychological development disorder (severe disorder of learning, attention or behaviour), and therefore require special attention'.

Under Article 47 of the Public Education Act, if on the basis of the opinion of the educational expert panel, the child with special educational needs is placed in an integrated kindergarten or school, the educational institution shall provide the specialist (specialised teacher, speech or other therapist, conductive educator, etc.), the special curriculum and educational materials required by the specific needs of the child. The maintainers (i.e. the entities responsible for maintaining the school: the state or the private foundation) may not exempt this duty by referring to the absence of the financial resources of providing these services, especially because in terms of Paragraph 10 of the Article, the required specialist may be provided through the network of travelling specialist and conductive teachers which is operated by the state office maintaining schools.

There have been a number of cases before the Equal Treatment Authority in which educational institutions refused to provide such accommodation, or only agreed to provide it partially referring to the difficulties this obligation would impose on them. Most of such cases have ended in a settlement between the parties, e.g. a case, in which a kindergarten restricted the amount of time a child with autism was allowed to spend in the institution on the basis that 'in the absence of the required technical and hygienic conditions', the institution could not handle the situation that the child was not toilet-trained. In the settlement the parties agreed that the parent would stay in with the child for a period of six weeks during which the kindergarten would develop the conditions required for accommodating the needs of a child who is not toilet-trained.⁷²

In other areas, while there are no explicit legal norms prescribing reasonable accommodation, case law seems to suggest that courts and the Equal Treatment Authority qualifies the unjustified refusal to provide reasonable accommodation as a form of discrimination.

An example for health care related case law is provided by case no. EBH/10/2013 of the Equal Treatment Authority. It was an *actio popularis* claim against the practice of a health care institution refusing to provide stomatology treatment to HIV positive patients and patients suffering from Hepatitis and sending them to another hospital for treatment. The institution tried to defend its practice by – among others – referring to the fact that the extra protective measures they would need to take in order to be able to treat such patients in an integrated manner (i.e. together with other patients) and in this sense accommodate the specific needs stemming from their health status, would impose a disproportionate financial burden on them. The Authority did not accept the defence – as the institution failed to provide any evidence to substantiate it – and concluded that the patients had suffered direct discrimination.⁷³

⁷² Equal Treatment Authority, EBH/121/2015, 16 February 2016, <http://www.egyenlobanasmod.hu/article/view/ebh-121-2015>.

⁷³ Equal Treatment Authority, EBH/10/2013, March 2013, http://egyenlobanasmod.hu/article/view/10_2013.

A case in relation to housing was launched by a woman living in social housing with her two autistic sons one of whom also suffered from a serious kidney illness. The flat they were provided by the municipality was in very poor condition, the walls were wet and mouldy, and the toilet was in the yard. After their request for housing that better accommodated the specific needs stemming from the condition of the child (e.g. having an indoor toilette, which is not characteristic of all social housing) was rejected by the municipality, the family turned to the Equal Treatment Authority. Although there is no statutory requirement of reasonable accommodation in relation to housing, the authority started to process the complaint. Finally, the case was closed down with a friendly settlement after the municipality promised to provide the family with a full comfort two-room apartment in a better state of repair.⁷⁴

In relation to access to services, a case can be quoted in which a visually impaired passenger complained to the Equal Treatment Authority that the airline denied his access to the flight because he had not indicated his disability when he had made the reservation online on 4 February 2008, only on 21 March, i.e. 10 days before his flight was scheduled (1 April 2008). According to the defence of the airline, they require passengers to indicate at the time of the reservation the need for special assistance due to safety reasons, because if they are not informed in a timely manner, then a flight attendant must perform this task, which may cause a security risk. Thus, in this case, the airline was in principle willing to provide the accommodation (assistance), and the issue was whether the conditions to which they subjected it were excessive or reasonable. The Equal Treatment Authority concluded that the airline's requirements were not justifiable due to their arbitrariness (a person may make a reservation months, but also just few days before the actual flight), and also because in this particular case, the company was made aware of the special need 10 days before the flight, which ought to have been sufficient to prepare for the accommodation.⁷⁵

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Hungary, failure to meet the duty of reasonable accommodation is not expressly regulated as a form of discrimination, however, as it can be seen from the cases quoted above, in practice it is sometimes regarded as such. The logic behind the jurisprudence is the one outlined in Guideline No. 309/1/2011. (II.11.) TT of the Equal Treatment Advisory Board, which established that 'the failure to guarantee accessibility of buildings and equal access to public services amounts to a breach of the requirement of equal treatment, so the scope of the ETA covers this omission. The (...) failure to guarantee accessibility shall be regarded as direct discrimination under Article 8 of the ETA, because as a result of this failure, persons with disabilities are treated less favourably than people without disabilities in their movement, and access to services.'⁷⁶

So where there is a statutory obligation to provide reasonable accommodation (recruitment, the adaptation of the working environment after a person with disability is employed), the failure to meet the reasonable accommodation duty counts as discrimination. If, however no such obligation is in place (e.g. to adapt the working environment in order to make the employer capable of offering employment to a person with disability), the failure to meet the duty cannot be sanctioned through the anti-discrimination legislation.

⁷⁴ Equal Treatment Authority, EBH/934/2008, no date is available, http://www.egyenlobanasmod.hu/article/view/934_2008.

⁷⁵ Equal Treatment Authority, EBH/146/2009, no date available, http://www.egyenlobanasmod.hu/article/view/146_2009.

⁷⁶ <http://www.egyenlobanasmod.hu/article/view/a-tan%C3%A1csad%C3%B3-test%C3%BClet-309-1-2011-ii-11-tt-sz-%C3%A1ll%C3%A1sfoglal%C3%A1sa-az-akad%C3%A1lymentes%C3%ADt%C3%A9si-k%C3%B6telezetts%C3%A9gr%C5%91l>.

In cases, where the failure to provide reasonable accommodation amounts to discrimination, the same sanctions can be applied as for other instances of the violation of the requirement of equal treatment (e.g. fine by the Equal Treatment Authority, damages awarded by the labour or civil court, etc. – for the description of possible sanctions, see Sections 6.1 and 6.5).

The same is true for the shifting of the burden of proof. In areas where a statutory obligation to provide reasonable accommodation exists, it ought to be sufficient for the claimant to substantiate the existence of the protected ground and the disadvantage (in such cases the lack of reasonable accommodation), and then it would burden the respondent to provide a justification for the failure (e.g. the disproportionate nature of the burden). However, in the absence of an express legal provision and consolidated case law, we must warn that the above is mainly the author's interpretation of the legal framework on the basis of an analogy with the situation in the area of accessibility.

f) Duties to provide reasonable accommodation in respect of other grounds

In Hungary, there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Hungary, national law requires some services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. However, the practice of courts makes this obligation relative.

Under Article 4 Point (f) of the RPD Act, the term 'public services' covers among others:

- all state activities including the public administrative, justice and law enforcement activities as well as cultural, educational, scientific, social, sports, health care services, child welfare and protection services of institutions maintained by the state;
- all activities of local councils and cultural, educational, scientific, social, sports, health care services, child welfare and protection services maintained by minority self-governments and denominations;
- all client-based services available to the public.

In terms of Point (h) of the same Article:

- a service is 'equally accessible' if it is accessible, foreseeable, comprehensible, and perceivable – as independently as allowed by the given person's status – for everyone, with special regard to people whose locomotive, visual, audio, mental or communicational functions are restricted;
- a building is 'equally accessible' if everyone – with special regard to people whose locomotive, visual, audio, mental or communicational functions are restricted – can access it, can enter those parts of it which are open to the public, can leave it in an emergency, and can use the equipment and objects placed in it;
- information is 'equally accessible' if it is foreseeable, comprehensible, and perceivable for everyone, with special regard to people whose locomotive, visual, audio, mental or communicational functions are restricted, and its users can acquire it in an accessible manner.

Different deadlines were set forth by the law for the different types of services – e.g. services provided by the state, by municipalities or private actors providing public services – but these either expired or were deleted by Act LXII of 2013⁷⁷ as from 1 January 2014.

⁷⁷ Hungary, Act LXII of 2013 on the Amendment of Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (2013. évi LXII. törvény a fogyatékos személyek jogairól

As it was referred to above, in the practice of the Equal Treatment Authority, the failure to make a public building accessible qualifies as direct discrimination. In its case 13/2006,⁷⁸ a person with disability filed a complaint with the Authority claiming that he had not been able to attend the court hearing held in his civil lawsuit because the Central District Court of Pest (CDCP) is not accessible for persons using wheelchairs, and the employees of the CDCP did not provide him with appropriate assistance. The CDCP did not question that compared to clients with no disabilities, the complainant had suffered a disadvantage due to his disability, but claimed that the distinction had an objectively reasonable ground, namely the fact that the State had not provided the courts with the budgetary resources that would be necessary for making court buildings accessible. The CDCP went for judicial review in the case, but the ETA's decision was upheld by the court.

Despite the fact that Article 7 Paragraph (2) of the ETA allows for the objective justification of direct discrimination claims, the Equal Treatment Authority did not accept the reference to financial problems as an exempting factor. The Authority obliged the CDCP to terminate the injurious situation within 60 days and ordered that its decision be published on its own website.

It needs to be pointed out however that in its June 2013 decision on the accessibility of a newly constructed bus terminal (see above under Section 2.2.), the Curia accepted reference to financial difficulties as a legitimate defence in relation to the failure to provide accessibility. In his petition, the claimant emphasised that the construction permission for the old bus terminal's reconstruction was issued in March 1999, i.e. after the coming into force of Act LXXVIII of 1997 on Building Matters,⁷⁹ Article 31 of which prescribed that after 1 January 1998, the competent building authority may only issue a permission for the construction and reconstruction of public buildings if they are accessible. Furthermore, the construction of the terminal was completed in March 2003 (i.e. at a time when there were no temporal limitations on the duty to provide accessibility). Nevertheless, the new bus terminal was designed and built in a manner that while it was accessible for wheelchair users, persons with visual impairments could not use it without assistance (the fact that the terminal was not accessible for persons with visual impairments was fully confirmed by the expert appointed in the court procedure).

In its decision no. Pfv.IV.20.104/2013/4 the Curia established that 'there is no statutory provision prescribing that discrimination caused by the failure to guarantee accessibility may not be exempted under any circumstances', and that although the deadline for ensuring accessibility had indeed expired on 1 January 2010 in relation to the bus terminal, 'it is common knowledge that the reconstruction of all the buildings and external units of a bus terminal with such a heavy traffic with the aim of providing accessibility requires significant investment and time. Taking all this into account, it can be established that the fact the defendant has not solved all the problems raised by the claimant, can be regarded to have a reasonable economic ground directly related to the relevant legal relation.'

In the author's view when the Curia came to this conclusion, not only did it render the duty to make public buildings accessible relative when it allowed for the justification of the failure to do so on the basis of the economic burden, it also failed to take into consideration the fact that during the bus terminal's reconstruction between 1999 and 2003 the defendant company would have had the possibility (and obligation) to take into account all the specific accessibility needs of the different groups with disabilities, and if it had complied with this obligation, no further reconstructions – and thus no further financial

és esélyegyenlőségük biztosításáról szóló 1998. évi XXVI. törvény módosításáról), 24 May 2013, <http://mkogy.jogtar.hu/?page=show&docid=a1300062.TV>.

⁷⁸ Equal Treatment Authority, EBH/13/2006, March 2006, <http://egyenlobanasmod.hu/article/view/ebh-zanza0307>.

⁷⁹ Hungary, Act LXXVIII of 1997 on Building Matters (1997. évi LXXVIII. törvény az épített környezet alakításáról és védelméről), 24 July 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700078.TV.

investments – would be needed. So in a sense the Curia exempted the defendant on the basis of the defendant's own failure to abide by the pertaining legal norms.

In relation to transportation matters the following needs to be pointed out: Article 51, Paragraph (4) of Act XLI of 2012 on Personal Transportation Services⁸⁰ (hereinafter: PTS Act) stipulated until 30 December 2012 that the conditions of equal access on vehicles of personal transportation, as well as at railway stations, stations and stops serving the transportation of persons, shall be provided until 1 January 2013 at the latest.

Just one day before the expiry of the deadline, Act CCVIII of 2012 on the Amendment of Certain Laws Aimed at the Substantiation of the State Budgetary Act and Other Purposes⁸¹ amended this provision, which now claims that the conditions of equal access 'shall be provided gradually, therefore, in the course of investments, developments, acquisitions, as well as – so far as it is technologically possible – reconstructions concerning these vehicles and establishments, the requirements of equal access shall be enforced.'

Thus, the eliminated 1 January 2013 deadline was not replaced by any clearly defined deadline, and (especially read in conjunction with the above Curia decision) the law now provides a loophole by making it possible to refer to technological problems as an excuse for not providing accessibility in the course of reconstructions, although accessibility of public personal transport systems would be a key condition for the equal participation of people with disabilities in all spheres of social life, including education, work, social and healthcare, exercising of civil and political rights.

In Hungary, national law contains a general duty to provide accessibility by anticipation for people with disabilities.

As it could be seen from what is said above, the Hungarian system is based on anticipation.

h) Accessibility of public documents

There is no general obligation to translate documents into Braille, but national law prescribes this obligation in relation to some documents.

For example, under Article 16 Paragraph (2) of the ETA, the records of the Equal Treatment Authority's hearing shall – upon the visually impaired party's request – be translated into Braille, and – also upon request – the final decision shall also be provided in Braille.

In terms of Article 88 of the Election Procedure Act, upon request, the election office shall support the participation of voters with disabilities by sending them a notification about the voting in Braille and/or by providing them with a so-called voting sample, i.e. a Braille-written sample into which the ballot sheet can be placed so that the voter can cast his/her vote without assistance.

Under Article 2 of Decree 30/2005 of the Ministry of Health on the information sheets attached to human medicines,⁸² the name and (if there are different versions of the medicine as far as the strength of the effective agent is concerned) the strength of the effective agent shall be indicated in Braille on the packaging of the medicine.

⁸⁰ Hungary, Act XLI of 2012 on Personal Transportation Services (2012. évi XLI. törvény a személyszállítási szolgáltatásokról), 2 May 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200041.TV.

⁸¹ Hungary, Act CCVIII of 2012 on the Amendment of Certain Laws Aimed at the Substantiation of the State Budgetary Act and Other Purposes (2012. évi CCVIII. törvény egyes törvényeknek a központi költségvetésről szóló törvény megalapozásával összefüggő, valamint egyéb célú módosításáról), 22 December 2012, <http://mkogy.jogtar.hu/?page=show&docid=a1200208.TV>.

⁸² Hungary, Decree 30/2005 of the Ministry of Health (30/2005. (VIII. 2.) EüM rendelet az emberi alkalmazásra kerülő gyógyszerek címkéjéről és betegtájékoztatójáról), 2 August 2005, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500030.EUM.

Interpretation in sign language is prescribed in a wider circle in relation to official proceedings.

Upon his/her request, the testimony of a person with hearing impairments shall be taken through sign interpretation, or he/she can also testify in writing. Also upon request, persons with speech impairments have the right to testify in writing. These norms are to be applied in administrative,⁸³ criminal⁸⁴ and civil⁸⁵ proceedings alike.

In terms of Article 39 of Act CLXXXV of 2010 on Media Services and Mass Communication,⁸⁶ the providers of audio-visual media services shall endeavour to gradually make their programmes accessible to persons with hearing impairments. Public service media providers and those commercial providers that reach the widest audience are obliged to provide subtitling or sign language interpretation for public service announcements (political advertisements, programmes containing political information), news programmes (including traffic information, weather forecasts and sports news) as well as programmes on persons with disabilities and equal opportunities.

Case law however shows that in spite of the gradually improving legal framework and the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), the practice still leaves much room for improvement.

The CRPD Committee's jurisprudence in the case of *Nyusti and Takács v. Hungary*⁸⁷ can be summarised as follows. Two blind persons concluded contracts for private current account services with a Hungarian bank, the OTP Bank Zrt., according to which they were entitled to use bank cards. However, they were unable to use the automatic teller machines (ATM) without assistance, as the ATM keyboards were not marked with Braille fonts, and the ATMs did not provide voice assistance for bank card operations. The two blind persons had to pay an annual fee for bank card usage and transaction fees equal to those fees paid by other customers, regardless of the fact that they were unable to use these services on a 24-hour basis unlike other, sighted customers.

They claimed that they received inferior quality services for the same charges, and therefore in August 2005, they brought a civil action under the Civil Code to the Metropolitan Court. In their action, they asked the court to recognize that the OTP violated their right to equal treatment and to oblige the bank to bring this infringement to an end by retrofitting all the ATMs operated by the OTP or – alternatively – to order the retrofitting of the ATMs operated by the OTP throughout the on the basis of balanced territorial distribution. They also sought non-pecuniary damages of EUR 1 000 (HUF 300 000). The Metropolitan Court found in favour of the authors,⁸⁸ and ordered the OTP to retrofit within 120 days at least one of its ATMs in the capital towns of each county, one in each district of Budapest, and four further ATMs in the districts where the complainants reside. The Metropolitan Court also granted pecuniary damages in the amount of EUR 670 (HUF 200 000) to each of the authors. In establishing the amount of the damages, it took into consideration, inter alia, that the OTP had recently purchased new ATMs that could not be retrofitted and had not taken any measures to facilitate the complainants' access to the services provided by the ATMs.

⁸³ GPSA, Article 60.

⁸⁴ Hungary, Act XIX of 1998 on the Code of Criminal Procedure (*1998. évi XIX. törvény a büntetőeljárásról*), 23 March 1998, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800019.TV, Article 114.

⁸⁵ CCP, Article 184.

⁸⁶ Hungary, Act CLXXXV of 2010 on Media Services and Mass Communication (*2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról*), 31 December 2010, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1000185.TV.

⁸⁷ CRPD, Communication No. 1/2010, CRPD/C/9/D/1/2010, 15-19 April 2013, available from: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx>.

⁸⁸ Metropolitan Court, 27.P.29.062/2005/35, 14 May 2007, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

However, upon appeal, the Metropolitan Court of Appeal changed the first instance decision and fully rejected the complainants' claim.⁸⁹ The Metropolitan Court of Appeal held that the mere fact that the complainants needed or might need assistance from other members of the society due to their disability did not violate their human dignity and that, therefore, it may not be considered as a humiliation to the complainants as human beings. The Court further established that the OTP was entitled to the freedom of concluding contracts, and this freedom must be respected not only when signing a contract, but also when amending it. Thus, the Court may not, upon request by one party to a contract, intervene into a longstanding contractual relationship and oblige the OTP to fulfil an obligation which did not constitute a part of the contractual agreement. In its decision of 4 February 2009⁹⁰ the Supreme Court upheld the second instance decision.

After exhausting domestic remedies, with the help of the Hungarian Helsinki Committee, the complainants submitted a complaint in March 2010 to the CRPD Committee and requested it to establish that Hungary has violated its obligations under the Convention on the Rights of Persons with Disabilities (hereafter: Convention).

In its decision published on 23 April 2013 the CRPD established that Hungary had failed to fulfil its obligation stipulated in Article 9 of the Convention by not ensuring accessibility of the banking card services for persons living with visual impairments on an equal basis with others. The CRPD therefore made numerous recommendations to Hungary including inter alia the following: (i) providing remedy for the complainants; (ii) establishing minimum standards of banking services; (iii) creating a legislative framework with concrete, enforceable and time bound benchmarks; (iv) providing regular training on the scope of the Convention to judges.

However, although the Hungarian government paid the complainants compensation for the violation, apart from a meeting between the government officials and representatives of the Hungarian National Federation of Blind and Visually Impaired Persons on October 2013, no concrete measures have been taken by Hungary to comply with the recommendations in relation to the structural problems revealed by the case – most importantly no concrete legislative measures whatsoever have been proposed, drafted or at least considered by the competent ministry.

This was also the conclusion of the Parliamentary Commissioner for Fundamental Rights (Hungary's Ombudsman), who – in his April 2015 report issued upon the Hungarian Helsinki Committee's complaint – stated that while the Hungarian Government's steps are to be welcome, they are of preparatory nature and do not meet the requirement that a clear, concrete and enforceable legal framework with set deadlines be put in place to guarantee the accessibility of ATM's, and called on the Government to adopt such a legal framework.⁹¹

⁸⁹ Metropolitan Court of Appeal, 2.Pf.21.073/2007/4, 10 January 2008, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

⁹⁰ Supreme Court, Pfv.IV.21.144/2008/7, 4 February 2009, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

⁹¹ See the Ombudsman's Report no. AJB-2979/2014.

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)

In Hungary, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Hungary, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination.

Article 1 of the ETA proclaims that 'based on the requirement of equal treatment, natural persons and groups of natural persons as well as legal persons and organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and the equal account shall be taken of individual features'.

Furthermore, when defining discrimination Articles 8 and 9 of the ETA refer to 'a person or group' and 'certain persons or groups'. The ETA itself does not define the term person for its purposes. Thus, the terminology of the Civil Code – where persons are defined as natural (*természetes*) or legal (*jogi*) – shall apply if interpretation is necessary.

Protection against discrimination can also be sought under Articles 2:42, 2:43 and 2:51 of the Civil Code. Under Article 3:1 of the Civil Code, provisions relating to the protection against the violation of inherent personal rights (which include the right to non-discrimination) apply to legal persons unless due to the character of the protection it is limited to natural persons. For the purposes of protection, therefore, legal persons are in general included.

In Hungary, the personal scope of anti-discrimination law covers certain natural and legal persons for the purpose of liability for discrimination.

In relation to liability – for historical reasons – the ETA primarily lists (mostly public) legal entities. Under Article 4, these include: the Hungarian state, local and nationality self-governments, public authorities, the army, the police, prison services, border guards, public foundations and associations, organisations representing employees' and employers' interests, bodies providing public services, schools and universities, persons and institutions providing social and child protection services, museums, libraries, private pension schemes, voluntary mutual insurance schemes, health service providers, political parties and other organs funded from central budget.

Four groups of private actors are mentioned in Article 5. Private actors fall under the scope of the ETA and shall therefore abide by the requirement of equal treatment if they (i) offer a public contract or make a public offer, or (ii) provide public services or sell goods. The third group includes entrepreneurs, companies and other private legal entities (including educational institutions and their maintainers) using state support, while the fourth group comprises employers and contractors.

At the same time, it depends on judicial interpretation whether those private actors who do not fall into these four categories are liable for discrimination under the general norms of the Civil Code pertaining to the protection of inherent personal rights.

The following are expressly excluded from ETA's scope (Article 6): (i) family relations, (ii) legal relations between relatives; (iii) issues relating to the faith of churches (to use the exact – and not entirely clear – wording of the Hungarian legislation: 'a denominational legal person's legal relationship directly related to the denomination's religious activity'), (iv) the internal operations of NGOs and legal entities – except for establishing and terminating membership. Political parties are also an exception to this rule: in their case, only differentiation based on political views falls outside the scope of the ETA.

The ETA's solution concerning personal scope may easily be in breach of the directives, as it exempts most private and certain public actors from the ETA's application in sectors covered by the directives.

The reason for this is the following: the ETA does not enumerate the fields falling under its scope: it approaches the issue of material scope from the direction of personal scope, when it says that the entities enumerated in Article 4 (see their list above) shall respect the requirement of equal treatment in all their actions and practices (no matter which sector they operate in).

Although the ETA's scope is extended to only four limited groups of private actors, the material scope within which they shall abide by the requirement of equal treatment may not be defined either.

Whereas with regard to some of these groups (e.g. employers or private actors offering goods and services), it is easy to find the corresponding material sector (employment and access to publicly available goods and services respectively), with regard to the other two main categories (private actors making a public offer and private actors receiving state funds), such a correspondence is difficult to make.

Therefore, we can say that with regard to the (mostly) public entities listed in Article 4 and to some of the private actors listed in Article 5, the material scope of the ETA covers all possible fields and sectors (and not only the ones included in the directives).

Still, the ETA puts special emphasis on five sectors, in relation to which special rules (e.g. special exempting provisions – see above, in Section 2.2) are formulated. These sectors are: employment (Articles 21 – 23); social protection and healthcare (Articles 24 – 25); housing (Article 26); education and training (Articles 27 – 29); and access to goods and services (Articles 30 and 30/A). This however does not mean that the requirement of equal treatment shall only in these fields be respected by the entities falling under the ETA's personal scope. These sectors are highlighted only due to their special importance.

The issue of personal and material scope bears specific significance because at this point the Hungarian regulation may be in breach of the directives: the directives have a limited material scope but within that material scope they apply to all persons, the ETA has a practically unlimited material scope, but its personal scope covers only four groups of private actors. Therefore, in the author's view, in the sectors included in the material scope of the directives, the ETA is in breach of the *acquis*, as it does not prescribe the obligation of non-discrimination for all private actors, which is not compensated by the fact that the ETA's material scope covers fields that do not fall under the ambit of the directives. This is so, in spite of the fact that the private actors falling under the scope of the ETA are defined in such a way that an actual breach is unlikely to occur. An exception is harassment in relation to which it is impossible to act under the ETA against co-workers for instance, as only the employer can be held liable, however, in such cases the provisions of the Civil Code protecting inherent personal rights can be invoked providing a different type of protection (see Section 6.1 on sanctions applicable by civil courts).

b) Private and public sector including public bodies

In Hungary, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination.

As it was outlined above, Article 1 of the ETA proclaims that 'based on the requirement of equal treatment, natural persons and groups of natural persons as well as legal persons and organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and the equal account shall be taken of individual features'. The provision does not differentiate between whether the protected persons or groups belong to the public or the private sector.

In Hungary, the personal scope of anti-discrimination law covers the public sector including public bodies and certain segments/actors of the private sector for the purpose of liability for discrimination.

As it was outlined above, under Point a), in relation to liability – for historical reasons – the ETA primarily lists public legal entities under Article 4, while only four groups of private actors are enumerated in Article 5.

