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# Country report

## Non-discrimination

Hungary

2017

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# **Country report**

# **Non-discrimination**

# **Hungary**

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## EXECUTIVE SUMMARY

### 1. Introduction

Hungary is a country of 10 million. 15 years after the political transition into democratic pluralism, Hungary became a member of the European Union. The creation of democratic laws and institutions has been paralleled by increasing awareness of the principle of equal treatment, but the issue of discrimination was brought to the limelight by the debates generated by the process leading to the adoption of a comprehensive anti-discrimination law in late 2003 (ETA).<sup>1</sup> The law 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 and strategic litigation by NGOs have further raised awareness of the issue and the situation of the groups most exposed to discrimination.

The group most vulnerable to discrimination is that of the Roma. The only 'visible' ethnic minority in Hungary constitutes 4%–7% of the country's population. Despite 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 debate concerns the segregation of Roma pupils in education, which is still widespread in Hungary in three common patterns: 'auxiliary schools' for children with mental disabilities predominantly attended by Roma students; segregated 'Gypsy schools' (often reflecting segregation in housing); and segregated classes within 'mixed' schools, usually offering lower quality of education.

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, and the school bus service launched to enable the Roma children to travel to mainstream schools, was terminated by the local council. Lower instance courts concluded that this was a case of segregation, however – not looking into the voluntariness of parents' decision – the Curia overturned the decisions in April 2015, and while it accepted that 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 religiously committed and they could enrol their children in the secular district school.<sup>2</sup> The decision was followed by an amendment on the law on public education authorising the government to determine the specific conditions for organising religious and minority education. Educational experts were concerned that this would open a way to allow segregation based on ethnicity in the framework of religious education. The legislative procedure however came to a halt due to the letter of formal notice sent in May 2016 by the European Commission, requesting the country to put an end to practices leading to the overrepresentation of Roma children in special schools for mentally disabled children and to a considerable degree of segregated education in mainstream schools.<sup>3</sup> The dialogue between the Commission and Hungary on the issue is still in progress.

Problems were also raised by the practices of municipalities apparently aimed at driving out of town the – mostly Roma – residents of its most indigent neighbourhoods. In the case of the municipality of Miskolc, 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, but to date the problems have not been reassuringly settled, and the process of driving out the Roma from Miskolc has not come to a halt, raising concerns about the effectiveness of the available legal remedies.

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<sup>1</sup> Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities.

<sup>2</sup> Curia, Decision Pfv.IV.20.241/2015/4, 22 April 2015, [http://cfcf.hu/sites/default/files/Kuria\\_Nyiregyhaza\\_20150422.pdf](http://cfcf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf).

<sup>3</sup> See: [http://europa.eu/rapid/press-release MEMO-16-1823\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm).

Similarly, despite a relatively detailed and seemingly progressive legal framework, persons with disabilities also face discrimination (including the failure to guarantee accessibility and reasonable accommodation of their specific needs) in many areas of life, such as education, employment and access to services. While the legal framework promoting the integrated education of children with disabilities is in place, many educational institutions fail – primarily due to the lack of financial and human resources – to provide the conditions required for their successful integration.

With regard to migrants, the picture is mixed. The situation of ‘traditional’ migrant groups (such as the Chinese or Turkish communities) is relatively unproblematic, however, asylum seekers and recognised refugees face serious problems in many areas of life, including education and housing. The number of asylum seekers and refugees is very low as a result of the physical and legal barriers set by the Hungarian authorities. In addition, the Hungarian state fully terminated as of 1 June 2016 the refugee integration support scheme (financial benefits, housing allowance, language courses, etc.) introduced in 2013. Social workers assisting refugees report increasing difficulties in finding housing for them and also attempts to divert refugee children away from schools and convince them to become private pupils. However, while anti-discrimination law applies to migrants on an equal footing with anyone else, these cases do not reach the legal forums, as litigation is neither a priority nor a realistic option for the concerned families and persons.

## **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. This general ban is detailed by the ETA. Sectoral laws (civil law, labour law, and so on) invoke the provisions of the ETA in 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) go beyond the requirements of the directives.

The protection provided by the ETA is amplified by the Civil Code,<sup>4</sup> 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). The institutional framework set up by the ETA is amplified by statutes regulating the operation of institutions with certain functions in the combat against discrimination (e.g. the Commissioner for Fundamental Rights).

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.

## **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.

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<sup>4</sup> Act V of 2013 on the Civil Code.



The general objective justification clause makes a distinction on the basis of the right the differentiation concerns. If this right is a fundamental one, 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. 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. There are also special exempting rules related to different sectors, such as employment or education.

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 contains a list of the protected grounds. It has 19-items – among others sex, national or ethnic origin, disability, state of health, religious or other similar philosophical conviction, sexual orientation, sexual identity, motherhood age, and financial status – and is non-exhaustive, so grounds not explicitly identified are also covered.

Harassment, instruction to discriminate and victimisation are clearly outlawed. Neither the instruction to discriminate, nor discrimination by association is expressly defined, but the concepts are applied in case law, e.g. in a case before the Equal Treatment Authority, where an employer had terminated an employee's contract during the probation period, because she had to take a leave of absence because of her 2-year old child's illness. The Authority concluded that discrimination had taken place on the ground of 'health status', thus it employed the notion of discrimination by association.<sup>5</sup>

The concept of multiple discrimination is not known in the Hungarian legislation, and there are no plans to adopt specific regulations, 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) entities 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 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. harassment by colleagues).

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<sup>5</sup> 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 employment); (iii) the Equal Treatment Authority; (iv) the administrative bodies authorised to sanction discrimination (e.g. the consumer protection inspectorate); (v) the regional Governmental Office (to initiate a petty offence procedure in education). In the relationship between the different public administrative authorities the key principle is that it is for the victim to decide which authority to turn to.

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.<sup>6</sup> If however, one starts a case before a court, administrative organs, including the Authority will have to suspend their proceedings and base their decision on facts as established by the court.

The sanctions that may be imposed by the Authority do not provide the victim with compensation (the fine imposed by the Authority 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 to engage, either on behalf or in support of victims of discrimination. The ETA has 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. Non-governmental and interest representation organisations are also entitled to the rights of the concerned party in such administrative proceedings.

Associations can also 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), if 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,<sup>7</sup> 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.<sup>8</sup> 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, 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. A 2016 court decision might signalise a shift in this approach: in its October 2016 judgment, the Pécs appeals court banned a segregated Roma school from admitting new first-grade pupils in September 2017, and ordered the competent institutions to draft a desegregation plan detailing how the first-

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<sup>6</sup> Act I of 2012 on the Labour Code.

<sup>7</sup> Decision of the Supreme Court published as leading judgment no. BH 2006. 14.

<sup>8</sup> 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 central building and the substandard supplementary buildings, where no gymnasium, library, computers or specialised class rooms could be found.

graders who otherwise would have been enrolled into this school shall be placed in local mainstream schools.<sup>9</sup>

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 somewhat restricted the criteria of its application.

The ETA has not made the system of sanctions much more consistent. Different fields (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. The statutory acknowledgment of situation testing by the ETA was an 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, the Authority relied on phone calls made by two testers, one using a typical Roma name.<sup>10</sup>

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. 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:

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<sup>9</sup> Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016. Available at: <http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf>.

<sup>10</sup> Case no. EBH/180/2006 of the Equal Treatment Authority.

- 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 put in place step by step (as a result of the latest amendment, the Authority's president 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.

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 disseminating information related to non-discrimination. The Authority has 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 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 private actors 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 religion<sup>11</sup> 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 people with disabilities, in spite of an amendment to the RPD Act, which – if interpreted strictly – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure, 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:

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<sup>11</sup> Act CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities.

- In the 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. creating segregated Roma schools by opening denominational schools in segregated Roma neighbourhoods will be allowed by courts.
- Accessibility of public premises and services is incomplete, 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 is a low level of awareness among the population about the non-discrimination area and the Authority's scope of activity, 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 expanded the Authority's outreach, further efforts are needed to achieve a significant increase in numbers.
- Mostly due to the lack of necessary staffing, the Equal Treatment Authority 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.

#### Good practices:

- Afterschool educational programs (AEP's) are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programs to offset the fact that schools rarely possess the resources to effectively help the catching up of underprivileged children. One key problem with the status of AEP's is that no normative support is available for them, they have been supported on a project basis since 2002. As the calls for application are usually published with large gaps in time, AEP's must often suspend or significantly limit their activities for a full schoolyear to survive periods between funding cycles, although continuity is a key element in their success. Furthermore, in the 2016 round of applications several well-known NGO-operated AEP's with many years of experience remained without funding due to deficiencies in the formulation of the calls and mistakes of the evaluation process. To remedy the situation, a new call has been issued, which is still pending. Furthermore, talks about a shift to normative-funding are about to start in April 2017.

## 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 vers le 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, 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)<sup>12</sup> qui ont mis la problématique de la discrimination sous les feux des projecteurs. Cette loi 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 et les recours stratégiques intentés en justice par des ONG ont renforcé davantage encore la 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 le groupe le plus vulnérable à cet égard. Il s'agit de la seule minorité ethnique «visible» de Hongrie, qui représente 4 à 7 % de la population. En dépit de 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 actuellement le plus animé concerne la ségrégation des élèves roms dans l'enseignement, qui reste courante en Hongrie et s'articule autour de trois axes communs: des «écoles auxiliaires» pour enfants souffrant de troubles mentaux, qui sont fréquentées surtout par des élèves roms; des «écoles tziganes» séparées, qui reflètent souvent une ségrégation au niveau du logement; et des classes séparées au sein d'école «mixtes», qui dispensent généralement un enseignement de moindre qualité.

Une affaire a mis une nouvelle fois cette problématique en lumière: en l'espèce une école située dans un quartier rom avait été fermée par la municipalité pour mettre fin à une ségrégation. Après quelques années toutefois, elle a été réouverte en tant qu'établissement confessionnel, et le conseil local a supprimé le service de bus scolaires institué pour permettre aux enfants roms de se rendre dans des écoles ordinaires. Les juridictions inférieures ont considéré qu'il s'agissait de ségrégation mais la Cour suprême – ignorant le caractère volontaire de la décision des parents – a infirmé leurs décisions en avril 2015 et conclu, tout en admettant que les 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 s'inscrit dans un engagement religieux et qu'ils ont la possibilité d'inscrire leurs enfants dans l'école de quartier laïque.<sup>13</sup> Cet arrêt a été suivi d'une modification de la loi sur l'enseignement public, qui autorise le gouvernement à déterminer les conditions spécifiques dans lesquelles l'enseignement religieux et minoritaire peut être organisé. Des experts de l'éducation ont fait part de leur préoccupation quant au fait que cette disposition pourrait ouvrir la voie à une ségrégation fondée sur l'origine ethnique dans le cadre de l'enseignement religieux. La procédure législative a toutefois été interrompue suite à l'envoi en mai 2016 d'une lettre de mise en demeure dans laquelle la Commission européenne invite le pays à mettre fin à des pratiques conduisant à une surreprésentation des enfants roms dans les écoles spéciales pour enfants handicapés mentaux et à un degré considérable de ségrégation de l'enseignement dans les écoles ordinaires.<sup>14</sup> Le dialogue entre la Commission et la Hongrie sur cette question est toujours en cours.

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<sup>12</sup> Loi CXXV de 2003 sur l'égalité de traitement et la promotion de l'égalité des chances.

<sup>13</sup> Cour suprême, arrêt Pfv.IV.20.241/2015/4 du 22 avril 2015, [http://cfcf.hu/sites/default/files/Kuria\\_Nyiregyhaza\\_20150422.pdf](http://cfcf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf).

<sup>14</sup> Voir: [http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_fr.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_fr.htm).

Des problèmes découlent également de pratiques municipales apparemment destinées à ce que les habitants des quartiers les plus pauvres, roms pour la plupart, quittent la ville. Dans le cas de la municipalité de Miskolc, 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 politiques locales enfreignent le droit à l'égalité de traitement, le problème n'a toujours pas été réglé de façon rassurante et le processus d'éviction des Roms de Miskolc se poursuit – ce qui pose question quant à l'efficacité des recours juridiques disponibles.

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. Bien que le cadre juridique favorisant l'enseignement intégré des enfants handicapés soit en place, de nombreux établissements éducatifs n'offrent pas – essentiellement par manque de ressources financières et humaines – les conditions requises pour réussir l'intégration de ces enfants.

Pour ce qui concerne les migrants, le bilan est mitigé. La situation des groupes de migrants «traditionnels» (communauté chinoise ou turque notamment) pose relativement peu de problème, mais les demandeurs d'asile et les réfugiés reconnus se heurtent à de sérieuses difficultés dans de nombreux domaines de vie, y compris l'enseignement et le logement. Le nombre de demandeurs d'asile et de réfugiés est très faible en raison des entraves physiques et légales mises en place par les autorités hongroises. De surcroît, l'État hongrois a mis totalement fin, à dater du 1<sup>er</sup> juin 2016, au programme d'appui à l'intégration des réfugiés (prestations financières, allocation de logement, cours de langues, etc.) introduit en 2013. Les travailleurs sociaux venant en aide aux réfugiés signalent une difficulté croissante pour leur trouver des logements ainsi que des tentatives visant à écarter les enfants de réfugiés des écoles et à les convaincre de suivre un enseignement privé. Toutefois, alors le droit antidiscrimination s'applique aux migrants au même titre qu'à quiconque, ces cas ne parviennent jamais jusqu'aux instances judiciaires, étant donné qu'une action en justice ne constitue ni une priorité ni une option réaliste pour les familles et personnes concernées.

## **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. Cette interdiction générale est détaillée par la loi sur l'égalité de traitement. Les lois sectorielles (le droit civil, le droit du travail, etc.) invoquent les dispositions de la loi sur l'égalité de traitement dans 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 notamment) au-delà des exigences de celles-ci.

La protection assurée par la loi sur l'égalité de traitement est complétée par le Code civil,<sup>15</sup> 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 de règlements régissant le

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<sup>15</sup> Loi V de 2013 sur le Code civil.

fonctionnement d'institutions dotées de compétences pour lutter contre la discrimination (le Commissaire des droits fondamentaux, entre autres).

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 certaines incohérences subsistent dans l'application judiciaire de la loi sur l'égalité de traitement.

### **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, 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 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. Il existe également des règles d'exemption spéciales relatives à différents secteurs tels que l'emploi ou l'éducation.

Des modifications législatives ont été adoptées durant l'année 2012 pour exempter les organisations fondées sur une éthique religieuse (écoles confessionnelles notamment), et 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 de 19 motifs protégés, qui sont notamment le sexe, l'origine ethnique ou nationale, le handicap, l'état de santé, la conviction religieuse ou toute autre conviction philosophique similaire, l'orientation sexuelle, l'identité sexuelle, la maternité, 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.

