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# Country report

## Non-discrimination

Hungary  
2019  
including summary



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# **Country report**

## **Non-discrimination**

Transposition and implementation at national level of  
Council Directives 2000/43 and 2000/78

### **Hungary**

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Reporting period 1 January 2018 – 31 December 2018

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## EXECUTIVE SUMMARY

### 1. Introduction

Hungary is a country of around 10 million people. Fifteen years after its political transition into democratic pluralism, Hungary became a member of the EU. The creation of democratic laws and institutions has been accompanied by increasing awareness of the principle of equal treatment, but the issue of discrimination was brought to light by the debates generated by the process leading to the adoption of a comprehensive anti-discrimination law in late 2003 – Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA).<sup>1</sup> The law established the Equal Treatment Authority (hereinafter also referred to as the Authority) – a body responsible for combating discrimination in all sectors and with regard to all grounds. The Authority's activities 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 the Roma population. The only 'visible' ethnic minority in Hungary constitutes 6–9 % of the country's population. Despite positive legislative changes and significant amounts spent on integration programmes, Roma still face deeply rooted discrimination in education, employment, healthcare, housing and access to goods and services. They are greatly over-represented in 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 and manifests itself in three common patterns: 'auxiliary schools' for children with intellectual disabilities predominantly attended by Roma students; segregated 'Gypsy schools' (often reflecting segregation in housing); and segregated classes within 'mixed' schools, usually offering a lower quality of education.

The systemic nature of the problem is illustrated by a recent court decision in which a foundation sued the ministry responsible for educational affairs for failing to take effective action against the segregation of Roma pupils in 28 schools for over a decade. The first instance court concluded<sup>2</sup> that the ministry's failure to take action had amounted to discrimination, and prescribed several steps to be taken with the aim of eliminating segregation. These included banning 13 segregated schools throughout the country from admitting new first-graders; assigning the concerned first-graders to other schools; preparing and publishing desegregation plans; amending the methodology of inspecting educational institutions' compliance with the principle of non-discrimination; and paying a public interest fine of approximately EUR 156 250 (HUF 50 million) to be spent on the civil monitoring of desegregation programmes over the next five years. While the second instance court<sup>3</sup> significantly modified the first instance judgment in relation to the sanctions imposed – leaving only the obligation to prepare desegregation plans and to pay a public interest fine intact – it shared the assessment that the ministry had failed to take effective action to end segregation in several schools, although it had been aware of the widespread existence of segregation in these educational institutions.

The inactivity of the authorities contributes to the fact that, despite the nuanced legal framework, the extent of segregation is on the rise, and according to the available data, the steep increase in the number and proportion of denominational schools within the

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<sup>1</sup> Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of 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>2</sup> Metropolitan Court, Decision No. 40.P.23.675/2015/84, 18 April 2018, <http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>.

<sup>3</sup> Metropolitan Appeals Court, Judgment No. 2.Pf.21.145/2018/6/I, 14 February 2019.

Hungarian educational system has only boosted this trend and 'facilitated the flight of local elites from state-owned schools'.<sup>4</sup>

Problems were also raised by the practices of municipalities apparently aimed at driving out of town the – mostly Roma – residents of its most impoverished neighbourhoods. In the case of the municipality of Miskolc (northeast Hungary), the Curia (Hungary's Supreme Court), 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. However, the problems have not been definitively resolved: the process of driving out the Roma population from Miskolc has not come to a halt, raising concerns about the effectiveness of the available legal remedies. After a court decision concluding that the municipality's policies had amounted to harassment of local Roma, the mayor of Miskolc expressly stated: 'They [the NGOs bringing the lawsuit] may object to this, they may bring lawsuits, we will pay the fines if we must, like we have done in the past, but it is not [them] who can tell us what we must do in Miskolc to protect public safety.'<sup>5</sup>

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 a lack of financial and human resources – to provide the conditions required for their successful integration.