If, however the Civil Code's provisions pertaining to the protection of inherent personal rights are interpreted widely enough to cover discriminatory acts of those private actors who do not fall under the ETA's scope, then liability for discrimination can be considered to extend to the whole private sector with the limitation that certain provisions (such as the one on the shifted burden of proof) apply only in procedures concerning the four groups covered by the ETA.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Hungary, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.

Article 3 of the ETA defines labour relations (*foglalkoztatási jogviszony*) so as to cover employment, public employment, employment by court, the prosecution services, other bodies of the justice system, official and contractual service relations in the armed forces and law-enforcement, employment as an official foster parent, the legal relationship between temporary work agencies and their clients.

Other relations aimed at employment (*munkavégzésre irányuló egyéb jogviszony*) include home-work, the legal relation of independent contractors, members of a specialised agricultural or producers' group, members of a cooperative, and the elements of a company or civil law based activity aimed at performing work.

In terms of Article 5 of the ETA, the employer (in connection with employment) and the person who has the right to give instructions (in connection with other relations aimed at employment) are among those private actors who fall under the personal scope of the ETA.

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))

In Hungary, national legislation includes 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 for the five grounds in both private and public sectors as described in the directives.

Article 21 of the ETA prescribes that the principle of equal treatment shall be respected in relation to:

- access to employment, including public job announcements and selections criteria;
- actions leading up to employment in the wider sense;
- actions relating to the commencement and termination of employment.

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

In Hungary, national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.

As it was mentioned above, Article 3 of the ETA defines labour relations so as to cover a very wide range of legal relationships within the framework of which work is done. Article 5 lists employers and person with the right to give instructions in other legal relations aimed at employment among those private actors who fall under the personal scope of the ETA.

In addition, Article 21 of the ETA prescribes that the principle of equal treatment shall be respected in relation to:

- actions relating to the commencement and termination of employment (dismissals);
- remuneration;
- working conditions;
- promotion and training;
- liability for damages and disciplinary actions.

Article 21 of the ETA claims that the ban on discrimination shall extend to all aspects of employment. Its list is non-exhaustive, therefore, occupational pensions constituting part of pay would be covered by the law.

Occupational pension schemes are governed by Act LXXXII of 1997 on Private Pension and Private Pension Funds⁹² (Private Pensions Act). In terms of Article 5 Paragraph (2) of the Act, 'it is prohibited to differentiate between fund members on the basis of their religion, racial or ethnic origin, political conviction, age and sex'.

Although this provision was not amended by the ETA (which unified the previously very patchy and inconsistent anti-discrimination provisions of the different sectoral laws), it seems likely that this is rather a negligent omission than a conscious decision of the legislator 'allowing' discrimination on grounds not included in this seemingly closed list (e.g. marital status or sexual orientation). In any way, the application of the Civil Code's provisions on inherent personal rights and/or the ETA would make a potential violation of the principle of equal treatment by an occupational pension fund sanctionable.

As to contractual relations, we have to reiterate that employment and working conditions as well as pay and dismissals are covered in relation to employment in a wider sense, i.e. both labour relations and other relations aimed at employment.

⁹² Hungary, Act LXXXII of 1997 on Private Pension and Private Pension Funds (1997. évi LXXXII. törvény a magánnyugdíjról és a magánnyugdíjpénztárakról), 25 July 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700082.TV.

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))

In Hungary, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

As it was mentioned above, Article 3 of the ETA defines labour relations so as to cover a very wide range of legal relationships within the framework of which work is done. Article 5 lists employers and person with the right to give instructions in other legal relations aimed at employment among those private actors who fall under the personal scope of the ETA.

In addition, Article 21 of the ETA provides that the principle of equal treatment shall be respected in relation to any training preceding or carried out during employment (in the widest sense), so all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience can be regarded to be covered.

In addition, Article 27 of the ETA (defining forms of education falling under the law's scope) is so wide that all forms of vocational training will definitely fall under the law's definition of education. In terms of Article 27, 'the principle of equal treatment extends to any form of care, education or training, which a) is carried out in accordance with requirements approved or prescribed by the State, or b) is supported by the State ba) by direct normative budgetary subsidy, or bb) indirectly, especially through tax benefits (hereinafter collectively: education)'.

Furthermore, even if non-accredited adult lifelong learning courses provided by private actors do not fall under the term 'education' in the sense of the ETA, they will still be covered as a type of service accessible for the public (Article 5 – private actors falling under the law's personal scope).

Article 14 of Act IV of 1991 on the Promotion of Employment⁹³ enumerates the forms of financial support that may be provided to those who participate in training programmes aimed at promoting employment. The Act on the Promotion of Employment also contains a clause (Article 2), which prescribes that the requirement of equal treatment shall be abided by.

Since the ETA applies to all forms of education, vocational training outside the employment relationship (by technical schools, universities or any other educational institution) also falls under the scope of the Hungarian national anti-discrimination legislation.

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))

In Hungary, national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Article 21 of the ETA expressly lists membership and participation in workers' organisations as an area in which the requirement of equal treatment shall be complied with.

⁹³ Hungary, Act IV of 1991 on the Promotion of Employment (1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról), 23 February 1991, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100004.TV.

In terms of regulation in force as of 1 October 2009, organisations representing the interests of workers or employers are expressly listed under Article 4 of the ETA, defining the law's personal scope, so they are obliged to abide by the requirement of equal treatment in all their actions, practices, policies, measures, which of course includes the benefits they provide too. The amendment also makes it clear that not only the external relations of interest groups of employers and employees, but also the exercise of members' rights and participatory rights in such organisations fall under the scope of the law.

So called public associations (such as the bar associations and different professional chambers) do fall under the personal scope of the ETA (see above).

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

In Hungary, national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive.

As a general remark in relation to the paragraphs to follow, it needs to be reiterated that the ETA covers all grounds covered by the directives and goes way beyond their scope with respect to the number of protected grounds. Therefore, all the answers below are to be interpreted to cover all the grounds included in the directives.

As to social protection: Article 24 of the ETA stipulates that the requirement of equal treatment shall be enforced in relation to social security, specifically when provisions are requested and provided that are financed from the social security schemes, and in the case of social or child protection allowances.

Pursuant to Article 25 of the ETA the following areas are specified in relation to health care: participation in programmes aimed at the prevention of diseases and screening, medical services aimed at healing and prevention, the use of premises, nutrition and the satisfaction of other needs.

Article 25 Paragraph (2) allows for preferential treatment – based specifically on the state of health or disability – to be accorded in an act of parliament or a government decree based on an act of parliament in both the fields of social security and health care.

Article 7 Paragraph (1) of Act CLIV of 1997 on Healthcare⁹⁴ (Healthcare Act) reinforces the prohibition of discrimination in the field of healthcare, when it claims that all patients shall be entitled – within the framework prescribed by law – to receive health services that meet the requirement of equal treatment.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

In relation to religion or belief, age, disability and sexual orientation, national law does not seek to rely on the exception in Article 3(3), Directive 2000/78.

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

In Hungary, national legislation does not expressly include social advantages as formulated in the Racial Equality Directive. However, discrimination in this area can easily be argued to be unlawful under the Hungarian non-discrimination law, especially if the discriminator falls under the personal scope of the ETA (i.e. it is listed in Article 4 of the ETA), since all kinds of disadvantageous differentiations made by such actors are regarded as discrimination under Article 8 irrespective of the area in which they take place.

⁹⁴ Hungary, Act CLIV of 1997 on Healthcare (1997. évi CLIV. törvény az egészségügyről), 23 December 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700154.TV.

An example is provided by case 68/2008 of the Equal Treatment Authority, in which the Authority established discrimination based on political opinion when the mayor of a village instructed the conductor of the 'village bus' (a bus-line operated by the local council to guarantee appropriate transportation for residents for social purposes, such as going to school, visiting sick relatives in the hospital, doing large scale shopping, etc.) not to allow the complainant to get on the bus. The reason for the instruction was that the complainant's political views were different from those of the mayor, over which the two persons had several conflicts.

In Hungary, the lack of definition of social advantages does not raise problems.

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

In Hungary, national legislation includes education as formulated in the Racial Equality Directive.

The ETA devotes a chapter to education, as a result of which the bulk of anti-discrimination provisions is to be found here.

In the context of education, first of all we have to call attention to Article 7 Paragraph (1) and Article 10 Paragraph (2) of the ETA. In terms of Article 7 Paragraph (1) segregation shall be regarded as a form of breach of the requirement of equal treatment. Article 10 Paragraph (2) claims that 'segregation is a behaviour aimed at separating individuals or a group of persons from other individuals or another group of persons in a comparable situation, based on a characteristic defined in Article 8, without an express authorisation set out in an Act of Parliament.' The provision on segregation is included in the ETA to clearly deem 'separate but equal' type of behaviours unlawful. If separation also entails some disadvantage (e.g. lower level education for the separated Roma class within an elementary school), direct discrimination can be applied, if however, in a given case it is difficult to prove that the separated group (the Roma class) suffers disadvantages other than stemming from the nature of such separation, the provision on segregation may be relied on. This rule exempts the victims of such practices from the obligation to prove that segregation is in itself a disadvantage, therefore it may be regarded as a further easing of the rules of evidencing compared to the reversed burden of proof (see Section 6.3).

In its chapter entitled 'Education and training' the ETA provides for the following. Under Article 27 Paragraph (1) the principle of equal treatment extends to any care, education and training a) carried out in accordance with requirements approved or ordered by the State, or b) whose organisation is supported by the State ba) by direct normative budgetary subsidy, or bb) indirectly, especially by releasing or clearing taxes or by tax credit (hereinafter collectively: education).

Pursuant to Article 27 Paragraph (2) the principle of equal treatment shall be enforced in relation to education defined in Paragraph (1), particularly in:

- determining the conditions of accessing education and assessing applications;
- defining and setting the requirements for education;
- performance evaluation;
- providing and using services related to education;
- access to benefits related to education;
- accommodation and supplement in dormitories;
- issuing certificates and diplomas obtainable in education;
- access to vocational guidance; and
- the termination of the relationship related to participation in education.

Paragraph (3) does not only prohibit segregation in an educational institution, or in a division, class or group within such an educational institution, but perceives as a form of

discrimination education limited to a care or educational system, or a care or educational system or institution created or maintained according to standards that do not reach accepted professional requirements or do not meet professional rules, and thus do not ensure a reasonably expectable opportunity to prepare for state exams.

Paragraph (4) declares that educational institutions shall not have groups pursuing extracurricular activities, pupil or student societies and other organisations of pupils, students or parents whose objective is to discredit, stigmatise or exclude individuals or groups.

Pursuant to Article 28 Paragraph (1), if the education is only organised for students of one sex, it does not violate the principle of equal treatment, provided that participation in such an education is voluntary, and will not result in any disadvantages for the participants. Similarly to voluntary single sex education, under Paragraph (2) voluntary religious or ethnic minority education may be taken to conform to the principle of equal treatment if (in elementary and higher education, at the initiation and by the voluntary choice of the parents, at college or university by the students' voluntary participation) education based on religious or other ideological conviction, or education for national minorities is organised in a way that the goal or the curriculum of the education justifies the creation of separated classes or groups; provided that this does not result in any disadvantage for those participating in such an education, and the education complies with the requirements approved, laid down and subsidised by the State.

Although it is included in the text of the law quoted above, the fact needs to be underlined that such separated education is deemed compatible with the principle of non-discrimination only if participation is voluntary. At the elementary and secondary level, the pupils' and students' parents have to initiate the forming of such classes or groups on a voluntary basis, whereas in higher education it shall be based on the students' voluntary participation. A further condition is that such education shall be of equal value with ordinary (i.e. not separated) education. (This exception was necessary because the Nationalities Act, for example, contains the possibility for minority parents to initiate the formulation of separated minority classes for their children, where they can learn the minority language and minority culture. To maintain the legality of such classes, an exempting rule had to be inserted. This is however, only a possibility and not anything compulsory.)

Under Paragraph (3) a legal act may divert from the requirement of equal treatment concerning admission criteria in respect of educational institutions serving the protection of linguistic or cultural identity, or denominational or national minority schools.

Last, under Article 29, a government decree created pursuant to the law or the authorisation thereof may order an obligation to give positive discrimination to a specified group of participants in education within or outside the school system in respect of education or training.

The most often concerned grounds in relation to education-discrimination are disability and Roma origin, but cases concerning sexual orientation have also been dealt with under the ETA.

In one case for instance, the complainant was employed by the respondent school as a part time teacher of Hungarian language and literature. As a result of his higher than usual pitch he became a target of constant mockery by his students, some of whom regularly called him a "fag". After he tried in vain to discuss the matter with the students, he notified the head teacher of the class and also the headmaster about the problem. Nonetheless, no steps were taken, what is more the students received good "attitude grades" at the end of the school year. Finally, the complainant's contract was not prolonged at the end of the year. He brought an action against the school before the Equality Authority (the national equality body), claiming that he was discriminated against on the basis of his – assumed

– sexual orientation. The headmaster claimed that he had been informed about the harassment only at the very end of the year. He also argued that the complainant did not indicate in a timely manner that he did not agree with the grading of the students, and that he did not ask for disciplinary measures to be taken against the students when the problems occurred, and at the very end of the school year it would not have made sense to launch such proceedings. Finally, the fact that his contract was not prolonged had nothing to do with his complaints. The headmaster's intention was to eliminate the complainant's position, although it is true that eventually, upon the request of the school's maintainer, the position was kept and another person was employed.

The Authority rejected the school's defence. It was established in the procedure that the problems faced by the complainant had been widely known in the school, so it was impossible that the head teacher and the headmaster had not been informed about them. Furthermore, even if the complainant had made his grievances known to the employer at the end of the school-year, he would still have been required to take measures to investigate the case. Finally, the Authority found it irrelevant that the employment of another teacher into the complainant's position was based on the maintainer's request. The Authority established that the complainant had been subjected to both direct discrimination (due to his dismissal) and harassment (due to the employer's failure to address the harassment by the students) based on his assumed sexual orientation.⁹⁵

a) Pupils with disabilities

In Hungary, the general approach to education for pupils with disabilities does raise problems.

In terms of Article 13 Paragraph (1) of the RPD Act, persons with disabilities have the right to participate in early development and care, kindergarten education, school education, developmental preparation, vocational training, adult training and tertiary education in accordance with their state and age and in line with the provisions of the relevant laws. Under Paragraph (2) of the same Article, if – based on the opinion of the specialised expert panel – it is advantageous for the development of their skills, persons with disabilities shall participate in integrated kindergarten and school education.

However, as to the practice, the 2010 shadow report prepared for the CRPD by the Hungarian Disability Caucus states that 'infringement of equal opportunity is perpetrated from kindergarten care right up to higher education, simply by the fact that the majority of educational institutions fail to comply with the requirement of accessibility. Over and above legal and physical barriers, the introduction of inclusive education is significantly impeded by society's resistance, the lack of appropriate training for teachers and the underfinancing of the educational system.'⁹⁶

The fact that no significant improvement has been achieved seems to be corroborated by a 2013 research into the vocational training of persons with disabilities, which – on the basis of focus groups and interviews – identifies as one of the biggest problems in relation to the education of people with disabilities that even when it is conducted in an integrated manner, it is so-called 'cold integration', meaning that the children with disability are educated together with their peers, however their special needs are not truly accommodated. (A telling example of this is told by one of the interviewees with hearing impairment, who recalls that one of his teachers regularly explained mathematical problems with his back to the class, facing the blackboard, and that he only received occasional extra help from some of his classmates).⁹⁷

⁹⁵ Decision no. EBH 165/2013 of the Equal Treatment Authority.

⁹⁶ Hungarian Disability Caucus (2010), *Disability Rights or Disabling Rights? CRPD Alternative Report*, p. 153, available at: http://mdac.org/sites/mdac.info/files/english_crpdc_alternative_report.pdf.

⁹⁷ Tausz, Katalin (2013), *Fogyatékos emberek a szak- és felnőttképzés rendszerében* (Persons with disabilities in vocational and adult education), p. 21.

As reflected by the 2013 annual report of the Commissioner for Educational Rights, another deeply rooted problem of the system is the unwillingness of integrated educational institutions to undertake the extra burden imposed by the requirement of accommodation (even if based on their statutes of foundation they provide such accommodation).⁹⁸ The 2014 report also emphasises that the Commissioner receives several complaints from parents about schools that fail to provide the special services and/or exemptions prescribed by the educational expert panels, the task of which is to refer children with disabilities into educational institutions meeting their special needs.⁹⁹

The experiences of the Hand in Hand Foundation's legal advice program have shown that for many families the geographical distance from the educational institution capable of providing education adequate for their child's disability poses the most serious difficulty.¹⁰⁰ This was confirmed by the 2014 annual report of the Commissioner for Educational Rights.¹⁰¹

The above problems and their longstanding nature explain why the general level of education of persons with disabilities is still significantly lower than that of the general population. Within the general population, the percentage of people whose highest level of education does not exceed accomplished primary school studies is around 40%, whereas in the case of persons with disabilities this ratio is above 50%, while approximately 9% of persons with disabilities have a university or college degree, as opposed to circa 15% of the total population.¹⁰²

b) Trends and patterns regarding Roma pupils

In Hungary, there are specific patterns existing in education regarding Roma pupils such as segregation.

In spite of the detailed legislative framework, segregation of Roma pupils in different forms is still widespread in Hungary. Three common patterns of segregation seem to unfold: (i) 'auxiliary schools' established for children with mental disabilities are often predominantly attended by Roma students; (ii) segregated 'Gypsy schools' the distribution of which often reflects segregation in housing; and finally (iii) segregated classes (or even buildings) within 'mixed' schools, usually of a lower standard in terms of teaching materials and quality and often abusing so-called 'minority education' (a form of education originally aimed at assisting minority groups in preserving their cultural traditions).

The Hajdúhadház case described above (Section 2.3.1) provides an example for segregated units within the same school, while a January 2013 case adjudicated by the European Court of Human Rights exemplifies type (i) segregation. In the case of Horváth and Kiss v. Hungary,¹⁰³ two applicants of Roma origin filed an application against Hungary on the basis that both of them were relegated to special schools for children with 'mild mental disabilities' by the competent educational expert panels, although later on it was established by independent expert examinations that neither of them were mentally disabled and that they could be educated in a school with a normal curriculum. The ECtHR noted that the tests that had been used to assess the applicants' learning ability had given rise to controversy. In particular, the Hungarian authorities had set the borderline value of mental disability at IQ 86 and thus significantly higher than the World Health Organisation

⁹⁸ Commissioner for Educational Rights (2014), Az oktatási jogok biztosának beszámolója 2014. évi tevékenységéről (The report of the Commissioner for Educational Rights about his activities in 2014), pp. 61-67.

⁹⁹ Commissioner for Educational Rights (2015), Az oktatási jogok biztosának beszámolója 2013. évi tevékenységéről (The report of the Commissioner for Educational Rights about his activities in 2013), pp. 69-76.

¹⁰⁰ <http://aosz.hu/esoember/esetjogi-tanulmanyfuzet-az-nhm-projekt-tapasztalatai/>.

¹⁰¹ Commissioner for Educational Rights (2015), p. 67.

¹⁰² Tausz (2013), p. 11.

¹⁰³ Horváth and Kiss v. Hungary, Application no. 11146/11.

value of IQ 70. The ECtHR also pointed out that the expert panel had failed to individualise the applicants' diagnoses and to specify the nature of their special educational needs. The ECtHR concluded that the schooling arrangements for Roma with an alleged 'mild mental disability' had not been attended by adequate safeguards that would have ensured that their special needs as members of a disadvantaged group were taken into account. As a result, they had been isolated from pupils from the wider population and had received an education which was likely to have compromised their personal development instead of helping them to develop skills to facilitate their life among the majority population, accordingly, there had been a violation of Article 2 of Protocol No. 1 (right to education) in conjunction with Article 14 (ban on discrimination) of the European Convention on Human Rights in respect of both applicants.

A recent example of a segregated Roma school is the CFCF's lawsuit against the municipality of Nyíregyháza and the Greek Catholic Church. The building of the Huszártelep school in Nyíregyháza is located in a highly segregated area of the town. It was operating as a municipality-run school in 2007, when – as a result of the CFCF's court action and extensive negotiations – the Nyíregyháza municipal council closed it down and placed the school's pupil in the town's other schools attended by majority children, also providing a school bus service to provide these children with access to the schools.

In 2011, the new mayor moved to have the Huszártelep school reopened as part of the Greek Catholic Church's primary school, providing the school building for free to the denomination and committing substantial local funds for extra financial help. At the same time, the local council stopped the school bus service, and although it provided a 30% support for transportation costs, a lot of Roma parents could not afford to send their children to schools, let alone escort them there.

In the lawsuit launched by the CFCF against the town of Nyíregyháza, the church, the school and the state office maintaining schools (which took over the maintenance of schools from local councils), the courts of first and second instance established that the large majority of the pupils in the school were of Roma origin, and accepted the opinion of the claimants' experts that segregated education leads to falling behind and significantly decreases chances of success in later stages of education and working life. Therefore, the court had to look into the question whether the exempting clause can be applied, i.e. whether the separated education was indeed motivated by religious education and initiated voluntarily by the parents.

From among the first 15 pupils of the school, only two claimed to be Greek Catholic, most parents, when filling out the form containing information about why they want to send their children into this particular institution, claimed that they had chosen this school because it was in their close proximity, which was clearly not a religious motive. On this basis, the courts established that this particular condition (voluntary initiative of the parents) of lawfully separate education had not been in place, therefore, the church and the schools had segregated the Roma pupils. The courts also established that by (i) providing the church with the school building free of charge, (ii) terminating the school bus service, and (iii) providing the school with substantial financial support, the municipality also has responsibility in the segregation of the Roma pupils from the non-Roma.

Upon the respondents' request for review, however, the Curia completely overturned the second instance decision in its judgment of 22 April 2015.¹⁰⁴ It accepted that the majority of the pupils in the Huszártelep school are Roma, and that segregation is a disadvantage in itself, however, it concluded that based on Article 28 Paragraph (2) of the ETA, the separation could be exempted, as the school offers religious education and the separation was voluntarily initiated by the parents of the children.

¹⁰⁴ Curia, no. Pfv.IV.20.241/2015/4, 22 April 2015, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

The Curia concluded that since:

- some of the parents expressed their wish for the reopening of the school (at least according to members of the local Roma self-government);
- the Roma self-government expressed its approval of the school's reopening;
- the parents were fully aware that the education in the kindergarten and the school would be committed to the Greek Catholic faith;
- not only Roma pupils can attend the school, as it is open to pupils coming from any part of the settlement;
- the parents have the opportunity to enrol their children in the secular school within the catchment area of which they live, or to any other denominational school;
- the pupils can request their transfer between the two schools maintained by the Greek Catholic Church (the Huszártelep and the church's 'inner city' school), the pupils from Huszártelep can enrol into the inner city school, and neither of the two schools asks for a tuition fee;
- the quality of education and the pedagogical program of the Huszártelep school was not challenged by the claimants.

Therefore, it cannot be denied that the parents of the children enrolled into the Huszártelep school, freely exercised their right to choose the education for their children, so the conditions of Article 28 Paragraph (2) have been met, and segregation has not been committed (and from this point of view the fact that most of the parents chose the school because of its proximity and not its religious affiliation is irrelevant).

The Curia dismissed the claimant's reference to the D.H. v. Czech Republic decision of the European Court of Human Rights, claiming that in that case the quality of education provided to the Roma pupils was a decisive element in the finding of discrimination, however, in the Huszártelep case the claimant did not question the quality of the education or the school's educational program. So the free choice of the parents and the unchallenged quality of education together exclude the possibility that segregation had taken place.

There are a number of serious problems with these conclusions both from the factual and the legal point of view.

From the factual point of view, the main deficiency of the decision is that it refuses to take into account that the actual circumstances prevent the parents from making a truly voluntary choice. Huszártelep is located in the outskirts of Nyíregyháza, with limited access to public transportation, so for most children it would take some 40 minutes to reach by public transportation the secular school into the catchment area of which they belong. In addition, most of the indigent parents cannot afford to pay even 70% of the transportation costs.

From the legal point of view, there is one very important deficiency of the decision, namely that Article 28 Paragraph (2) contains the requirement that for the exemption to be applicable, the education shall be 'organised in a way that the goal or the curriculum of the education justifies the creation of separated classes or groups'. This obviously means that religious education may only justify religious separation, and minority education may only justify separation based on ethnicity, because only then can an acceptable relation be established between the goal of the education on the one hand and the separation based on a protected ground on the other. However, the Curia has overlooked this element of the exemption, and concluded that it has no relevance that only two out of the 15 parents enrolling their children attributed any importance to the school's religious affiliation.

With regard to the municipality, the Curia concluded that since it was under no legal obligation to operate a school bus service, the termination of this service and its replacement with a 30% contribution to transportation costs shall not be regarded as an action falling under the ETA. Furthermore, in the Curia's view, the provision of the building

to the denomination served to fulfil the need of religious exercise, therefore, the issue of segregation could not even be raised. Finally, the Curia's decision was completely silent on the matter of additional financial supports provided by the municipality to the denominational school.

The Huszártelep case is also interesting because it gave rise to a debated amendment of the National Public Education Act. After the second instance court decision, the Minister of Human Resources – who throughout the case insisted that the Greek Catholic school offered *catch-up education* rather than segregation based on Roma origin¹⁰⁵ and even testified as a witness in the lawsuit – and the ministry repeatedly expressed their deep dissatisfaction with the judgment and publicly announced that they would look into legal ways to provide 'catch-up' education to disadvantaged children.¹⁰⁶

Not long after, in December 2014 a clause was inserted the National Public Education Act authorising the government to determine in a decree 'the specific conditions of organising education based on religion or other ideological conviction, and national minority school education, with a view to fulfilling the conditions as set forth in Paragraph (2) of Article 28 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, with special regard to the ban on segregation' [Article 94 Paragraph (4)(z)]. Based on the antecedents of the case, several NGOs active in the field regarded the amendment as an authorisation for the government to allow segregation. The amendment came into effect on 1 January 2015, so on its basis it would have been possible by now to pass legislation on the matter, however, it has not happened yet.