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 ces concepts sont appliqués par la jurisprudence – notamment dans une affaire dont l'Autorité pour l'égalité de traitement a été saisie et dans laquelle un employeur avait résilié le contrat d'une travailleuse durant sa période d'essai du fait qu'elle avait dû prendre congé parce que son enfant de deux ans était malade. L'Autorité a conclu à l'existence d'une discrimination fondée sur «l'état de santé» – appliquant ainsi la notion de discrimination par association.<sup>16</sup>

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<sup>16</sup> Autorité pour l'égalité de traitement, affaire n° EBH/23/2011.



Le concept de discrimination multiple est inconnu de la législation hongroise et il n'existe aucun projet d'adoption de réglementation spécifique 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.

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 entités 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 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 (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 survient dans le cadre de l'emploi); (iii) l'Autorité pour l'égalité de traitement; (iv) les organes administratifs habilités à sanctionner la discrimination (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). En ce qui concerne la relation entre les diverses administrations publiques, le principe de base veut qu'il appartienne à la victime de décider à quelle autorité elle veut s'adresser.

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.<sup>17</sup> Toutefois, lorsqu'une affaire est portée devant une juridiction, 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 juridiction saisie.

Les sanctions qui peuvent être imposées par l'Autorité n'offrent pas d'indemnisation à la victime (l'amende infligée par l'Autorité 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 d'engager une action. La loi sur l'égalité de traitement a modifié la situation en affirmant que toute organisation non gouvernementale ou représentative d'intérêts qui y a un intérêt légitime, de même que

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<sup>17</sup> Loi I de 2012 sur le Code du travail.

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 d'égalité de traitement. Les organisations non gouvernementales et représentatives d'intérêts sont également habilitées à exercer les droits de la partie concernée dans ce type de poursuites administratives.

Les associations peuvent également engager une 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;<sup>18</sup> 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.<sup>19</sup> Il convient de signaler 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, 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. Une décision judiciaire de 2016 pourrait faire évoluer cette situation: dans un arrêt d'octobre 2016 en effet, la cour d'appel de Pécs a interdit à une école rom séparée d'accepter de nouveaux élèves en première année en septembre 2017, et a ordonné aux institutions compétentes d'élaborer un plan de ségrégation précisant de quelle manière les élèves qui auraient autrement été inscrits dans cette école seront placés dans des écoles locales ordinaires.<sup>20</sup>

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 les critères de son application.

La loi sur l'égalité de traitement n'a pas rendu le régime des sanctions beaucoup plus cohérent. Différents domaines (enseignement et 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

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<sup>18</sup> Arrêt de principe n° 2006.14 de la Cour suprême.

<sup>19</sup> 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.

<sup>20</sup> Cour d'appel de Pécs, arrêt Pf.III.20.004/2016/4 du 13 octobre 2016. Disponible sur: <http://ccf.hu/sites/default/files/kaposvarIfok.pdf>.

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. La reconnaissance officielle du test de situation par la loi sur l'égalité de traitement a été une étape majeure 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, l'Autorité s'est appuyée sur les appels téléphoniques effectués par deux «testeurs», dont l'un a utilisé un nom typiquement rom.<sup>21</sup>

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<sup>er</sup> 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

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<sup>21</sup> 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 mis en place de manière progressive (suite au dernier amendement en date, le président/la présidente de l'Autorité ne peut 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.

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 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 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 tous les acteurs privés (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 religion<sup>22</sup> 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 au sens strict – garantit uniquement l'obligation d'aménagement raisonnable en rapport avec la procédure de recrutement 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 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 religieuse soit abusivement utilisée pour légitimer la ségrégation des élèves roms – autrement dit

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<sup>22</sup> 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.

- que la création d'écoles roms séparées en procédant à l'ouverture d'écoles confessionnelles dans des «ghettos» roms – soit admise par les tribunaux;
- l'accessibilité des lieux et des services publics n'est pas 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 étendu le rayonnement de l'Autorité, mais des efforts supplémentaires s'imposent pour faire réellement augmenter le nombre de ces dossiers;
  - en raison essentiellement d'un manque de personnel, l'Autorité pour l'égalité de traitement 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.

#### Bonnes pratiques:

- Les programmes parascolaires sont une forme particulière d'enseignement organisés à l'intention des enfants défavorisés afin d'améliorer leurs chances de réussite à l'école – étant donné que les écoles elles-mêmes disposent rarement des ressources leur permettant d'assurer efficacement le rattrapage dont ces enfants ont besoin. Le statut de «programme parascolaire» a notamment pour inconvénient que ce type de programme n'a bénéficié jusqu'ici d'aucun soutien normatif et que le financement s'effectue sur une base de projet depuis 2002. Étant donné que les appels à candidatures sont généralement publiés avec d'importants décalages dans le temps, il arrive fréquemment que les programmes parascolaires doivent suspendre ou fortement réduire leurs activités pendant une année scolaire complète pour survivre entre les cycles de financement, alors que la continuité est un facteur essentiel de leur réussite. Lors du cycle de candidatures de 2016, de surcroît, plusieurs programmes parascolaires gérés par des ONG réputées et ayant une expérience de plusieurs années n'ont pas obtenu de financement en raison de déficiences dans la formulation des appels et d'erreurs dans le processus d'évaluation. Un nouvel appel à candidatures a été publié pour remédier à cette situation; il est toujours en cours. Des discussions à propos d'une réorientation en faveur d'un financement normatif sont en outre sur le point de démarrer (avril 2017).

## ZUSAMMENFASSUNG

### 1. Einleitung

Ungarn hat 10 Millionen Einwohner. 15 Jahre nach dem Übergang 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 einher. Das Thema Diskriminierung rückte jedoch im Zuge der Debatten in den Vordergrund, die im Rahmen des Prozesses zur Verabschiedung des allgemeinen Antidiskriminierungsgesetzes (GstG) Ende 2003 entstanden.<sup>23</sup> Mit dem Gesetz 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 und strategische Klagen einiger NRO haben das Bewusstsein für diese Thematik und für die Situation der am meisten von Diskriminierung betroffenen Gruppen weiter geschärft.

Die am stärksten von Diskriminierung betroffene Gruppe ist die der Roma. Die einzig „sichtbare“ ethnische Minderheit Ungarns stellt nur 4-7 % der Bevölkerung des Landes. Trotz verbesserter 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. Die hitzigste Debatte betrifft derzeit die Sonderbehandlung von Roma-Kindern im Bildungsbereich, die in Ungarn nach wie vor weit verbreitet ist und in drei gängigen Formen auftritt: „Hilfsschulen“ für Kinder mit geistiger Behinderung, die vorwiegend von Roma besucht werden, getrennte „Zigeunerschulen“ (die häufig Ausdruck segregierter Wohnviertel sind) und gesonderte Klassen in „gemischten“ Schulen, in denen die Bildungsqualität oft geringer ist.

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 wurde sie jedoch als konfessionelle Schule wieder eröffnet und der Schulbus, der eingerichtet worden war, um den Roma-Kindern den Besuch von Regelschulen zu ermöglichen, vom Gemeinderat abgeschafft. 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 2015 – ohne die Freiwilligkeit der Entscheidung der Eltern zu prüfen – jedoch auf. Sie räumte zwar ein, dass die Schüler/innen in der Schule Roma waren und dass Segregation an sich eine Benachteiligung darstellt, entschied jedoch, die Separierung könne als Ausnahme gewertet werden, da den Eltern bekannt gewesen sei, dass der Unterricht in dieser Schule konfessionell gebunden sein würde, und sie ihre Kinder auf die nicht-konfessionelle Schule schicken könnten.<sup>24</sup> Auf diese Entscheidung folgte eine Änderung des Gesetzes über das staatliche Bildungswesen, mit der die Regierung ermächtigt wurde, die spezifischen Bedingungen für die Organisation religiöser Bildung und der Bildung von Minderheiten festzulegen. Bildungsexperten äußerten sich besorgt, dass damit ein Weg eröffnet würde, Segregation aufgrund der ethnischen Zugehörigkeit im Rahmen der religiösen Schulbildung zu erlauben. Aufgrund eines Schreibens der Europäischen Kommission vom Mai 2016, in dem diese das Land aufforderte, Praktiken zu beenden, die dazu führten, dass der Anteil der Roma-Kinder an speziellen Schulen für geistig behinderte Kinder unverhältnismäßig hoch sei und in den Regelschulen oft getrennter Unterricht stattfinde, kam das Gesetzgebungsverfahren jedoch zum Erliegen.<sup>25</sup> Der Dialog zwischen der Kommission und Ungarn zu diesem Thema ist noch im Gange.

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<sup>23</sup> Gesetz CXXV von 2003 über Gleichbehandlung und die Förderung der Chancengleichheit.

<sup>24</sup> Kurie, Entscheidung Pfv.IV.20.241/2015/4, 22. April 2015, [http://cfcf.hu/sites/default/files/Kuria\\_Nyiregyhaza\\_20150422.pdf](http://cfcf.hu/sites/default/files/Kuria_Nyiregyhaza_20150422.pdf).

<sup>25</sup> Vgl. [http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_de.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_de.htm).

Für Probleme sorgten auch Praktiken von Kommunen, die allem Anschein nach darauf abzielten, die Bewohner der ärmsten Viertel – überwiegend Roma – aus der Stadt zu vertreiben. Im Fall der Gemeinde Miskolc kamen sowohl die Kuria als auch die Gleichstellungsbehörde und die Ombudsstelle zu dem Ergebnis, dass bestimmte Aspekte der lokalen Vorschriften und Vorgehensweisen gegen das Recht auf Gleichbehandlung verstießen. Die Probleme wurden aber bis heute nicht zufriedenstellend gelöst; die Vertreibung der Roma aus Miskolc wurde nicht gestoppt und wirft Fragen hinsichtlich der Wirksamkeit der verfügbaren Rechtsmittel auf.

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. Der rechtliche Rahmen zur Förderung der integrierten Bildung von Kindern mit Behinderungen ist zwar vorhanden, viele Bildungseinrichtungen erfüllen jedoch – vor allem aufgrund fehlender finanzieller und personeller Ressourcen – die Voraussetzungen für eine erfolgreiche Integration dieser Kinder nicht.

Im Hinblick auf Zuwanderinnen und Zuwanderer ist das Bild gemischt. Die Situation der „traditionellen“ Zuwanderergruppen (z. B. der chinesischen und der türkischen Gemeinschaft) ist relativ unproblematisch. Asylsuchende und anerkannte Flüchtlinge stehen jedoch in vielen Lebensbereichen, einschließlich Bildung und Wohnungsraumversorgung, vor großen Problemen. Aufgrund der von den ungarischen Behörden errichteten physischen und rechtlichen Barrieren ist die Zahl der Asylsuchenden und Flüchtlinge sehr gering. Darüber hinaus hat der ungarische Staat das im Jahr 2013 eingeführte Programm zur Förderung der Flüchtlingsintegration (finanzielle Leistungen, Wohngeld, Sprachkurse usw.) zum 1. Juni 2016 vollständig eingestellt. Sozialarbeiter/innen, die Flüchtlingen betreuen, berichten über zunehmende Schwierigkeiten, Wohnraum für sie zu finden, sowie über Versuche, Flüchtlingskinder von Schulen weg zu verlagern und sie zum Besuch von Privatschulen zu überreden. Obgleich das Antidiskriminierungsrecht für Zugewanderte genauso gilt wie für alle anderen, kommen diese Fälle nicht vor Gericht, da das Führen eines Rechtsstreits für die betroffenen Familien und Personen weder eine Priorität noch eine realistische Option ist.

## **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 allgemeine Verbot ist im GstG im Detail geregelt. Sektorale Vorschriften (Zivilrecht, Arbeitsrecht usw.) verweisen in allen diskriminierungsbezogenen Fällen auf die Bestimmungen des GstG und gewährleisten so die Einheitlichkeit des Systems. Das GstG deckt alle fünf in den Richtlinien genannten Diskriminierungsgründe ab und geht in einigen Punkten (z. B. Diskriminierungsgründe) über die Vorgaben der Richtlinien hinaus.

Der im GstG vorgesehene Schutz wird durch das Zivilgesetzbuch<sup>26</sup> erweitert, 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 GstG. Der durch das GstG eingerichtete institutionelle Rahmen wird durch Verordnungen gestärkt,

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<sup>26</sup> Gesetz V von 2013 über das Zivilgesetzbuch.

die die Tätigkeit von Institutionen regeln, die bestimmte Funktionen bei der Bekämpfung von Diskriminierung haben (z. B. der Kommissar für Grundrechte).

Zwar sind immer mehr Opfer bereit, ihre Beschwerden öffentlich zu machen, und strengen immer mehr NRO strategische Klagen an – die Rechtsprechung entwickelt sich jedoch nur langsam und es bestehen nach wie vor Unstimmigkeiten in der Anwendung des GStG durch die Gerichte.

### **3. Wichtigste Grundsätze und Begriffe**

Das GStG 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 GStG unterscheidet zwischen drei Ausnahmegründen: (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, so 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. Darüber hinaus existieren Sonderausnahmeregelungen für bestimmte Sektoren, z. B. für Beschäftigung und Bildung.

2012 wurde eine Gesetzesänderung eingeführt, 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 GStG 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 GStG enthält eine Liste der verbotenen Diskriminierungsgründe. Zu den 19 Punkten dieser Liste gehören unter anderem Geschlecht, nationale oder ethnische Herkunft, Behinderung, Gesundheitszustand, religiöse oder philosophische Überzeugung, sexuelle Ausrichtung, sexuelle Identität, Mutterschaft, Alter und finanzieller Status. Die Aufzählung ist nicht abschließend, sodass auch nicht ausdrücklich genannte Gründe abgedeckt sind.

Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind eindeutig verboten. Weder Anweisung zur Diskriminierung, noch Diskriminierung durch Assoziierung sind ausdrücklich definiert; in der Rechtsprechung werden die Begriffe jedoch angewendet, so z. B. in einem Fall, der der Gleichbehandlungsstelle vorgelegt wurde, in dem ein Arbeitgeber einer Arbeitnehmerin während der Probezeit gekündigt hatte, weil sie aufgrund einer Erkrankung ihres zweijährigen Kindes Urlaub nehmen musste. Die Gleichbehandlungsstelle kam zu dem Ergebnis, dass eine Diskriminierung aufgrund des „Gesundheitszustands“ vorlag, und wandte folglich das Konzept der Diskriminierung durch Assoziierung an.<sup>27</sup>

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<sup>27</sup> Verfahren Nr. EBH/23/2011 der Gleichbehandlungsstelle.