An important issue in relation to the political and social context is the active campaign that has been carried out against migrants and helpers of migrants by the Hungarian Government since 2015. This has resulted in a public attitude that is not conducive to the idea of diversity and non-discrimination. In February 2018, the Prime Minister expressly rejected the idea of diversity: 'Diversity is not a value, it is a given. We must declare it: we do not want to become diverse in a way that we get mixed, our colour, our traditions, our national culture get mixed with others. We don't want that. [...] We want to stay like we have been for 1 100 years here, in the Carpathian Basin.'<sup>6</sup>

These sentiments are not just empty rhetoric. During the summer of 2018, two pieces of legislation were passed by the Hungarian Parliament. One criminalises the organisation of assistance in initiating asylum claims for asylum seekers who are not persecuted in their country of origin or in the country through which they arrived to Hungary or whose fear of such persecution is unfounded. The other imposes a 25 % tax on donations to organisations that support migration (e.g. portray migration in a positive light or organise education, media campaigns or media seminars that are deemed to support migration). Both acts of legislation were heavily criticised by international bodies, including the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, which, in joint reports, called on Hungary to repeal both laws<sup>7</sup> – to no avail.

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<sup>4</sup> See Fejes, J. B. and Szűcs, N. (eds.) (2018), *Én vétkem. helyzetkép az oktatási szegregációról* (Mea Culpa. State of affairs in educational segregation), Szeged, Motiváció Oktatási Egyesület, available at: [https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%89n-v%C3%A9tkem\\_online.pdf](https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%89n-v%C3%A9tkem_online.pdf), p. 15, and Asztalos, G., 'A 22-es csapdája – őszintén az egyházi iskolákról' (Catch 22 – honestly about denominational schools), available at: [http://szemlelek.blog.hu/2018/02/10/oszinten\\_az\\_egyhazi\\_iskolakrol](http://szemlelek.blog.hu/2018/02/10/oszinten_az_egyhazi_iskolakrol).

<sup>5</sup> <https://borsodihir.hu/helyben-jaro/2018/12/miskolc-polgarmestere-elkuldte-a-jogvedoket-a-fenebe>.

<sup>6</sup> <https://budapestbeacon.com/orban-uses-conference-mayors-vow-protect-hungarys-ethnic-group/> and [https://www.youtube.com/watch?v=-xyutFLn\\_8E](https://www.youtube.com/watch?v=-xyutFLn_8E).

<sup>7</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e) and [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e).



## 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. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the collective complaints protocol of the Revised European Social Charter have also not been ratified by Hungary.

The cornerstone of the legislation is the general anti-discrimination clause of the Fundamental Law of Hungary<sup>8</sup> adopted in 2011. This general ban is detailed by the ETA. Sectoral laws (e.g. civil law, labour law) simply refer to the provisions of the ETA in discrimination-related instances, which creates consistency within the system. The ETA covers all five grounds included in the EU directives and in some respects (e.g. the number of grounds covered) goes beyond the requirements of the directives.

The protection provided by the ETA is amplified by the Civil Code,<sup>9</sup> which lists the right to non-discrimination as an 'inherent right' (i.e. a right that is inalienably attached to the human personality) and prescribes specific sanctions for the infringement of such a right (e.g. damages, public apology), and by a number of other laws (e.g. the law on consumer protection). The institutional framework established by the ETA is augmented by statutes governing the operation of institutions with functions aimed at combating discrimination (e.g. the Commissioner for Fundamental Rights).

## 3. Main principles and definitions

The ETA specifies definitions for both direct and indirect discrimination. The definitions are largely 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 cases where differentiation is acceptable: (i) a general objective justification; (ii) special exceptions; and (iii) positive action.