Other developments of the educational policy negatively affecting pupils in a disadvantaged position (including Roma children and children with disabilities) also need to be mentioned here. In their report prepared for the mid-term evaluation of the implementation of the recommendations addressed to Hungary during the country's universal periodic report under the aegis of the UN, NGOs active in Hungary – including the CFCF and the European Roma Rights Centre – criticised – among others – the following phenomena:

The new act on public education worsened the situation of multiply disadvantaged and/or Roma students in a number of ways. It reintroduced failing which is likely to mainly affect disadvantaged and Roma children. The new act reduced the upper limit of compulsory school attendance from 18 to 16 years as of 1 January 2013. The NGOs warned that this increases the likelihood of students leaving secondary education without obtaining a qualification, which again is most likely to impact negatively those children who come from marginalised families. Experience so far seems to confirm this prediction: according to the estimations of school wardens interviewed in the framework of an ongoing research, the rate of Roma children dropping out from secondary education doubled as a result of the measure.¹⁰⁷

Public schools have been nationalised as of 1 January 2013. A new centralised state body, the Klebelsberg Centre for Management of Educational Institutions (KLIK) has become the sole maintainer of all primary and secondary schools that were previously managed by municipalities. While this could have been a historic opportunity to inspect all schools and take firm measures against unlawful practices, such as segregation of Roma children, the Centre instead left segregated schools intact, and in certain cases even reversed already started desegregation processes (e.g. in Piliscsaba, where the Centre launched a new class in a segregated – Roma-only – school which was about to be closed down by the

¹⁰⁵ See for instance: http://hvg.hu/itthon/20121222_Balog_nincs_szegregacio_a_Huszartelepi_r.

¹⁰⁶ See for instance: http://hvg.hu/itthon/20141106_Nem_tetszik_az_iskolai_szegregacios_itele.

¹⁰⁷ Presentation by Nikolett Oláh (Roma Education Fund) at the conference *Szolidaritás és szerkezetváltás: az informális intézmények szerepe a roma gyerekek oktatásában* (Solidarity and restructuring: the role of informal institutions in the education of Roma children), held on 24 March 2015. See: http://kisebbssegkutato.tk.mta.hu/uploads/files/olah_ea.pdf.

municipality before the takeover by the Centre). The KLIK has been criticised by actors of the education system for the lack of expertise in the area of Roma education.¹⁰⁸

That centralisation has not resulted in enhanced action against segregation is also illustrated by a recent court judgment. In November 2010, the Supreme Court (predecessor of the Curia) established that the Pécsi street school in Kaposvár was ethnically segregated, and that its maintainer, the Municipal Council of Kaposvár had violated the requirement of equal treatment by failing to act against the spontaneously developed segregation through (for instance) re-determining the catchment areas of the local schools. Despite the court decision, the Municipal Council did not take any measures to put an end to the segregation. Consequently, the CFCF decided to start another lawsuit into the issue in late 2013. The CFCF extended the lawsuit to the KLIK and also the Ministry of Human Resources (as KLIK's supervisory body) requesting the court not only to establish the violation, but also to order desegregation through closing the school.

In its first instance decision delivered on 11 November 2015, the Kaposvár Regional Court established the violation, and also declared that the Ministry was responsible for the breach of the requirement of equal treatment, because it failed to instruct the KLIK to put an end to the segregation. (At the same time, the court took the stance that it was not in the position to order the implementation of the complex desegregation plan devised by CFCF and based on the closing of the segregating school.)¹⁰⁹

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

In Hungary, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

Article 5 of the ETA extends the scope of the law to all actors who offer a public contract or make a public offer, or provide public services or sell goods to the public.

In addition, discrimination with regard to access to goods and services is regulated by Article 30 of the ETA:

- (1) It is considered a particular violation of the principle of equal treatment if at premises open to customers, particularly in catering, commercial, cultural and entertainment establishments, and based on a characteristic defined in Article 8,
- a) the provision of services or sale of goods is denied or neglected,
 - b) the services provided and goods sold are not of the same quality as those normally available at the particular premises,
 - c) a notice or sign is placed implying that a certain individual or individuals are excluded from the provision of services or sale of goods at the premises.

Paragraphs (2) and (3) as well as Article 30/A contain a specific exemption clause for access to goods and services (see under Section 2.2).

The above list is not exhaustive, so other forms of discrimination connected to access to goods and services are also covered by the ETA.

3.2.9.1 Distinction between goods and services available publicly or privately

In Hungary, national law does not 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).

¹⁰⁸ Oláh, Nikolett (2015).

¹⁰⁹ Kaposvár Regional Court, 11.P.21.553/2013/70, 11 November 2015, http://cfcf.hu/sites/default/files/MX-M264N_20151116_142154.pdf.

The reason for this is that private entities offering a public contract or making a public offer are among those four types of private actors who fall under the personal scope of the ETA.

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

In Hungary, national legislation includes housing as formulated in the Racial Equality Directive.

Under Article 4, public actors who have a role in housing (including municipalities) fall under the law's scope. Article 5 of the ETA extends the law's personal scope to all persons making a public offer, including an offer for renting out a private apartment.

Discrimination in housing is forbidden by Article 26 of the ETA, which runs as follows:

- (1) It is a particular violation of the principle of equal treatment when any persons because of their characteristics defined in Article 8 are
 - a) inflicted with direct or indirect discrimination in respect of the granting of housing subsidies, benefits, interest subsidies by the state or a municipality,
 - b) put in a disadvantageous position in determining the conditions of sale or leasing of state-owned or municipal housing and plots.
- (2) The issuing of occupancy and other building permits by the relevant authorities shall not be denied, or tied to any conditions, based directly or indirectly on characteristics defined Article 8.
- (3) The conditions of access to housing shall not be determined with the aim of artificially separating any particular groups based on characteristics defined in Article 8 to any settlement or part thereof, rather than by the group's voluntary decision.

Thus, housing discrimination is dealt with in relation to state or municipal housing. However, housing provided by private actors (e.g. the renting out of apartments) will also fall under the scope of the ETA, provided that the given private actor advertises the housing possibility publicly.

In this case the act will fall under the ETA's ambit in accordance with Article 5, which claims that private persons shall abide by the requirement of equal treatment if they offer a public contract or make a public offer (see above, under Section 3.1.2).

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Hungary there are patterns of housing segregation and discrimination against the Roma.

With regard to the issue of housing it needs to be pointed out that in Hungary, the proportion of social housing (8%) is way below the EU average (33%).¹¹⁰ The proportion of housing owned by local councils (providing a basis for social housing) has decreased from 4.6% in 2001 to 3% in 2012.¹¹¹ The lack of social housing has a very negative impact on the housing conditions of the marginalised Roma groups, significantly reducing their chances to find a way out from the segregated Roma neighbourhoods and settlements.

As to patterns and cases in housing discrimination and segregation, the following can be said.

A monitoring report written by civil society organisations on the implementation of Hungary's National Roma Integration Strategy and Decade Action Plan in 2012 states as follows:

¹¹⁰ <http://www.mut.hu/?module=news&action=getfile&fid=114874>.

¹¹¹ http://www.ksh.hu/thm/2/indi2_7_7.html.

'The housing situation of the Roma is significantly worse than that of the average population. According to the 2011 Survey carried out by UNDP, 29% of Roma live in bad quality (run down) homes or in ghettos (as opposed to 8% of the non-Romani population); 30% of them have no access to good quality/public water supply, and one-third of them have no access to public sewer, whereas these circumstances apply to only 8 and 12% of the non-Romani population, respectively. Most of the Romani households (81%) use wood for heating, while only half of non-Romani households do so. (...) Half (52%) of the Roma live in households with arrears of some sort, mainly with water and electricity utilities. (...)

According to data of a 2010 Survey, a total of 1633 ghettos inhabited by poor or Romani people are located in 823 settlements and in 10 districts of the capital city, that is, in one-fourth of all settlements. 60% of the ghettos are located in (large) villages. A total of 280-315 thousand people (3% of the total population of the country) live in those ghettos. Two-thirds of the ghettos are located on the periphery of settlements and 14% of them in areas which are defined as a non-residential area by the given local governments. In half of the ghettos more than 75 people live, and one thousand or more people live in 49 ghettos. In 16% of ghettos there is no access to piped water supply, and in 77 ghettos there is no public tap. 184 ghettos cannot be accessed through surfaced roads, and a surfaced road leads to only the edge of 422 of them; there is no public lighting in 118 segregated neighbourhoods.'¹¹²

In 2010, the proportion of complaints submitted to the Minorities Ombudsman in relation to housing had increased to 20% within the total number of complaints, and exceeded 50% within complaints related to social issues. In 2015, complaints filed with the Ombudsman's deputy responsible for minority affairs concerning housing constituted the third largest group of complaints after education and social benefits.¹¹³

One case needs to be mentioned specifically in relation to housing discrimination. In May 2014, the Municipal Council of Miskolc (North-East Hungary) amended its Decree No. 25/2006. (VII.12.) on Social Housing,¹¹⁴ introducing a limitation on receiving financial compensation for the termination of tenancy in social housing for those who live in 'low comfort' social housing. The decree as amended stipulated that the authorities can only provide financial compensation (in the amount of EUR 6400 – HUF 2 million) to low comfort social housing tenants in order to secure a mutually-agreed termination of the tenancy if the tenants undertake to comply with the following cumulative obligations: (i) they purchase a property from the compensation; (ii) the property is purchased outside of the territory of Miskolc, (iii) they agree to a 'restraint on alienation and encumbrance' (prohibiting the owner from selling or mortgaging of the property), registered in the land registry for five years in respect of the purchased property and enforceable by Miskolc Local Council.

As opposed to low comfort housing tenants, tenants of higher quality social housing are provided with the possibility of being relocated within Miskolc. Therefore, this was differential treatment of low comfort as compared to ordinary social-housing tenants, *de facto* allowing the authorities to 'expel' from the territory of Miskolc tenants living in low comfort social housing. Tenants of low comfort housing are almost exclusively Roma, who thus would no longer be able to access social services in Miskolc due to the change of their

¹¹² Civil Society Coalition (2012), *Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Hungary*, p. 96, available at: http://www.romadecade.org/cms/upload/file/9270_file8_hu_civil-society-monitoring-report_en.pdf.

¹¹³ Commissioner for Fundamental Rights (2016), *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2015* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies 2015), p. 230.

¹¹⁴ Hungary, Decree No. 25/2006. (VII.12.) of the Municipality of Miskolc on the Renting of Housing (*Miskolc Megyei Jogú Város Önkormányzatának 25/2006. (VII. 12.) számú rendelete a lakások bérletéről*), 12 July 2006, http://www.miskolc.hu/sites/default/files/dokumentumok/csatolmanyok/25-2006._a_lakasok_berleterol_egyseges_szerkezet_2016.majus_1._napjatol.pdf.

address. The fact that the measure has a disparate impact on Roma was also known to the authorities.

The Borsod-Abaúj-Zemplén County Government Office (government offices are vested with the task of overseeing the legality of municipal decrees) requested the Municipal Council to amend the decree, but the council refused to do so. The Government Office filed a motion with the Curia for the quashing of the decree. In its decision Köf.5003/2015/4,¹¹⁵ the Curia concluded that the amendment puts persons living in low comfort social housing in a disadvantaged situation compared to persons living in social housing of higher comfort levels, and although differentiation may be acceptable if it has a legitimate purpose, in this particular case, no such purpose was presented. The grounds for the discrimination according to the Curia were financial situation and "other characteristic" (more closely: social status) – the ethnic aspect of the matter was not mentioned in the decision.

This however was not the only problem related to housing the local Roma community had to face. In July 2014, the NGO NEKI filed an *actio popularis* complaint with the Equal Treatment Authority claiming that the municipality of Miskolc is systematically terminating the social housing tenancies of persons living in the Numbered Streets (a segregated Roma neighbourhood) without taking any measures to provide them with housing and thus exposing them to the threat of homelessness. In their petition, they identified a number of ways in which the tenancies are terminated, including the following: (i) replacing indeterminate tenancies with fixed term tenancies whenever possible (e.g. when a tenant is moved to a new apartment); (ii) refusing to prolong fixed term tenancies after their expiry (even in the case of tenants who always pay their rent and utility fees); (iii) terminating tenancies even when the tenants who are overdue with payments are willing and able to pay the arrears. At the same time, despite its obligations under the laws of Hungary and its own town development strategy, the municipality has failed to (i) notify the tenants of the Numbered Streets beforehand in due course; (ii) involve the tenants in the decision making process in any way; (iii) prepare any impact assessment of the situation; (iv) take any steps to place those tenants who were forced to leave the tenancies because of the expiry of their contract. According to NEKI's estimation, as a result of these practices and failures, 40-45% of approximately ca. 900, mostly Roma residents of the Numbered Streets have been exposed to the threat of homelessness, which amounts to discrimination on the basis of their financial situation, social status and ethnic origin.

In its decision no. EBH/67/22/2015,¹¹⁶ the Authority established that municipalities are obliged under Article 13 of Act CLXXXIX of 2011 on Hungary's Municipalities¹¹⁷ to provide for and rehabilitate persons who become homeless on their territory and to take steps to prevent homelessness. For the same reason, the municipality's argument that after the termination of the tenancy agreements it does not have obligations in relation to the former tenants is unfounded. The municipality's role in relation to housing is dual: it is the owner on the one hand, but has social responsibilities on the other, so by referring to its ownership and property rights, it cannot be exempted from its social duties.

The Authority went on to state that the municipality failed to take all those measures that should have preceded the elimination of a segregated neighbourhood (preparation of a mobilisation plan, making an impact assessment, informing the tenants, etc.), and recalled that discrimination may be committed through omission according to the Supreme Court's case law. Furthermore, the Authority qualified the municipality's omission as indirect discrimination, claiming that despite its apparent neutrality (being based on the location

¹¹⁵ Curia, Köf.5003/2015/4, 28 April 2015, <http://www.kuria-birosag.hu/hu/onkuqy/kof500320154-szamu-hatarozat>.

¹¹⁶ Equal Treatment Authority, EBH/67/22/2015, 15 July 2015, <http://egyenlobanasmod.hu/article/view/ebh-67-2015>.

¹¹⁷ Hungary, Act CLXXXIX of 2011 on Hungary's Municipalities (2011. évi CLXXXIX. törvény Magyarország helyi önkormányzatairól), 28 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100189.TV.

of the tenancies), it had a disproportionately negative effect of a group of persons distinguishable on the basis of their ethnicity and indigence.

On this basis, the Authority established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas, and by doing so, discriminated them on the basis of their social status, financial situation and Roma origin.

The Authority obliged the municipality to put an end to the discriminative situation by developing an action plan (by 31 December 2015) on where within Miskolc, how and from what sources it can provide the tenants of the Numbered Streets with adequate housing. The Authority also called on the municipality to stop its ongoing discriminative practice until the action plan is prepared. Furthermore, the Authority obliged the municipality to prepare (by 30 September 2015) another action plan on how it will provide those with adequate housing who have already become homeless or are concerned by the revealed practices (e.g. their tenancy expires by 31 December and the municipality does not wish to prolong it or they are under eviction processes). Finally, the Authority imposed a fine of HUF 500,000 (EUR 1,670) on the municipality.

The decision was upheld by the Metropolitan Administrative and Labour Court in its decision no. 6.K.33.048/2015/17 delivered on 25 January 2016.¹¹⁸

¹¹⁸ Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available from <http://birosag.hu/uqyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function. The court concluded that the apparently neutral series of measures by the municipality had a disproportionate negative effect on Roma persons who constitute a majority of the tenants, thus, the municipality committed indirect discrimination. Due to its special responsibilities, the municipality cannot invoke its ownership rights to justify such discrimination. The court also confirmed that it is within the Authority's scope of authority to oblige the municipality to adopt action plans in order to make the sanctions applicable by the Authority meaningful.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Hungary, national legislation provides for an exception for genuine and determining occupational requirements.

Article 22 Paragraph (1) of the ETA provides an exception for genuine and determining occupational requirements (GORs), which seems to comply with the relevant provisions of the directives. It reads as follows:

The principle of equal treatment is not violated if

- a) the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of employment; or
- b) the differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.

Even this exempting clause is deemed non-applicable by Paragraph (2) in cases concerning equal pay for equal work, when the ground concerned is gender or racial or ethnic origin. This provision is in itself a source of unjustified differentiation, as there is no reason based on the directives why broader justifications for unequal pay should be permissible in respect of religion, disability and sexual orientation. It is by all probability a result of hasty legislation aimed at transposing the EU acquis (Directives 2000/43/EC and 2002/73/EC) which was done in an inconsistent manner, not paying due attention to the fact that the Directive 2000/78/EC also excludes differentiation in pay on these grounds.

As suggested by domestic terminology that clearly corresponds to the relevant provisions of the directives, albeit is far more generally phrased, the legislator intended Article 22 (a) to be the equivalent of the genuine and determining occupational requirement rule, while (b) is the Hungarian version of the religious ethos exception (with an additional element that allows special institutions of national and ethnic minorities to employ people coming from that particular national and ethnic group).

Prior to ETA Hungarian labour law contained a simple exemption under former Article 5 Paragraph (5) of the old Labour Code. This provided that 'any difference of treatment clearly and directly required by the character and nature of the work shall not constitute discrimination'.

Opinion no. 97 of the Labour Law Board (*Munkaügyi Kollégium*)¹¹⁹ of the Supreme Court, interpreting this provision states: 'In particular, [such difference of treatment is not prohibited] when the difference of treatment is based on essential and legitimate conditions that may be taken into consideration at the time of hiring. Consequently, the employer may only lawfully require that men fill certain occupations where the character or nature of the work, or labour conditions excludes the employment of women.'

The above guidelines have remained valid after the coming into force of the ETA. These, when read in conjunction with Article 22 (a) ETA seem to reassure compliance with community law with regard to genuine occupational requirements.

¹¹⁹ Labour Law Board of the Supreme Court, Opinion no. 97, date and link not available.

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

In Hungary, national law provides for an exception for employers with an ethos based on religion or belief.

The above quoted Article 22 of the ETA provides an exception concerning an ethos based on religion or belief. Paragraph (1) Point (b) claims that the principle of equal treatment is not violated if the differentiation arises directly from a religious or other ideological conviction fundamentally determining the nature of the organisation, and it is proportionate and justified by the nature of the employment activity or the conditions of its pursuit.

Furthermore, Article 19 Paragraph (3) of the Act on Churches sets forth that 'religious communities conduct their activities outlined in Article 9 Paragraph (1) [educational, healthcare, charity, social, cultural, sports, youth-related, child protection activities] directly or through their institutions in accordance with their religious identity, and therefore, specific requirements may be determined concerning recruitments and the establishment, maintenance and termination of the legal relationship of employment, provided that these requirements can be regarded as justified by the nature or substance of the community's religious ethos, they are necessary for preserving and maintaining the ethos, and they are proportionate'.

It is doubtful whether these provisions are fully in line with the Directive 2000/78, as Article 22 of the ETA does not seem to incorporate the Directive's notion of 'legitimacy', although it is likely that in the course of applying the law, courts and authorities would see this as an implied requirement of any distinction based on religious ethos, however, there is no case law on this issue yet.

Furthermore, according to the Directive, a differentiation based on the religious ethos of an organisation may only be based on the religion of a person subjected to the differentiation, and not on any other characteristics (e.g. sexual orientation), whereas the Hungarian provisions do not impose this restriction on the application of these exempting clauses.

In the case of denominational schools, additional legal provisions cause further problems. Article 32 Paragraph (1) of the National Public Education Act sets forth that if the educational institution is maintained by a denomination, (i) it may in the course of recruiting teachers and other employees attach weight to considerations related to religion and belief, and define them as criteria of recruitment; (ii) it may restrict or ban the teachers' general right to carry out his/her educational work in accordance with his/her belief and set of values (without imposing these on the child or pupil); and (iii) it may – in its Rules of Operation and house rules and in line with the teachings of the maintaining denomination – prescribe regulations concerning appearance and behaviour, rights and obligations and religious activities. Disciplinary proceedings may be launched against the child, pupil or teacher for breaching these latter obligations.

In the author's view these provisions are not in conformity with Article 4 of Directive 2000/78 for a number of reasons. Firstly, according to the Directive, Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive.

At the time of Hungary's accession to the Union, Act LXIX of 1993 on Public Education¹²⁰ (the previous act on public education, parts of which are still in force until 1 September 2013) contained no provisions authorising denominational educational institutions (or their maintainers) to set considerations related to religion and belief as recruitment criteria or prescribe regulations concerning appearance, behaviour or religious activities. (The only restriction that was in place in relation to teachers and employees at the time of the accession was that the denominational school was authorised to restrict or ban the exercise of the teacher's right to perform his/her educational activities in accordance with his/her own beliefs and set of values.)

Secondly, the above outlined provisions do not contain any reference to the genuineness, legitimacy and justified nature of the differentiation, they are absolute, unqualified and unconditional. Therefore, they are not in line with the Directive's requirement that a difference of treatment shall not constitute discrimination only if 'by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement'.

It still needs to be seen how the relation of this new provision to Article 22 Paragraph (1) Point (b) is interpreted, which has a decisive impact on its conformity with Article 4(2) of the Directive. Article 32 Paragraph (1) of the National Public Education Act does not specify what types of special conditions may be set, and how the selection criteria shall be formulated, therefore, it can be interpreted in line with Article 22 Paragraph (1) Point (b) of the ETA and regarded as a declarative rule simply reinforcing those already existing special rights of organisations based on a religious ethos that were put in place by the ETA. The same interpretation would follow from the principle of indirect effect of the EU acquis, i.e. the domestic authorities' obligation to interpret domestic laws in a way that is compatible with the acquis.

However, another interpretation is also possible. One can argue that there would have been no point in re-declaring an already existing right, and therefore the legislator's intention behind the adoption of Article 32 Paragraph (1) must have been to make it possible for church institutions to set conditions going beyond those that were already permitted under the ETA. In this case there would be a collision between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori*, this collision can be solved in favour of Article 32 Paragraph (1), since this is the norm that was adopted later. This interpretation opens the door for employment-related differentiation that goes way beyond what is allowed by the Directive.

Looking at the legislative reasons attached to Article 32 of the National Public Education Act, it seems that the legislator's intention was directed to create an exception to the GOR provision of the ETA, which takes precedence over Article 22 of the ETA. The legislative reasons run as follows. 'The ethos of educational institutions maintained by a denomination is necessarily determined by the religious principles of the maintaining denomination, therefore further special and exceptional provisions pertain to public educational institutions maintained by churches. Some of these provide extra rights to the maintainer and parallel to that restrict the autonomy of the staff, and concern the rights and obligations of the parents and children. Since the law declares the [parents' and children's] right to freely choose the educational institution to attend, these restrictions are not detrimental to children and parents. The provisions influencing the rights of the staff are necessary in order to guarantee the ethos based on religion or belief, at the same time the law wishes to guarantee professional freedom and autonomy of teachers.'

That the schools (or at least some schools) themselves share this interpretation is demonstrated by a case of the Hungarian Helsinki Committee, in which a denominational

¹²⁰ Hungary, Act LXIX of 1993 on Public Education (1993. évi LXXIX. törvény a közoktatásról), 3 August 1993, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300079.TV.

school dismissed a boarding house teacher who had been working for the institution for ten years (and whose performance was rated excellent by auditors commissioned by the maintaining church) as soon as the above provisions of the National Public Education Act entered into force on the basis that his world view was not in line with the school's religious values. If the school leadership had thought that this was possible under Article 22 of the ETA, it could have dismissed him beforehand. However, by all probability they were of the view that under the ETA it would have been difficult for them to substantiate that religiosity was a genuine and determining occupational requirement, as the teacher always saw to it that the students abide by the religious requirements and attend the religious events of the school. In the labour lawsuit, no judicial decision was reached, because finally the school acknowledged the violation and the parties concluded a settlement.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Hungary, there are 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.

Article 6 of the ETA stipulates that a denominational legal person's legal relationships directly related to the denomination's religious activity are excluded from the scope of the law. Therefore, churches enjoy complete freedom with regard to the employment of priests and pastors and other persons with directly religious tasks.

Case law also shows that religious freedom can be an exempting factor in cases not expressly removed from the ETA's ambit. The Károli case concerned the conflict between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. After dismissing a theology student who had confessed his homosexuality to one of his professors, the Faculty Council of the Károli Gáspár Calvinist University's Theological Faculty published a general declaration on 10 October 2003, claiming that 'the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life'.

Under the ETA, the gay and lesbian rights protection organisation Háttér Társaság a Melegekért (Háttér Support Group for Gays and Lesbians) brought an *actio popularis* claim against the university, requesting the court to declare that the defendant violated the right of homosexuals as a social group to equal treatment, to oblige the defendant to put an end to the infringement and to withdraw its declaration as well as to pay punitive damages.

The first instance court came to the conclusion that the declaration of the Faculty Council is an opinion protected by the freedom of expression and not transgressing the limits of constitutionality.¹²¹ The decision was upheld by the second instance court with basically the same reasoning.¹²² The gay and lesbian organisation submitted a request for extraordinary review to the Supreme Court.

The Supreme Court rejected the claim on 8 June 2005.¹²³ The Court accepted the claimant's argument that even the proving of an abstract disadvantage may be sufficient for the establishment of discrimination and the shifting of the burden of proof. However, it took the stance that the denominational university is exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule of the ETA [Article 7 Paragraph (2)], according to which an action based on a protected characteristic 'shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'.