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

#### **4. Sachlicher Anwendungsbereich**

Das GstG 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.

In der Privatwirtschaft fallen nur vier Gruppen von Akteuren unter das GstG: (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) Rechtssubjekte, 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).

Auch wenn es nicht leicht ist, einen Bereich zu finden, in dem eine Privatperson unter den Anwendungsbereich der Richtlinien, jedoch nicht unter den persönlichen Anwendungsbereich der ungarischen Gesetze fällt, und auch wenn die Europäische Kommission die Vertragsverletzungsverfahren gegen Ungarn bezüglich der Richtlinien 2000/43/EG und 2000/78/EG eingestellt hat, können solche Differenzen auftreten (z. B. bei Belästigung durch 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). Im Verhältnis zwischen den verschiedenen staatlichen Stellen gilt das Grundprinzip, dass das Opfer selbst entscheiden kann, an welche Stelle er/sie sich wenden möchte.

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.<sup>28</sup> Sobald jedoch ein Verfahren vor einem Gericht begonnen hat, müssen behördliche Stellen, einschließlich der Gleichbehandlungsstelle, ihre Verfahren aussetzen und ihrer Entscheidung die vom Gericht festgestellten Tatsachen zugrunde legen.

Die von der Gleichbehandlungsstelle verhängten Sanktionen gehen nicht als Entschädigung an das Opfer (die von der Gleichbehandlungsstelle verhängte Geldbuße wird an den Staat gezahlt); Beschwerdeführer, die zusätzlich Schadensersatz möchten, müssen also trotzdem vor Gericht ziehen.

Vor Inkrafttreten des GstG waren Vereinigungen und Verbände nach ungarischem Recht nicht in jedem Fall berechtigt, zur Unterstützung oder im Namen von Betroffenen zu intervenieren. Das GstG hat die Situation entscheidend verbessert, weil es festlegt, dass jede nichtstaatliche Organisation und Interessenvertretung, die ein legitimes Interesse hat, wie auch die Gleichbehandlungsstelle sich im Namen des Opfers an Verfahren beteiligen

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<sup>28</sup> Gesetz I von 2012 über das Arbeitsgesetzbuch.

kann, die aufgrund einer Verletzung des Gleichbehandlungsgrundsatzes angestrengt wurden. Nichtstaatliche Organisationen und Interessenvertretungen sind in diesen Verwaltungsverfahren außerdem mit den Rechten der betroffenen Partei ausgestattet.

Vereinigungen und Verbände können auch eine Popularklage einreichen. 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 wollte<sup>29</sup>. 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.<sup>30</sup> Es muss betont werden, dass die meisten Klagen gegen Segregation zwar in dem Sinne erfolgreich waren, dass eine Segregation festgestellt und den Schulträgern und Schulen eine Fortsetzung des Verstoßes untersagt wird. Allerdings haben sich die Gerichte häufig geweigert, konkrete Maßnahmen zur Aufhebung der Segregation anzuordnen, weshalb diese in den meisten betroffenen Schulen weiter fortbesteht. Ein Gerichtsurteil von 2016 könnte eine Verschiebung dieses Ansatzes signalisieren: In einem Urteil vom Oktober 2016 verbot das Berufungsgericht Pécs einer gesonderten Roma-Schule, im September 2017 neue Schülerinnen und Schüler aufzunehmen, und wies die zuständigen Institutionen an, einen Desegregationsplan mit Angaben dazu zu erarbeiten, wie die Erstklässler/innen, die andernfalls in dieser Schule eingeschrieben worden wären, in den lokalen Regelschulen untergebracht werden sollten.<sup>31</sup>

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

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

Das GstG hat das Sanktionssystem nicht wesentlich vereinheitlicht. Unterschiedliche Bereiche (Bildung, Zugang zu Gütern und Dienstleistungen usw.) arbeiten weiterhin mit unterschiedlichen Sanktionen, die von den für den jeweiligen Bereich zuständigen Verwaltungsstellen (z. B. dem Verbraucherschutzamt) verhängt werden. 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. Die gesetzliche

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<sup>29</sup> Urteil des Obersten Gerichtshofs, veröffentlicht als Grundsatzurteil Nr. BH 2006. 14.

<sup>30</sup> 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.

<sup>31</sup> Berufungsgericht Pécs, Pf.III.20.004/2016/4., 13. Oktober 2016; abrufbar unter: <http://ccf.hu/sites/default/files/kaposvarIIfok.pdf>.

Anerkennung von Situationstests im Zuge des GstG war eine 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 einem Telefongespräch erwähnte, dass er Roma sei. Die Stelle berief sich in ihrer Entscheidung auf die Telefonanrufe zweier Testpersonen, von denen eine einen für Roma typischen Namen angab.<sup>32</sup>

Das GstG 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 GstG 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 GstG vorlegen.

Der Rechtsrahmen, der die Unabhängigkeit der Gleichbehandlungsstelle garantiert, wurde schrittweise geschaffen (nach der letzten Änderung kann der/die Leiter/in der Stelle ohne Angabe von Gründen durch den Ministerpräsidenten nicht abberufen werden). Nach starken Einschnitten im Jahr 2010 hat sich die finanzielle Lage der Gleichbehandlungsstelle seit 2013 wieder stabilisiert.

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<sup>32</sup> Fall Nr. EBH/180/2006 der Gleichbehandlungsstelle.

Die Gleichbehandlungsstelle hat 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. Sie hat darüber hinaus einige wichtige Entscheidungen getroffen, die als Richtlinien für die künftige Umsetzung des GstG dienen können.

## 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 GstG gilt das Gleichbehandlungsgebot 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 privatwirtschaftlichen Akteure zur Nichtdiskriminierung verpflichtet (z. B. können Kollegen auf der Basis des GstG nicht wegen Belästigung zur Rechenschaft gezogen werden).
- Das GstG erlaubt in bestimmten Fällen eine unmittelbare Diskriminierung aus objektiven Gründen.
- Je nach rechtlicher Auslegung könnten einige Bestimmungen des neuen Gesetzes über Kirchen und Religion<sup>33</sup> 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 dieses – bei strenger Auslegung – Arbeitgeber nur beim Einstellungsverfahren 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.

Sorgen bereiten auch folgende Punkte:

- Die Auslegung des GstG durch die Kuria in dem in der Einleitung beschriebenen Fall birgt die Gefahr, dass religiöse Bildung als Entschuldigung für die Segregation von Roma missbraucht wird, d. h. dass die Schaffung gesonderter Schulen für Roma durch Eröffnung konfessioneller Schulen in Roma-Vierteln von den Gerichten erlaubt wird.
- 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 dafür ist eine mangelnde Sensibilisierung der Bevölkerung für das Thema Antidiskriminierung und den Aufgabenbereich der Gleichbehandlungsstelle sowie die Tatsache, dass viele Opfer aus marginalisierten Gruppen kommen, die ihre Rechte nur schlecht

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<sup>33</sup> Gesetz CCVI von 2011 über die Gewissens- und Religionsfreiheit und die Rechtsstellung von Kirchen, Konfessionen und religiösen Gemeinschaften.

durchsetzen können. Zwar hat die Stelle durch ein Netzwerk regionaler Schiedsrichter ihre Reichweite inzwischen 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 mangelnden Personals (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.

#### Bewährte Verfahren:

- Außerschulische Bildungsprogramme (ABP) sind eine spezielle Bildungsform für unterprivilegierte Kinder, die darauf abzielt, den Bildungserfolg dieser Kinder zu fördern. Sie bieten Bildungsmaßnahmen außerhalb des Lehrplans an, um einen Ausgleich dafür zu schaffen, dass Schulen selten über die erforderlichen Ressourcen verfügen, um den Aufholprozess unterprivilegierter Kinder effektiv zu unterstützen. Ein zentrales Problem des Status der ABP liegt darin, dass keine normative Förderung für sie zur Verfügung steht; sie werden seit 2002 auf Projektbasis gefördert. Da die Aufforderungen zur Einreichung von Anträgen in der Regel in großen Zeitabständen veröffentlicht werden, sind ABPs häufig gezwungen, ihre Aktivitäten über ein volles Schuljahr auszusetzen oder erheblich einzuschränken, um Zeitspannen zwischen Finanzierungszyklen durchzustehen, obwohl Kontinuität ein Schlüsselement für ihren Erfolg ist. Darüber hinaus gingen in der Antragsrunde 2016 aufgrund von Mängeln bei der Formulierung der Aufforderungen und Fehlern im Auswertungsprozess mehrere namhafte, von NGOs betriebene ABP mit langjähriger Erfahrung bei der Mittelverteilung leer aus. Um diesen Zustand zu beheben, wurde eine neue Aufforderung veröffentlicht, die noch anhängig ist. Im April 2017 sollen außerdem Gespräche über eine Umstellung auf normative Finanzierung beginnen.

## 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 July 2016, grounds covered: all (not specified), material scope: non-discrimination in the provision of fundamental rights;<sup>34</sup>
- 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);<sup>35</sup>
- 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 2017, grounds covered: disability, material scope: health care, education, employment, culture and sports, housing, transportation, access to public services, accessible environment, accessible communication;<sup>36</sup>
- 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 2017, grounds covered: all, material scope: employment;<sup>37</sup>

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<sup>34</sup> Hungary, the Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100425.ATV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV).

<sup>35</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV).

<sup>36</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV).

<sup>37</sup> 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](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 2017, grounds covered: all (not specified), material scope: all (not specified).<sup>38</sup>

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<sup>38</sup> 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](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 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 these provisions can be enforced against private actors (or only against 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 Nationalities<sup>39</sup> (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."<sup>40</sup> 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,<sup>41</sup> in the other on the basis of belonging to the Roma national minority.<sup>42</sup> (From 2013 on, the Authority has been consistently using the term "belonging to a national minority" in Roma discrimination cases.)

The main reason is 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. E.g., 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 acknowledged nationalities is discriminated against, the protection will be based on Article

<sup>39</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100189.TV).

<sup>40</sup> 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.

<sup>41</sup> Equal Treatment Authority, EBH/50/2012, 5 January 2012, <http://egyenlobanasmod.hu/article/view/ebh-50-2012>.

<sup>42</sup> Equal Treatment Authority EBH/117/2012, 22 May 2012, <http://egyenlobanasmod.hu/article/view/ebh-117-2012>.

8 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 Communities<sup>43</sup> (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.) 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 have so far arisen 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.

However (although no such case has been litigated yet so far), a problem may arise in relation to reasonable accommodation, which is regulated in the RPD Act and the Labour Code, and therefore persons not falling under the RPD Act's definition may be left without protection against failures to provide reasonable accommodation.

#### *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.

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<sup>43</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100206.TV).

### 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.

### 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.<sup>44</sup> 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.

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<sup>44</sup> Equal Treatment Authority, EBH/72/2008, 25 April 2008, [http://www.egyenlobanasmod.hu/article/view/72\\_2008](http://www.egyenlobanasmod.hu/article/view/72_2008).

The Authority takes this recommendation into account: for instance, in case no. EBH/23/2011,<sup>45</sup> 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's defence was that both parties can terminate the labour contract without any justification during the probation period. The Authority concluded that this defence had 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 the dismissal), and established the violation of the equal treatment requirement. The basis for the discrimination was 'health status', thus the Authority employed the notion of discrimination by association.<sup>46</sup>

## **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.

<sup>45</sup> Equal Treatment Authority, EBH/23/2011, date and link are not available.

<sup>46</sup> Equal Treatment Authority, EBH/23/2011, February 2011, <http://www.egyenlobanasmod.hu/jogesetek/hu/23-2011.pdf>.

However, 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.

Although the specific exempting clauses related to employment coincide to a great extent with the GOR and religious ethos provisions, so it may be argued that in practice the general objective justification clause may not be applied in relation to employment (thus 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.),<sup>47</sup> 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. 35/1994<sup>48</sup> 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 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 Curia<sup>49</sup> 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 areas accessible for persons with disabilities would require a substantial financial investment and longer time. Therefore the respondent's failure to have solved all the accessibility problems raised by the claimant had a reasonable

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<sup>47</sup> Constitutional Court, 61/1992 (XI. 20.) AB határozat, 20 November 1992, <http://public.mkab.hu/dev/dontesek.nsf/0/7F28814984A06851C1257ADA00526FCE?OpenDocument>.

<sup>48</sup> Constitutional Court, 35/1994. (VI. 24.) AB határozat, 24 June 1994, <http://public.mkab.hu/dev/dontesek.nsf/0/5668A96A2701F0DBC1257ADA005276E5?OpenDocument>.

<sup>49</sup> Curia, Pfv.IV.20.104/2013/4, 19 June 2013, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

economic ground directly related to the given legal relationship. Therefore, the claim had to be rejected.

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.

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, ETA

(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, ETA

(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, ETA

(2) 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.

(3) 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, ETA

(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 ETA<sup>50</sup> 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 Procedure<sup>51</sup> (CCP) 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 they indeed use evidence originating from situation testing.

#### 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.<sup>52</sup>

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<sup>50</sup> 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->.

<sup>51</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV).

<sup>52</sup> <http://dev.neki.hu/wp-content/uploads/2013/05/tesztelési-tanulmány.pdf>.



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. The two non-Roma testers purchased two tickets at the entrance without any trouble and went inside. Twenty minutes later an employee went up to them, issued membership cards to them and registered their names and addresses in a book. The employee 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 a Roma volunteer and a local Roma youth also wanted to buy two tickets at the door but were refused, as they did not have membership cards. 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 HUF 100 000 (approximately EUR 330) per claimant. The defendant submitted a request for extraordinary remedy to the Supreme Court. In its decision (published under the number EBH 2002.625),<sup>53</sup> 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).<sup>54</sup>

Case 180/2006 of the Equal Treatment Authority:<sup>55</sup> 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.

Two testers called the employer, both of them claiming that they had the required skills and experience. 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, the Equal Treatment Authority found that the employer directly discriminated in breach of Article 8 ETA and imposed a fine of HUF 700 000 (approximately EUR 2 330) on him.<sup>56</sup>

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.

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<sup>53</sup> Supreme Court, Pfv. IV. 21.269/2001, date and link not available.

<sup>54</sup> [http://dev.neki.hu/wp-content/uploads/2013/05/390\\_ff2000.pdf](http://dev.neki.hu/wp-content/uploads/2013/05/390_ff2000.pdf).

<sup>55</sup> Equal Treatment Authority, EBH/180/2006, date not available, <http://egyenlobanasmod.hu/article/view/ebh-180-2006>.

<sup>56</sup> [http://dev.neki.hu/wp-content/uploads/2013/05/390\\_ff2000.pdf](http://dev.neki.hu/wp-content/uploads/2013/05/390_ff2000.pdf).