The general objective justification clause makes a distinction on the basis of the right affected by the differentiation. If this right is a fundamental one, the differentiation may only be exempt 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. Legislation exempting organisations based on a religious ethos (such as denominational schools) may go beyond what can be regarded as an appropriate transposition of Directive 2000/78 due to the fact that it allows for unqualified and unconditional differentiation by religious organisations (e.g. in the recruitment of employees) without any requirement for a legitimate aim. The third exception from the requirement of equal treatment is positive action. The ETA does not establish a *sui generis* duty to provide reasonable accommodation, but the labour law recognises the obligation. In terms of the relevant jurisprudence, the failure to comply with statutory requirements aimed at evening out existing disadvantages of persons or groups with protected grounds amounts to discrimination.

Discrimination on all the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU) is expressly prohibited but Hungarian national law covers other

<sup>8</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>9</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).

grounds as well. The ETA contains a list of the protected grounds. It has 19 items, including sex, national or ethnic origin, disability, state of health, religious or other similar philosophical conviction, sexual orientation, gender identity, motherhood, age and financial status. The list is not 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.

The concept of multiple discrimination is not known in Hungarian legislation, and there are no plans to adopt specific regulations. However, there are some cases in which the concept is applied (e.g. a company's remuneration policy based on presence at the workplace, thus putting women with children in a disproportionately disadvantaged situation compared to women and men without children and men with children, was deemed to be discriminatory on this basis).<sup>10</sup>

Both the Equal Treatment Authority and the courts regularly apply the concepts of direct discrimination, indirect discrimination, harassment and segregation. The application of these concepts has become more or less unproblematic since the ETA came into force more than 15 years ago. Some recent examples of direct discrimination include a list provided by a real estate agency, in which some properties were marked with a 'No Roma' warning;<sup>11</sup> a refusal to rent out a swimming pool to an LGBTQI sports club;<sup>12</sup> the denial of access to a museum of a visually impaired complainant with his guide dog.<sup>13</sup> In a recent first instance decision, the court concluded that pregnant Roma women were subjected to indirect discrimination by a town hospital's policy of charging for mandatory maternity ward clothing (i.e. protective clothing that reduced the risk of visitors spreading contagious diseases to the babies) for friends and family members wishing to visit them, as they were disproportionately impacted by the financial burden this policy imposed on patients.<sup>14</sup> An example of a court decision on segregation is provided above under Point 1.

#### **4. Material scope**

The ETA approaches the issue of scope from the personal rather than 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 scope of the ETA: (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). However, there is no relevant case law in this area.

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<sup>10</sup> Case No. EBH/130/2017 of the Equal Treatment Authority, 7 August 2017, <http://egyenlobanasmod.hu/hu/jogeset/ebh1302017-0>.

<sup>11</sup> Equal Treatment Authority, Decision No. EBH/70/2018, 9 January 2018, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh702018>.

<sup>12</sup> Judgment of the Metropolitan Court (reference number not available), 11 July 2018, <http://hatter.hu/hirek/a-birosag-szerint-is-diszkriminalta-az-uszoda-az-lmbtq-sportegyesuletet>.

<sup>13</sup> Equal Treatment Authority, Decision No. 115/2018, 12 January 2018, <https://www.egyenlobanasmod.hu/hu/jogeset/ebh1152018>.

<sup>14</sup> Miskolc Regional Court, Judgment No. 10.P.22.249/2017/19, 15 October 2018, available at: [http://www.errc.org/uploads/upload\\_en/file/5102\\_file1\\_hungary-miskolc-court-decision-october-2018.pdf](http://www.errc.org/uploads/upload_en/file/5102_file1_hungary-miskolc-court-decision-october-2018.pdf).

## 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 Government office (to initiate a petty offence procedure in education). The key principle with regard to the relationship between the different public administrative authorities is that the victim must decide which authority to turn to.