¹²¹ Metropolitan Court, 19.P.21.788/2004, date and link not available.

¹²² Metropolitan Appeals Court, 2.Pf.21.318/2004/4, date and link not available.

¹²³ Supreme Court, Pfv.IV.20.678/2005/5, 8 June 2005,
http://epa.oszk.hu/02300/02334/00020/pdf/EPA02334_Fundamentum_2005_03_100-104.pdf.

In the Supreme Court's view, in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors (although this is not inevitable, as students with a degree in theology do not automatically become pastors).

Another relevant case is the lawsuit on the segregation of Roma pupils in Nyíregyháza (described in Section 3.2.8), where the denominational character of the school seemed to have played a role in the Curia's reluctance to look into whether the initiative of the parents was truly voluntary, although it needs to be added that the decision does not conclusively claim at any place that the parents' decision was motivated by *their* religious conviction. It states on the one hand that the school is a denominational one and on the other that the parents were sufficiently informed and made a voluntary choice, as they could have chosen other schools. The issue of the parents' motives is in fact blurred throughout the judgment.

– Religious institutions affecting employment in state funded entities

In Hungary, 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.

In this regard, the special rules of employment outlined above shall be read in conjunction with the fact that certain institutions maintained by churches do receive state funding, such as denominational schools, hospitals, social care homes. Under Article 5 of Act CXXIV of 1997,¹²⁴ such institutions receive a per capita support under the same rules and on equal footing with similar institutions maintained by local councils (based on the notion that these institutions perform state tasks: health care provision, education, etc.).

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Hungary, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78). However, the statutes regulating the status of armed forces contain provisions on age limits and physical suitability.

Article 5 of the Act XLII of 2015 on the Service Relationship of Professional Members of Law Enforcement Organisations¹²⁵ (regulating organisations, such as the police, prison services, customs and excise guards, etc., hereafter: Law Enforcement Organisations Act) runs as follows:

- (1) With regard to the service relationship the requirement of equal treatment shall be met.
- (2) The law enforcement organisation guarantees without discrimination the advancement of its professional member, based exclusively on his/her professional qualities, training, experience, performance and service time.

Article 6 of Act CCV of 2012 on the Status of Military Personnel¹²⁶ (hereafter: Armed Forces Act) claims that the State and the employer shall comply with the requirement of equal treatment. Furthermore, remedying the violation of the requirement of equal treatment shall not result in the violation or limitation of a third person's rights.

¹²⁴ Hungary, Act CXXIV of 1997 on the Financial Conditions of the Religious and Public Interest Activities of Churches (1997. évi CXXIV. törvény az egyházak hitéleti és közcélú tevékenységének anyagi feltételeiről), 10 December 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700124.TV.

¹²⁵ Hungary, Act XLII of 2015 on the Service Relationship of Professional Members of Law Enforcement Organisations (2015. évi XLII. törvény a rendvédelmi feladatokat ellátó szervek hivatásos állományának szolgálati jogviszonyáról), 24 April 2015, <http://mkogy.jogtar.hu/?page=show&docid=a1500042.TV>.

¹²⁶ Hungary, Act CCV of 2012 on the Status of Military Personnel (2012. évi CCV. törvény a honvédek jogállásáról), 18 December 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200205.TV.

This however does not exclude the possibility of differential treatment based on age and disability (or rather: physical features) in the context of armed forces and other armed organisations. The limitations are set forth by the relevant statutes

Under Article 33 of the Law Enforcement Organisations Act, those may enter service who are older than 18 and at least 10 years younger than the upper age limit pertaining to them, and are suitable for service from a medical, psychological and physical point of view.

In terms of Article 31 of the Armed Forces Act (regulating the army), those may enter service who are older than 18, and are suitable for service from a medical, psychological and physical point of view.

The detailed regulations are set forth by Joint Decree 57/2009 of the Ministry of Justice and Law Enforcement, the Ministry of Municipalities and the Minister without Portfolio Overseeing Civil Secret Services.¹²⁷ The Decree contains a very detailed description of what suitability from a medical, psychological and physical point of view means.

The Equal Treatment Authority had a related case. A woman filed a complaint because she was refused admission to the Police College due to her height. The College used the exemption that it was obliged by the Decree (i.e. a statutory norm) to reject the application, since under its terms, a woman who is less than 162 centimetres tall may not become a police officer (for men, the limit is 168 centimetres). Consequently, the Authority had to reject the complaint, but indicated to the Ministry of Justice and Law Enforcement that a revision of the Decree is necessary. (If a law, such as an Act of Parliament or a Ministerial Decree is discriminatory, only the Constitutional Court is entitled to declare it null and void. The Authority only has the right to initiate the amendment with the responsible entity.)

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Hungary, national law does not include exceptions relating to difference of treatment based on nationality.

In Hungary, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

Although the English text of Article 8 Point d) of the ETA mentions nationality (*nemzetiség*) among protected grounds, this expression does not refer to citizenship, it is used to refer to affiliation with a national minority. However, differentiation based on nationality (citizenship) is not excluded from the scope of the Act: in fact, it is one of the 'other characteristics' to be protected by the Act, as supported by the case law of the Equal Treatment Authority.

For instance, in the case 56/2007, the Equal Treatment Authority established direct discrimination by a company providing financial services because it rejected to provide a Romanian citizen settled in Hungary with a EUR 330 (HUF 100,000) loan for a home-cinema system on the basis that the foreign citizenship of the complainant increases the risks of non-payment and the possible costs of an enforcement procedure in the case of non-payment. The Authority established that the automatic exclusion of foreign nationals

¹²⁷ Hungary, Joint Decree 57/2009 of the Ministry of Justice and Law Enforcement, the Ministry of Municipalities and the Minister without Portfolio Overseeing Civil Secret Services (57/2009. (X. 30.) IRM-ÖM-PTNM együttes rendelet egyes rendvédelmi szervek hivatásos állományú tagjai egészségi, pszichikai és fizikai alkalmasságáról, közalkalmazottai és köztisztviselői munkaköri egészségi alkalmasságáról, a szolgálat-, illetve keresőképtelenség megállapításáról, valamint az egészségügyi alapellátásról), 30 October 2009, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0900057.irm.

without any mechanism devised to examine thoroughly their relevant personal circumstances (job, salary, etc.) constitutes direct discrimination that may not be exempted by referring to increased risks and costs as objective justification.

Statelessness would similarly be an 'other characteristic' protected by the ETA.

b) Relationship between nationality and 'race or ethnic origin'

Due to the fact that members of the ethnic minority that is most often exposed to discrimination (i.e. the Roma) are Hungarian citizens, there is no overlap in the case law between discrimination based on nationality (in the sense of citizenship) and ethnicity.

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

a) Benefits for married employees

In Hungary, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

Such a differentiation could be challenged either as direct discrimination under the ambit of 'other characteristic', or as indirect discrimination based on sexual orientation.

b) Benefits for employees with opposite-sex partners

In Hungary, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.

There are no explicit provisions in national law with regard to this issue, and there is no related case law. Looking at the general legal framework, one can say that this type of overt discrimination would not be justifiable. In its Decision 14/1995 (III. 13.), the Constitutional Court expressly declared that 'those (social and health care) benefits that are provided on the basis of partnership, may not be made dependent on the sex of the partners.'¹²⁸ Although this was stated with regard to state social security arrangements, the Constitutional Court's view would by all probability be taken into consideration in a legal dispute between an employer and an employee as well.

With regard to such benefits a claim of discrimination could be made under the ETA. Based on Article 19, it would be simple for the claimant to prove the disadvantage and the existence of a protected ground, following which the employer would by all probability try to rely on the general exempting rule [Article 7 Paragraph (2)] and claim that the differentiation has an objectively reasonable ground. In the light of the Constitutional Court's above outlined decision, it is highly doubtful that such an attempt could be successful.

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In Hungary, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78). These however are not expressly stated in anti-discrimination law.

¹²⁸ Constitutional Court, 14/1995 (III. 13.) AB határozat, 13 March 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/DA693CDE8BF08185C1257ADA005257FB?OpenDocument>.

Decree 33/1998 of the Ministry of Welfare on the Medical Examination and Assessment of Labour, Professional and Personal Hygienic Suitability¹²⁹ (hereinafter: Labour Suitability Decree) covers job and profession related suitability tests [Article 1 (a) and (b)]. The former serves to test whether the applicant can meet the encumbrance resulting from the activity he/she needs to perform on the job. The latter seems to be of an even more strictly medical nature, testing suitability prior to (re)training.

Some relevant provisions can be found in the Labour Code. Article 51 Paragraph (3) prescribes that the employee may only be employed for work that may not entail disadvantageous effects on him/her taking into consideration his/her physical features or maturity. Under Paragraph (4) of the same Article, the employer shall provide free labours suitability examinations before the start of the employment and at regular intervals subsequently.

The Labour Code here refers to examinations conducted in terms of the Labour Suitability Decree. Article 10 Paragraph (1) of the Decree states: 'In the course of examining and assessing labour suitability it shall be taken into consideration that women (with special regard to women of child-bearing age, pregnant women – especially those in the early phase of pregnancy –, women who have recently given birth, women who are breast feeding and women giving milk) are not or only conditionally suitable for work entailing health risks or dangerous encumbrances as enumerated under Annex 8.'

Under Article 10/A Paragraph (1) 'the encumbrances excluding or only conditionally allowing the employment of minors are listed in Annex 8'. Article 10/B Paragraph (1) prescribes that 'in the course of examining and assessing labour suitability it shall be taken into consideration that older employees are not or only conditionally suitable for work entailing health risks or dangerous encumbrances and enumerated under Annex 8'. Annex 8 of the Decree contains a very detailed list of encumbrances that are potentially harmful to the health of vulnerable groups and therefore require prohibition. Examples are: microwave radiation, overpressure, exposition to highly poisonous, carcinogenic materials and materials damaging reproductive capacity. Annexes 9 and 9/A list the activities for which individual risk assessment is required when deciding on the suitability of women, and young employees.

Definitions, such as ageing, and vulnerable groups [Article 1 (n) and (o) of the Labour Suitability Decree] suggest that explicitly formulated health and safety considerations are restricted to (young and old) age and motherhood, which however does not mean that disability, health and safety considerations may not be invoked as a justification for differentiation on the basis of 'general suitability' [under Article 1 (a) of the Decree a job suitability test is aimed at establishing whether a person is capable of enduring the encumbrance imposed on him by pursuing a certain activity at a particular working place in a particular job] or Article 22 (a) of the ETA (genuine and occupational requirement provision).

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

4.7.1 Direct discrimination

In Hungary, national law does not provide a specific exception for direct discrimination on age.

a) Justification of direct discrimination on the ground of age

¹²⁹ Hungary, Decree 33/1998 of the Ministry of Welfare on the Medical Examination and Assessment of Labour, Professional and Personal Hygienic Suitability (33/1998. (VI. 24.) NM rendelet a munkaköri, szakmai, illetve személyi higiénés alkalmasság orvosi vizsgálatáról és véleményezéséről), 24 June 1998, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800033.NM.

However, in Hungary it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age.

Not only on the ground of age, but generally the ETA permits objective justification for direct discrimination. Unlike the directives, the ETA attaches a general exemption clause to not only indirect but also to direct discrimination. As pointed out above, under Article 7 Paragraph (2) of the ETA, 'unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'.

This means that the level of protection available for a person against discrimination depends on the type of right the discrimination concerns. For instance, if a person is subjected to differentiation with respect to education, the differentiating act will be measured with the stricter test (legitimate aim, necessity, suitability, proportionality), as the right to education is a fundamental one. If, however a right or obligation that does not fall into the category of fundamental rights is concerned (e.g. access to a service), the objective reasonability of the measure will be sufficient to exempt the person making the differentiation.

The above provision is not applicable with regard to differentiation based on racial or ethnic origin, but all other grounds, including age, fall under its scope.

The specific exempting provision for employment sets a stricter test. Under Article 22 Paragraph (1) (a) the principle of equal treatment is not violated if the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment. So in employment related cases the employer would have to go beyond reasonableness to argue that a differentiation based on age is justifiable. With regard to the principle of equal pay for equal work, no justification is allowed for ethnicity and gender, but differentiation based on all other grounds, including age, is in principle justifiable.

Whether the test applied by the Court of Justice of the European Union in the Mangold-case¹³⁰ would be passed, depends on the type of the right the differentiation concerns: if it is a fundamental right (such as the right to employment), the stricter test [Article 7 Paragraph (2) Point a)] will be applied, so the requirements of 'appropriateness' and 'necessity' will be taken into consideration in assessing whether a differentiation based on age shall be allowed.

b) Permitted differences of treatment based on age

In Hungary, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78.

Under Article 294 of the Labour Code, a 'young employee' is an employee who is below 18 years of age. The Labour Code contains numerous provisions aimed at the protection of young employees. These are mostly related to employment and working conditions. For instance, young employees may not be employed for night shifts (Article 114), they are entitled to five extra days off per year (Article 119), and so on.

¹³⁰ Judgment C-144/04, Werner Mangold v Rüdiger Helm, 22 November 2005.

Apart from these provisions, age-related differences are mostly in place with regard to dismissals and promotion or access to employment. For these, see the relevant parts of Section 4.

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Hungary, national law does not 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).

Membership in a private pension fund was before January 2011 either obligatory (for career beginners establishing an employment relationship for the first time provided they are younger than 35 years of age) or voluntary (in January 2011 even those were allowed to leave private pension funds, for whom membership had been compulsory, and from this date there is no compulsory membership). In either case, the pension fund itself may not fix an age for admission.

On the other hand, under Article 30 of the Private Pensions Act, employees may not request that private pension funds (including ones established by the employer) start to pay their pensions before they reach the pensionable age, as defined in the law relating to state pensions (it is possible to request this later than the pensionable age).

If an employee leaves the employer, and the fund established by the employer is a so-called closed fund (where only employees can be members), he/she has to choose another private pension fund. In this case, the payments made to the fund until the termination of the membership will be transferred to the new fund.

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

In Hungary, there are 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.

Article 2 of the Act IV of 1991 on the Promotion of Employment expressly claims that while the requirement of equal treatment shall be respected in connection with the promotion of employment and the support of job seekers, this shall not exclude the possibility of offering additional rights to those who are in a disadvantaged position on the labour market.

The Act on the Promotion of Employment enumerates the forms of state support available for the promotion of employment. The funding of trainings is one of the available forms of support. Employees under 25 and persons with caring responsibilities are expressly mentioned by Article 14 among the groups for the training of which funding may be requested.

Article 16 makes it possible for the State Employment Service to provide employers for a maximum of one or – in cases concerning persons in a severely disadvantaged position – two years with support amounting to 50% or 60% of the salary and social security payments of disadvantaged workers or workers with disabilities respectively, if the employer a) undertakes to maintain the employment for the whole period of the provision of the support; b) has not dismissed with reference to circumstances concerning its own operation the employee within 12 months preceding the submission of the request for support; and c) undertakes not to dismiss the employee with reference to circumstances concerning its own operation during the time the support is being provided.

The definition of who shall be regarded to be a disadvantaged worker is set forth by Article 11 of Decree 6/1996 of the Minister of Labour on Supports Promoting Employment and Supports that May be Provided from the Labour Market Fund in Crisis Situations.¹³¹ The categories are – among others – the following:

- persons with primary education or below;
- persons over 50;
- career beginners up to the age of 25;
- single parents of at least one child below 18;
- persons who within 12 months preceding the commencement of the employment were in prison or pre-trial detention.

Protection against dismissals for persons with caring responsibilities does also exist in the Hungarian legal system. Under Article 65 of the Labour Code, employers shall not terminate an employment relationship by regular dismissal – among others – during a leave of absence without pay for nursing or caring for a child; during pregnancy; during the 24-week long maternity leave.

Protection against dismissals exists for older workers as well. Under Article 66 Paragraphs (4) and (5) of the Labour Code, employers shall be allowed to terminate an employee's employment relationship within a five-year period preceding the employee's eligibility for old age pension by regular dismissal only in particularly justified cases. In terms of Article 77 Paragraph (4), the amount of severance pay shall be increased by up to three months' average earnings if the employee's employment relationship is terminated within a five-year period before his/her eligibility for old age pension.

4.7.3 Minimum and maximum age requirements

In Hungary, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

According to Article 34 of the Labour Code, all persons entering into an employment relationship as employees shall be at least sixteen years of age. During the school holidays, full-time pupils and students attending elementary school, vocational school or secondary school may also enter into an employment relationship, provided that they are at least 15 years old. Under the same Article, persons younger than 16 may be employed for the purposes of performance in artistic, sports, modelling or advertising activities upon prior authorisation by the competent guardianship authority.

Besides these general rules, there are minimum age requirements only with regard to a very limited circle of positions (e.g. members of the Constitutional Courts shall be at least 45 years old, judges shall be at least 30 years old).

The Constitutional Court has in a number of cases dealt with the question whether it is legitimate to define an age minimum or maximum with regard to certain positions and occupations. In its Decision No. 857/B/1994 the body stated the following: 'the legislator is entitled to subject the exercise of certain professions and the filling of certain positions to age-related conditions, i.e. to set a lower and an upper age limit.'¹³² The Constitutional Court established that 'age-related restrictions concerning the filling of certain positions shall not be regarded as discriminatory unless they are arbitrary'.

¹³¹ Hungary, Decree 6/1996 of the Minister of Labour on Supports Promoting Employment and Supports that May be Provided from the Labour Market Fund in Crisis Situations (6/1996. (VII. 16.) MűM rendelet a foglalkoztatást elősegítő támogatásokról, valamint a Munkaerőpiaci Alapból foglalkoztatási válsághelyzetek kezelésére nyújtható támogatásról), 16 July 1996, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99600006.MUM.

¹³² Constitutional Court, 857/B/1994 AB határozat, 20 February 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/C4B0DFED73219E48C1257ADA005294B9?OpenDocument>.

Therefore, according to the Constitutional Court, 'differentiation based on age is permitted, if it pertains to each person in the given category and is not arbitrary, i.e. it is reasonable and necessary for the aim to be achieved'. No case law from ordinary courts is at present available on this matter, nor has the compatibility of age limitations for certain professions been discussed during the transposition of the directives.

4.7.4 Retirement

a) State pension age

In Hungary, there is a difference between the private and the public sphere in relation to the legal consequences of reaching the pensionable age.

In Hungary, in the private sphere, there is no state pension age, at which individuals must begin to collect their state pensions. An individual can collect a pension and still work, which means that there is no need to defer pension if an individual wishes to work longer.

In Hungary, in the public sphere, there is a state pension age, at which individuals must begin to collect their state pensions. An individual cannot collect a pension and still work in public positions, but if he/she wishes to work longer, the pension can be deferred under certain circumstances.

Under Article 18 of Act LXXXI of 1997 on State Pensions¹³³ (State Pensions Act), the pensionable age in Hungary is at this moment 63 for both men and women, but will be raised to 65 gradually by 2022. Notably, only workers with twenty years in service are eligible for a full old age pension, others can receive a partial pension. There is one significant exception: namely women with 40 years of service (including maternity leaves and other similar periods) can retire irrespective of their actual age.

Employees are not obliged to begin to collect their state pensions and they can continue working after pensionable age, however when they fulfil the pensionable age, they will be qualified as pensioners from the point of view of the Labour Code (Article 66) provided that they have the necessary amount of service years. This means that their protection against dismissal and redundancy ceases, as explained below.

Penalties are not imposed on employees who work beyond pension age. In the private sphere, there is no cap on the number of working hours and the salary of persons collecting their pensions.

In the public sphere however, a person who has reached the pensionable age has to choose between collecting the pension or continuing to work (provided that according to the rules pertaining to him/her, he/she has the choice to serve on – see below). Under Article 83/C of the State Pensions Act, the payment of the pension has to be suspended if the pensioner starts working (or continues to work) as a:

- public servant (e.g. a teacher teaching in a public school, a doctor working in a public hospital);
- civil servant (working in the public administration);
- governmental servant;
- high ranking state official;
- judge;
- justice employee (e.g. a court clerk);
- prosecutor;
- person serving in a law enforcement agency or the army.

¹³³ Hungary, Act LXXXI of 1997 on State Pensions (1997. évi LXXXI. törvény a társadalombiztosítási nyugellátásról), 25 July 2007, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700081.TV.

An intricate system regulates the length of work incapacitated pensioners can perform and the salary they can receive without being disqualified from their pension: the lower the level of incapacity, the higher the number of limitations.

The differentiation between the public and private sphere must be revised in light of the European Court of Human Rights' judgment in the case *Fábián v. Hungary* (appl. no. 78117/13) delivered on 15 December 2015.¹³⁴

In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In accordance with the above outlined provisions, the payment of the applicant's pension was suspended. His administrative appeal against that decision was unsuccessful.

The Court established that the applicant's pension right was a pecuniary right within the ambit of Article 1 of Protocol No. 1 and his status as a pensioner simultaneously employed in the public sphere could be considered "other status" for the purposes of Article 14 of the Convention. The Court concluded that the difference in treatment pursued the legitimate aim of reducing public expenditure. There were in fact two forms of difference in treatment: one between different categories of employees in the public sphere, and the other between persons employed in the private and public spheres. As regards the former, the Court could see no justification from the perspective of reducing public expenditure for the difference in treatment between different categories of employees in the public sector and accepted that the exempted State employees were in a situation analogous to that of the applicant. As to the difference in treatment between the public and private spheres, while it was true that only public employees received two sets of income from public sources, the Government's core argument – that no State pension should be paid to those who did not need a substitute for salary as they were already employed – applied equally to retired persons employed in the private sphere because, from that perspective, pensions paid to them could also be regarded as redundant public expenditure. These two groups were thus also in an analogous situation.

Therefore, in the Court's view the Government's arguments to justify the difference in treatment between publicly and privately employed retirees on the one hand, and between various categories of civil servants on the other, were unpersuasive and thus not based on any "objective and reasonable justification", so it was concluded that there had been a violation of the applicant's rights under Article 14 in conjunction with his right to property.

The Government appealed and the case is now pending before the Grand Chamber.

b) Occupational pension schemes

In Hungary, there is normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

As it was mentioned above, under the provisions of Article 7 of Private Pensions Act, employers and professional chambers (such as the Bar Association) may establish private pension funds for their employees or members. Employers may also undertake to complement the payments made by employees into private pension funds.

There are no differences between the operation of private pension funds established by employers and other private pension funds. Employees may request that such private pension funds start to pay their pensions when they reach the pensionable age, as defined in the law relating to state pensions, or later, depending upon their choice.

¹³⁴ European Court of Human Rights, *Fábián v. Hungary*, application. no. 78117/13, 15 December 2015, <http://hudoc.echr.coe.int/eng?i=001-159210>.

Collecting pensions from such schemes does not prevent employees from working on, but the restrictions referred to above and described in detail below also apply to employees who receive private pensions.

c) State imposed mandatory retirement ages

In Hungary, there are state-imposed mandatory retirement ages.

Compulsory retirement only exists in the case of employees in public service: e.g. civil servants, judges, public notaries, the professional personnel of armed organisations.

- Under Article 60 Paragraph (1) (j) of Act CXCIX of 2011 on Civil Servants,¹³⁵ the service relationship of civil servants ceases when they reach the general pensionable age (provided that they have 20 years of service time). If they do not have 20 years of service time, or if they receive a special permission from their superior, they may continue to work, but not after reaching the age of 70.
- Under Article 90 (ha) of Act CLXII of 2011 on the Status and Remuneration of Judges¹³⁶ (Judicial Status Act), if a judge reaches the actual pensionable age, he/she has to retire. Although this was 62 at the relevant time, in an attempt to comply with the decision of the Court of Justice of the European Union (see below), the Hungarian Government provided judges older than 62 with a transitional period, therefore at the moment judges still have to retire at the age of 70 (their traditional mandatory retirement age), and their mandatory retirement age will be decreased gradually to 65 by 2022, so in 2022, the mandatory retirement age of judges will coincide with the general pensionable age (see Articles 232/C and 232/J of the Act).
- The same applies to prosecutors under Article 34 (d) and Articles 165/C and 165/J of Act CLXIV of 2011 on the Status of the Chief Public Prosecutor, Prosecutors and Other Prosecutorial Employees and the Prosecutorial Career.¹³⁷
- Similar rules apply to notaries public in terms of Article 22 Paragraph (1) (d) and Article 178 of Act XLI of 1991 on Public Notaries.¹³⁸
- Under Article 80 Paragraph (1) Point (a) of the Law Enforcement Organisations Act, the service relationship of the member of the professional personnel ceases once he/she reaches the upper age limit of professional service. Under Article 81, the upper age limit coincides with the general pensionable age.

These provisions were not subject to debate during the transposition of the directives, they have however come under domestic and international serious criticism when the mandatory retirement age for judges and prosecutors (which was 70 before the coming in to force of the Fundamental Law in April 2011), was abruptly reduced to the actual general pensionable age with an insufficient transitory period.

Following the Commission's letter of formal notice in January 2012 and then the reasoned opinion in March 2012, the Commission finally brought an action against Hungary in June under Article 258 TFEU for failure to fulfil obligations on the basis that the contested Hungarian regulation is contrary to Articles 2 and 6(1) of Directive 2000/78 in that they give rise to unjustified discrimination and, are neither appropriate nor necessary to achieve the allegedly legitimate objectives invoked by Hungary. The Commission's action

¹³⁵ Hungary, Act CXCIX of 2011 on Civil Servants (2011. évi CXCIX. törvény a közszolgálati tisztviselőkről), 30 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100199.TV.

¹³⁶ Hungary, Act CLXII of 2011 on the Status and Remuneration of Judges (2011. évi CLXII. Törvény a bírák jogállásáról és javadalmazásáról), 2 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100162.TV.