Case EBH/17/2016 of the Equal Treatment Authority:<sup>57</sup> 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.<sup>58</sup>

### **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 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 a test that is less strict 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.

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<sup>57</sup> Equal Treatment Authority, EBH/17/2016, 20 January 2016, <http://egyenlobanasmod.hu/article/view/ebh-17-2016>.

<sup>58</sup> <http://egyenlobanasmod.hu/article/view/ebh-17-2016>, [http://helsinkifigyelo.blog.hu/2015/07/13/hajlektalant\\_igazoltatni\\_rutin\\_rasszista\\_hoborgot\\_meg\\_szakmai\\_hiba](http://helsinkifigyelo.blog.hu/2015/07/13/hajlektalant_igazoltatni_rutin_rasszista_hoborgot_meg_szakmai_hiba).

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 Information<sup>59</sup> (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.

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.

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.

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 round 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

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<sup>59</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100112.TV).

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').<sup>60</sup>

This approach 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,<sup>61</sup> 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 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.

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.

*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 2015/2016 school year 28 340 Roma, 50 292 German, 1 000 Romanian and 3 720 Slovak pupils participated in elementary minority education.<sup>62</sup>

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

<sup>60</sup> The document can be downloaded from: <https://www.palyazat.gov.hu/doc/3367>.

<sup>61</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0900139.TV).

<sup>62</sup> [http://www.kormany.hu/download/0/83/f0000/Koznevelesi\\_statistikai\\_evkonyv\\_2015\\_2016.pdf](http://www.kormany.hu/download/0/83/f0000/Koznevelesi_statistikai_evkonyv_2015_2016.pdf).

predominantly attended by Roma students, constituting a specific form of segregation. According to experts, 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 Education<sup>63</sup> (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) [Article 41 Paragraph (4a)].<sup>64</sup>

*Ethnic origin for the purposes of the elections of minority self-governments:* 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.

Under Articles 86-87 of Act XXXVI of 2013 on the Election Procedure<sup>65</sup> (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 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,<sup>66</sup> 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. 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.

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<sup>63</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100190.TV).

<sup>64</sup> 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.

<sup>65</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300036.TV).

<sup>66</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100191.TV).

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 Authorities<sup>67</sup> (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.

#### 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 case<sup>68</sup> 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.

*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 (HUF 147 600 – approximately EUR 490 – 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 employers. (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:*<sup>69</sup> 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,

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<sup>67</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0400140.TV).

<sup>68</sup> 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.

<sup>69</sup> Equal Treatment Authority, EBH/190/2012, <http://egyenlobanasmod.hu/article/view/ebh-190-2012>.

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:*<sup>70</sup> 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 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. The case went up to the Supreme Court, but none of the higher courts questioned the validity of the statistical data established by the expert.

## **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.

Since the definition of harassment in the ETA refers to "the relevant person", and no reference is made to a group of persons, for some time, it was uncertain whether harassment under the ETA can be committed against a group. The issue was settled by the Curia, which – reading in conjunction Article IX Paragraph (5) of the Fundamental Law and Article 1 of the ETA – concluded in a case (concerning publicly made anti-Roma statements of a town mayor) that the ETA shall be understood as prohibiting harassment committed not only against individuals but also against groups and that any other interpretation would fly in the face of the principles set out in the ETA and the Fundamental

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<sup>70</sup> Supreme Court, Pfv.IV.20.936/2008/4, 19 November 2008, available from <http://birosag.hu/ugyfelpapcsolati-portal/anonim-hatarozatok-tara> through the search function.



Law, and if such inciting statements could not be sanctioned, it would contradict the objectives defined by these laws.<sup>71</sup>

Harassment is also prohibited and sanctionable under the Civil Code (as behaviour violating a person's dignity), although it is not expressly defined therein. In terms, of Article 2:42 Paragraph (2) of the Civil Code, everyone shall respect human dignity, and the inherent personal rights stemming therefrom.

The above means that the personal and material scope of the prohibition of harassment will depend on whether the behaviour that is alleged to violate the ban on harassment is adjudicated on the basis of the ETA or the Civil Code. As it will be explained below (Section 3.1.), the ETA has limited personal scope when it comes to private entities: while all public entities fall under the law's scope in all fields of life, only four groups of private actors are covered by the law: (i) persons offering a public contract or making a public offer, (ii) persons providing public services or sell goods; (iii) entrepreneurs, companies and other private legal entities using state support, and (iv) employers (in the broad sense). As opposed to this, everybody is bound by the Civil Code's provisions protecting inherent personal rights in all areas of life, however, when it comes to liability for breaches of such rights (including cases of harassment), there is a limitation on liability for damages, as described in the following subsection.

#### 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 under Article 2:42 of the Civil Code, which contains the general ban on the violation of inherent civil rights. This liability is restricted to the non-pecuniary sanctions foreseen by the Civil Code (e.g. an apology), 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 from his/her employee 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).

## **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.

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<sup>71</sup> Curia, Kfv.III.37.848/2014/6, 29 October 2014, available at: [http://www.helsinki.hu/wp-content/uploads/kiskunlachaza\\_ciganyozo-polgarmester\\_kuria.pdf](http://www.helsinki.hu/wp-content/uploads/kiskunlachaza_ciganyozo-polgarmester_kuria.pdf).

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, the obligation is more or less in place. Below a short summary is given of the relevant provisions to substantiate this stance.<sup>72</sup>

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 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,

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<sup>72</sup> 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.



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 Laws<sup>73</sup> 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 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 Safety<sup>74</sup> (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.

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<sup>73</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700121.TV).

<sup>74</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300093.TV).

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 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.

However, 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. Furthermore, 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,<sup>75</sup> institutions of higher education are obliged to provide to applicants with disabilities the conditions for participation in the admission procedure. Paragraph (5) of the 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

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<sup>75</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200423.KOR).

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 therapist, conductive educator, etc.), the special curriculum and educational materials required by the child’s specific needs. The maintainers (i.e. the entities responsible for maintaining the school: the state or the private foundation) may not be exempted from this duty by referring to the absence of the required financial resources, 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 – According to Article 15/A – is operated by the regional state centre maintaining schools.

There have been 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 cases have ended in a settlement, 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.<sup>76</sup>

In other areas, while there are no explicit legal norms prescribing reasonable accommodation, case law suggests that courts and the Equal Treatment Authority qualify 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 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 referring to the fact that the extra protective measures they would need to take in order to treat such patients 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.<sup>77</sup>

A housing case 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) 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 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.<sup>78</sup>

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<sup>76</sup> Equal Treatment Authority, EBH/121/2015, 16 February 2016, <http://www.egyenlobanasmod.hu/article/view/ebh-121-2015>.

<sup>77</sup> Equal Treatment Authority, EBH/10/2013, March 2013, [http://egyenlobanasmod.hu/article/view/10\\_2013](http://egyenlobanasmod.hu/article/view/10_2013).

<sup>78</sup> Equal Treatment Authority, EBH/934/2008, no date is available, [http://www.egyenlobanasmod.hu/article/view/934\\_2008](http://www.egyenlobanasmod.hu/article/view/934_2008).

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 ten days before his flight was scheduled. The airline requires passengers to indicate at the time of the reservation the need for special assistance, 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 ten days before the flight, which should have been sufficient to prepare for the accommodation.<sup>79</sup>

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.'<sup>80</sup>

So where there is a statutory obligation to provide reasonable accommodation, 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.

In cases, where the failure to provide reasonable accommodation amounts to discrimination, the same sanctions can be applied as for other instances of discrimination (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 (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.

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<sup>79</sup> Equal Treatment Authority, EBH/146/2009, no date available, [http://www.egyenlobanasmod.hu/article/view/146\\_2009](http://www.egyenlobanasmod.hu/article/view/146_2009).

<sup>80</sup> <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>.

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.

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

However, the obligation in certain cases is prescribed as a gradual process without clear deadlines, and some case law does not follow this approach.

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 2013<sup>81</sup> as from 1 January 2014.

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,<sup>82</sup> 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.

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<sup>81</sup> 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 és esélyegyenlőségük biztosításáról szóló 1998. évi XXVI. törvény módosításáról), 24 May 2013, <http://mkogy.jogtar.hu/?page=show&docid=a1300062.TV>.

<sup>82</sup> Equal Treatment Authority, EBH/13/2006, March 2006, <http://egyenlobanasmod.hu/article/view/ebh-zanza0307>.

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.

However, 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 laws in force at the time of the planning and construction required accessibility for building permissions to be issued. Nevertheless, the new bus terminal was designed and built in a manner that persons with visual impairments could not use it without assistance.

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 (...) 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, not only did the Curia 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 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 done so, no further reconstructions 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 the area of transportation, Article 51, Paragraph (4) of Act XLI of 2012 on Personal Transportation Services<sup>83</sup> (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.

However, one day before the expiry of the deadline, the provision was amended,<sup>84</sup> and 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.

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<sup>83</sup> 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/hjegv\\_doc.cgi?docid=A1200041.TV](http://net.jogtar.hu/jr/gen/hjegv_doc.cgi?docid=A1200041.TV).

<sup>84</sup> 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>.



In terms of Article 39 of Act CLXXXV of 2010 on Media Services and Mass Communication,<sup>85</sup> 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*<sup>86</sup> 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 were discriminated against by being provided inferior quality services for the same charges, and therefore in August 2005, they brought a civil action under the Civil Code. Although the first instance court found in favour of the complainants,<sup>87</sup> the claim was ultimately rejected by the Supreme Court on 4 February 2009.<sup>88</sup> The Supreme Court upheld the second instance decision which held that the mere fact that the complainants needed or might need assistance from other members of the society did not violate their human dignity. Furthermore, OTP was entitled to the freedom of concluding contracts, and therefore, a court may not, upon request by one party, intervene into a longstanding contractual relationship and oblige the OTP to fulfil an obligation which did not originally constitute a part of the agreement.

In March 2010, the complainants turned to the CRPD Committee. In its decision of 23 April 2013, the CRPD established that Hungary had failed to fulfil its obligation stipulated in Article 9 of the Convention on the Rights of Persons with Disabilities by not ensuring accessibility of the banking card services for persons living with visual impairments on an equal basis with others. The CRPD 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, the implementation of the substantive recommendations proceeds rather slowly. In his April 2015 report, the Parliamentary Commissioner for Fundamental Rights

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<sup>85</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1000185.TV).

<sup>86</sup> 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>.

<sup>87</sup> 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.

<sup>88</sup> 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.

(Hungary's Ombudsman) called on the Government to put in place a clear, concrete and enforceable legal framework with set deadlines to guarantee the accessibility of ATM's.<sup>89</sup>

This was done only in June 2016, when Decree 22/2016 of the Minister of National Economics on the Provisions Prescribing the Equal Access of Persons with Disabilities to Financial Services in Banks<sup>90</sup> was adopted. The Decree obliged banks to adopt a strategy to promote the access of persons with disabilities to financial services by 15 September 2016 and to publish by 1 October on their website (in an accessible manner) the accessible services it offers to clients with disabilities along with the branch offices where these services are offered and the availabilities of these branch offices. However, a press release issued on 13 December by the Hungarian National Bank<sup>91</sup> concluded that many banks still did not fully comply with the requirements set by the decree.

#### 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,<sup>92</sup> 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.

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,<sup>93</sup> criminal<sup>94</sup> and civil<sup>95</sup> proceedings alike.

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<sup>89</sup> See the Ombudsman's Report no. AJB-2979/2014.

<sup>90</sup> Hungary, Decree 22/2016 of the Minister of National Economics on the Provisions Prescribing the Equal Access of Persons with Disabilities to Financial Services in Banks (22/2016. (VI. 29.) NGM rendelet a hitelintézetekben a fogyatékos személyek pénzügyi szolgáltatásokhoz való egyenlő esélyű hozzáférését előíró szabályokról), 29 June 2016, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1600022.NGM&timeshift=ffffff4&txreferer=00000001.TXT](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1600022.NGM&timeshift=ffffff4&txreferer=00000001.TXT)

<sup>91</sup> <http://www.mnb.hu/sajtoszoba/sajtokozlemenyek/2016-evi-sajtokozlemenyek/tobb-banknal-meg-nincs-egyenlo-eselyuk-a-fogyatekos-ugyfeleknek>.

<sup>92</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500030.EUM).

<sup>93</sup> GPSA, Article 60.

<sup>94</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800019.TV), Article 114.

<sup>95</sup> CCP, Article 184.



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

###### **a) Protection against discrimination**

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.

###### **b) Liability for discrimination**

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

As mentioned above, 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.

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).

### **3.1.3 Private and public sector including public bodies (Article 3(1))**

#### **a) Protection against discrimination**

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.

#### **b) Liability for discrimination**

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, 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 prohibits discrimination in the following areas: 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 prohibits discrimination in the following areas: 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 persons 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.

#### **3.2.3.1 Occupational pensions constituting part of pay**

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 Funds<sup>96</sup> (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

<sup>96</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700082.TV).

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.

### **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 persons 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 Employment<sup>97</sup> 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.

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<sup>97</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100004.TV).

### **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 prohibits discrimination in the following areas: 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.

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 prohibits discrimination in the following areas: 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 Healthcare<sup>98</sup> (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. (Since the law invokes the ETA by referring to the

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<sup>98</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700154.TV).

'requirement of equal treatment', this provision covers all the 20 grounds listed in Article 8 of the ETA.)

#### 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 prohibit discrimination in the following areas: 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.

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) 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 prohibits discrimination in the following areas: 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: (i) determining the conditions of accessing education and assessing applications; (ii) defining and setting the requirements for education; (iii) performance evaluation; (iv) providing and using services related to education; (v) access to benefits related to education; (vi) accommodation and supplement in dormitories; (vii) issuing certificates and diplomas obtainable in education; (viii) access to vocational guidance; and (ix) 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 mothers of a 13-year old boy decided to find a new school for their son. The boy's interview with the future class teacher went fine, and a trial-week was agreed on. At the end of the interview, the mother told the teacher that she was raising the child together with her same-sex registered partner. The next day the teacher wrote an email stating that 'due to their family status' the child could not be admitted to her class. The mother turned to the leadership of the school which confirmed that the teacher's decision is final, so she decided to start legal action against the school with the help of Háttér Society, an NGO providing legal assistance to LGBTQ people. In the fall of 2014, the Equal treatment Authority concluded that discrimination had taken place and imposed a fine of HUF 50 000 (approximately EUR 170) on the school.<sup>99</sup>

The parents also decided to also sue the school for damages. In its decision of 24 June 2016, the Metropolitan Court of Budapest found in favour of the plaintiffs, and established a violation of the mother's inherent personal right to non-discrimination.<sup>100</sup> The court concluded that the child's admittance to the school had been rejected due to his mother's sexual orientation. In response to the school's argument that the rejection was in line with the interest of the child, the court stated that '[a]ny educational institution and their teachers are expected [...] to use the necessary pedagogical tools to prevent the bullying of students who differ from their classmates in whatever aspect. Students with such characteristics [...] cannot suffer a disadvantage because an educational institution or a class teacher is not willing or able to take into consideration their special needs and facilitate their integration to the community of students.' The court awarded the mother HUF 350 000 (approximately EUR 1 170) as non-pecuniary damages, and ordered the school to cover the interests and legal fees.