It is possible for a victim of discrimination to initiate a procedure before the Equal Treatment Authority, or any other administrative organ before bringing a lawsuit based on the Civil Code or the Labour Code.<sup>15</sup> If, however, a complainant initiates a case before a court, administrative organs, including the Equal Treatment Authority will have to suspend their proceedings and base their decision on facts as established by the court. The sanctions that may be imposed by the Equal Treatment Authority do not provide the victim with compensation (the fine imposed by the Equal Treatment Authority is paid to the state), so if a complainant wishes to be granted damages as well, they still need to go to court.

As they exist in the legal system, the sanctions can potentially be applied in a proportionate, effective and dissuasive manner. Compliance with the requirements of the EU acquis therefore primarily depends on how the sanctions are used by the courts and authorities. In this regard, there has been some improvement in recent years, as courts have started to move from obliging respondents in general terms to stop discriminatory practices towards prescribing specific measures to be taken.

The ETA guarantees the right of associations to engage, either on behalf of or in support of victims of discrimination: any non-governmental and interest representation organisation with a legitimate interest 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 *actio popularis* claims. 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 was 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>16</sup> Other cases were taken by a foundation aimed at the desegregation of education against public bodies failing to take measures against the segregation of Roma pupils in their schools.<sup>17</sup>

Cases are increasingly brought to the attention of the public. In this regard, there has been a significant improvement in the past few years.

The ETA shifted the burden of proof with regard to all discrimination cases with the exception of criminal and quasi-criminal procedures.

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<sup>15</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).

<sup>16</sup> Decision of the Supreme Court published as Leading Judgment No. BH 2006. 14.

<sup>17</sup> See for instance the case described in Point 1 of the Executive Summary.

Different fields (education, access to goods and services) still operate with different sanctions against discrimination that may be applied by the specific administrative organs in the given field (e.g. the consumer protection inspectorate). Some degree of consistency is provided by the Equal Treatment Authority, which may impose a fine in cases of discrimination regardless of the sector in which 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.

The ETA also introduced statutory acknowledgment of situation testing. The relevant provision expressly authorises the Equal Treatment Authority to conduct testing in the course of its investigations and to take its result into consideration as 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 told the prospective employer by phone that he was 50 years of age. The complaint was confirmed by the Authority's tester when the employer's representative also ended the phone call on hearing his age.<sup>18</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 implemented (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 training sessions, workshops and conferences was held within the framework of a four-year programme supported by the European Commission and the Hungarian state. However, the intensity of the dialogue could not be sustained after the extra funding ended in 2014.

## **6. Equality bodies**

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin (Equal Treatment Authority) was established by the ETA and began operation on 1 February 2005. It is an autonomous public administrative body with overall responsibility for ensuring compliance with the principle of equal treatment. The Equal Treatment 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 may/shall: (i) 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; (ii) initiate lawsuits with a view to protecting the rights of persons and groups whose rights have been violated; (iii) review and comment on drafts of legal acts concerning equal treatment; (iv) make proposals concerning governmental decisions and legislation pertaining to equal treatment; (v) regularly inform the public about the situation concerning the enforcement of equal treatment; (vi) provide information to those concerned and offer assistance in acting against the violation of the principle of equal treatment; (vii) prepare an annual report for Parliament on its activities and its experiences in applying the ETA.

The legal framework guaranteeing the Authority's formal independence has been put in place gradually (as a result of the latest amendment, its President may not be dismissed at any time without justification by the Prime Minister), and after a significant cut in 2010, its financial situation was stabilised again in 2013.

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<sup>18</sup> Case No. EBH/180/2006 of the Equal Treatment Authority.

The Authority has conducted a significant amount of work since its inception. It has emphasised cooperation with the civil sector and the dissemination of information related to non-discrimination. It has handed down some important decisions in cases which can be regarded as particularly sensitive in the atmosphere that prevails in Hungary today.