¹³⁷ Hungary, Act CLXIV of 2011 on the Status of the Chief Public Prosecutor, Prosecutors and Other Prosecutorial Employees and the Prosecutorial Career (2011. évi CLXIV. törvény a legfőbb ügyész, az ügyészek és más ügyészszégi alkalmazottak jogállásáról és az ügyészi életpályáról), 28 November 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100164.TV.

¹³⁸ Hungary, Act XLI of 1991 on Public Notaries (1991. évi XLI. törvény a közjegyzőkről), 7 October 1991, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100041.TV.

concerned all legal professionals, including prosecutors and public notaries as well. In its decision of 6 November 2012,¹³⁹ the CJEU established that the national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 was not in line with Articles 2 and 6(1) of Directive 2000/78/EC. The CJEU concluded that the radical lowering of the retirement age by eight years with a very short transitory period while on the other hand raising the general pensionable age did not take the interests of those affected into sufficient account, and could not therefore be seen as necessary to achieve the objective of standardising the retirement age for public-sector professions. Furthermore, the CJEU concluded that the contested national legislation was not appropriate to achieve the pursued objective of establishing a more balanced 'age structure', since after the first wave of replacing the dismissed persons with young professionals, the system does not allow for further corrections to the age structure.

Following up on the judgment, the Hungarian legislation adopted Act XX of 2013¹⁴⁰ – remedying most, but not all the failures. The main points of the law can be summarized as follows:

- The mandatory retirement age will be reduced gradually to 65 years by 31 December 2022 for all legal professionals.
- Judges dismissed on the basis of the regulation found to be in breach of EU norms by the CJEU had to make a statement within 30 days from the coming into force of the new Act whether they wish to be reinstated. If so, they were reinstated to the court at which they previously worked (but not to their previous leadership positions) and fully compensated for the financial losses they suffered.
- If an unlawfully dismissed judge did not request reinstatement, he/she was paid a general compensation equalling the amount of his/her 12 month's salary. Any damage exceeding this amount has to be enforced in a lawsuit.
- Practically the same provisions were introduced with regard to prosecutors.

d) Retirement ages imposed by employers

In Hungary, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

Workers as a rule can continue working after they reach pensionable age. They however are not entitled to the same protection after reaching the pensionable age.

In terms of Article 66 Paragraph (9) of the Labour Code, the employer is not obliged to provide the reasons for the dismissal if the employee has passed the pensionable age, although in all other cases reasons shall be provided, and if a dispute arises, the employer shall be obliged to prove that the reasons are real and relevant. On the other hand, it needs to be mentioned that only an exceptionally reasonable justification may be acceptable if the dismissal takes place within five years before the employee reaches the pensionable age.

Another restriction is that employers are exempted from severance payment if they dismiss an employee after he/she has reached the pensionable age. On the other hand, if the

¹³⁹ CJEU, Case C-286/12, 6 November 2012, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=20661>.

¹⁴⁰ Hungary, Act XX of 2013 on Amendments related to Upper Age Limits to be Applied in Certain Relationships in the Justice Sphere (2013. évi XX. törvény az egyes igazságügyi jogviszonyokban alkalmazandó felső korhatárral kapcsolatos törvénymódosításokról), 25 March 2013, <http://mkogy.jogtar.hu/?page=show&docid=a1300020.TV>.

dismissal takes place within five years before the employee reaches the pensionable age, an additional three months' salary shall be paid in addition to the severance payment prescribed by law.

f) Compliance of national law with CJEU case law

In Hungary, national legislation is in line with the CJEU case law on age regarding compulsory retirement.

From what is set forth above, it can be concluded that Hungarian national legislation is for the most part in line with most principles arising in the CJEU case law.

Where the domestic law clearly does not seem to be in line with the jurisprudence of the CJEU is the exclusion of employees beyond the pensionable age from severance payment (c.f. the Andersen judgment of the CJEU,¹⁴¹ in which the Court concluded that by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, none the less wish to waive their right to such a pension temporarily in order to continue with their career, the pertaining national law unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued).

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Hungary, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. However, as was pointed out above, if someone has passed the retirement age, his/her dismissal is possible without reasons provided.

b) Age taken into account for redundancy compensation

In Hungary, national law provides compensation for redundancy. This is affected by the age of the worker.

If a person is dismissed after he/she has reached the pensionable age (and has the necessary service time), he/she is not entitled to compensation.

Otherwise, if a person is dismissed due to redundancy, he/she is entitled to compensation, and the amount of the compensation is dependent on the number of years he/she has worked for the company, so age may play a role in the amount.

Furthermore, if an employee is dismissed within the five-year period preceding his/her retirement age, he/she shall be entitled to an additional compensation amounting to up to three times his/her monthly salary (Article 77 of the Labour Code).

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)

In Hungary, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

However, these grounds could be referred to when claiming that a certain action falls under Article 7 Paragraph (2) of the ETA, i.e. it serves the enforcement of a fundamental right

¹⁴¹ Judgment C-499/08, Ingeniørforeningen i Danmark v Region Syddanmark, 12 October 2010.

and is necessary, suitable and proportionate, or it is found by objective consideration to have a reasonable ground.

4.9 Any other exceptions

In Hungary, other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

With regard to education – Article 28

(1) If the education is only organised for students of one sex, it does not violate the principle of equal treatment, provided that participation in such education is voluntary, and will not result in any disadvantages for the participants.

(2) The principle of equal treatment is not violated if,

a) in elementary and secondary education, at the initiation and by the voluntary choice of the parents, or

b) in higher education by the students' voluntary participation, education based on religious or other ideological conviction, or education for national minorities is organised in a way that the goal or the curriculum of the education justifies the creation of separated classes or groups; provided that this does not result in any disadvantage for those participating in such education, and that the education complies with the requirements approved, laid down and subsidised by the State.

With regard to access to goods and services – Article 30

(1) Entry into premises established for a group defined by characteristics listed in Article 8 for the purposes of preserving traditions or maintaining cultural and self-identity and open to the immediate public may be limited or subject to membership or specific conditions.

(2) The limitation in accordance with paragraph (2) must be obvious from the name of the establishment and the circumstances of the use of the service; and this shall not be done in a manner that may be humiliating and defamatory to individuals who do not belong to the particular group, and furthermore it must not provide an opportunity for an abuse of this right.

Article 30/A

(1) In relation to insurance services and services based on the insurance principle – with the exception of group life-, casualty- and health insurances and unless the pertaining laws stipulate otherwise – differentiation based on gender infringes the principle of equal treatment if the service provider's measure results in gender based direct or indirect differentiation in relation to the fees to be paid by or the services provided to the concerned individuals.

(2) In relation to services referred to in Paragraph (1), costs related to pregnancy and maternity shall not lead to differences in relation to the fees to be paid by or the services provided to the concerned individuals.

These may be problematic with regard to racial or ethnic origin, as the Racial Equality Directive does not allow for specific exemptions of direct discrimination in connection with these fields. This may be a breach of the transposition obligation, which however could be remedied through applying the principles of the direct and indirect effect and the primacy of community law.

Special attention must be called to the exemption on education, as the Nyíregyháza decision of the Curia (Section 3.2.8) has shown how religious education may become a means to legitimise separated education of children belonging to an ethnic minority. Therefore, an amendment of the current wording of the ETA may be necessary in order to

clarify justification defences and ensure their compliance with EU law by declaring that racial or ethnic origin based separation of pupils/students may not be justifiable for purposes other than minority education.

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

a) Scope for positive action measures

In Hungary, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

National law does not differentiate between protected grounds, nor is it limited to employment, when providing for preferential treatment. Pursuant to Article 11 Paragraph (1) of the ETA 'a measure aimed at the elimination of an expressly identified social group's objectively substantiated inequality of opportunities is not considered a breach of the principle of equal treatment if a) it is based on an Act of Parliament, on a government decree based on an Act or on a collective contract, effective for a definite term or until a specific condition is met, and/or b) the election of a party's executive and representative organ and the setting up of a candidate at the elections defined at the Election Procedure Act is executed in line with the party's fundamental rules'.

Paragraph (2) brings positive action in line with relevant CJEU case law, when it provides that 'a measure aimed at evening out a disadvantage shall not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances'.

Certain provisions of domestic law *expressis verbis* allow for positive action:

- RDP Act, Article 3: Given their situation, persons with disabilities have less access to their rights than others, therefore, it is reasonable to accord preferences to them in all possible ways;
- ETA, Article 23: An act, a government decree based on an act or collective contract may order an obligation for preferential treatment for a specified group of employees in respect of the labour relationship or other relationship aimed at employment;
- ETA Article 25 Paragraph (2): Pursuant to or authorised by the law and based on health, disability or a characteristic defined in Article 8, a government decree may grant additional benefits to specified social groups within the framework of the social and health care system, in accordance with the provisions herein;
- ETA, Article 29: A government decree created pursuant to the law or the authorisation thereof may order an obligation to provide preferential treatment to a specified group of participants in education within or outside the school system in respect of education or training.

b) Main positive action measures in place on national level

Article 24 Paragraph (1) of Government Decree 423/2012 on the Admission Procedures of Universities provides an example of narrowly tailored preferential treatment: in terms of this provision, 40 points shall be added to the number of points achieved by socially disadvantaged applicants, applicants with disabilities and applicants with caring responsibilities related to children (in a system where the maximum number of points is 500, and admission is based on the number of points). Since the Roma are highly overrepresented among socially disadvantaged applicants, this measure may also be regarded as one that targets racial or ethnic origin.

Article 24 Paragraphs (5) and (6) allow the higher education institutions to exempt students with disabilities from health and other suitability requirements for admission provided that the exemption is in accordance with the type of disability and that it does not provide full exemption from fulfilling the educational requirements of admission.

For over a decade, the subsequent governments have operated stipend programs for disadvantaged and/or Roma primary and high school pupils/students. According to Article

6 Paragraph (2a) of Decree 152/2005 of the Government on the 'For the Road Stipend Program',¹⁴² at least 50% of the children receiving support shall be of Roma origin (if not all the places reserved for Roma can be filled up due to a lack of enough applications, non-Roma children can also be admitted at the expense of the Roma-quota). In terms of Article 4, pupils/students and mentors shall apply jointly. Under Article 7, mentors shall – among others – prepare a development plan for the child, evaluate the child's progress regularly, spend at least two hours per week on mentoring the child, and maintain regular contacts with the child's teachers. Participants of the program receive a monthly stipend. The applicant children shall verify their disadvantaged status (i.e. that they receive some form of state subsidy or service attached to indigence), and the Roma applicants shall make a declaration about their affiliation with the Roma minority and present a recommendation from the local, or – in its absence – the national Roma self-government.¹⁴³

A quota-type of measure in relation to the employment of disabled persons is constituted by Article 23 of Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws,¹⁴⁴ in terms of which employers shall be obliged to pay a so called 'rehabilitation contribution' if the number of their employees exceeds 25 and the proportion of persons with disabilities within the workforce is below 5%. According to analyses, this quota system has achieved some improvement in the employment of persons with disabilities: their employment rate increased from 11 to 18% between 2001 and 2012, while the proportion of employers employing persons with disabilities rose from 17 to 40% between 2008 and 2012.¹⁴⁵

Examples of positive action measures targeted directly at the Roma minority in the area of employment can also be found, e.g. the government's 2013 initiative to employ 100 Roma civil servants and deploy them in the regional centres for public administration in settlements where the proportion of the Roma is relatively high within the population.¹⁴⁶

¹⁴² Hungary, Decree 152/2005 of the Government on the 'For the Road Stipend Program' (152/2005. (VIII. 2.) Korm. rendelet az Útravaló Ösztöndíjprogramról), 2 August 2005, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500152.KOR.

¹⁴³ See for instance the application guide for the 2015/16 stipend: http://www.emet.gov.hu/userfiles/felhivasok/MACIKA/utr_15_usz/P%C3%A1ly%C3%A1zati%20%C3%BAtmutat%C3%B3%20UTR-15-USZ.pdf.

¹⁴⁴ Hungary, Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws (2011. évi CXCI. törvény a megváltozott munkaképességű személyek ellátásairól és egyes törvények módosításáról), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100191.TV.

¹⁴⁵ Tardos, K. (2013), 'Jó gyakorlatok a megváltozott munkaképességűek foglalkoztatására' (Good practices in employing persons with altered labour suitability), Kultúra és Közösség, 2013/I. Available at: <http://www.hrportal.hu/download/megvaltozottmunkakepesseg.pdf>.

¹⁴⁶ http://www.parlament.hu/documents/10181/59569/Infojegyzet_2013_39_kormanyablakok.pdf/ca1e617f-cd45-4dc4-a4e5-4e5619657cce.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Hungary, the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation).

Judicial procedures

Civil courts

Victims of discrimination may sue in civil courts based on Articles 2:42 and 2:43 of the Civil Code, claiming that inherent rights are protected by the Civil Code, and that the right to non-discrimination is an inherent right. The possible remedies applicable by the court are listed under Articles 2:51-2:53 of the Civil Code. Article 2:51 runs as follows:

- (1) A person whose inherent rights have been violated may – within the statute of limitation – demand the following on the basis of the violation and depending on the circumstances of the case:
- a) a court declaration of the occurrence of the infringement,
 - b) to have the infringement discontinued and the perpetrator banned from further infringement;
 - c) that the perpetrator provides adequate redress, and, make this fact public at his/her own expense;
 - d) the termination of the injurious situation and the restoration of the previous state, and the elimination of the object that came into existence as a result of the violation, or to have such an object deprived of its injurious nature;
 - e) that the perpetrator or its successor hand over the financial asset acquired through the violation.

Article 2:52 of the Civil Code stipulates that:

- (1) A person whose inherent rights have been violated, may claim moral compensation for the non-pecuniary damage made to him/her.
- (2) The provisions pertaining to damages shall be applied to moral compensation – with special regard to the determination of the liable person and exculpation – with the difference that for moral compensation to be payable the claimant shall not be required to prove any further damage beyond the occurrence of the inherent right violation.
- (3) The sum of the moral compensation shall be determined by the court in accordance with the circumstances of the case, with special regard to the severity and regularity of the violation, the degree of liability, and the violation's impact on the claimant and his/her environment.

Article 2:53 prescribes that a person who suffers pecuniary damages as a result of the violation of his/her inherent rights, may claim damages from the violator in accordance with the general provisions governing damages.

These provisions provide victims of discrimination with a flexible instrument, as they apply to all types of discrimination no matter which field or ground is at issue.

Labour courts

In Hungary, so called 'labour and administrative' courts apply the Labour Code. The most important remedies in labour law are the following.

The court may declare an agreement null and void under Article 27.

If the discrimination is manifested in the unlawful termination of the employment, under Article 82, the employer shall compensate the employee for the damages suffered. Full compensation is restricted by Paragraph (2) of the provision, according to which under the heading of lost income a maximum of 12-months' salary may be claimed by the employee.

In terms of Article 83, if the termination of the employment constitutes the violation of the requirement of equal treatment, the employee may request the court to order his/her reinstatement (in other cases of the unlawful termination of employment, this option is not available with some exceptions, such as when the dismissed employee was a trade union representative).

In other cases of discrimination (i.e. when it is not a dismissal that serves as the subject matter of the case), the employer is liable to pay full damages to the employee, in terms of Article 167 of the Labour Code.

Administrative procedures

Before the ETA came into force, procedures used to be field-specific. Different administrative organs had powers to act in the different sectors. With the coming into force of the ETA, this has partly changed. The Equal Treatment Authority (hereafter: Authority) has authorisation to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.).

Besides the authorisations required by the Racial Equality Directive, this body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination. (Section 6.5 will deal with the sanctions that the Authority is entitled to impose, and the Authority's organisation will be described in detail in Chapter 7.)

The establishment of the Authority did not mean that all the administrative organs that used to have authority to act in discrimination cases were deprived of their powers. This made it necessary to create a system preventing a clash of authority. Below we describe the most important administrative organs having powers in discrimination cases, and then we outline the distribution of authority between them.

Access to goods and services

Under Article 45/A Paragraph (2) of Act CLV of 1997 on Consumer Protection¹⁴⁷ (hereafter: Consumer Protection Act), the consumer protection authority shall monitor that provisions related to the requirement of equal treatment are respected in the course of access to goods and services, and in the event that a breach is found, the authority shall conduct proceedings. Under Article 47, if the authority establishes the breach of the provisions guaranteeing consumers' rights (including the requirement of non-discrimination), it may apply a number of sanctions, including a fine, the maximum amount of which is determined by the annual revenue of the service provider concerned.

Education

¹⁴⁷ Hungary, Act CLV of 1997 on Consumer Protection (1997. évi CLV. törvény a fogyasztóvédelemről), 23 December 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700155.TV.

In terms of Article 79 of the National Public Education Act, the lawful operation of educational institutions is supervised by the so-called Government Offices seated in each county and the capital. If the office finds a violation, it may impose the following sanctions: (i) it calls on the head of the educational institution to terminate the violation and notifies the institution's maintainer; (ii) if the educational institution is not maintained by the state or a municipality, it may initiate that the body paying financial support to the institution review or suspend the support; or even that the concerned pupils be transferred to another institution; (iii) it may impose a fine up to EUR 3 330 (HUF one million); (iv) it may initiate that the court establish the nullity of a decision delivered by the institution.

With regard to discrimination, a special sanction is also available. Under Paragraph (6) of Article 79, if the Government Office establishes that the educational institution has violated the requirement of equal treatment in the course of the admission or the transfer of a pupil, upon the request of the concerned parent, it can declare that the given pupil is admitted or transferred to that particular educational institution (provided that less than 150 days have passed from the parent's request), and launches a petty offence proceeding against the head of the educational institution. Following such a decision, the Government Office monitors as needed but at least once every academic year whether the educational institution respects the requirement of equal treatment.

Distribution of powers

If a service provider discriminates against a customer, both the Authority and the consumer protection authority have competence to examine the case and impose sanctions on the discriminator. It was therefore necessary to devise a system for distributing the cases. The key principle is that it is up to the victim to decide which authority he/she wishes to turn to:

Under Article 15 of the ETA, a violation of the principle of equal treatment within the scope of the ETA shall be investigated by a) the Authority or b) another public administrative body that has been granted authority in a separate act for assessing violations of the principle of equal treatment, as chosen by the offended party.

Also in terms of Article 15, in order to avoid double procedures, the Authority shall inform other organs, and other organs shall inform the Authority about the initiation of a procedure into a case of discrimination, as well as the procedure's outcome, or about the outcome of the subsequent judicial review, if there is one. Furthermore, if a procedure has been initiated before any public administrative body into a case of discrimination, the other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall suspend their procedure initiated in the same case with regard to any other person until a binding decision is made in the matter. If the case has been judged by any public administrative body, then other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the former public administrative body.

This means the following. If for example a group of Roma people are denied access to a pub, the members of the group can decide whether they turn to the Authority or the consumer protection. If one of them turns to the Authority, it shall notify the consumer protection, as the case falls into the consumer protection's authority as well. If then another member of the group files a complaint with the consumer protection, this organ may not proceed with regard to the first complainant, and shall suspend its procedure with regard to the second one. Once the Authority has made a decision on the case, the consumer protection may continue its procedure, but it has to base its decision on the facts established by the Authority.

The Authority has some degree of dominance though, as under Article 15 Paragraph (6), the Authority may participate as an interpleader in the judicial review of a public administrative decision brought by another public administrative body concerning the principle of equal treatment.

No parallel proceeding of the Authority and a court (civil or labour) is possible. In terms of Article 15/B of the ETA, if the victim of discrimination also files a lawsuit with the court, the Authority shall suspend its procedure until the case is adjudicated, and notifies the court about the suspending decision. When the court case is closed, the court notifies the Authority about its decision. The Authority then can proceed but is shall do so on the basis of the facts of the case as established by the court. If the case has been judged by the court before the victim turns to the Authority, the Authority a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the court.

Petty offence proceedings

Petty offence proceedings in the Hungarian legal system are quasi criminal proceedings devised for small scale violations. Their procedural rules are set out in Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Database¹⁴⁸ (Petty Offences Act).

Petty offences are decided upon by the general petty offence authority (the local branches of the Government Offices) or a specialised authority. The decision is subject to judicial review either on the basis of the case file or a hearing (depending on the request of the sanctioned person). The judicial decision may not be further appealed.

Discrimination in education qualifies as a petty offence. Under Article 248 Paragraph (5) of the Petty Offences Act, the person who, by deliberately violating legal provisions relating to public education discriminates against a child or student is punishable with a fine up to EUR 500 (HUF 150 000). The proceeding shall be conducted by the Government Offices seated in Budapest and the counties.

It has to be noted that under Article 19 Paragraph (3) of the ETA, the shifted burden of proof does not apply to these proceedings. No costs on the part of the aggrieved party emerge in such proceedings.

Conciliation procedures

General mediation procedure

According to Article 1 of Act LV of 2002 on Mediation¹⁴⁹ (hereinafter: Mediation Act), its aim is to facilitate the settling of civil law disputes emerging in connection with the personal and property rights of private and other persons in cases where the parties' right of determination is not limited by law. As no such limitation exists in relation to the ban on discrimination in the Civil Code, victims of discriminatory acts are entitled to resort to the mediation procedure.

Under Article 36, the agreement reached in a mediation procedure does not prevent the parties from asserting their claim in a court procedure. However, in these cases claimants are liable to pay all costs.

¹⁴⁸ Hungary, Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Database (2012. évi II. törvény a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről), 6 January 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV.

¹⁴⁹ Hungary, Act LV of 2002 on Mediation (2002. évi LV. törvény a közvetítői tevékenységről), 17 December 2002, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0200055.TV.

Mediation by the Equal Treatment Authority

Under Article 64 of the GPSA, public administrative authorities are authorised to try to resolve the conflict through forging an agreement between the parties, if the circumstances of the case seem to allow it. Pursuant to Article 75 of the GPSA, if the parties reach an agreement in the course of the complaints procedure, the proceeding authority includes the agreement in a formal decision. If the attempt to have the parties reach an agreement is not successful, the authority continues its proceeding, and – depending on the result of the investigation – decides on the case.

As a public administrative body, the Equal Treatment Authority also has the above authorisations regarding friendly settlements. Under Article 16 of the ETA, the Equal Treatment Authority is obliged to try to forge a friendly settlement among the parties.

Although it is not expressly forbidden by the GPSA, the Authority's practice does not allow for friendly settlements including a financial compensation for the victim.

Education

Decree 40/1999 of the Minister of Education established the Commissioner for Educational Rights.¹⁵⁰ Under Article 1 of the Decree, the Office of the Commissioner for Educational Rights is an independent, internal organisational unit of the ministry responsible for education that promotes citizens' rights concerning education. The Decree establishes a special conciliation procedure.

Parents, students, teacher etc. have the right to complain, provided that all available administrative remedies are exhausted and less than a year has elapsed since the measures complained of (Article 5). Complaints relating to Articles 70/F and 70/G of the Old Constitution (right to education, right to the freedom of teaching), public education, higher education and vocational education and training can be brought to the Commissioner (Article 3). The explicit inclusion of Article 70/A of the Constitution in the scope would be highly advisable.

Complaints not dismissed by the Commissioner undergo the conciliation procedure. The Commissioner sends the petition to the institution complained of for a declaration and initiates that consensus be reached with the petitioner. In case of an agreement the Commissioner prepares a report and sends it to the parties concerned. If no consensus is reached, the Commissioner prepares a report on the results of the conciliation and calls on the institution to terminate the infringement. In case of non-compliance the Commissioner sends a recommendation to both the institution and its supervisory organ. The latter have the duty to respond within 30 days. The Commissioner reports to the minister responsible for education (Article 7).

Other forums to be approached in cases of discrimination

The 'Ombudsman'

Before 1 January 2012, there were four ombudspersons in Hungary: the Ombudsman for Civil Rights (General Ombudsman), the Ombudsman for Future Generations, the Ombudsman for the Rights of National and Ethnic Minorities (Minorities Ombudsman) and the Ombudsman of Data Protection. At present, there is one Ombudsman, the Commissioner for Fundamental Rights, who has two deputies responsible for the right of future generations and minorities respectively.

¹⁵⁰ Hungary, Decree 40/1999 of the Minister of Education on the Commissioner for Educational Rights (40/1999. (X. 8.) OM rendelet az Oktatási Jogok Miniszteri Biztosa Hivatalának feladatairól és működésének szabályairól), 8 October 1999, <http://net.jogtar.hu/jr/gen/getdoc2.cgi?dbnum=1&docid=99900040.OM>.

Under Article 30 of the Fundamental Law, the Ombudsman (who is appointed by two-thirds parliamentary majority vote for six years) investigates violations of fundamental rights and initiates general or individual measures to remedy such violations.

The status and proceedings of the Ombudsman is regulated by Act CXI of 2011.¹⁵¹ Any victim of acts or omissions of public authorities or public service providers can complain to the Ombudsman's office, provided that all administrative remedies are exhausted or none exist. The Ombudsman can also proceed ex officio.

The Ombudsman can investigate into any authority, including the armed forces, national security services, and policing organisations. He/she may request information, look into files, visit premises and can hear any employee of the examined authority. When finding a violation, the Ombudsman issues recommendations, to which the supervisory body of the authority found to be in breach of fundamental rights shall respond within 30 days. Further, the Ombudsman may (i) petition the Constitutional Court; (ii) initiate criminal or disciplinary proceedings; and (iii) propose that a legal provision be amended, repealed or issued.

The Ombudsman's main publicity weapon is the annual report submitted to Parliament. Further, he/she can request parliamentary investigations and debates.