#### 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.'<sup>101</sup>

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<sup>99</sup> Equal Treatment Authority, EBH/366/2014, Fall of 2014. Available at: [http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/6a968df50ff677b4744e52e23cf33774/366\\_2014\\_megallapito\\_szexualis\\_iranyultsag.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/6a968df50ff677b4744e52e23cf33774/366_2014_megallapito_szexualis_iranyultsag.pdf).

<sup>100</sup> Metropolitan Court of Budapest, 31.P.25.499/2015/16/1, 24 June 2016.

<sup>101</sup> 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](http://mdac.org/sites/mdac.info/files/english_crpdc_alternative_report.pdf).

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).<sup>102</sup>

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).<sup>103</sup> The 2015 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.<sup>104</sup> In one of the cases quoted, the school expressly stated to the parents that it was unable to provide the services prescribed by the expert panel, so the management strongly suggested that the child should become a so-called private pupil.<sup>105</sup>

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.<sup>106</sup> This was confirmed by the 2014 annual report of the Commissioner for Educational Rights.<sup>107</sup>

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.<sup>108</sup>

#### b) Trends and patterns regarding Roma pupils

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

#### *Common patterns of segregation*

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<sup>102</sup> Tausz, Katalin (2013), *Fogyatékos emberek a szak- és felnőttképzés rendszerében* (Persons with disabilities in vocational and adult education), p. 21.

<sup>103</sup> Commissioner for Educational Rights (2014), *Az oktatási jogok biztosának beszámolója 2013. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2013), pp. 61-67.

<sup>104</sup> Commissioner for Educational Rights (2016), *Az oktatási jogok biztosának beszámolója 2015. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2015), pp. 71-88.

<sup>105</sup> Commissioner for Educational Rights (2016), p. 73.

<sup>106</sup> <http://aosz.hu/esoember/esetjogi-tanulmanyfuzet-az-nhm-projekt-tapasztalatai/>.

<sup>107</sup> Commissioner for Educational Rights (2015), *Az oktatási jogok biztosának beszámolója 2014. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2014), p. 67.

<sup>108</sup> Tausz (2013), p. 11.

In spite of the detailed legislative framework, segregation of Roma pupils in different forms is still widespread in Hungary. While the changes in the definition of 'disadvantaged' and 'especially disadvantaged' children have made it more difficult to conduct comparable impact studies,<sup>109</sup> statistical data show that the degree of segregation seems to be on the rise. According to a recent study, the segregation index (the degree to which 'disadvantaged' and 'especially disadvantaged' children are separated from non-disadvantaged peers in the course of their education) had increased nationally from 27.2 to 32.9 and from 29.2 to 34 respectively between 2010 and 2013.<sup>110</sup>

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,<sup>111</sup> 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 had an intellectual disability 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 and the expert panel had failed to individualise the applicants' diagnoses and 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, 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.

The operation of the expert panels was the subject matter of a domestic case as well, in which a first instance decision was delivered on 10 March 2016. The lawsuit was launched by CFCF and the European Roma Rights Center against the Ministry of Human Resources (EMMI), the Klebelsberg Centre for Management of Educational Institutions (KLIK, i.e. the state body acting as the sole maintainer of all primary and secondary schools that were previously managed by municipalities) and the Heves County Pedagogical Service. In its decision, the Eger Regional Court established<sup>112</sup> that the Pedagogical Service (which is responsible for the pedagogical panels forming an expert opinion on whether children with special educational needs can be educated in an integrated manner or only in special schools or classes) had been committing since 2004 indirect discrimination against Roma pupils in Heves County through its practice of testing their school suitability with diagnostic methods that are not culture-neutral. KLIK and EMMI have also been found to be in

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<sup>109</sup> Due to changes in the legislation, since 31 August 2013, certain categories of children who used to fall into the 'especially disadvantaged' group have been qualified as 'disadvantaged', which blurs certain important differences and makes comparisons between the pre and post 2013 periods very difficult.

<sup>110</sup> Hajdu, Tamás –Hermann, Zoltán –Horn, Dániel – Varga, Júlia (2015), *A közoktatás indikátorrendszere 2015* (The indicator system of public education 2015), <http://econ.core.hu/file/download/kozoktatasi/indikatorrendszer.pdf>, pp. 130-132. (The index is 100 when disadvantaged or especially disadvantaged children are fully separated from their non-disadvantaged peers.)

<sup>111</sup> European Court of Human Rights, Horváth and Kiss v. Hungary, Application no. 11146/11.

<sup>112</sup> Eger Regional Court, 12.P.20.166/2014/92, 10 March 2016.

violation of the requirement of equal treatment by failing to take the legally prescribed measures to monitor the activities of the pedagogical services, and therefore contributing the continuation of the indirect discrimination. The court obliged the respondents to put an end to the violation.

With regard to the Pedagogical Service, the court concluded that the plaintiffs had put forth evidence from which it could be presumed that by failing to use culture-neutral testing methods, the expert panels misdiagnosed Roma children in a highly disproportionate number of cases, thus preventing them from the possibility of receiving education that meets the requirements set by their mental abilities. With regard to EMMI and KLIK, the court called attention to the fact that their failure to monitor the services was particularly disturbing, since they had information about severe problems with the practice of the expert panels from their own background institutions.

An important 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 the Nyíregyháza municipal council closed it down. In 2011, the new mayor moved to have the Huszártelep school reopened as part of the Greek Catholic Church's primary school.

In the lawsuit launched by the CFCF against the town of Nyíregyháza, the church, the school and KLIK, the courts of first and second instance established that since the large majority of the pupils in the school were of Roma origin, and their separate education was not based on the voluntary initiative of the parents (e.g. because the municipality stopped the school bus service that could take the children to the mainstream schools), therefore the children's right not to be segregated had been violated.

However, the Curia overturned the second instance decision in its judgment of 22 April 2015.<sup>113</sup> 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.

From the factual point of view, the main deficiency of the decision is that it refuses to take into account that the actual circumstances (e.g. the geographical proximity of other schools and the inability to afford transportation costs) prevent the parents from making a truly voluntary choice. From the legal point of view, there is one very important deficiency of the decision, namely that Article 28 Paragraph (2) requires 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. 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.

The Huszártelep gave rise to a debated amendment of the National Public Education Act. After the second instance court decision, the Minister of Human Resources 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.<sup>114</sup>

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

<sup>113</sup> 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.

<sup>114</sup> See for instance: [http://hvg.hu/itthon/20141106\\_Nem\\_tetszik\\_az\\_iskolai\\_szegregacios\\_itele](http://hvg.hu/itthon/20141106_Nem_tetszik_az_iskolai_szegregacios_itele).

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)].

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, no legislation on the matter has been passed yet. This is most probably due to the letter of formal notice sent in May 2016 by the European Commission to Hungary, requesting the country to put an end to practices leading to the result that Roma children are disproportionately over-represented in special schools for children with intellectual disabilities and also subject to a considerable degree of segregated education in mainstream schools.<sup>115</sup>

#### *The missed chance for desegregation offered by centralisation*

As mentioned above, public schools had been nationalised as of 1 January 2013. KLIK became the sole maintainer of all primary and secondary schools that were previously managed by municipalities. While this could have been a historic opportunity to take firm measures against as segregation of Roma children, KLIK instead left segregated schools intact, or even reversed already started desegregation processes (e.g. in Piliscsaba, where it launched a new class in a segregated – Roma-only – school which was about to be closed down by the municipality).

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. 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. The CFCF extended the lawsuit to the KLIK and also to EMMI (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.<sup>116</sup> 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.

This decision was partly turned around on 14 October 2016, by the Pécs Appeals Court acting as court of second instance. The Appeals Court agreed with the first instance court that the defendants were responsible for the segregation, but at the same time it also ordered that the segregated school must be closed in an upgoing system: i.e. in the next schoolyear no first graders may be admitted to the school. Those ca. 20 first graders who belong to the school's catchment area will have to be distributed among other, non-segregated schools of the town.<sup>117</sup> Although a review by the Curia has been requested by the respondents, the decision was complied with, and no admissions of first graders will be made in September 2017.<sup>118</sup>

#### *The afterschool education programs*

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<sup>115</sup> See: [http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm).

<sup>116</sup> Kaposvár Regional Court, 11.P.21.553/2013/70, 11 November 2015, [http://cfcf.hu/sites/default/files/MX-M264N\\_20151116\\_142154.pdf](http://cfcf.hu/sites/default/files/MX-M264N_20151116_142154.pdf).

<sup>117</sup> Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016. Available at: <http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf>.

<sup>118</sup> Information from CFCF staff.



Another issue to be mentioned is the developments concerning afterschool education programs (*tanoda* in Hungarian, hereafter referred to as AEP's). AEP's are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programs, such as tutoring, community building programs, etc. The first AEP's were started cca. 15 years ago in Hungary.<sup>119</sup>

Although they fill a crucial gap in the education system (schools very rarely possess the financial and human resources to effectively help the catching up of underprivileged children and promote their educational success) and politicians often proudly refer to AEP's as best practices, no normative support is available for them, they have been supported on a project basis in six different rounds of applications since 2002.<sup>120</sup> One constant problem is that the calls for application are usually not published in a manner that guarantees continuous operation. Thus AEP's must suspend or significantly limit their activities for a full schoolyear, although continuity and keeping the trust of the disadvantaged children and families is a key element in the operation of AEP's.<sup>121</sup> For instance, although the previous funding cycle ended in June 2015, a call for applications for operating AEP's in the Mid-Hungarian Region was published only in the summer of 2016, and to this day, no decisions on the funding have been made.<sup>122</sup>

Similarly, in spite of the funding cycle ending in the summer of 2015, the new call for applications for all the other regions was issued only in October 2015 (with a December deadline for submission and an envisaged April 2016 deadline for deciding on the applications).<sup>123</sup> This in itself forced AEP's to reduce or suspend their activities in the 2015/2016 schoolyear, but most of them managed to maintain at least some activities not to lose touch with the children. However, the decisions were finally made with a delay of close to six months: at the end of September 2016.<sup>124</sup>

This was not the only problem with the call for applications. As early as in December 2015, experts called – in vain – attention to some rules and requirements of the call, which made it doubtful that AEP's run by NGO's would be capable of submitting successful applications. For instance, while it was required from all applicants to undertake to employ a project manager and a leading financial officer, the maximum amount that could be spent on their salary from the funding provided by the call was very limited (approximately EUR 67) per month. Similarly, the amount to be spent on overhead (public utility bills, postal and banking costs, maintenance) was maximised – at EUR 47 per month. These requirements put those entities (denominations, foundations) that have an already existing infrastructure and budget into a significant advantage compared to NGO's whose the main or sole activity is the operation of an AEP.

The results confirmed the preliminary worries. Many of the NGO-run AEP's that had been the most well-known for their professional achievements, were not successful. AEP's which have been operating successfully for 5-15 years<sup>125</sup> remained without support, while brand new AEP's without any previous experience received funding. According to an analysis prepared by the Tanoda Platform Network (a network of experienced AEP's) (i) only cca. 25% of the successful applicants have any previous experience; (ii) there were demonstrable mistakes in the evaluation of applications; (iii) the evaluations could only be inspected in Budapest, but many applicants could not afford the time and/or money to do so.<sup>126</sup>

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<sup>119</sup> [http://index.hu/belfold/2016/09/27/orommel\\_ertesitem\\_hogy\\_palyazatat\\_elutasitottuk/](http://index.hu/belfold/2016/09/27/orommel_ertesitem_hogy_palyazatat_elutasitottuk/).

<sup>120</sup> [http://hvg.hu/itthon/20151214\\_tanoda\\_program\\_civilek\\_palyazat](http://hvg.hu/itthon/20151214_tanoda_program_civilek_palyazat).

<sup>121</sup> [http://index.hu/belfold/2016/09/12/emmi\\_palyazat\\_tanoda](http://index.hu/belfold/2016/09/12/emmi_palyazat_tanoda).

<sup>122</sup> Information provided by the Tanoda Platform Network.

<sup>123</sup> [http://index.hu/belfold/2016/09/12/emmi\\_palyazat\\_tanoda](http://index.hu/belfold/2016/09/12/emmi_palyazat_tanoda).

<sup>124</sup> [http://index.hu/belfold/2016/09/27/orommel\\_ertesitem\\_hogy\\_palyazatat\\_elutasitottuk/](http://index.hu/belfold/2016/09/27/orommel_ertesitem_hogy_palyazatat_elutasitottuk/).

<sup>125</sup> Including the Real Pearl Foundation's AEP operating in Biharkeresztes for 5 years (see: <http://igazgyongy-alapitvany.hu/en/>); the AEP in Gilvánfa, working since 2009, see: <http://www.szmca.hu/gilvanfa.html>) and the Szent Márton AEP operating for 15 years (<http://szentmartontanoda.hu/in-english.html>).

<sup>126</sup> [http://hvg.hu/itthon/20161013\\_emmi\\_tanodak\\_palyazat](http://hvg.hu/itthon/20161013_emmi_tanodak_palyazat).

The problems were recognised by the Government as well. On 17 October, the State Secretary Responsible for Social Matters and Catching Up, acknowledged that there had been applications that had been evaluated defectively, and said that the Government was 'extremely sorry that it was the AEP's with the greatest methodological knowledge that were not successful, this knowledge must be saved'.<sup>127</sup> A bridging support of HUF 200 million (approximately EUR 666 700) was provided to the concerned AEP's in December 2016, and a new call for (in the amount of HUF 2 billion, i.e. approximately EUR 6.7 million) was published in January 2017 exclusively for AEP's that were successful in the preceding two funding rounds, but not in the most recent one. However, some long-standing and successful AEP's that previously funded their operations from sources other than the operative programs are again left out as a result of these eligibility criteria.<sup>128</sup>

### *Denominational schools*

Finally, mention must be made about the role of denominational schools in the education of underprivileged children (among whom Roma are highly overrepresented). Recent statistical analyses<sup>129</sup> prove that the number of denominational schools and their share of the Hungarian educational system is steeply rising. The number of denominational schools had increased by 68%(!) between 2010 and 2014, which was inevitably paralleled by an increase in the proportion of children studying in denominational schools (compared to all the children attending schools): from 4.9% to 13.8% in general and from 4% to 13% in primary schools between 2001 and 2014 (with the brunt of the increase taking place after 2010).<sup>130</sup>

One would therefore expect that the proportion of indigent pupils/students – i.e. disadvantaged (*hátrányos helyzetű*) and especially disadvantaged (*halmozottan hátrányos helyzetű*) children – has also increased in such schools (and their presentation in denominational institutions is now higher than the national average proportion of children studying in denominational institutions), however, the numbers show that the increase in the proportion of these children in primary schools has remained below the general increase. According to the authors of the analysis, this means that 'denominational primary schools prefer pupils of relatively more favourable social background in poor regions and smaller settlements too'.<sup>131</sup>

Educational experts also claim that denominational schools contribute to the increase in segregation in two ways: by operating mainstream schools where hardly any Roma pupils are admitted and by opening schools in segregated Roma neighbourhoods (this seems to be substantiated by the Nyíregyháza case).