## 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, 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.
- The special exempting clauses, as they are known, contain certain inconsistencies, unjustified distinctions between certain grounds and wider possibilities for exemption than allowed by the directives, e.g. the new 2018 regulation<sup>19</sup> of genuine and determining occupational requirements may result in a situation where this strict exemption is only applied to recruitment, whereas in other areas of employment a more lenient justification based on reasonability is applied. Depending on judicial interpretation, some provisions of the law governing churches and religion<sup>20</sup> and the National Public Education Act may give rise to a contradiction between domestic and EU law in relation to organisations with a religious ethos, as they provide such organisations with unqualified and unconditional rights to make differentiations in recruitment.
- The exclusion of workers of pension age from a severance payment and the capping by the Labour Code of damages that may be granted in cases where an employee is dismissed in a discriminatory manner may be in violation of the relevant Court of Justice of the European Union (CJEU) jurisprudence.
- The obligation of reasonable accommodation has not been unambiguously transposed into Hungarian law. The problem is especially acute with regard to employing people with disabilities, as the requirement of reasonable accommodation seems to be guaranteed only in relation to the recruitment procedure, but does not prescribe reasonable efforts to adapt the workplace to the special needs of people with disabilities to promote their actual employment.

Further issues of concerns are the following:

- Accessibility to public premises and services is incomplete, although the obligation to provide an accessible environment has been in place for over a decade.
- The degree of segregation of Roma pupils/students in education has been rising steadily. Recent legislative amendments regarding when and how separate education for majority and minority children is allowed and what role denominational schools may play in such arrangements do not seem conducive to reversing these trends.
- The number of cases in which the Equal Treatment Authority establishes discrimination and in which a friendly settlement is reached is still very low compared

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<sup>19</sup> The relevant provision in the ETA was amended by: Hungary, Act L of 2017 on Amending Certain Laws Relevant to the Coming into Effect of the Act on the General Administrative Procedure and the Act on the Code of Administrative Litigation (2017. évi L. törvény az általános közigazgatási rendtartásról szóló törvény és a közigazgatási perrendtartásról szóló törvény hatálybalépésével összefüggő egyes törvények módosításáról), 25 May 2017, <https://mkogy.jogtar.hu/jogszabaly?docid=A1700050.TV>.

<sup>20</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, <https://net.jogtar.hu/jogszabaly?docid=A1100206.TV>.

to the overall number of complaints to the body. The most probable explanation for this is a low level of awareness among the population about the area of non-discrimination and the Equal Treatment Authority's scope of activity, and also the fact that many potential complainants come from marginalised groups who have little ability to assert their rights.

- The Equal Treatment Authority carries out very few *ex officio* procedures, mainly due to a lack of staff (this is problematic precisely because of the above-mentioned low level of awareness and assertiveness on the part of victims). 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:

- After-school education programmes (AEPs) are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programmes to compensate for the fact that schools rarely have the resources to effectively help underprivileged children 'catch up'. An important step in this regard has been the 2018 agreement between the Government and the stakeholders on more reliable funding and a legislative framework for their operation.
- Jurisprudence is evolving when it comes to judicial decisions obliging respondents to end systemic discrimination. Following Judgement No. Pfv.IV.20.085/2017 of the Curia upholding a judicial order to close down a segregated school, Hungarian courts seem to be moving away from the interpretation that they may only declare the existence of systemic discrimination and order in general terms, without specifying the 'how', that the respondent should put an end to the discrimination. In an increasing number of cases, courts have started to prescribe specific measures be taken in order to enforce the requirement of equal treatment.

## INTRODUCTION

### The national legal system

The Hungarian legal system is a continental legal system that primarily follows 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 augmented by laws, while detailed regulation is provided by Government and ministerial decrees. The coherence of the system is guarded by the Constitutional Court, 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 (e.g. criminal law, civil law, labour law, administrative law) with most fields having their own procedural codes.

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

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 applied as points of reference at times if concurring interpretation of domestic law is possible.