The ETA fails to settle potential clashes of authority between the Authority and the Ombudsman who also has the authority to conduct individual and comprehensive investigations into cases of discrimination. The ETA contains no solution for cases in which the conclusion of and the sanction imposed by the Authority is not in line with the opinion of the Ombudsman. It only restricts itself to exempting the decisions and measures of the Ombudsman from the Authority's investigation.

b) Barriers and other deterrents faced by litigants seeking redress

In civil and labour lawsuits there is no obligation to retain a lawyer for the first instance proceeding, but professional legal assistance may mean a significant advantage, since the court is bound by the petitions of the claimant (in relation to both the claim and the evidentiary motions). State funded legal aid (including representation by a patron attorney) is available, but the indigence threshold is very low. Under Articles 5 and 6 of Act LXXX of 2003 on Legal Aid,¹⁵² the state pays for the legal aid if the party's monthly per capita income does not exceed the minimum old age pension (EUR 95 or HUF 28 500, or), or – if the party lives alone – his/her monthly net income does not exceed 150% of the minimum old age pension (EUR 143 or HUF 42 750) and advances the fees and costs of the legal aid provider if the party's income does not exceed 43% of the gross average national salary of the second year preceding the year in which the legal aid is provided (EUR 339 or HUF 101 910). Another deterring factor may be that if the claimant loses the case he/she has to pay the other party's legal costs.

It also needs to be pointed out that – under Article 73/A of the CCP – in the second instance lawsuits launched in relation to a violation of inherent rights (including discrimination suits), legal representation is mandatory for the person who has submitted an appeal.

Lawsuits launched due to the violation of inherent rights fall into the competence of county courts located in county seats, which means that if the claimant does not live at or around the seat, money and time has to be spent on travel whenever a hearing is held (unless a legal representative is involved, in which case the claimant is only obliged to appear in

¹⁵¹ Hungary, Act CXI of 2011 on the Commissioner of Fundamental Rights (2011. évi CXI. törvény az alapvető jogok biztosáról), 26 July 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV.

¹⁵² Hungary, Act LXXX of 2003 on Legal Aid (Act LXXX of 2003 on Legal Aid), 6 November 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300080.TV.

court if the court wishes to hear him/her in person). Furthermore, civil proceedings can be very lengthy: up to 3-4 years.

The above also apply to labour court cases with the addition that in certain cases (such as dismissals), the deadline for initiating a lawsuit is relatively short: 30 days (Article 287). In this regard there is a difference between the private and the public sector, as in some segments of the latter (e.g. the judiciary), the deadline for suing is even shorter, 15 days.

With regard to barriers and deterring factors in administrative procedures, the following can be said. The administrative organs are obliged by Article 3 of the GPSA to fully establish the facts of a given case, therefore, the role of legal assistance is not as crucial as in court cases, although the involvement of a lawyer is obviously an asset. Furthermore, administrative proceedings are significantly shorter than court cases. On the other hand, administrative bodies may not grant compensation to the victim and may not oblige the discriminator to apologise or provide moral remedy in any other way.

c) Number of discrimination cases brought to justice

In Hungary, there are some available statistics on the number of cases related to discrimination brought to justice.

Such statistics regarding court cases are not available, however, data related to the activities of the Equal Treatment Authority exist.

Caseload of the Equal Treatment Authority, 2005 – 2014¹⁵³

Year	Number of complaints	Administrative decisions	Decisions establishing discrimination	Friendly settlements
2005	491	144	9	6
2006	592	202	27	13
2007	756	159	29	3
2008	1153	256	37	23
2009	1087	273	48	18
2010	1373	377	40	36
2011	1014	359	42	39
2012	2772	213	31	28
2013	1496	345	21	30
2014	1005	251	23	27
2015	884	240	33	17

d) Registration of discrimination cases by national courts

In Hungary, discrimination cases are not registered as such by national courts.

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

a) Engaging on behalf of victims of discrimination (representing them)

In Hungary, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.

Under Article 18 Paragraph (1) of the ETA, 'non-governmental and interest representation organisations' and also the Equal Treatment Authority may act on behalf of the victim in

¹⁵³ Source: Website of the Equal Treatment Authority: annual reports of the Authority, available at: <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-az-egyenlő-bánásmód-hatóság-tevékenységéről>.

proceedings launched due to the violation of the requirement of equal treatment (for instance in civil lawsuits initiated due to a violation of inherent personal rights or labour lawsuits).

Under Article 3 of the ETA, a 'non-governmental and interest representation organisation' means:

- Any non-governmental organisation formed under the Act on the Right to Assembly, Public Benefit Status and the Operation and Funding of Non-governmental Organisation,¹⁵⁴ whose objectives set out in its articles of association or statutes include the promotion of equal social opportunities or the catching up of disadvantaged groups defined by an exact enumeration of the concerned protected ground(s) or the protection of human rights defined by an exact enumeration of the concerned protected ground(s). The exact enumeration of the concerned protected ground(s) means that for instance an LGBT organisation will not be authorised to launch actio popularis procedures against discrimination concerning persons with disabilities, unless its statutes contain reference to disability. Based on the text of the law, the amendment should not prevent organisations aimed to protect the rights of a particular group from taking action against intersectional discrimination if the protected ground that is relevant for them is among those that are concerned in the given case, but – in the absence of case law – it still needs to be seen whether a flexible or restrictive interpretation will be adopted.
- The minority (nationality) self-government in respect of a particular national and ethnic minority.
- The trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions.

As it is outlined above, only those non-governmental organisations and foundations are authorised to act on behalf or in support of the victims, whose objectives set out in the articles of association or statutes include the promotion of equal social opportunities of disadvantaged groups or the protection of human rights, and they may only act to promote the right of those protected groups that are expressly mentioned in their articles of association. There are no further conditions for the legal standing in relation to associations.

To prove its legal standing, the non-governmental and interest representation organisation shall submit its statutes (so that it could be established whether they are entitled to act in relation to the given complaint) and the authorisation signed by the individual victim.

Their authorisation shall be in line with the general rules pertaining to authorisations (as prescribed by Article 196 of the CCP). The usual practice is that they either give an authorisation to an attorney at law who is commissioned by the non-governmental and interest representation organisation, or they authorise an employee of the organisation in a way that in the authorisation it is indicated that that person is representing the victim on behalf of the organisation.

One of the problem areas is that there are no special provisions on victim consent in cases, where obtaining formal authorisation is problematic, e.g. of minors or persons under guardianship. In practice, this has caused problems when people under guardianship wished to take action against the Guardianship Office, but the guardians employed by the office obviously refused to sign the powers of attorney.

b) Engaging in support of victims of discrimination

¹⁵⁴ Hungary, Act CLXXV of 2011 on the Right to Assembly, Public Benefit Status and the Operation and Funding of Non-governmental Organisation (2011. évi CLXXV. törvény az egyesülési jogról, a közhasznú jogállásról, valamint a civil szervezetek működéséről és támogatásáról), 14 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100175.TV.

In Hungary, associations/organisations/trade unions are entitled to act in support of victims of discrimination.

In terms of Article 18 Paragraph (2) of the ETA, non-governmental and interest representation organisations are entitled to the rights of the concerned party in administrative proceedings initiated due to the infringement of the requirement of equal treatment, which means they can enter already running proceedings to support the complainant, but cannot initiate the proceeding if the victim has not done that.

In relation to standing to act in support of victims, the same rules apply as the ones outlined under point a) above.

c) Actio popularis

In Hungary, national law allows associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (actio popularis).

The possibility of bringing an actio popularis claim was introduced into the Hungarian system by Article 20 of the ETA. If the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by a) the Public Prosecutor; b) the Equal Treatment Authority, or c) any non-governmental and interest representation organisation, provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. A non-governmental and interest representation organization may – if the above conditions prevail – also choose to launch a proceeding before the Authority. It needs to be noted that a specificity of such cases in relation to the burden of proof is that the substantiation of the danger of violation is sufficient on the part of the complainant organization (so no actual disadvantage needs to be substantiated).

The types of associations are the same as described above. In a proceeding before the Authority such associations may seek all the sanctions that are generally applicable by the Authority (see below, under Section 6.5). Before a civil court they may – out of the list of sanctions applicable in lawsuits launched for the violation of inherent personal rights – seek all the sanctions with the exception of damages.

The first case ever emerging under the ETA was the actio popularis claim brought by an LGBT rights organisation against a denominational university (and described in detail under Section 4.2). The Chance for Children Foundation has launched a number of actio popularis claims with respect of the segregation of Roma pupils, one example being the Nyíregyháza case described under Section 3.2.8.

A restriction of the right has been brought along by a decision of the Constitutional Court. Following the delivery of the final decision in an actio popularis lawsuit brought by the Chance for Children Foundation against a local school where Roma pupils were educated in a segregated manner, the Foundation filed a complaint with the Constitutional Court, claiming that the Curia's decision (according to which courts in general are not authorised to order that the segregation be ended) had violated the pupils' constitutional rights. However, in its decision the Constitutional Court declared the complaint inadmissible on the basis that only natural and legal persons concerned by the actual individual case may file a constitutional complaint against a court decision. Since it is not the NGO that is actually concerned by the segregating practice, (i.e. the Curia's decision concerns the

constitutional rights of persons other than the NGO – i.e. the pupils) it does not have a standing before the Constitutional Court.¹⁵⁵

Two judges (out of 15) had a dissenting opinion, emphasising that the possibility of *actio popularis* claims has been introduced into the Hungarian legal system exactly on the basis that members of the most marginalised groups are usually not in the position to take action against widespread discriminative practices. If the rules guiding the submission of constitutional complaints are interpreted in a way that excludes NGO's from turning to the Constitutional Court after an *actio popularis* case has been decided by the ordinary courts, it renders the constitutional protection against discriminative practices void. The CFCF made an application to the ECtHR claiming that the exclusion of its standing before the Constitutional Court constitutes a violation of its rights under Article 6 of the European Convention of Human Rights, but the application was rejected on the basis that the 'denial of *locus standi* was based on criteria virtually identical to that of the Court (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008), namely the lack of being directly affected'.¹⁵⁶

d) Class action

In Hungary, national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

It must be added though that while there is no separate set of rules for such cases, associations are not prevented from obtaining authorisations from more than one victim and launch one single case on their behalf. It needs to be added that since the Hungarian legal system does not recognise the classic form of class action, in such cases the claims of each victim will be examined individually.

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

In Hungary, national law requires a shift of the burden of proof from the complainant to the respondent.

Article 19 of the ETA provides for the shift of the burden of proof. It is applicable on all grounds of discrimination, in all fields and all types of procedures, except for criminal and petty offence proceedings. It shall be noted that Article 19 of the ETA addresses data protection concerns, when taking into consideration not only real but also assumed ethnic origin.

The test for the shift of the burden of proof only requires that the allegedly injured party substantiates, rather than proves, his/her claims. Substantiation involves a lower level of certainty: if therefore the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or the other party must have assumed so), then the burden of proof is shifted. The provision reads as follows:

- (1) In procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to launch an *actio popularis* claim shall substantiate that
 - a) the injured person or group has suffered a disadvantage, or – in a case of *actio popularis* claims – there is a direct danger thereof; and

¹⁵⁵ Constitutional Court, IV/3311-9 /2012, 17 June 2013, http://cfcf.hu/sites/default/files/Gal%C3%A9ria/Gy%C5%91r_Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1g_2013.06.17.pdf.

¹⁵⁶ European Court of Human Rights, *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v Hungary*, Application no. 786/14, 25 March 2014.

b) the injured party or group possesses – or is by the violator assumed to possess – characteristics defined in Article 8.

(2) If the case described in Paragraph (1) has been substantiated, the other party shall prove

a) that the circumstances substantiated by the injured party of the entity entitled to launch an *actio popularis* claim do not prevail; or

b) that it has observed or, in respect of the relevant relationship, was not obliged to observe, the requirement of equal treatment.

The Hungarian solution requires claimants or complainants to substantiate the disadvantage and protected characteristic – real or supposed by the perpetrator. This is more generous than the solution applied by the directives, because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way, whereas the directives require that facts substantiating discrimination, i.e. a disadvantage caused because of the existence of a protected ground also be established. In the Hungarian system it is the task of the other party to prove that there is no such a link.

While this is the strict grammatical interpretation and in 2006, the Equal Treatment Advisory Board (see Section 7 below on the Board) issued guidelines (revised in 2008) on the shift of the burden of proof, setting it out that it is not the complainant's obligation to prove that there was a causal link between the protected ground and the disadvantage,¹⁵⁷ judicial practice has taken another direction.

In the case serving as the basis of Decision no. Kfv.II.37.053/2010/8 of the Supreme Court,¹⁵⁸ the complainant worked on the basis of an indefinite term contract as a financial director at the respondent until 2004, when she went on a maternity leave. In 2007, she wished to return, but her former position had been terminated by the time, and her former tasks were performed in the framework of a different position by a person employed for an indefinite term. The employer offered a lower level position to the complainant for a salary 15% less than the previous one. The complainant turned to the Equal Treatment Authority claiming that she had been discriminated on the basis of her motherhood. In its decision of 7 August 2008, the Authority established discrimination based on motherhood and the ground 'other characteristic'. The employer requested judicial review from the Metropolitan Court, but the court upheld the Authority's decision on the basis that the new position offered by the employer was significantly different from the previous position, which was filled by a person employed for an indefinite term, although in such cases replacement is generally solved by employing someone for a definite term to enable the return of the mother. The employer turned to the Supreme Court for the review of the MC's decision.

In its decision dated 6 October 2010, the Supreme Court quashed the decision of the Authority and the Metropolitan Court on the basis that the Authority had failed to identify and set out in its decisions the evidence proving that there is a causal link between the complainant's motherhood and the disadvantage she had suffered. Referring to Article 4 of Directive 97/80/EC, the Supreme Court claimed that complainants are obliged to put forth evidence that make it at least likely that they have suffered a disadvantage because they belong to a certain group. Since the complainant in this case did not come up with such evidence and the Authority did not look into the issue, its decision shall be null and void, and in the repeated procedure the complaint shall be rejected as unsubstantiated. The decision was later published as a leading decision in the court's official journal.

¹⁵⁷ <http://www.egyenlobanasmod.hu/article/view/a-tan%C3%A1csad%C3%B3-test%C3%BClet-2008-m%C3%A1rciusi-%C3%A1ll%C3%A1sfoglal%C3%A1sa-a-bizony%C3%ADt%C3%A1si-k%C3%B6telezetts%C3%A9g-megoszt%C3%A1s%C3%A1val-kapcsolatban>.

¹⁵⁸ Supreme Court, Kfv.II.37.053/2010/8, 6 October 2010, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Hungary, there are legal measures of protection against victimisation.

Victimisation is prohibited by Article 10 Paragraph (3) of the ETA, which claims that 'victimisation is a conduct that causes infringement, is aimed at causing infringement, or threatens with infringement, against a person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts'.

In a case of victimisation, the same sanctions may be applied against the perpetrator as against discriminators. As we can see, the above definition extends the protection to persons providing assistance to the victim in any form.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

Under Section 6.1 we already outlined most of the sanctions that may be applied in discrimination cases (civil law sanctions, labour law sanctions, petty offence and administrative sanctions). Below we partly reiterate and partly supplement the list. We give a detailed description of only those remedial forums and legal institutions which are not described under Section 6.1.

General sanctions (applicable irrespective of the sector)

Besides the sanctions listed in Articles 2:51-2:53 of the Civil Code applicable by regular Civil Courts in a lawsuit aimed at redressing the violation of the right to equal treatment as an inherent personal right (which include the possibility of awarding to the victim moral compensation), the sanctions imposed by the Equal Treatment Authority can be used to redress discrimination in any sector and based on any ground.

Under Article 17/A Paragraph (1) of the ETA, if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, it may a) order that the situation constituting a violation of law be terminated; b) prohibit the future continuation of the conduct constituting a violation of law, c) order that its decision establishing the violation of law be published, d) impose a fine, e) apply a legal consequence determined in a special act. These sanctions can be applied jointly.

Paragraph (3) prescribes that the legal consequences set out in Paragraph (1) shall be determined taking into consideration all circumstances of the case, with particular regard to those who have been affected by the violation of law, the consequences of the violation of law, the duration of the situation constituting a violation of law, the repeated demonstration of conduct constituting a violation of law and the financial standing of the person or entity committing such a violation.

Under Paragraph (5), the sum of the fine imposed by the Authority can range from EUR 167 (HUF 50 000 to EUR 20 000 (HUF 6 million).

Under Article 17/B, the decision of the Authority may not be appealed within a public administrative procedure, but its judicial review is possible according to the general rules applicable to public administrative decisions. The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Administrative and Labour Court. The Metropolitan Administrative and Labour Court shall proceed through a panel comprised of three professional judges (instead of the normal proceeding when only one judge is deciding on the case), if the claimant or the Authority requests so.

Education

Under Article 59 Paragraph (3) of the Act on National Public Education, the kindergarten, school, dormitory and the organiser of occupational training are objectively and fully liable regardless of their culpability for damages caused to children and students in relation to their placement in kindergartens, studies in schools, membership in a dormitory and in relation to occupational training. In relation to damages the relevant provisions of the Civil Code shall be applied, taking into account that the above organs may only be exempted from liability for damages if they prove that the damages occurred outside of their sphere of operation and were caused by an unavoidable reason. No damages shall be paid if they occurred as a result of the unavoidable conduct of the person injured.

This provision puts a higher degree of responsibility on educational institutions that they would normally have under the Civil Code with regard to damages caused through discrimination. Under the normal rules a party can be exempted from liability for damages if he/she proves that he/she acted as it can be generally expected in the given situation, whereas educational liability is close to being objective.

b) Ceiling and amount of compensation

Compensation (damages and moral compensation granted by the civil court) is not capped: there is no upper limit. With regard to fines that can be imposed by administrative and petty offence authorities, the laws define the highest possible amounts (which are indicated in the respective sections above).

As to the amounts awarded in civil court cases, the following can be said. According to the Hungarian law, compensation can be pecuniary (damages) and moral. In discrimination cases moral compensation is more characteristic.

Since moral compensation cannot be quantified, it is up to the Court to decide about the amount of the compensation. There is no upper statutory limit, however, Hungarian Courts for a long time tended to be rather cautious in establishing the amounts. In a number of cases concerning discrimination in access to services (most frequently the denial of Roma guest to enter discos and bars), the amount of compensation was quite steadily around EUR 333 (HUF 100 000). Recently however, the average amounts have started to rise. In some recent cases, discrimination based on racial or ethnic origin was sanctioned with non-pecuniary damages of around EUR 2 000, which is a promising change in the general judicial approach.

In labour cases, the situation has become somewhat more complex due to the recent changes in labour law. As it was outlined above, under Article 82 of the Labour Code, if the discrimination is manifested in the unlawful termination of the employment, the employer shall compensate the employee for the damages suffered. In terms of Paragraph (2), if one of the elements of the damages demanded is lost income, no more than 12 months' salary may be claimed by the employee under this heading. The reason for this provision (which means a significant change to the previous situation in which no such cap existed) was that the protracting lawsuits put employers into very difficult situations if for instance after three-four years they had to pay the full amount of the unlawfully dismissed employee's unpaid salary, provided that he/she did not find a new job during that time. The change has a very detrimental effect on employees, as this way there is a maximum 'penalty' employers have to pay for an unlawful dismissal, which may dissuade them from trying to reach a friendly settlement and may make them interested in making the case as long as possible through appealing the subsequent judicial decisions (since the delaying tactics will not have an impact on how much they have to pay in the end).

In terms of Article 83, if the termination of the employment constitutes the violation of the requirement of equal treatment, the employee may request the court to order his/her

reinstatement. If the claimant is reinstated, it will mean that his/her employment has to be regarded as continuous, so he/she shall receive his/her lost income as 'unpaid salary' and not as 'damages', therefore, the capping does not apply.

In any way, it is certain that if the victim of the discriminative dismissal does not claim reinstatement, there is a 12-month cap on the lost income he/she can demand even if the lawsuit lasts longer than a year.

With regard to the sanctioning practice of the Authority, it can be said that it applies fines between ca. EUR 1 000 and EUR 17 000.¹⁵⁹ In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1 400 and EUR 1 700 respectively. An EUR 1 550 fine was imposed for age-related discrimination on a travel agency, which dismissed several employees who were over 50, and within six months employed four new staff members, all of whom were around 30. A EUR 15 000 (HUF 4.5 million) fine was imposed on an employer who committed indirect discrimination (against persons going on a sick leave either because of their own illness or in order to care for their sick children) by reducing the salary of those who spend less than 85% of their working time in the workplace.¹⁶⁰ The highest amount ever was imposed on a bar found to be discriminating on the basis of ethnicity in relation to entry for the second time. In this case the Equal Treatment Authority imposed a fine of EUR 16,670 (HUF 5 million) on the bar.¹⁶¹

c) Assessment of the sanctions

Sanctions are regulated in a manner that they could meet the requirements set forth by the directives. As to the practice the following can be said.

While the number of cases in which a fine is imposed showed a decreasing tendency in the previous years (e.g. in 2012 the Authority imposed a fine in only two cases¹⁶² as opposed to 11 cases in 2011¹⁶³ and 20 in 2010),¹⁶⁴ the trend seems to have changed. The summary of the Authority's annual activities for the year 2014 states that every third decision establishing discrimination (there were 23 such cases) imposed a fine on the discriminator, whereas in 2015, a fine was imposed in 17 out of the 33 cases where discrimination was established.¹⁶⁵ In 2015, the Authority also seemed more willing to impose fines on state bodies than in previous years.

A problem of practice must be raised in relation to the decisions of the civil courts in school segregation cases. The Chance for Children Foundation has won numerous *actio popularis* cases against segregating schools and the municipalities maintaining them, however, according to information from CFCF staff, the situation in the majority of these schools has not changed significantly after the court decisions. In the view of the CFCF, the reason is that courts are not willing to prescribe actual steps for the schools and/or the municipalities (after the recentralisation of the school system: the state body managing the schools) through which they are to carry out desegregation.

In one of the CFCF's cases, the issue was raised whether the courts can oblige the respondents (schools and school maintainer) to terminate the injurious situation (which is one of the sanctions of an inherent rights violations listed in the Civil Code) and if they can, whether they can define the way the termination of the injurious situation (i.e. the desegregation of the pupils) is to be done. The court of second instance in the case took

¹⁵⁹ <http://www.egyenlobanasmod.hu>.

¹⁶⁰ <http://www.egyenlobanasmod.hu/jogesetek/hu/700-2007.pdf>.

¹⁶¹ http://www.neki.hu/index.php?option=com_content&view=article&id=416:oetmillio-forint-birsagot-kell-fizetnie-a-rio-cafenak&catid=1:friss-hk&Itemid=64.

¹⁶² http://www.egyenlobanasmod.hu/data/2012_tevekenysege_szamok_tukreben.pdf.

¹⁶³ http://www.egyenlobanasmod.hu/data/2011_tevekenysege_szamok_tukreben.pdf.

¹⁶⁴ <http://www.egyenlobanasmod.hu/data/2010beszamolo2.pdf>.

¹⁶⁵ <http://www.egyenlobanasmod.hu/article/view/2015-a-sz%C3%A1mok-t%C3%BCkr%C3%A9ben-infografika>.

the stance that such an obligation can be made, however, its actual way may not be determined in the judgment, as civil law is not suitable for remedying segregation that has evolved in the framework of public law relationships (between the municipality and the school, the municipality and the children, the school and the children).

In its decision of 24 November 2010 (no. Pfv.IV.21.568/2010/5), the Supreme Court did not share this view, and claimed¹⁶⁶ that in principle courts can prescribe the way of desegregation (so the public nature of the relationship does not prevent them from doing so), however due to the fact that courts are bound by the claimant's plea, this can only happen if the claimant submits as part of the petition a sufficiently detailed, realistic and realisable desegregation plan, otherwise the obligation to terminate the violation would remain a judicial obligation that cannot be executed. In the particular case the claimant's request that the segregated school be closed down and its pupils be distributed among other schools may not be regarded as sufficiently determined and detailed, and in addition such a measure 'would have incalculable consequences'.

Although the CFCF has ever since this 2010 decision launched a number of lawsuits and has undoubted expertise in the area of educational segregation, so far the Hungarian courts have not found in any of the cases that their claims would meet these requirements, and although they in many cases established the existence of segregation they never once prescribed actual measures through which segregation should be terminated.¹⁶⁷ For instance, in the Kaposvár case described under Section 3.2.8, the court took the stance that while nothing in the Hungarian legal framework excludes the possibility that courts adjudicating segregation cases provide detailed orders as to how segregation shall be terminated, the desegregation process is such a complex one depending on many factors (namely: political will, consensus among local professionals, applicability of the professional principles to the specific local circumstances) that it would not be possible to order its implementation with the clarity and unambiguity that is required from a judicial decision in order for it to be executable, and therefore, in the said case, the court refused to prescribe such a plan.

At the same time, in the case of the Numbered streets in Miskolc described under Section 3.2.10, the Metropolitan Administrative and Labour Court dismissed the Miskolc municipality's arguments, which challenged the Equal Treatment Authority's decision – among others – on the basis that the body is not authorised to oblige the municipality to take certain positive measures, such as the adoption of an action plan and that the Authority did not specify the contents of the action plan, so the decision is impossible to execute.

The court responded to this by pointing out that the statutory possibility of obliging the discriminator to terminate the injurious situation, when the violation manifests itself in the form of an omission would be devoid of any meaning if the Authority could not oblige the violator to take specific action. Therefore, the Authority was authorised to oblige the municipality to draft action plans. At the same time, taking into consideration the specific knowledge the municipality has, and also the municipality's scope of authority, it was justified that the Authority did not provide a detailed action plan itself, but only set the goals and trusted the municipality with coming up with the details.

Thus, it seems that two different branches of court (one civil, the other administrative) have a completely different approach on this matter (there is no available information on whether the municipality has requested the judgment's review by the Curia). As to the legal basis of the two decisions, the following can be said.