### c) Migrant children in education

A certain duality can be sensed in the education of migrant children. Experts and social workers involved in the integration of migrant children claim that while the education of children from 'traditional' migrant groups (e.g. the Chinese or Turkish communities) is mostly unproblematic (in areas that are densely populated by these communities, local schools are prepared for any challenges that may arise in this respect), the same cannot be said about asylum seekers or even recognised refugee children.

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<sup>127</sup> <http://abcug.hu/czibere-voltak-hibasan-elbirt-tanodapalyazatok/>.

<sup>128</sup> Information provided by the Tanoda Platform Network.

<sup>129</sup> Hermann, Zoltán –Varga, Júlia (2016), Állami, önkormányzati, egyházi és alapítványi iskolák: részarányok, tanulói összetétel és tanulói teljesítmények (State, municipal, denominational and foundation schools: proportions, and the composition and achievements of students), available at: [www.tarki.hu/hu/publications/SR/2016/15hermann.pdf](http://www.tarki.hu/hu/publications/SR/2016/15hermann.pdf).

<sup>130</sup> Hermann-Varga (2016), pp. 313-315.

<sup>131</sup> Hermann-Varga (2016), p. 321.

There is no established state-run infrastructure for integrating them into the Hungarian school system or helping teachers to deal with the specific challenges raised by the education of these children. This work (which is similar to that of the AEP's) is mostly done by civil society organisations – however, not on a normative financial basis, but depending on the actual availability of project funding. According to anecdotal reports, in order to avoid the problems arising from these children's lack of a command of Hungarian, potential cultural differences and gaps in their education, some schools try to prevent the children's attempts to enrol, and/or persuade them to become private pupils (not attending classes, but taking exams after each semester).<sup>132</sup>

However, while anti-discrimination law applies to migrants on an equal footing with anyone else (in the area of education as well as in any other areas of life), these cases do not reach the legal forums (as litigation is not a realistic option for the concerned families and/or children), so there is no case law in this regard.

### **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 prohibits discrimination in the following areas: 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.

Paragraph (2) and Article 30/A contain specific exemption clauses for access to goods and services.<sup>133</sup>

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).

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<sup>132</sup> Interview with András Kováts, Director of Menedék Hungarian Association for Migrants, 3 May 2017.

<sup>133</sup> Article 30 (2) 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.

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.



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 prohibits discrimination in the following areas: 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).

In relation to the situation of migrants in housing, the following can be said. According to experts and social workers involved in the integration of migrants, migrants, especially refugees often face severe difficulties and frequent rejections when trying to find housing, rent apartments. The most likely explanation for this is the unprecedented increase in xenophobia paralleled with a high demand for rentable apartments and a significant rise in rents.<sup>134</sup> In 2016, the government conducted a nationwide anti-migrant campaign with messages (in the form of government-sponsored billboards and advertisements), such as: (i) did you know that the Paris terror attacks were carried out by immigrants? (ii) did you know that nearly one million immigrants want to come to Europe from Libya alone? or (iii) did you know that since the start of the immigration crisis, harassment of women has increased in Europe?

As a result, the extent of xenophobia in Hungary reached an all-time high in January 2016. The research institute TÁRKI has been for over two decades measuring xenophobia and the Hungarian society's attitude towards foreigners by asking whether all asylum seekers should be accepted in Hungary (xenophiles), only certain groups of asylum seekers should be accepted ("thinkers") or no asylum seekers should be accepted at all irrespective of where they come from (xenophobes). In January 2016, the proportion of those who would not allow anyone to enter Hungary reached an all-time peak, whereas the proportion of

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<sup>134</sup> Interview with András Kovács, Director of Menedék Hungarian Association for Migrants, 3 May 2017.

xenophiles (those who think that all asylum seekers should be accepted) decreased to practically zero (reaching an all-time low).<sup>135</sup>

This has an inevitably negative impact on owners' willingness to let their apartments to migrants. However, just as in the case of education, while anti-discrimination law applies to migrants on an equal footing with anyone else also in the area of housing, these cases do not reach the legal forums, so there is no case law in this regard either.

#### 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.

The proportion of social housing (8%) is way below the EU average (33%).<sup>136</sup> 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.<sup>137</sup> 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.

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:

'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. (...) Half (52%) of the Roma live in households with arrears of some sort, mainly with water and electricity utilities. (...)

A total of 280-315 thousand people (3% of the total population of the country) live in (...) ghettoes. Two-thirds of the ghettos are located on the periphery of settlements (...). (...) 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.'<sup>138</sup>

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.<sup>139</sup>

The recent years have been characterised by attempts of municipalities to push out Roma persons/populations from the settlements and/or prevent them from moving in.

In May 2014 for instance, 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

<sup>135</sup> [http://www.tarki.hu/hu/news/2016/kitekint/20160330\\_refugees.pdf](http://www.tarki.hu/hu/news/2016/kitekint/20160330_refugees.pdf).

<sup>136</sup> <http://www.mut.hu/?module=news&action=getfile&fid=114874>.

<sup>137</sup> [http://www.ksh.hu/thm/2/indi2\\_7\\_7.html](http://www.ksh.hu/thm/2/indi2_7_7.html).

<sup>138</sup> 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.habitat.hu/files/HU\\_updated\\_civil\\_society\\_monitoring\\_report.pdf](http://www.habitat.hu/files/HU_updated_civil_society_monitoring_report.pdf).

<sup>139</sup> 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. (The report for the year 2016 is not available yet.)

in 'low comfort' social housing. The decree stipulated that the authorities can only provide financial compensation to low comfort social housing tenants in order to secure a mutually-agreed termination of the tenancy if the tenants undertake to buy property outside of the territory of Miskolc.

Tenants of higher quality social housing were still provided with the possibility of being relocated within Miskolc. 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.

The Borsod-Abaúj-Zemplén County Government Office (government offices are vested with the task of overseeing the legality of municipal decrees) filed a motion with the Curia for the quashing of the decree. In its decision Köf.5003/2015/4,<sup>140</sup> 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" (social status) – the ethnic aspect of the matter was not mentioned.

In another case, the NGO NEKI filed an *actio popularis* complaint with the Equal Treatment Authority in July 2014 claiming that the municipality of Miskolc was 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 its decision no. EBH/67/22/2015,<sup>141</sup> 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) 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 with housing those who have already become homeless or face a direct threat thereof due to the discriminative practices. Finally, the Authority imposed a fine of HUF 500 000 (approximately EUR 1 670) on the municipality.

In its decision no. 6.K.33.048/2015/17 delivered on 25 January 2016,<sup>142</sup> the Metropolitan Administrative and Labour Court rejected the municipality's request for a judicial review and upheld the Authority's decision in every aspect. The court recalled that public entities falling under the ETA'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.

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<sup>140</sup> Curia, Köf.5003/2015/4, 28 April 2015, <http://www.kuria-birosag.hu/hu/onkuqy/kof500320154-szamu-hatarozat>.

<sup>141</sup> Equal Treatment Authority, EBH/67/22/2015, 15 July 2015, <http://egyenlobanasmod.hu/article/view/ebh-67-2015>.

<sup>142</sup> Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

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 – e.g. the realisation of urban planning – was at least apparently neutral, but due to the composition of the population in the Numbered Streets, the municipality's actions clearly affected persons belonging to a number of protected groups (Roma, indigent, disadvantageous social status) in a disadvantageous manner, 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 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 Numbered Streets. It 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 is an omission would be devoid of meaning if the Authority could not oblige the violator to take specific action. The Authority was thus 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.

Ultimately, in June 2016, the municipality formally complied – at least partially – with the obligation, when it adopted its Local Equal Opportunities Program, which contains a part on 'solving the housing problems related to the elimination of the segregated neighbourhood of the Numbered Streets'.<sup>143</sup> However, as it was pointed out by several NGO's and experts active in the field, the only tangible content-element of the 'plan' was the creation of a Social Housing Society (to be operated by the Hungarian Charity Service of the Order of Malta) vested with the task of managing altogether 30 social housing units with the purpose of placing the families remaining without housing. 30 units are obviously insufficient to provide housing for all the concerned and potentially concerned residents of the Numbered Streets, but the NGO's also criticised the process of adopting the plan (no impact assessment preceded the drafting) and the absence of (i) adequate financial resources appropriated for the realization of the plan; (ii) any compensation foreseen for the families that have already moved out from the Numbered Streets; and (iii) information on the municipality's concrete plans regarding the area.<sup>144</sup> NEKI also formally requested the Equal Treatment Authority to enforce the decision,<sup>145</sup> however the Authority took the stance that by adopting an action plan, the municipality had met its obligations under the final and binding decision.

That the NGO concerns were not unfounded seems to be substantiated by recent developments: in March 2017, 80 apartments were demolished in the area, and a high

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<sup>143</sup> [http://www.miskolc.hu/sites/default/files/dokumentumok/csatolmanyok/hep\\_2016\\_04\\_20\\_-2.pdf](http://www.miskolc.hu/sites/default/files/dokumentumok/csatolmanyok/hep_2016_04_20_-2.pdf), pp. 57-59.

<sup>144</sup> <http://dev.neki.hu/a-szamozott-utcakkal-kapcsolatos-intezkedesi-terv-elfogadhatatlan/>.

<sup>145</sup> The first instance administrative body must take measures to enforce a final and binding decision if the obliged party fails to do so. Under Article 134 of the GPSA, in cases where the decision obliged a party to do something, one of the available means is to impose fines on the failing party until it meets its obligation set put in the decision.

ranking municipal official told the press that they would demolish all the apartments of the neighbourhood, including those 30, which the charity service of the Order of Malta was supposed to take over with the purpose of providing housing to families in need. Out of the 30 housing units mentioned in the action plan, only four had actually been renovated between June 2016 and March 2017. Many of the families that were forced to leave the Numbered Streets had to move to the outskirts of the town (further away from educational and healthcare infrastructure) into equally segregated, but often even more substandard neighbourhoods.<sup>146</sup>

In another case, in July 2015, the mayor of Mezőkeresztes (North-East Hungary) published in the municipal council's newspaper an open letter (titled 'Let us stop the decrease of real estate prices') to the town's residents, in which he encouraged the residents to sell their real estates to companies or private persons with regular income, who are capable of accumulating savings or start viable enterprises. The mayor also asked the residents to 'if they can (...) refrain from selling their real estates to Roma people coming from other settlements'. The open letter was also published on the council's website.

In its 8 November 2016 decision delivered upon the Hungarian Civil Liberties Union's claim, the Equal Treatment Authority concluded the following: in the open letter addressed to the public, the mayor suggested that Roma people from other settlements cannot be persons with regular income, nor can they be capable of accumulating savings or start viable enterprises, and if they buy the real estate with an instalment-plan, they are unlikely to fully pay the price and the owner must be prepared to enter into long legal disputes with them. It violates the dignity of Roma people if the mayor calls on the population to refrain from selling their real estates to them. The mayor's open letter is capable of creating a hostile, humiliating or offensive environment vis a vis the Roma people, so the mayor committed harassment. The Authority obliged the mayor to remove the open letter from the municipal council's website. It also ordered that its decision be published (besides the Authority's own website) in the next issue of the council's newspaper and on the municipal council's website (for 30 days). Finally, the Authority imposed a fine of HUF 100 000 (approximately EUR 330) on the mayor.<sup>147</sup>

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<sup>146</sup> <http://nepszava.hu/cikk/1124790-szamozott-utcak---nincstelensegbol-a-nyomorba-vezet-az-ut>.

<sup>147</sup> Equal Treatment Authority, EBH/549/2016, 8 November 2016, available at: [http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/21540b3c217ebb08a34e1495ecc688eb/549\\_2016.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/21540b3c217ebb08a34e1495ecc688eb/549_2016.pdf).

## 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*)<sup>148</sup> 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.

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<sup>148</sup> 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 Education<sup>149</sup> (the previous act on public education, parts of which were still in force until 1 September 2013) contained no provisions authorising denominational educational institutions to set considerations related to religion and belief as recruitment criteria or prescribe regulations concerning appearance, behaviour or religious activities.

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 some schools themselves share this interpretation is demonstrated by a case of the Hungarian Helsinki Committee, in which a denominational 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

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<sup>149</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300079.TV).



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 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.<sup>150</sup> The decision was upheld by the second instance court with basically the same reasoning.<sup>151</sup> The organisation submitted a request for extraordinary review to the Supreme Court.

The Supreme Court rejected the claim on 8 June 2005.<sup>152</sup> The Court 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'. 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).

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<sup>150</sup> Metropolitan Court, 19.P.21.788/2004, date and link not available.

<sup>151</sup> Metropolitan Appeals Court, 2.Pf.21.318/2004/4, date and link not available.

<sup>152</sup> 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](http://epa.oszk.hu/02300/02334/00020/pdf/EPA02334_Fundamentum_2005_03_100-104.pdf).

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,<sup>153</sup> 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 Organisations<sup>154</sup> (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 Personnel<sup>155</sup> (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.

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

<sup>153</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700124.TV).

<sup>154</sup> 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>.

<sup>155</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200205.TV).

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.<sup>156</sup> 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 HUF 100 000 (approximately EUR 330) 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 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.<sup>157</sup>

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

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<sup>156</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0900057.irm).

<sup>157</sup> Equal Treatment Authority, EBH/56/2007, June 2007, <http://www.egyenlobanasmod.hu/article/view/ebh-56-2007>.

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. 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.'<sup>158</sup> 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.