### List of main legislation transposing and implementing the directives

The main pieces of legislation transposing and implementing the two directives are the following:

- The Fundamental Law of Hungary (Article XV) – date of adoption: 25 April 2011, grounds covered: all (not specified), material scope: non-discrimination in the provision of fundamental rights;<sup>21</sup>
- Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA) – date of adoption: 28 December 2003, grounds covered: all (open-ended list), material scope: all (not specified);<sup>22</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, grounds covered: disability, material scope: healthcare, education, employment, culture and sports, housing, transportation, access to public services, accessible environment, accessible communication;<sup>23</sup>
- Act I of 2012 on the Labour Code (Labour Code) – date of adoption: 6 January 2012, grounds covered: all, material scope: employment;<sup>24</sup>
- Act V of 2013 on the Civil Code (Civil Code) – date of adoption: 26 February 2013, grounds covered: all (not specified), material scope: all (not specified).<sup>25</sup>

<sup>21</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>22</sup> Hungary, Act CXXV of 2003 on Equal Treatment and the Promotion of 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>23</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>24</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).

<sup>25</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 constitution of Hungary includes the following articles dealing with non-discrimination.

Article XV of the Fundamental Law reads as follows:

- (1) Every person shall be equal before the law. Every human being shall have legal capacity.
- (2) Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other opinion, national or social origin, property, birth or on any other ground.
- (3) Women and men shall have equal rights.
- (4) Hungary shall take special measures to promote the realisation of equal opportunities.
- (5) Hungary shall take special measures to protect children, women, the elderly and persons with disabilities.

Thus, 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 when Constitutional Court jurisprudence is taken into account it can be concluded that all the grounds covered by the directives are included at least implicitly.

In its jurisdiction on the non-discrimination clause in the Old Constitution (which was also open-ended), the Constitutional Court consistently regarded sexual orientation as being one of the 'other grounds'.<sup>26</sup> In its Decision No. 13/2013. (VI. 17.) AB,<sup>27</sup> the Constitutional Court concluded that the old jurisprudence of the Constitutional Court shall apply to the Fundamental Law if the provisions of the Old Constitution and the Fundamental Law are identical or similar from a substantive point of view, and there is nothing in the constitutional context or the particularities of the individual case that would exclude the possibility of such an application. Reading this in conjunction with the old jurisprudence, it seems unambiguous – and it has not been challenged – that Article XV of the Fundamental Law does include sexual orientation (and the same is true for age).

This provision applies to all areas covered by the directives. Its 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 the case in all the areas affected 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.

For a long time, the provisions were regarded as not directly applicable. However, there have been some recent judicial decisions, including one on the state administration's responsibility for the widespread systemic segregation of Roma children (see Section 3.2.8), in which the courts have applied constitutional provisions directly to decide conflicts between competing rights.

<sup>26</sup> In its Decision No. 20/1999 (VI. 25.) on abolishing a discriminatory provision of the Penal Code (rendering certain forms of sexual contact between same-sex siblings punishable, while not rendering them punishable if the siblings are of different sex), the Constitutional Court claimed the following: 'The sole basis of distinction in the case examined is sexual orientation: homosexual siblings are punishable under the law, whereas heterosexual siblings are not. In terms of Article 70/A of the Constitution, this is discrimination based on "other ground"'. Decision available at:

<sup>27</sup> <http://public.mkab.hu/dev/dontesek.nsf/0/1264902F1E6415B7C1257ADA00527C70?OpenDocument>.  
<https://net.jogtar.hu/jogszabaly?docid=A13H0013.AB&txtreferer=A1100162.TV>.



It is debatable 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 the **main legislation** transposing the two EU anti-discrimination directives:

Article 8 of the ETA lists the following protected grounds: a) sex, b) racial affiliation, c) colour of skin, d) nationality (not in the sense of citizenship), e) belonging to a national 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) gender identity, o) age, p) social origin, q) financial status, r) part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, s) belonging to an interest representation organisation, t) any other situation, attribute or condition of a person or group.