¹⁶⁶ Supreme Court, Pfv.IV.21.568/2010/5, 24 November 2010, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

¹⁶⁷ Interview with CFCF staff.

The civil court referred to Article 220 of the CCP as well as to Article 13 and other, unspecified provisions of Act LIII of 1994 on the Execution of Judgments,¹⁶⁸ setting forth that the ruling shall be formulated in a manner that it could serve as the basis of the execution and that its interpretation shall not pose any difficulty during the execution process.

The administrative court simply referred to Article 17/A of the ETA (listing the potential sanctions applicable by the Authority) and the preamble of the ETA, according to which those whose right to equal treatment has been violated shall be provided with a remedy that is effective.

¹⁶⁸ Hungary, Act LIII of 1994 on the Execution of Judgments (*1994. évi LIII törvény a bírósági végrehajtásról*), 11 May 1994, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99400053.TV.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin is the Equal Treatment Authority (Authority) established by the ETA. It started its operation on 1 February 2005. Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure¹⁶⁹ (ETAD) was adopted on 26 December 2004 (as of 1 July 2013, its provision have been integrated into the ETA).

It needs to be pointed out that the Commissioner for Fundamental Rights (through his deputy responsible for minority affairs) also performs some of the functions required by Article 13 of Directive 2000/43: he conducts independent surveys concerning discrimination, publishes independent reports and makes recommendations on any issue relating to such discrimination. The Ombudsman has a very restricted possibility to assist victims in pursuing their complaints, and the scope of the Ombudsman's investigation is restricted to authorities and public service providers. For a detailed description of the Ombudsman's status and authorisations, see Section 6.1.

The Authority – which is the designated body according to the transposition process – is vested with the right and duty to act against any discriminatory act irrespective of the ground of discrimination (sex, racial affiliation, colour of skin, nationality, belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, sexual identity, age, social origin, financial status, part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, belonging to an interest representation, any other situation, attribution or condition of a person or group) or the field concerned (employment, education, access to goods, etc.). Besides the authorisations required by the Racial Equality Directive, the body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination.

- b) Status of the designated body/bodies – general independence

Article 33 of the ETA defines the Authority as an autonomous administrative body with the overall responsibility to ensure compliance with the principle of equal treatment. In terms of Paragraph (3) of the Article, 'the Authority is independent, it is subordinated only to the laws, it shall not be instructed in relation to the exercise of its duties; and performs its activities independently from all other organisations and without any external influence. Only an act of Parliament can set forth further tasks for the Authority'.

Under Article 35 of the ETA, the President of the Republic appoints the Authority's President for nine years upon the recommendation of the Prime Minister. The criteria for the position are the following: (i) Hungarian citizenship; (ii) eligibility to be voted on in elections (this includes – among others – a clear criminal record); (iii) outstanding expertise in the field of human rights or the prohibition of discrimination; (iv) a bar exam and (v) at least five years of practice in the legal field or in public administration. The President may not be the member of any party and may not pursue political activities. He/she may not pursue paid activities with the exception of educational, scientific and art-related ones. He/she may not fill leading positions in economic enterprises.

¹⁶⁹ Hungary, Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure (362/2004. (XII. 26.) Korm. rendelet az Egyenlő Bánásmód Hatóságról és eljárásának részletes szabályairól), <http://www.egyenlobanasmod.hu/data/362-2004Kr.pdf>.

The President can be only dismissed under very specific conditions: (i) if a conflict of interest arises and he/she fails to terminate the cause within 30 days; (ii) if he/she is unable to perform his/her duties for over 90 days; (iii) if he/she intentionally provides false data in his/her financial statement (that he/she is obliged to make annually). This is a positive change compared to the previous situation, when the President could be dismissed by the Prime Minister at any time without any justification.

Budgetary independence is guaranteed by Article 34 of the ETA, which claims that the Authority is a central budgetary institution vested with so called 'chapter authorizations', with its budget included – as from 1 January 2013 – in the budget of the Parliament (this also means a positive change compared to the situation up until 31 December 2012, when the Authority's budget constituted a chapter in the budget of the Ministry supervising the Authority).

Thus, on the level of the legal framework, the Authority's budgetary independence is secured. As to the actual financial resources however, we can say that despite a clearly growing work load, the Authority's budget appropriated for staff costs was for a long time insufficient. Due to severe cuts between 2009 and 2012, staff had to be dismissed, however, in recent years the Authority's budget appropriated for staff costs has been on the rise. In terms of Act CCXXX of 2013 on Hungary's Budget for the Year 2014,¹⁷⁰ EUR 518 660 (HUF 155.6 million) was allocated for staff costs. Act C of 2014 on the 2015 budget¹⁷¹ has increased this amount to EUR 606 000 (HUF 181.8 million). The average number of employees is at present 24 persons, out of which 10 are lawyers doing case work.¹⁷²

It has to be noted that in 2009 the Authority received additional funds of EUR 3 million 36 thousand (HUF 911 million) in the form of a grant financed by the European Social Fund and the Hungarian State. The grant was to be used over four years, and was spent on the setting up of (i) a regional system of lawyers providing potential complainants with legal advice and assistance in formulating their petitions; (ii) research activities; as well as (iii) training and awareness raising (for details see Section 8.1).

Before 1 February 2012, the Authority performed most of its duties in co-operation with an advisory board (the Equal Treatment Advisory Board, hereinafter: Advisory Board) whose members had extensive experience in the protection of human rights and in enforcing the principle of equal treatment. The primary role of the Board was to assist the Authority's work with legal opinions on issues arising in the Authority's practice. However, Act CLXXIV of 2011¹⁷³ completely abolished the Equal Treatment Advisory Board as of 1 February 2012. As a result of the involvement of NGOs in the selection procedure of the Board's members, some members came from the NGO community, which made it possible to channel the specific and very direct experience and knowledge of anti-discrimination NGOs into the work of the Board, and thus of the Authority. The dissolution of the Board has terminated this opportunity.

c) Grounds covered by the designated body/bodies

¹⁷⁰ Hungary, Act CCXXX of 2013 on Hungary's Budget for the Year 2014 (2013. évi CCXXX. törvény Magyarország 2014. évi központi költségvetéséről), 21 December 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300230.TV.

¹⁷¹ Hungary, Act C of 2014 on Hungary's Budget for the Year 2015 (2014. évi C. törvény Magyarország 2015. évi központi költségvetéséről), 29 December 2014, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1400100.TV.

¹⁷² http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/1935c98a394f6530cb4ea8855f09d31b/EB_H_foglalkoztatottak_2015.pdf.

¹⁷³ Hungary, Act CLXXIV of 2011 (2011. évi CLXXIV. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény és egyes kapcsolódó törvények, valamint a miniszteri hatósági hatáskörök felülvizsgálatával összefüggő egyes törvények módosításáról), 14 December 2011, <http://mkogy.jogtar.hu/?page=show&docid=a1100174.TV>.

The Authority has a mandate to deal with all the grounds contained in the open ended list of the ETA, therefore, its mandate extends to all possible grounds on the basis of which unlawful differentiation may be made.

d) Competences of the designated body/bodies – and their independent exercise

The Authority is authorised and obliged to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.). The Authority's scope of competence extends to all the grounds and fields covered by the ETA (see above, under the relevant sections).

The competences of the Authority are set forth by Article 14 of the ETA. They include the following:

- based on a complaint or ex officio, the Authority shall conduct an investigation to establish whether the principle of equal treatment has been violated, or based on a complaint conduct an investigation to establish whether employers obliged to adopt an equal opportunities plan have abided by this duty, and deliver a decision on the basis of the investigation;
- may initiate an *actio popularis* claim with a view to protecting the rights of persons and groups whose rights have been violated;
- review and comment on drafts of legal acts and reports concerning equal treatment;
- make proposals concerning governmental decisions and legislation pertaining to equal treatment;
- regularly inform the public and the Parliament about the situation concerning the enforcement of equal treatment;
- in the course of performing its duties, co-operate with the non-governmental and interest representation organisations and the relevant state bodies;
- continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment;
- provide assistance in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;
- provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment.

Article 14 Paragraph (1) Point (g) of the ETA gives the mandate to provide independent assistance to victims of discrimination (the Authority shall 'continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment').

The right to *conduct independent surveys* is not explicitly formulated, but the possibility to do so is implicitly included in the ETA. In terms of Article 14 Paragraph (1) (e), the Authority shall 'regularly inform the public and the Parliament about the situation concerning the enforcement of equal treatment'. Article 14 Paragraph (1) (h) claims that the Authority shall 'provide assistance in the preparation of governmental reports to international organizations, especially to the Council of Europe concerning the principle of equal treatment', in terms of Point (i) of the same Paragraph, the Authority shall 'provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment'. This is obviously only possible if the Authority possesses information about the nationwide situation concerning discrimination. Therefore, in the author's view, the Authority's right to carry out such surveys is not to be questioned.

As to the practical possibility (financial and human resources), the circumstances for a long time prevented the Authority from fulfilling this task. This situation was changed by the above mention 4-year grant from the European Social Fund and the Hungarian State, in

the framework of which altogether seven researches were carried out:¹⁷⁴ (i) gender wage gap and segregation in contemporary Hungary; (ii) employee selection practices in the light of discrimination; (iii) impact of the equal opportunity plan; (iv) relations between employers' attitudes, labour market employment of employees with protected characteristics and insuring proper working conditions; (v) extent of gaining knowledge of one's rights as a victim of discrimination – with special focus on women, Roma, people with disabilities, and LGBT people; (vi) discriminative mechanisms in public administration and legislation at the municipal level; (vii) increase in the awareness related to equal treatment between 2010 and 2013.

It is a problem that with the end of the grant, no resources are available for maintaining the survey activities, so these types of activities have come to a halt.

The mandate to *publish independent reports and make recommendations* concerning discrimination are set forth by Article 14 Paragraph (1) (d) of the ETA (the Authority shall 'make proposals concerning Governmental decisions and legislation pertaining to equal treatment'), Article 14 Paragraph (1) (e) of the ETA (the Authority shall 'regularly inform the public and the Parliament about the situation concerning the enforcement of equal treatment'), and finally Article 14 Paragraph (2) of the ETA ('in order to continuously inform the public, the Authority shall on its website regularly publish its reports, proposals and detailed information concerning its activities').

The key element of the Authority's activity is none of the three tasks envisioned by the Racial Equality Directive, but investigating into and deciding on individual instances of discrimination. In terms of Article 14 Paragraph (1) (a), the Authority has the mandate to conduct independent investigations both *ex officio* and also based on individual complaints ('the Authority shall, based on a complaint or – in cases defined herein – *ex officio*, conduct an investigation to establish whether the principle of equal treatment has been violated, (...) and make a decision on the basis of the investigation').

This is a quasi-judicial function, so in this regard the service provided by the Authority goes beyond simple *assistance in asserting claims*. On the other hand, due to the scarce financial and human resources this function may in practice prevent the Authority from actually fulfilling the other tasks (with the exception of the annual report, the preparation of which is an obligation).

As to the legal sanctions applicable if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, see Section 6.5.

As to the independence of the manner in which the tasks are carried out, the Authority's place within the governmental structure and the fact that it is an administrative body may be raised as a problem in spite of its autonomous status.

e) Legal standing of the designated body/bodies

In Hungary, the designated body has legal standing to bring discrimination complaints (on behalf of identified and not identified victim(s)) and to intervene in legal cases concerning discrimination.

Under Article 14 Paragraph (1) (g) of the ETA, the Authority 'shall continuously provide information to those concerned and provide assistance with regard to acting against the violation of equal treatment'.

¹⁷⁴

http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TA_MOP_zarokiadvany.pdf.

Under Article 18 of the ETA, unless stipulated otherwise by the law, based on an authorisation from the victim, the Authority may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment.

Furthermore, in administrative proceedings launched due to the violation of the principle of equal treatment, the Authority shall be entitled to exercise the rights of a party.

As was outlined above, in terms of Article 20 of the ETA, if the principle of equal treatment is violated, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by – among others – the Authority, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.

Due to the problems of inadequate staffing, these types of activities are rather rare. The Authority has never launched an *actio popularis* lawsuit, and intervened in only one case during its history.¹⁷⁵

f) Quasi-judicial competences

In Hungary, the body is a quasi-judicial institution.

As outlined above, under Article 14 of the ETA, the Authority shall, based on a complaint or ex officio, conduct an investigation to establish whether the principle of equal treatment has been violated, and deliver a decision on the basis of the investigation.

The proceeding usually starts with a complaint (ex officio investigations are rare, their number is 1-4 per year on average),¹⁷⁶ which the Authority communicates to the other party, who reacts to the complaint in writing. The complainant has the possibility to put forth comments in relation to the other party's reaction, and usually at this point the Authority holds a hearing where both parties are present. A decision may also be delivered without a hearing, but under Article 16 of the ETA, this is an exceptional possibility.

The Authority is obliged by law to fully discover and establish the facts of the case, so it does not only rely on evidence put forth by the parties. It may resort to different sources of evidence, witnesses, documents and expert opinions being the most frequently applied methods.

Based on the results of the proceeding, the Authority delivers a decision. Under Article 17/A of the ETA, if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, it may a) order that the situation constituting a violation of law be terminated; b) prohibit the future continuation of the conduct constituting a violation of law, c) order that its decision establishing the violation of law be published, d) impose a fine, e) apply a sanction determined in a special act. The sanctions can be applied jointly.

Under Paragraph (5), the sum of the fine imposed by the Authority can range from EUR 167 (HUF 50 000) to EUR 20 000 (HUF 6 million).

Under Article 17/B, the decision of the Authority may not be appealed within a public administrative procedure, but in accordance with the general rules applicable to public administrative decisions, the judicial review of the Authority's decision is possible. The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Administrative and Labour Court.

¹⁷⁵ Information from Authority staff.

¹⁷⁶ Information from Authority staff.

Under Article 16 of the ETA, the costs of the proceeding are advanced by the Authority and (with regard to its own costs) the respondent. If the complaint is rejected, the complainant is only obliged to pay the procedural costs if he/she has acted in bad faith.

In the court phase, the court fee is advanced by the state. If the party's (either the claimant's or the respondent's) claim is rejected, he/she has to repay both the court fee and the costs of the other party/parties (the Authority as defendant and the other party in the original proceeding as intervener).

If the respondent fails to comply with the Authority's decision, the decision may be executed in accordance with the general provisions applying to the execution of administrative decisions.

g) Registration by the body/bodies of complaints and decisions

In Hungary, the body registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public on the Authority's website as part of the Authority's annual report.¹⁷⁷

h) Roma and Travellers

As was outlined above, the Authority is an administrative decision-making body investigating complaints, delivering decisions on them and imposing sanctions on the perpetrators. Therefore, it does not set its own agenda and priority issues, it acts retroactively – in accordance with the types of complaints addressed to it. Consequently, we may not speak about a consistent approach on the part of the Equal Treatment Authority, though due to the structural characteristics of discrimination in Hungary, a large proportion of its complainants come from the Roma minority.

In 2013, disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination (119 and 129 respectively). Sexual orientation and gender identity were identified as the ground of discrimination by 11 and two complainants respectively.¹⁷⁸ The trends did not change in the year 2014: disability was indicated by the complainants in 98 cases, belonging to a national minority in 69 (other terms indicating ethnicity – colour of skin, race, etc. – were identified as the ground for discrimination in an additional 19 cases), while 16 persons complained of discrimination based on sexual orientation and two on gender identity.¹⁷⁹ Similarly, in 2015, most complaints were based on disability (74 cases) and affiliation with a national minority (64 instances).¹⁸⁰

Some of the investigations launched ex officio by the Authority concern Roma persons (for instance the Rimóc bike case described under Section 2.3.1), furthermore, the researches mentioned under point d) focused greatly on the situation of the Roma in the labour market, which also demonstrates that the Authority is aware of the special situation of the Roma.

¹⁷⁷ The Authority's annual reports are available at: <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-az-egyenlő-bánásmód-hatóság-tevékenységéről>.

¹⁷⁸ <http://www.egyenlobanasmod.hu/article/view/tajekoztato-az-egyenlo-banasmod-hatosaq-2013-evi-tevekenysegerol>.

¹⁷⁹ <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-egyenlő-bánásmód-hatóság-2014-évi-tevékenységéről>.

¹⁸⁰ <http://www.egyenlobanasmod.hu/article/view/az-egyenlő-bánásmód-hatóság-2015-évi-tevékenységéről>.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Since it was established, the Authority – which as a governmental agency is working under the supervision of the Government – has been active in disseminating information about the legal protection against discrimination.

The Authority's website (www.egyenlobanasmod.hu) contains a lot of information, including the relevant legislation, a brief and clearly formulated description of the Authority's scope of competence and the Authority's case law.

Mention has to be made of a grant provided to the Authority with the aim of enhancing its effectiveness and accessibility in the framework of the so-called Social Renewal Operative Programme 5.5.5 (hereafter: TÁMOP project). The TÁMOP project is financed by the European Social Fund and the Hungarian State, it was started in 2009 and ended in 2014.¹⁸¹ The total TÁMOP project budget was EUR 3 million 36 thousand (HUF 911 million).¹⁸²

As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (lawyers, attorneys at law) were at the beginning seated in the so-called Houses of Opportunities (a regional equal opportunities network) in every county seat and in the capital. From 2011 on, a more diverse system was set up, and the referees started to hold consultation hours in offices of NGOs, government offices and community centres. They are forwarding discrimination complaints, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system. In 2013, the referee system served 2730 clients and forwarded 173 complaints to the Authority.¹⁸³ In 2014 these numbers were 1835 and 110 respectively,¹⁸⁴ whereas in 2015, the referees forwarded 84 complaints out of a total of 1848.¹⁸⁵

The TÁMOP project consisted of three further elements.

The first element was a series of campaigns, aimed at sensitising the general public. Its results – contained – among others the following:

- forwarding of the Authority's newsletter to over 2 500 addresses;
- organising ten workshops for 100-100 participants (6 at universities) participating in over 350 events (conferences, workshops) aimed at transferring knowledge about the issue of non-discrimination;
- close to 1 000 appearances on radio and over 1 700 on television;
- publishing 3 000 copies of a short film about non-discrimination and 3 000 copies of a multimedia DVD on the issue;
- organising different competitions (for short films dealing with non-discrimination, for artwork by young people that were later turned into a travelling exhibition; and design competition);

¹⁸¹ For the project grant see <https://www.palyazat.gov.hu/doc/1311>.

¹⁸² Unless indicated otherwise, the results of the program are presented on the basis of its closing study available at: http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TAMOP_zarokiadvany.pdf.

¹⁸³ http://www.egyenlobanasmod.hu/data/EBH_2013_tevekenysegi_szamok_tukreben.pdf.

¹⁸⁴ <http://www.egyenlobanasmod.hu/article/view/egyenlo-banasmod-hatosag-2014-evi-tevekenysege-a-szamok-tukreben>.

¹⁸⁵ <http://www.egyenlobanasmod.hu/article/view/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-a-szamok-tukreben>.

- placing over 23 000 posters and 200 giant posters, and circulating over 80 000 leaflets.

Many of the workshops and trainings organised in the framework of the programme were attended by NGO workers and activists and trade union representatives.

The second element consisted of a series of trainings held by the Authority for teachers, social workers and the media, combined with workshops with NGOs and public administration staff members. A 30-hour training module (a combination of sensitisation and legal knowledge transfer) was developed, and altogether 80 trainings were held. The series of trainings ended in March 2014, altogether over 1 500 persons accomplished the training.

As it was also mentioned above, seven researches and a final study constituted the third element of the project: four researches dealt with discrimination in the field of employment, one analysed clients' awareness of their rights and the remaining two looked into discriminatory practices within the system of public administration.

It must be raised in relation to these activities that with the extra funding ending, the dissemination of information and dialogue with NGOs and social partners by the Authority could not continue with similar intensity, but the Authority still places emphasis on its awareness raising activities: its staff members gave presentations at 37 training programs, it placed 25 social media posts, together with the network of referees it was mentioned altogether close to 1500 times in mass media organs, and its website generated 32329 individual visits.¹⁸⁶

As to state structures specifically established to address the problems faced by the Roma, the following can be said. After the change of government, a Secretariat of State for Social Inclusion was set up, who operates within the Ministry of Human Resources and is responsible for the social inclusion of the Roma, but also of indigent people, people living in disadvantaged regions, people with low level education and persons who cannot be employed due to their health status.¹⁸⁷

The secretariat has launched a number of initiatives to improve the situation of the Roma. An example is the EUR 5 million (HUF 1.5 billion) programme aimed at providing Roma women with vocational training. In the three-year programme running between 2012 and 2015, over one thousand Roma women were trained as social nurses, nannies, social assistants. 300 of them have already found employment.¹⁸⁸

On 12 February 2013, the Government established a Consultation Council for Roma Affairs with Resolution 1048/2013. The council is a consultative and recommendation making body. It is chaired by the Prime Minister and co-chaired by the person appointed by the Prime Minister. Its members are the Minister of Human Resources, the Minister of Interior, the Minister of Economy and the Minister heading the Prime Minister's Office. The Chair is entitled to invite any other person whose presence seems to be necessary.

On 2 December 2011, Hungary was the first country to submit its national strategy (the National Social Inclusion Strategy) within the EU framework for National Roma Integration Strategies. While welcoming the efforts, NGOs active in the field prepared a critical analysis of the National Social Inclusion Strategy and the related governmental measures and put

¹⁸⁶ <http://www.egyenlobanasmod.hu/article/view/az-egyenl%C5%91-b%C3%A1n%C3%A1sm%C3%B3d-hat%C3%B3s%C3%A1g-2015-%C3%A9vi-tev%C3%A9kenys%C3%A9ge-a-sz%C3%A1mok-t%C3%B3kr%C3%A9ben>.

¹⁸⁷ <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag>.

¹⁸⁸ <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/tobb-mint-1000-roma-no-szerzett-szakkepesitest>.

forth a number of recommendations as well as suggested changes to the National Social Inclusion Strategy.¹⁸⁹

They claim among others that while 'research has shown that Roma in Hungary are discriminated against in almost all fields of life, and the general public, the political forces and decision-makers do little to protect the Roma as a vulnerable social group. Policy changes, such as abolishing the institution of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and moving this function to the portfolio of the deputy of the Commissioner for Fundamental Rights, have resulted in far less powerful institutional tools for combating discrimination. (...) At the local level, the powerless position of minority self-governments has been further weakened: their consent is not obligatory any longer to decide on matters affecting the local Romani community (...)'.¹⁹⁰

The NGOs also pointed out that the 'central government's exclusive Roma partner is the National Roma Self-Government (NRSZ) (strongly supported by the current government, heavily based on Lungo Drom representatives, an ally of FIDESZ), which is highly problematic because this arrangement excludes a large range of (non-Lungo Drom) Roma interest groups from meaningful participation, thus limiting critical feedback.'¹⁹¹

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

In terms of Articles 6:95 and 6:96 of the Civil Code, contracts that are contrary to a law, or are concluded with the intention of circumventing a legal obligation shall be null and void. Contracts that are manifestly immoral are also null and void.

Furthermore, under Article 27 of the Labour Code an agreement (individual or collective) that violates labour law regulations shall be null and void. If annulled or successfully contested, the agreement shall be invalid (Article 28). If invalidity results in damages, these shall be paid (Article 30).

Furthermore, as it was outlined in relation to the personal scope of the ETA, public foundations and public associations, and organisations representing employees' and employers' interests are obliged to comply with the requirement of equal treatment, therefore, if their internal rules violate this principle, a complaint may be filed with the Equal Treatment Authority. The internal operations of other associations and legal entities – with the exception of establishing and terminating membership – are however expressly exempted by the ETA from the requirement of equal treatment, so if such rules are contrary to the principle of non-discrimination, it may not be challenged through legal means.

b) Rules contrary to the principle of equality

In the areas covered by the directives, most legislation is in line with the principle of equal treatment. There are a number of statutes with regard to which the infringement of the principle of equal treatment may be argued (for instance, differences in the status of married couples and life partners, taking into consideration the fact that the possibility of getting married is not open for homosexual couples).

¹⁸⁹ Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Hungary, Available at:

http://www.romadecade.org/cms/upload/file/9270_file8_hu_civil-society-monitoring-report_en.pdf.

¹⁹⁰ Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Hungary, p. 9, available at:

http://www.romadecade.org/cms/upload/file/9270_file8_hu_civil-society-monitoring-report_en.pdf.

¹⁹¹ Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Hungary, p. 9, available at:

http://www.romadecade.org/cms/upload/file/9270_file8_hu_civil-society-monitoring-report_en.pdf.

The mechanism to eliminate laws that are contrary to the principle of equal treatment is in place. Under the provisions of Act CLI of 2011 on the Constitutional Court,¹⁹² the body is entitled to subsequently examine the constitutionality of any legal provision (with the exception of certain provisions relating to the central budget and taxes). Any law that is contrary to the constitutional non-discrimination clause is unconstitutional. Under Article 26, any person whose constitutional rights (including the right to non-discrimination) have been violated because a court has applied an unconstitutional norm, or applied a norm in an unconstitutional manner, has the right to petition (within 60 days from the date the final and binding decision is served to him/her) the Constitutional Court and ask the court to abolish the provision or quash the judicial decision.

If there is no judicial remedy against the particular law, it is also possible to petition the Constitutional Court within 180 days of the coming into force of the norm in question. This limitation is highly problematic, as it excludes the individual's possibility to request a constitutional review if he/she suffers the consequences of the unconstitutional legislation with more than 180 days from the law's coming into effect. In such cases, the Ombudsman can be requested to turn to the Constitutional Court (as the Ombudsman can request the constitutional review of any law irrespective of when it came into effect), however, the Ombudsman has a discretionary right to decide whether or not to comply with such a request.