A case that may be relevant in this regard for purposes of analogy, concerns the National Tax and Customs Office, which refused to grant the same tax and contribution exemptions and reductions to registered (same-sex) partners that it granted to married couples (e.g. the exemption from inheritance fees) on the basis that the two institutions (marriage and registered partnership) cannot be regarded as equivalent, although the law on registered partnership claims that unless it expressly stipulates otherwise, the laws pertaining to marriage shall be applied to registered partnerships on an equal footing. The Ombudsman launched an investigation into the matter and concluded in his report of December 2016<sup>159</sup> that this practice contradicted the regulation in force and constituted discrimination based on sexual orientation. On 25 January 2017, the tax authority announced in a press release that it would change its practice with immediate effect.<sup>160</sup>

<sup>158</sup> Constitutional Court, 14/1995 (III. 13.) AB határozat, 13 March 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/DA693CDE8BF08185C1257ADA005257FB?OpenDocument>.

<sup>159</sup> Commissioner for Fundamental Rights, Report no. AJB-4819/2016, December 2016, available at: [http://www.ajbh.hu/documents/10180/2500969/Jelent%C3%A9s+a+bejegyzett+%C3%A9lett%C3%A1rsak+vonatkoz%C3%B3+ad%C3%B3z%C3%A1si+szab%C3%A1lyokr%C3%B3l+4819\\_2016/2fd2bf13-c2e5-47da-ac64-2866fb3db0f4?version=1.0&inheritRedirect=true](http://www.ajbh.hu/documents/10180/2500969/Jelent%C3%A9s+a+bejegyzett+%C3%A9lett%C3%A1rsak+vonatkoz%C3%B3+ad%C3%B3z%C3%A1si+szab%C3%A1lyokr%C3%B3l+4819_2016/2fd2bf13-c2e5-47da-ac64-2866fb3db0f4?version=1.0&inheritRedirect=true).

<sup>160</sup> <http://www.hatter.hu/hirek/sajtokozlemeny-a-hetero-elettarsaknak-is-jarjon-az-oroklesi-illetekmentesseg>.

#### 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.

Decree 33/1998 of the Ministry of Welfare on the Medical Examination and Assessment of Labour, Professional and Personal Hygienic Suitability<sup>161</sup> (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 under Article 10 Paragraph (1) of the Labour Suitability Decree: '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 (...), 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).

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<sup>161</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800033.NM).

## **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**

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. 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-case<sup>162</sup> 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**

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<sup>162</sup> Judgment C-144/04, Werner Mangold v Rüdiger Helm, 22 November 2005.

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.

Apart from these provisions, age-related differences are mostly in place with regard to dismissals and promotion of 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.<sup>163</sup> The categories are – among others – the following: (i) persons with primary education or below; (ii) persons over 50; (iii) career beginners up to the age of 25; (iv) single parents of at least one child below 18; (v) 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

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<sup>163</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99600006.MUM).



to age-related conditions, i.e. to set a lower and an upper age limit.<sup>164</sup> The Constitutional Court established that 'age-related restrictions concerning the filling of certain positions shall not be regarded as discriminatory unless they are arbitrary'.

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 Pensions<sup>165</sup> (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: (i) *public servant (e.g. a teacher teaching in a public school, a doctor working in a public hospital)*; (ii) *civil servant (working in the public administration)*; (iii) *governmental servant*; (iv) *high ranking state official*; (v) *judge*; (vi) *justice employee (e.g. a court clerk)*; (vii) *prosecutor*; (viii) *person serving in a law enforcement agency or the army*.

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<sup>164</sup> Constitutional Court, 857/B/1994 AB határozat, 20 February 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/C4B0DFED73219E48C1257ADA005294B9?OpenDocument>.

<sup>165</sup> 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](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 may have to 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.<sup>166</sup> 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.

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, the case was heard by the Grand Chamber in November 2016, and is now awaiting judgment.

#### 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.

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.

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.

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<sup>166</sup> European Court of Human Rights, *Fábián v. Hungary*, application. no. 78117/13, 15 December 2015, <http://hudoc.echr.coe.int/eng?i=001-159210>.

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,<sup>167</sup> 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 Judges<sup>168</sup> (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.<sup>169</sup>
- 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.<sup>170</sup>
- 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.

The Commission brought an action against Hungary for failure to fulfil obligations on the basis that the contested Hungarian regulation is contrary to Directive 2000/78 in that they give rise to unjustified discrimination and, are neither appropriate nor necessary to achieve the allegedly legitimate objectives. The Commission's action concerned prosecutors and public notaries as well. In its decision of 6 November 2012,<sup>171</sup> the CJEU established that the national scheme requiring compulsory retirement of legal professionals when they reach the age of 62 was not in line with Articles 2 and 6(1) of Directive 2000/78/EC. The radical lowering of the retirement age by eight years with a very short transitory period

<sup>167</sup> Hungary, Act CXCIX of 2011 on Civil Servants (2011. évi CXCIX. törvény a közzszolgálati tisztviselőkről), 30 December 2011, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100199.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100199.TV).

<sup>168</sup> Hungary, Act CLXII of 2011 on the Status and Remuneration of Judges (2011. évi CLXII. Törvény a bírág jogállásáról és javadalmazásáról), 2 December 2011, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100162.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100162.TV).

<sup>169</sup> 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 ügyészégi alkalmazottak jogállásáról és az ügyész életpályáról), 28 November 2011, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100164.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100164.TV).

<sup>170</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100041.TV).

<sup>171</sup> 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>.

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. 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 2013<sup>172</sup> – remedying most, but not all the failures.

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 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,<sup>173</sup> 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).

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<sup>172</sup> 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>.

<sup>173</sup> Judgment C-499/08, Ingeniørforeningen i Danmark v Region Syddanmark, 12 October 2010.

#### **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 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 permitted 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) 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: (i) 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; (ii) 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; (iii) 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; (iv) 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',<sup>174</sup> 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). Pupils/students and mentors shall apply jointly to the program. 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.

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,<sup>175</sup> 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.<sup>176</sup>

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.<sup>177</sup>

With regard to migrants there are no positive action measures. In fact, the integration support scheme for recognised refugees and beneficiaries of subsidiary protection introduced in 2013 (containing elements such as financial benefits, housing allowance, language courses, etc.) was altogether terminated as of 1 June 2016 by Act XXXIX of 2016 on the Amendment of Certain Laws Concerning Migration and Other Related Laws.<sup>178</sup>

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<sup>174</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500152.KOR).

<sup>175</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100191.TV).

<sup>176</sup> 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>.

<sup>177</sup> [http://www.parlament.hu/documents/10181/59569/Infoegyzet\\_2013\\_39\\_kormanyablakok.pdf/ca1e617f-cd45-4dc4-a4e5-4e5619657cce](http://www.parlament.hu/documents/10181/59569/Infoegyzet_2013_39_kormanyablakok.pdf/ca1e617f-cd45-4dc4-a4e5-4e5619657cce).

<sup>178</sup> See: <http://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-legal-amendments-Apr-June-2016.pdf>.



## **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 provide 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

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 Protection<sup>179</sup> (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*

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

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<sup>179</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700155.TV).

review or suspend the support; or even that the concerned pupils be transferred to another institution; (iii) it may impose a fine up to HUF one million (approximately EUR 3 330); (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 the same Article, 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.

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 it 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 Database<sup>180</sup> (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 HUF 150 000 (approximately EUR 500). 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 Mediation<sup>181</sup> (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.

#### *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.

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<sup>180</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV).

<sup>181</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0200055.TV).

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.<sup>182</sup> 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'*

Hungary's Ombudsman is the Commissioner for Fundamental Rights, who has two deputies responsible for the right of future generations and minorities respectively.

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.<sup>183</sup> 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 law enforcement 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,

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<sup>182</sup> 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>.

<sup>183</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV).

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. State funded legal aid (including representation by a patron attorney) is available, but the indigence threshold is very low. 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 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, 2007 – 2016<sup>184</sup>**

<b>Year</b>	<b>Number of complaints</b>	<b>Administrative decisions</b>	<b>Decisions establishing discrimination</b>	<b>Friendly settlements</b>
<b>2007</b>	756	159	29	3
<b>2008</b>	1153	256	37	23
<b>2009</b>	1087	273	48	18
<b>2010</b>	1373	377	40	36
<b>2011</b>	1014	359	42	39
<b>2012</b>	2772	213	31	28
<b>2013</b>	1496	345	21	30
<b>2014</b>	1005	251	23	27
<b>2015</b>	884	240	33	17
<b>2016</b>	1017	278	31	28

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 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,<sup>185</sup> 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

<sup>184</sup> 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> and <http://www.egyenlobanasmod.hu/article/view/az-ebh-2016-ban/mid:7>.

<sup>185</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100175.TV).

- 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.

As it can be seen from the cases described in this report, many of which were launched by human rights and equality NGOs as action popularis claims or representatives of individual complainants, such organisations in Hungary are active in engaging on behalf of supporting the victims. Courts of other authorities generally accept their mandate to do so, and do not hinder them in carrying out their related activities.

One of the problematic 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

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).

Under 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).<sup>186</sup> 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.<sup>187</sup> This interpretation was shared by the European Court of Human Rights, which rejected CFCF's application claiming a violation of its rights under Article 6 of the European Convention of Human Rights on the basis of the lack of *locus standi*.<sup>188</sup>

#### 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.

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<sup>186</sup> 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](http://epa.oszk.hu/02300/02334/00020/pdf/EPA02334_Fundamentum_2005_03_100-104.pdf).

<sup>187</sup> 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](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).

<sup>188</sup> European Court of Human Rights, *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v Hungary*, Application no. 786/14, 25 March 2014.

### 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
  - 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,<sup>189</sup> 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,<sup>190</sup> 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

<sup>189</sup> <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>.

<sup>190</sup> 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.

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.

#### **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 HUF 50 000 (approximately EUR 167) to HUF 6 million (approximately EUR 20 000).

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 HUF 100 000 (approximately EUR 333). 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.<sup>191</sup> In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1 400 and EUR 1 700 respectively. A HUF 4.5 million (approximately EUR 15 000) 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.<sup>192</sup> 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 HUF 5 million (approximately EUR 16,670) on the bar.<sup>193</sup>

### 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 cases<sup>194</sup> as opposed to 11 cases in 2011<sup>195</sup> and 20 in 2010),<sup>196</sup> 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.<sup>197</sup> In 2015,

<sup>191</sup> <http://www.egyenlobanasmod.hu>.

<sup>192</sup> <http://www.egyenlobanasmod.hu/jogesetek/hu/700-2007.pdf>.

<sup>193</sup> [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](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).

<sup>194</sup> [http://www.egyenlobanasmod.hu/data/2012\\_tevekenysege\\_szamok\\_tukreben.pdf](http://www.egyenlobanasmod.hu/data/2012_tevekenysege_szamok_tukreben.pdf).

<sup>195</sup> [http://www.egyenlobanasmod.hu/data/2011\\_tevekenysege\\_szamok\\_tukreben.pdf](http://www.egyenlobanasmod.hu/data/2011_tevekenysege_szamok_tukreben.pdf).

<sup>196</sup> <http://www.egyenlobanasmod.hu/data/2010beszamolo2.pdf>.

<sup>197</sup> <http://www.egyenlobanasmod.hu/article/view/2015-a-sz%C3%A1mokr%C3%A9sben-infografika>.

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.

*Although in its decision of 24 November 2010 (no. Pfv.IV.21.568/2010/5), the Supreme Court claimed<sup>198</sup> 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 after this 2010 decision the CFCF launched a number of lawsuits and has undoubted expertise in the area of educational segregation, so far in only one case has their request for the prescription of concrete desegregation steps been granted. In the Kaposvár case described under Section 3.2.8,<sup>199</sup> the second instance court banned the competent respondents from admitting first-grade pupils to the segregated school from the 2017/18 academic year on, and obliged them to adopt and publish by 31 March 2017 on their websites a detailed desegregation plan on the admission and placement of those first-grade pupils who belong to the school's catchment area. Although a review by the Curia has been requested by the respondents, the decision seems to be complied with, and no admissions of first graders will be made in September 2017.

Similarly, in the case of the Numbered streets in Miskolc described under Section 3.2.10, the Metropolitan Administrative and Labour Court<sup>200</sup> 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.

These new developments entail the promise that after a long time, courts will accept that they have the right to prescribe concrete steps in order to remedy long-standing systemic

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<sup>198</sup> 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.

<sup>199</sup> Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016. Available at: <http://cfcf.hu/sites/default/files/kaposvarIIifok.pdf>.

<sup>200</sup> Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available from <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> through the search function.

discrimination-situations. It needs to be seen though how the execution of these judgments will proceed and be enforced, if needed.

## **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 Procedure<sup>201</sup> (ETAD) was adopted on 26 December 2004 (as of 1 July 2013, its provision had been integrated into the ETA).

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.

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<sup>201</sup> 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 C of 2014 on Hungary's 2015 budget,<sup>202</sup> HUF 181.8 million (approximately EUR 606 000) was allocated for staff costs. Act C of 2015 on the 2016 budget<sup>203</sup> has increased this amount to HUF 187.7 million (approximately EUR 625 700). The average number of employees is at present 25 persons, out of which 10 are lawyers doing case work.<sup>204</sup>

It has to be noted that in 2009 the Authority received additional funds of HUF 911 million (approximately EUR 3 million 36 thousand) 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 2011<sup>205</sup> 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

<sup>202</sup> 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](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1400100.TV).

<sup>203</sup> Hungary, Act C of 2015 on Hungary's Budget for the Year 2016 (2015. évi C. törvény - Magyarország 2016. évi központi költségvetéséről), 3 August 2015, [https://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1500100.TV](https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1500100.TV).

<sup>204</sup> <http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/92/Az%20EBH-n%C3%A1l%20foglalkoztatottak%20%C3%A9tsz%C3%A1m%C3%A1ra%20...%20%C3%B6sszes%C3%A4tett%20adatok%202016%20IV.%20negyed%C3%A9vig.pdf>.

<sup>205</sup> 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.

Since the Authority is an administrative decision-making body, the proceeding of which is triggered by individual complaints, it does not set its own agenda and priority issues – it acts retroactively in most cases. Therefore, although it has a limited number of cases on migrants in the sense of foreign citizens (see Section 4.4.), due to the lack of complaints it does not have case law on discrimination against migrants in the sense of persons concerned by the refugee crisis, nor does it treat this issue as a priority.

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:<sup>206</sup> (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.

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[http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TA\\_MOP\\_zarokiadvany.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TA_MOP_zarokiadvany.pdf).

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'.

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.<sup>207</sup>

#### 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),<sup>208</sup> 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 HUF 50 000 (approximately EUR 167) to HUF 6 million (approximately EUR 20 000).

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

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<sup>207</sup> Information from Authority staff.

<sup>208</sup> Information from Authority staff.

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.