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

##### a) Racial or ethnic origin

This term is not defined in national discrimination legislation, and even the terminology used in the ETA and in other relevant legal norms is very diverse. It is not possible, therefore, to provide information separately on racial origin and ethnic origin as interpreted in Hungarian law.

'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' (*nemzetiséghez való tartozás*)<sup>28</sup> and 'nationality' (*nemzetiség*) (not in the sense of citizenship).

There is a statutory definition of only one of these terms: nationality (*nemzetiség*, not in the sense of citizenship), which is set forth in Article 1 of Act CLXXIX of 2011 on the Rights of Nationalities<sup>29</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>30</sup> The other relevant terms have no legal definitions.

This uncertainty in relation to terms is also reflected in case law. In 2012, for instance, in two identical cases (launched because Roma guests were not allowed to enter the respective bars), the Equal Treatment Authority established the occurrence of discrimination on two different bases: in one on the basis of the colour of skin,<sup>31</sup> in the other on the basis of belonging to the Roma national minority.<sup>32</sup> (Since 2013, the Equal Treatment Authority has been consistently using the term 'belonging to a national minority' in Roma discrimination cases.)

<sup>28</sup> The literal translation of the expression 'nemzetiséghez való tartozás' is 'belonging to a nationality' but in practice it is used to cover those people who belong to a national minority within the meaning of Article 1 of Act CLXXIX of 2011 on the Rights of Nationalities. The expression 'nemzetiséghez való tartozás' is therefore translated in the text as 'belonging to a national minority'.

<sup>29</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?dbnum=1&docid=A1100179.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?dbnum=1&docid=A1100179.TV).

<sup>30</sup> Under Annex 1, the Act on Nationalities itself recognises 13 nationalities. These are: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, Ukrainian.

<sup>31</sup> Equal Treatment Authority, EBH/50/2012, 5 January 2012, <http://egyenlobanasmod.hu/hu/jogeset/ebh502012>.

<sup>32</sup> Equal Treatment Authority EBH/117/2012, 22 May 2012, <http://egyenlobanasmod.hu/hu/jogeset/ebh1172012>.

The main reason for the lack of definitions is that, due to the open-ended nature of the list of protected grounds, there is no pressing need to provide definitions or interpret the differences in these terms. For example, the fact that the term national minority is statutorily defined does not mean that persons affiliated with these 13 minorities are in a more advantageous position than others from the point of view of the ETA's application: if a person not belonging to any of the acknowledged nationalities is discriminated against, the protection will be based on Article 8 (b) (racial affiliation) or (c) (colour of skin), or maybe even (t) (other characteristic) of the ETA. This blurs the boundaries between the different concepts and no effort is made to come up with clear distinctions on behalf of either the bodies applying non-discrimination legislation, or the parties involved in such legal disputes.

#### b) Religion and belief

This term is not defined in national discrimination legislation. However, Article 1 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>33</sup> (Act on Churches) provides protection regarding both the forum internum and the forum externum, when it prescribes that no one shall be subjected to any disadvantage because of having, accepting, manifesting, confessing, changing or practising his or her religious belief or conviction.

Religion is not defined by Article 6 of the Act on Churches, but religious activities are. 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 embraces the entire human personality by requiring a specific code of conduct.

It needs to be added that this definition is provided in the context of church recognition, but not in the context of the exercise of the freedom of religion. However, this 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 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'. Definitions are therefore not as important an issue in Hungary as they are in legal systems with a closed list of protected grounds. The issue of what is to be regarded as religion under the ETA has not come up in the jurisprudence.

#### c) Disability

This term is not defined in national discrimination legislation, but some equivalent terms are used and interpreted elsewhere under 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, or 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, attribute or condition') no problems of definition have so far arisen in 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.

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<sup>33</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).

Although no such case has yet been litigated, a problem may arise in relation to reasonable accommodation, which is governed by 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.

d) Age

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

e) Sexual orientation

This term is not defined in national discrimination legislation or in any other legal norm, nor is the author aware of any case law where Hungarian courts attempted to provide a definition for the term.