The unconstitutional statute loses effect on the day of the publication of the Constitutional Court's decision and from this day on, it may not be applied. In certain cases, the Court may abolish norms retroactively or *pro futuro*, leaving time for the legislator to amend it, or adopt new legislation.

¹⁹² Hungary, Act CLI of 2011 on the Constitutional Court (2011. évi CLI. törvény az Alkotmánybíróságról), 21 November 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100151.TV.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Justice, the Ministry of Human Resources and the Equal Treatment Authority are primarily responsible for dealing with or coordinating issues regarding antidiscrimination on the grounds covered by this report.

Several different bodies have also been established with the aim of discussing and coordinating issues and activities falling under the scope of this report. Besides the Consultation Council for Roma Affairs mentioned above (under Section 8.1), mention may be made of the Roma Coordination Council established by Government Resolution 1102/2011. (IV.15.) with the aim of monitoring the progress of the inclusion policies, as well as the Inter-Ministerial Committee for Social Inclusion and Roma Affairs, which was set up by Government Resolution 1199/2010 with the purpose of coordinating government activities with aimed at the improvement of the living conditions and social situation and promoting the social integration of people living in extreme poverty. The Committee consists of representatives of the relevant ministries and is chaired by the Minister of Human Resources. The Committee's working groups hold consultations with the relevant government agencies on issues including regional development, employment policy, education policy, social policy and health care.

Mention must also be made of the National Disability Council (NDC), which was set up by Government Resolution 1330/2013. Out of the 15 NDC members only the chair represents the government, whilst the other 14 members are delegated by the largest members of disabled peoples' organizations (hereafter: DPOs) or by the alliance of smaller DPOs. The NDC is also a consultative forum; it provides the Government and the Minister responsible for promoting equal opportunities with advice. The Government Resolution does not envisage any consequence or sanction if the NDC's advice is not taken into account. The NDC also serves as the focal point of the CRPD Committee.

The fact that this abundance of different coordination bodies does not necessarily entail efficient operation is shown by what happened to the Anti-Segregation Roundtable, which was established in June 2013 with the declared aim of monitoring and discussing important issues related to educational integration and segregation (participation of civil society and churches, professional standards, etc.). The roundtable was envisaged to enhance the communication of governmental and civilian actors, however, two representatives of the civil sector, a head of an after-school study centre and the Chance for Children Foundation left the roundtable in July and September 2013 respectively, claiming that the government disregarded their views and demands and that the meetings were not productive at all.¹⁹³

¹⁹³ See for instance: http://hvg.hu/itthon/20130711_Balog_Heindl_roma_szegregacio; http://www.romnet.hu/hirek/2013/09/25/mohacsi_erksebet_is_kivonult.

10 CURRENT BEST PRACTICES

- *Testing by the Equal Treatment Authority*: not only NGOs, but – based on an express statutory authorisation – the Equal Treatment Authority also applies testing to establish discrimination in cases that allow for this type of evidencing.
- *The referee system established by the Equal Treatment Authority*: as a Budapest based administrative organisation, the Authority proved to be very difficult to access to complainants from the countryside. This realisation motivated the setting up of a system of referees in each county of Hungary. The referees receive clients in different locations (NGO offices, government offices, community centres) and provide them free legal advice, and – in cases raising the suspicion of discrimination – assist them in preparing written petitions to the Authority. Between 2009 and mid-2013, the referee system dealt with over 7 000 clients, and forwarded 540 complaints to the Authority.¹⁹⁴ In 2015, the referees forwarded 84 complaints out of a total of 1848 approaches by potential clients.¹⁹⁵ It needs to be mentioned that even with the referees, problems of access have not been fully solved, as they receive clients in county seats and other larger towns, so for the most indigent victims of discrimination (many of whom live in rural areas) it may still be difficult to avail themselves of the network's services.
- This is why it is important to provide local grass-root NGOs with sufficient knowledge to tackle discrimination. In this regard mention may be made of the *pilot project of the Legal Defence Bureau for National and Ethnic Minorities* aimed at providing NGOs in Borsod-Abaúj-Zemplén county (from which 30% of the complaints received by the organisation arrives) with theoretical and practical training into discrimination related matters. Training is provided two days per month for nine months, and is complemented by personal mentoring.¹⁹⁶ In the framework of the project, practical guides have been prepared on a number of subject, such as discrimination; child protection; criminal and petty offence procedures as well as public labour and social benefits.¹⁹⁷

¹⁹⁴

http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adb/TA_MOP_zarokiadvany.pdf, p. 16.

¹⁹⁵ <http://www.egyenlobanasmod.hu/article/view/az-egyenl%C5%91-b%C3%A1n%C3%A1sm%C3%B3d-hat%C3%B3s%C3%A1g-2015-%C3%A9vi-tev%C3%A9kenys%C3%A9ge-a-sz%C3%A1mokr%C3%B3kr%C3%A9ben>.

¹⁹⁶ <http://dev.neki.hu/senkit-nem-erdekel-mert-menniuk-kell/>.

¹⁹⁷ <http://dev.neki.hu/kiadvanyok/>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Whereas the Commission has closed the infringement procedures against Hungary under Directives 2000/43 and 2000/78, and has found that the Hungarian legislation is in accordance with the directives, in the author's view in some areas' full compliance is uncertain and is highly dependent on the judicial interpretation of the regulations in question. The areas in which possible breaches may occur are summarised below:

- Due to the comprehensive material scope of the ETA, the requirement of equal treatment as set forth by the ETA applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the directives, the Hungarian law may be in breach of the *acquis*, as it does not impose on all persons of the private sector the obligation of non-discrimination. (For a detailed explanation see Section 3.1.2.).
- Article 7 Paragraph (2) of the ETA allows for objective justification in certain cases of direct discrimination, depending on the ground for discrimination and on the nature of the right concerned (fundamental right or not). (For a detailed explanation see Section 2.2.).
- The rules for the justification of indirect discrimination are also not fully in line with the directives. (For a detailed explanation see Section 2.3).
- The so-called special exempting clauses also contain certain inconsistencies, unjustified distinctions between certain grounds and wider possibilities for exemption than allowed by the directives (see for example Section 4.1 on the equal pay for equal work principle and Section 4.2 on employers with an ethos based on religion or belief). Depending on judicial interpretation, some provisions of the new law on churches and religion and the new law on public education may cause a contradiction between domestic and EU law in relation to organisations with a religious ethos. (For a detailed explanation see Section 4.2.).
- The exclusion of workers of the pensionable age from a severance payment may be in violation of the relevant CJEU jurisprudence. (For a detailed analysis see Section 4.7.).
- The obligation of reasonable accommodation has not been unambiguously transposed into the Hungarian law. The problem is especially acute with regard to employing people with disabilities, in spite of an amendment to the RPD Act, which – if interpreted from a strict grammatical point of view – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure (i.e. primarily the job interview), but does not prescribe that reasonable efforts shall be made to adapt the workplace to the special needs of persons with disabilities to promote their actual employment. (The situation in this regard is rather complex. For details, see Section 2.6.).

11.2 Other issues of concern

- Article 28 (2) of the ETA as interpreted by the Curia in the *Huszártelep* case (see Section 3.2.8) poses the danger that religious education will be abused to exempt the segregation Roma pupils, so an amendment of the current wording of the ETA may be necessary in order to clarify justification defences and ensure their compliance with EU law.
- Furthermore, an amendment to the National Public Education Act authorises the government to adopt a decree on the specific conditions of religious and minority education (see Section 3.2.8), with special regard to the issue of segregation. NGOs are afraid that this legislation will enable the government to legalise ethnic segregation among specific circumstances (e.g. in the framework of religious education).

- The jurisprudence seems to render civil law sanctions ineffective in segregation cases due to the courts' reluctance to prescribe the carrying out of detailed desegregation plans (see Section 6.5).
- Accessibility of public premises and services is still far from complete, although the obligation to provide an accessible environment has been in place for over a decade. The government's unwillingness to implement the recommendations of the CRPD and the Curia's stance that financial difficulties may provide a reasonable justification for non-compliance with the relevant statutory obligation seem to prolong this deficiency as a long standing problem.
- The number of cases in which the Equal Treatment Authority establishes discrimination and in which a friendly settlement is achieved is still very low compared to the overall number of complaints to the body (in 2015 the combined number was 50 for about 900 complaints, see Section 6.1). The most probable explanation for this phenomenon is a low level of awareness among the population about the non-discrimination area and what the Authority's scope of activity is, and also the fact that many of the potential complainants come from marginalised groups with low levels of ability to assert their rights. While the Authority's network of referees has definitely extended the Authority's outreach (see above, under Section 10), further efforts are needed to achieve a significant increase in numbers.
- In relation to the Equal Treatment Authority it needs to be pointed out that – mostly due to the lack of necessary staffing – it carries out very few ex officio procedures (which is problematic exactly due to the above mentioned low level of awareness and assertiveness on the part of the victims), and with the end of the four-year TÁMOP programme (see Section 8) providing the body with substantial extra funding, it cannot maintain – definitely not at the previous level – some of its very important core functions (such as the carrying out of surveys and awareness raising).

12 LATEST DEVELOPMENTS IN 2015

Mention must be made of the housing situation in Miskolc. As it was described in Section 3.2.10, the local council of Miskolc adopted legislation and pursues practices which will potentially force tenants of low comfort social housing (predominantly Roma persons) to leave the town. While practically all state authorities have established that these practices are unlawful and discriminative, no effective measures have been taken by the municipality to remedy the situation.

The Curia's decision in the Huszártelep desegregation case (see Section 3.2.8) seems to have brought along a worrying turn in the so far consistent jurisprudence related to segregation in education. The judgment forecasts the possibility that when segregation is realised in denominational schools, a more lenient approach to the phenomenon might be taken.

12.1 Legislative amendments

In 2015, no significant legislative amendments took place from the point of view of non-discrimination. Drafts of legislation on the formulation of separated minority and religious educational units were prepared during the year, but these have not been adopted yet.

12.2 Case law

Name of the court: Curia

Date of decision: 22 April 2015

Name of the parties: Chance for Children Foundation v. the Municipality of Nyíregyháza, the Greek Catholic Church, two schools maintained by the church, the Klebelsberg Center for Management of Educational Institutions

Reference number: Pfv.IV.20.241/2015/4

Address of the webpage:

http://cfcf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf

Brief summary: The lawsuit concerned the reopening of a segregated Roma school under the auspices of the Greek Catholic Church after the municipal council terminated the school bus service enabling Roma parents to send their children to integrated schools after the closing down of the school in 2007. The courts of first (Nyíregyházi Törvényszék, decision no. 10G.15-13-040 099/22, dated 28 February 2014) and second instance (Debreceni Ítéltábla, decision no. Gf.I.30.347/2014/10, dated 6 November 2014) established that the large majority of the pupils in the school were of Roma origin (protected ground), and accepted the opinion of the plaintiffs' experts that segregated education leads to falling behind and significantly decreases chances of success in later stages of education and working life (disadvantage). Therefore, the court had to look into the question whether the ETA's exempting clause can be applied, i.e. whether the separated education was indeed initiated voluntarily by the parents. Based on the evidence collected in the proceeding, the courts concluded that this was not the case. From among the first 15 pupils of the school, only two claimed to be Greek Catholic, most parents, when filling out the form containing information about why they want to send their children into this particular institution, claimed that they had chosen this school because it was in their close proximity, which was clearly not a religious motive. The courts also established that by terminating the school bus service, and providing the school with substantial financial support, the municipality also has responsibility in the segregation of the Roma pupils from the non-Roma.

The Curia overturned the second instance decision in its judgment of 22 April 2015. While the Curia accepted that the majority of the pupils in the Huszártelep school are Roma, and that segregation is a disadvantage in itself, it concluded that the separation could be exempted, since the parents were fully aware that the education in the school would be committed to the Greek Catholic faith and they have the opportunity to enrol their children in the secular school within the catchment area of which they live, or to any other

denominational school, and the quality of education and the pedagogical program of the Huszártelep school was not challenged by the plaintiffs. The Curia did not consider that in the absence of a school bus service the voluntariness of the parents' choice is highly questionable, and that the religion based exemption may not be raised when only a small minority of the parents indicated the school's faith as the reason for their choice.

Name of the court: Curia

Date of decision: 28 April 2015

Name of the parties: Borsod-Abaúj-Zemplén County Government Office v. the Municipality of Miskolc

Reference number: Köf.5003/2015/4

Address of the webpage: <http://www.kuria-birosag.hu/hu/onkugy/kof500320154-szamu-hatarozat>

Brief summary: In May 2014, the Municipal Council of Miskolc (North-East Hungary) amended its Decree No. 25/2006. (VII.12.) on Social Housing, introducing a limitation on receiving financial compensation for the termination of tenancy in social housing for those who live in "low comfort" social housing. Article 23(3) of the decree as amended stipulates that the authorities can only provide financial compensation (in the amount of HUF 2,000,000 – EUR 6,400) to low comfort social housing tenants in order to secure a mutually-agreed termination of the tenancy if the tenants undertake to comply with the following cumulative obligations: (i) they purchase a property from the compensation; (ii) the property is purchased outside of the territory of Miskolc, (iii) they agree to a "restraint on alienation and encumbrance" (prohibiting the owner from selling or mortgaging of the property), registered in the land registry for five years in respect of the purchased property and enforceable by Miskolc Local Council. As opposed to low comfort housing tenants, tenants of higher quality social housing are provided with the possibility of being relocated within Miskolc. Therefore, this is differential treatment of low comfort as compared to ordinary social-housing tenants, de facto allowing the authorities to 'expel' from the territory of Miskolc tenants living in low comfort social housing. Tenants of low comfort social housing are almost exclusively Roma, who thus would no longer be able to access social services in Miskolc due to the change of their address (as under Hungarian law on social services, such services shall be provided by a local government on whose territory a person has a registered place of residence). The Borsod-Abaúj-Zemplén County Government Office requested the Municipal Council to amend the decree, but the council refused to do so. The Government Office filed a motion with the Curia for the quashing of the decree.

The Curia concluded that the amendment puts persons living in low comfort social housing in a disadvantaged situation compared to persons living in social housing of higher comfort levels, and although differentiation may be acceptable if it has a legitimate purpose, in this particular case, no such purpose was presented by the Municipal Council. The grounds for the discrimination according to the Curia were financial situation and "other characteristic" (more closely: social status).

The Curia stated that the amendment may not be regarded as a positive measure, since although the payment of a sum to compensate the termination of the tenancy is indeed a positive possibility, this is also open for the persons in comparable situation (tenants of higher comfort housing), who are not obliged to spend the compensation on housing outside the premises of Miskolc. The Curia also pointed out that the tenant's decision to leave the city may not be regarded as truly voluntary, as it stems from a legal norm adopted by the municipality. Finally, the Curia made it clear that the autonomy of owners stemming from the right to property can be restricted on the basis of the owners' responsibility for society, and this is especially true for municipalities. Based on the above, the Curia abolished the amended Article 23(3) of the municipal decree.

Name of the court: Metropolitan Administrative and Labour Court

Date of decision: 25 January 2016 (the case is included as the Equal Treatment Authority's reviewed decision was delivered on 15 July 2015)

Name of the parties: The Municipality of Miskolc v. Equal Treatment Authority

Reference number: 6.K.33.048/2015=7.

Address of the webpage: Not available online

Brief summary: The municipality of Miskolc started to systematically terminate the social housing tenancies of persons living in a highly segregated, low comfort part of the town, called the "Numbered Streets" without taking any measures to provide the tenants with alternative housing and thus exposing them to the threat of homelessness. In its decision of 15 July 2015 (no. EBH/67/22/2015) the Equal Treatment Authority established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas, and by doing so, discriminated them on the basis of their social status, financial situation and Roma origin. The Authority obliged the municipality to put an end to the discriminative situation by developing an action plan (by 31 December 2015) detailing on where within Miskolc, how and from what sources it can provide the tenants of the Numbered Streets with adequate housing. The Authority also called on the municipality to stop its ongoing discriminative practice until the action plan is prepared. Furthermore, the Authority obliged the municipality to prepare (by 30 September 2015) another action plan on how it will provide those with adequate housing who have already become homeless or face a direct threat thereof because of the discriminative practices. Finally, the Authority imposed a fine of HUF 500,000 (EUR 1,670) on the municipality.

The municipality requested a judicial review of the decision – among others – on the basis of the following arguments: (i) the Authority does not have authorisation to examine a practice, only the particular contractual relationships between the municipality and individual tenants; (ii) the elimination of the segregated areas concerns all the tenants irrespective of their ethnicity, social status or financial situation, so no discrimination may arise in the case; (iii) the Authority is not authorised to oblige the municipality to take certain positive measures (such as the adoption of an action plan); (iv) the Authority did not specify the contents of the action plan, so the decision is non-executable.

The court rejected the municipality's request for review and upheld the Authority's decision in every respect. The court recalled that under Article 4 of the ETA, the public entities falling under the law's scope are obliged to respect the requirement of equal treatment in all their legal relationships, measures and procedures. The elimination of the segregated areas (as all practices) is a series of measures, therefore the Authority did have the authorisation to examine the municipality's actions related to the elimination of the neighbourhood and its aggregated effects.

The court pointed out that for indirect discrimination to be established, "it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage". In the court's view the declared objective of the series of measures by the municipality – the realisation of urban planning and the exercise of the municipality's ownership rights – was – at least apparently – neutral, so it had to be established whether it had the effect of placing particularly persons possessing that characteristic at a disadvantage. The court's conclusion was that due to the composition of the population in the Numbered Streets, the municipality's actions clearly effected persons belonging to a number of protected groups (Roma, indigent, disadvantageous social status) at a disadvantage, and therefore the alleged background motives of the municipality were irrelevant.

The court pointed out that the municipality may not be exempted from its responsibility on the basis of its ownership rights, as in relation to tenants in social housing, it performs a dual function of the owner and the entity responsible for the social welfare of its residents. The parties (the municipality on the one hand and the tenants on the other) are in a

situation of structural imbalance, which fully substantiates the restrictions of property rights necessitated by the principle of equal treatment.

The court also established that the municipality committed indirect discrimination through its omission to take measures to protect from homelessness those who were evicted from the housing in the Numbered Streets (despite – among others – that its own integrated town development strategy contained the obligation to do so).

The court emphasised that since almost all the tenants in the Numbered Streets fall into one (or more) of the three protected groups listed by the Authority, the comparator in this case is necessarily hypothetical.

Finally, the court pointed out that the statutory possibility of obliging the discriminator to terminate the injurious situation, when the violation manifests itself in the form of an omission would be devoid of any meaning if the Authority could not oblige the violator to take specific action. Therefore, the Authority was authorised to oblige the municipality to draft action plans. At the same time, taking into consideration the specific knowledge the municipality has, and also the municipality's scope of authority, it was justified that the Authority did not provide a detailed action plan itself, but only set the goals and trusted the municipality with coming up with the details.

Trends and patterns in 2015 in cases brought by Roma

According to the available statistics, the trends and patterns do not seem to have changed with regard to the types of cases brought by Roma. There are no detailed and reliable statistics, but from information made available to the public in the media, it may be concluded that the majority of cases still regards employment, access to services, education and housing.

As it was outlined above (under Section 7.h), in 2013, disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination (119 and 129 respectively),¹⁹⁸ and the trends did not change in the year 2014: disability was indicated by the complainants in 98 cases, belonging to a national minority in 69.¹⁹⁹ Similarly, in 2015, most complaints were based on disability (74 cases) and affiliation with a national minority (64 instances).²⁰⁰

According to the Authority's annual report for the year 2014, most of the complaints concerned the field of employment, and within this field age, maternity, health status, and ethnic affiliation were the most frequently claimed grounds of discrimination.²⁰¹ Based on the brief summary on the Authority's 2015 activities, it seems likely that this trend has not changed, as employment remains the field with the most complaints.²⁰²

Still no statistics are available on legal proceedings launched by Roma people before courts.

¹⁹⁸ <http://www.egyenlobanasmod.hu/article/view/tajekoztato-az-egyenlo-banasmod-hatosag-2013-evi-tevekenysegerol>.

¹⁹⁹ <http://www.egyenlobanasmod.hu/article/view/egyenlo-banasmod-hatosag-2014-evi-tevekenysege-a-szamok-tukreben>.

²⁰⁰ <http://www.egyenlobanasmod.hu/article/view/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-a-szamok-tukreben>.

²⁰¹ http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8cbae26bdcff0cbfb3837d34dc68ef0a/EBH_beszamoló_2014_magyar.pdf, p. 15.

²⁰² <http://www.egyenlobanasmod.hu/article/view/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-a-szamok-tukreben>.

As it was mentioned above (under Section 3.2.10.), many of the complaints submitted by Roma persons to the Ombudsman, concern social housing. In 2015, the areas producing the highest number of complaints were: education, social benefits and housing (with complaints against the police on the fourth place).²⁰³

²⁰³ Commissioner for Fundamental Rights (2016), *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2015* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies 2015), p. 230.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Hungary

Date: 31 December 2015

Title of legislation (including amending legislation)	Fundamental Law of Hungary (Article XV) Abbreviation: Fundamental Law Date of adoption: 25 April 2011 Latest amendments: 01 October 2013 Entry into force: 01 January 2012 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV Grounds covered: all
	Constitutional law
	Material scope: all fields
	Principal content: general constitutional prohibition of discrimination
Title of legislation (including amending legislation)	Title of the law: Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities Abbreviation: ETA Date of adoption: 28 December 2003 Latest amendments: 01 January 2016 Entry into force: 27 January 2004 Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV&celpara=#xcelparam Grounds covered: all
	Civil and administrative law
	Material scope: All, with special focus on: employment (public and private), social protection and healthcare, housing, education, access to goods and services
	Principal content: prohibition of direct and indirect discrimination, victimisation, instruction to discriminate, harassment etc.; creation of a specialised body; shift of the burden of proof; legal standing of associations; sanctions of discrimination
Title of legislation (including amending legislation)	Title of the law: Act V of 2013 on the Civil Code Abbreviation: Civil Code Date of adoption: 26 February 2013 Latest amendments: 1 January 2016 Entry into force: 15 March 2014 Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV&celpara=#xcelparam Grounds covered: all
	Civil law
	Material scope: all
	Principal content: prohibition of discrimination, sanctions of discrimination
Title of legislation (including amending legislation)	Title of the law: Act I of 2012 on the Labour Code Abbreviation: Labour Code Date of adoption: 06 January 2012 Latest amendments: 01 January 2016 Entry into force: 01 July 2012 Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV&celpara=#xcelparam Grounds covered: all

	Labour law
	Material scope: employment
	Principal content: prohibition of discrimination, sanctions of discrimination
Title of legislation (including amending legislation)	Title of the law: Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities
	Abbreviation: RPD Act
	Date of adoption: 01 April 1998
	Latest amendments: 01 January 2016
	Entry into force: 01 January 1999
	Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV&celpara=#xcelparam
	Grounds covered: disability
	Civil and administrative law
	Material scope: numerous fields including education, employment, cultural activities, accessibility of public services, transportation
	Principal content: setting out the most important principles in relation to the inherent rights of people with disabilities, reasonable accommodation provisions (limited in scope)
Title of legislation (including amending legislation)	Title of the law: Act CXI of 2011 on the Commissioner for Fundamental Rights
	Abbreviation: N/A
	Date of adoption: 26 July 2011
	Latest amendments: 01 February 201
	Entry into force: 01 January 2016
	Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV&celpara=#xcelparam
	Grounds covered: all
	Constitutional law
	Material scope: acts of public entities and public service providers in all fields
	Principal content: creation of an organ with a role in combating discrimination
Title of legislation (including amending legislation)	Title of the law: Act II of 2012 on Petty Offences, the Petty Offence Procedure and the Petty Offence Database
	Abbreviation: Petty Offences Ac
	Date of adoption: 06 January 2012
	Latest amendments: 01 January 2016
	Entry into force: 15 April 2012
	Weblink: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV&celpara=#xcelparam
	Grounds covered: all
	Criminal law (petty offences)
	Material scope: education
	Principal content: sanctioning of discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Hungary

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd.mm. YYYY	Date of ratification (if not ratified please indicate) Dd.mm. YYYY	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	06.11.1990	05.11.1992	No	Yes	Theoretically yes, practically with some difficulties
Protocol 12, ECHR	04.11.2000	Not ratified	N/A	N/A	N/A
Revised European Social Charter	07.10.2004	20.04.2009	No	Collective complaints protocol signed but not ratified	Theoretically yes, practically with some difficulties
International Covenant on Civil and Political Rights	25.03.1969	17.01.1974	No	Yes	Theoretically yes, practically with some difficulties
Framework Convention for the Protection of National Minorities	01.02.1995	25.09.1995	No	N/A	Theoretically yes, practically with some difficulties
International Covenant on Economic, Social and Cultural Rights	25.03.1969	17.01.1974	No	No	Theoretically yes, practically with some difficulties
Convention on the Elimination of All Forms of Racial Discrimination	15.09.1966	04.05.1967	No	Yes	Theoretically yes, practically with some difficulties
Convention on the Elimination of Discrimination	06.06.1980	22.12.1980	No	Yes	Theoretically yes, practically with some difficulties

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention Against Discrimination Against Women					
ILO Convention No. 111 on Discrimination	not indicated on ILO website	20.06.1961	No	N/A	Theoretically yes, practically with some difficulties
Convention on the Rights of the Child	14.03.1990	07.10.1991	No	No	Theoretically yes, practically with some difficulties
Convention on the Rights of Persons with Disabilities	30.03.2007	20.06.2007	No	Yes	Theoretically yes, practically with some difficulties

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
via EU Bookshop (<http://bookshop.europa.eu>);
- more than one copy or posters/maps:
from the European Union's representations (http://ec.europa.eu/represent_en.htm);
from the delegations in non-EU countries
(http://eeas.europa.eu/delegations/index_en.htm);
by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm)
or calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (<http://bookshop.europa.eu>).