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.<sup>209</sup>

#### 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, which may be problematic from the point of view of the envisaged role of the equality body as set forth by Recital (24) of Directive 2000/43,<sup>210</sup> if the Authority is not provided with sufficient resources to be able to – besides its quasi-judicial functions – focus on analysing the problems related to discrimination based on racial or ethnic origin, studying possible solutions and providing concrete assistance for the victims. However, it must also be pointed out that due to the structural characteristics of discrimination in Hungary, a large proportion of the Authority's complainants do come from the Roma minority.

In 2014, disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination (98 and 69 respectively). Sexual orientation and gender identity were identified as the ground of discrimination by 16 and two complainants respectively.<sup>211</sup> The trends did not change in the year 2015: disability was indicated by the complainants in 74 cases, belonging to a national minority in 64.<sup>212</sup> No statistics are available for the year 2016 on the number of complaints broken down by ground, but out of the 32 cases in which it was concluded in 2016 that discrimination had

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<sup>209</sup> The Authority's annual reports are available at: <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-az-egyenlő-bánásmód-hatóság-tevékenységéről>.

<sup>210</sup> 'Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims'.

<sup>211</sup> <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-egyenlő-bánásmód-hatóság-2014-évi-tevékenységéről>.

<sup>212</sup> <http://www.egyenlobanasmod.hu/article/view/az-egyenlő-bánásmód-hatóság-2015-évi-tevékenységéről>.

taken place, the unlawful differentiation was again most often based on disability and affiliation with a national minority (7-7 cases).<sup>213</sup>

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.

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<sup>213</sup> <http://www.egyenlobanasmod.hu/article/view/az-ebh-2016-ban/mid:7>.

## 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](http://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 was financed by the European Social Fund and the Hungarian State, it was started in 2009 and ended in 2014.<sup>214</sup> The total TÁMOP project budget was HUF 911 million (approximately EUR 3 million 36 thousand).<sup>215</sup>

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 2014, the referee system served 1835 clients and forwarded 110 complaints to the Authority.<sup>216</sup> In 2015 these numbers were 1848 and 84 respectively,<sup>217</sup> whereas in 2016, the referees forwarded 73 complaints out of a total of 1905.<sup>218</sup>

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);

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<sup>214</sup> For the project grant see <https://www.palyazat.gov.hu/doc/1311>.

<sup>215</sup> 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](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TAMOP_zarokiadvany.pdf).

<sup>216</sup> <http://www.egyenlobanasmod.hu/article/view/egyenlo-banasmod-hatosag-2014-evi-tevekenysege-a-szamok-tukreben>.

<sup>217</sup> <http://www.egyenlobanasmod.hu/article/view/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-a-szamok-tukreben>.

<sup>218</sup> <http://www.egyenlobanasmod.hu/article/view/az-ebh-2016-ban/mid:7>.

- 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.

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.<sup>219</sup>

As to state structures specifically established to address the problems faced by the Roma, the following can be said. In 2010, a Secretariat of State for Social Inclusion was set up, which 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.<sup>220</sup>

The secretariat has launched a number of initiatives to improve the situation of the Roma. An example is a recently launched HUF 7.5 billion (approximately EUR 25 million) programme aimed at providing Roma women with on-the-job vocational training (as social caretakers, nurses and social assistants) at state-run social care institutions. In the second part of the program social care institutions run by churches, municipalities and NGO's may apply for support to be spent on employing women who have been trained in the program's framework.<sup>221</sup>

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.

<sup>219</sup> <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%A9g-e-sz%C3%A1mokr%C3%A9s-a-ben>.

<sup>220</sup> <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag>.

<sup>221</sup> <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/roma-nok-kepzeset-es-foglalkoztatasi-segito-program-indul-aprilisban>.



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 forth a number of recommendations as well as suggested changes to the National Social Inclusion Strategy.<sup>222</sup>

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 (...).'<sup>223</sup>

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.'<sup>224</sup>

## **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

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<sup>222</sup> 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.habitat.hu/files/HU\\_updated\\_civil\\_society\\_monitoring\\_report.pdf](http://www.habitat.hu/files/HU_updated_civil_society_monitoring_report.pdf).

<sup>223</sup> 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.habitat.hu/files/HU\\_updated\\_civil\\_society\\_monitoring\\_report.pdf](http://www.habitat.hu/files/HU_updated_civil_society_monitoring_report.pdf).

<sup>224</sup> 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.habitat.hu/files/HU\\_updated\\_civil\\_society\\_monitoring\\_report.pdf](http://www.habitat.hu/files/HU_updated_civil_society_monitoring_report.pdf).

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). In light of some of the cases outlined in this report, it must be mentioned that municipal councils use – with increasing frequency – their statutory authorisation for adopting decrees to regulate certain aspects of local societal life to pass sometimes overtly discriminative legislation in order to gain – real or assumed – political popularity among the majority population. While some of the most conspicuously unlawful decrees raise wider (sometimes nation-wide) attention and the remedial forums eliminate these laws, it seems highly likely that there are numerous such decrees and provisions in smaller settlements where the local minority communities’ ability to enforce their rights is limited.

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,<sup>225</sup> 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.

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<sup>225</sup> 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](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 AEP 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.<sup>226</sup>

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<sup>226</sup> See for instance: [http://hvg.hu/itthon/20130711\\_Balog\\_Heindl\\_roma\\_szegregacio](http://hvg.hu/itthon/20130711_Balog_Heindl_roma_szegregacio); [http://www.romnet.hu/hirek/2013/09/25/mohacsi\\_erksebet\\_is\\_kivonult](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.<sup>227</sup> In 2016, the referees forwarded 73 complaints out of a total of 1905.<sup>228</sup> 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.
- *The Afterschool Education Programs (tanodas)*: AEP's are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programs, such as tutoring, community building programs, etc. They fill a crucial gap in the education system (namely that schools very rarely possess the financial and human resources to effectively help the catching up of underprivileged children and promote their educational success). However, no normative support is available for them, they have been supported on a project basis in several different rounds of applications since 2002. As the calls for application are usually not published in a manner that guarantees continuous operation, AEP's must often suspend or significantly limit their activities for a full schoolyear to survive periods between funding cycles, although continuity and keeping the trust of the disadvantaged children and families is a key element in the success of AEP's. In this regard it is a positive development that talks about a shift to normative-funding are about to start in April 2017.

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[http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TA\\_MOP\\_zarokiadvany.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/c3d85264cfaec3a18542379bd526adbf/TA_MOP_zarokiadvany.pdf), p. 16.

<sup>228</sup> <http://www.egyenlobanasmod.hu/article/view/az-ebh-2016-ban/mid:7>.

## **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).

- 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).
- The project-based funding of AEP's puts these important initiatives into very difficult situations between funding cycles. The support for these initiatives should be made more transparent and foreseeable, as the continuity of the relationship between AEP personnel on the one hand and underprivileged children and their families on the other is a key to the success of AEP activities.
- As shown by the case of Miskolc – where the municipality's actions were deemed unlawful by several authorities, including the Ombudsman, the Equal Treatment Authority and different courts, but the irreversible pushing out of the Roma population continues – serious doubts can be raised whether the existing system of remedies can be regarded as adequate and whether the conditions of greater reliance on interim measures could and should be created.

## 12 LATEST DEVELOPMENTS IN 2016

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.

Another trend to pay attention to is that while the number of denominational schools and their share of the Hungarian educational system is steeply rising, statistical analyses show that in general such schools seem to contribute to an increase in the degree of segregation instead of reducing it. They seem to prefer pupils of relatively more favourable social background in poor regions and smaller settlements too, and when they educate disadvantaged pupils, they often do it in completely segregated neighbourhoods, thus preserving the segregation stemming from the housing situation.

### 12.1 Legislative amendments

In 2016, no significant legislative amendments took place from the point of view of non-discrimination. According to available information, further 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: most probably because the Government has been waiting for the outcome of its discussions with the Commission on the planned amendments' compatibility with EU requirements.

### 12.2 Case law

**Name of the court:** Metropolitan Administrative and Labour Court

**Date of decision:** 25 January 2016

**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 approximately (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.

**Name of the court:** Pécs Appeals Court

**Date of decision:** 13 October 2016

**Name of the parties:** Chance for Children Foundation v Somogy County Government Office, Klebelsberg Centre for Management of Educational Institutions, the town of Kaposvár and the Ministry of Human Resources

**Reference number:** Pf.III.20.004/2016/4

**Address of the webpage:** <http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf>

**Brief summary:** 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 to EMMI (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. The domestic court took the stance that the desegregation process is such a complex one depending on many factors (such as political will) 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.

This decision was partly turned around on 14 October 2016, by the Pécs Appeals Court acting as court of second instance. The Appeals Court agreed with the first instance court that the defendants were responsible for the segregation, but at the same time it also ordered that the segregated school must be closed in an upgoing system: i.e. in the next schoolyear no first graders may be admitted to the school. Those ca. 20 first graders who belong to the school's catchment area will have to be distributed among other, non-segregated schools of the town. A review by the Curia has been requested by the respondents.

**Name of the court:** Equal Treatment Authority

**Date of decision:** 8 November 2016

**Name of the parties:** Hungarian Civil Liberties Union v. the Mayor of Mezőkeresztes

**Reference number:** EBH/549/2016

**Address of the webpage:** <http://www.egyenlobanasmod.hu/article/view/ebh-549-2016>

**Brief summary:** In July 2015, the mayor of Mezőkeresztes (North-East Hungary) published in the municipal council's newspaper an open letter (titled 'Let us stop the decrease of real estate prices') to the town's residents, in which he encouraged the residents to sell their real estates to companies or private persons with regular income, who are capable of accumulating savings or start viable enterprises. The mayor also asked the resident to 'if they can (...) refrain from selling their real estates to Roma people coming from other settlements'. The open letter was also published on the council's website. The Hungarian Civil Liberties Union launched an actio popularis proceeding before the Equal Treatment Authority, claiming that the mayor had committed harassment based on ethnicity. The mayor failed to make a statement in the proceeding.

In its decision, the Authority concluded the following: it can be established beyond any doubt that in the open letter addressed to the public, the mayor suggested that Roma people moving in from other settlements cannot be private persons with regular income, nor can they be capable of accumulating savings or start viable enterprises, and if they buy the real estate with an instalment-plan, they are unlikely to fully pay the price and the owner must be prepared to enter into long legal disputes with them. The Authority is of the view that it violates in itself the dignity of Roma people if the mayor calls on the population to refrain from selling their real estates to them. Examined in its context, the Mezőkeresztes mayor's open letter is undoubtedly capable of creating a hostile, humiliating or offensive environment vis a vis the Roma people, so the mayor committed harassment. The Authority obliged the mayor to remove the open letter from the municipal council's website. It also ordered that its decision be published (besides the Authority's own website) in the next issue of the council's newspaper and on the municipal council's website (for 30

days). Finally, the Authority imposed a fine of HUF 100 000 (approximately EUR 330) on the mayor.

### Trends and patterns in 2016 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 2014, disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination (98 and 69 respectively).<sup>229</sup> The trends did not change in the year 2015: disability was indicated by the complainants in 74 cases, belonging to a national minority in 64.<sup>230</sup> No statistics are available for the year 2016 on the number of complaints broken down by ground, but out of the 32 cases in which it was concluded that discrimination had taken place, the unlawful differentiation was again most often based on disability and affiliation with a national minority (7-7 cases).<sup>231</sup>

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.<sup>232</sup> The Authority's report on its 2015 activities does not provide detailed statistics on the concerned sectors, only states that employment remains the field with the most complaints.<sup>233</sup> In the summary report on the year 2016, it is stated that out of the 32 cases in which it was concluded that discrimination had taken place, the most (seven) concerned employment.

Still no statistics are available on legal proceedings launched by Roma people before courts.

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).<sup>234</sup>

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<sup>229</sup> <http://www.egyenlobanasmod.hu/article/view/tájékoztató-az-egyenlő-bánásmód-hatóság-2014-évi-tevékenységéről>.

<sup>230</sup> <http://www.egyenlobanasmod.hu/article/view/az-egyenlő-bánásmód-hatóság-2015-évi-tevékenységéről>.

<sup>231</sup> <http://www.egyenlobanasmod.hu/article/view/az-ebh-2016-ban/mid:7>.

<sup>232</sup> [http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8cbae26bdcff0cbfb3837d34dc68ef0a/EBH\\_beszámoló\\_2014\\_magyar.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/8cbae26bdcff0cbfb3837d34dc68ef0a/EBH_beszámoló_2014_magyar.pdf), p. 15.

<sup>233</sup> [http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/f8085b68235119704ff7253a211226c0/EBH\\_2016\\_web.pdf](http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/f8085b68235119704ff7253a211226c0/EBH_2016_web.pdf).

<sup>234</sup> 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

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Hungary  
**Date:** 1 January 2017

<b>Title of legislation (including amending legislation)</b>	Fundamental Law of Hungary (Article XV) Abbreviation: Fundamental Law Date of adoption: 25 April 2011 Latest amendments: 01 July 2016 Entry into force: 01 January 2012 Web link: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV</a> Grounds covered: all
	Constitutional law
	Material scope: all fields
	Principal content: general constitutional prohibition of discrimination
<b>Title of legislation (including amending legislation)</b>	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: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV&amp;celpara=#xcelparam</a> 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
<b>Title of legislation (including amending legislation)</b>	Title of the law: Act V of 2013 on the Civil Code Abbreviation: Civil Code Date of adoption: 26 February 2013 Latest amendments: 01 January 2017 Entry into force: 15 March 2014 Weblink: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV&amp;celpara=#xcelparam</a> Grounds covered: all
	Civil law
	Material scope: all
	Principal content: prohibition of discrimination, sanctions of discrimination
<b>Title of legislation (including amending legislation)</b>	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 2017 Entry into force: 01 July 2012 Weblink: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV&amp;celpara=#xcelparam</a> Grounds covered: all

	Labour law
	Material scope: employment
	Principal content: prohibition of discrimination, sanctions of discrimination
<b>Title of legislation (including amending legislation)</b>	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 2017 Entry into force: 01 January 1999 Weblink: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV&amp;celpara=#xcelparam</a>
	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)
<b>Title of legislation (including amending legislation)</b>	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 2017 Entry into force: 01 January 2017 Weblink: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV&amp;celpara=#xcelparam</a>
	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
<b>Title of legislation (including amending legislation)</b>	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 2017 Entry into force: 15 April 2012 Weblink: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV&amp;celpara=#xcelparam">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV&amp;celpara=#xcelparam</a>
	Grounds covered: all
	Criminal law (petty offences)
	Material scope: education
	Principal content: sanctioning of discrimination

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Hungary  
**Date:** 1 January 2017

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd.mm. YYYY</b>	<b>Date of ratification (if not ratified please indicate) Dd.mm. YYYY</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	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

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd.mm. yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd.mm. yyyy</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention 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

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