### 2.1.2 Multiple discrimination

In Hungary, multiple prohibition is not *expressis verbis* prohibited in the law, but it is possible to sanction multiple discrimination.

In Hungary, the following case law deals with multiple discrimination.

In a recent case,<sup>34</sup> the Equal Treatment Authority dealt with multiple discrimination. The case concerned discrimination based on gender and maternity. While these characteristics fall outside the scope of this report, the case is worth mentioning from the perspective of multiple discrimination.

The case was initiated by four complainants, all blue-collar workers and mothers with one or more children under the age of 12, against their employer. They took the case because the employer's 'thirteenth month salary' policy that applied to blue-collar workers was based solely on the employees' actual presence in the workplace. According to the Hungarian legal norms, a parent is entitled to stay home with his or her sick child. The complainants stated that because of their children's illnesses, they had to stay home with them for so many days that they were not present in the workplace for the required number of days that would have qualified them for a 'thirteenth month salary'. They claimed that the policy had a disparate and unfair effect on them as women and parents. Having examined the statistical data on 'thirteenth month salaries', the Equal Treatment Authority concluded that women with children were deprived of the extra month's salary disproportionately more than any other employee in a comparable situation (women without children, men with children, men without children), i.e. the policy put those parents who were also female at a considerably greater disadvantage than those in a similar situation who were not female. The Authority held that, in this case, the effect of two characteristics (having children and being a woman) was cumulative and persons to which both characteristics applied were discriminated against.

While it did not impose a fine, it obliged the employer to adopt a 'thirteenth month salary' policy that was not discriminatory.

In another case, three female complainants of Roma origin turned to the Equal Treatment Authority, claiming that the mayor of the neighbouring municipality who employed them as public workers regularly made demeaning remarks about them, referring to their gender and using obscene language, and that he made unwanted physical advances, embracing and touching them against their will. The complainants also complained about the working conditions and tasks assigned to them. They said that they had to clean a ditch containing sewage water and animal waste, and they also had to stand outside in the rain for hours

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<sup>34</sup> Equal Treatment Authority, EBH/130/2017, 7 August 2017, <http://egyenlobanasmod.hu/hu/jogeset/ebh1302017-0>.

waiting for the mayor's instructions. The complainants put up with these atrocities because in the absence of any prospect of long-term employment, they were financially dependent on the income, and they had to support their young children. Finally, the complainants claimed that because they had rejected the mayor's advances, they were ultimately dismissed.

Although the complainants based their complaint solely on gender, the Equal Treatment Authority concluded that the harassment they had suffered was also connected to 'another characteristic' of the complainants, namely their vulnerable financial situation, as the mayor could harass the petitioners because of this vulnerable position. The Equal Treatment Authority also found it significant that the petitioners were of Roma ethnic origin. In that context, during the hearings, one of the complainants cited a comment by the mayor in which he suggested that since the petitioners were Roma, their word was worth 'nothing' compared to his. The Authority concluded that all of these characteristic features (gender, Roma origin, vulnerable social status) combined to form part of the basis of the mayor's behaviour towards them. The Authority imposed a fine of EUR 940 (HUF 300 000) on the municipality. According to a summary of the case, when determining the scale of the fine, the Authority took into account the fact that the complainants were discriminated against on the basis of multiple grounds.<sup>35</sup>

### **2.1.3 Assumed and associated discrimination**

#### **a) Discrimination by assumption**

In Hungary, discrimination based on a perception or assumption of a person's characteristics is prohibited under national law.

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 (not in the sense of citizenship), belonging to a national minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, other situation, attribute or condition (hereinafter collectively referred to as 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(1)(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'.

The equality body and the courts apply the standard methods of gathering and assessing evidence when determining the perpetrators' assumptions. An example is provided by a case decided by the Equal Treatment Authority, in which the employer harassed the complainant and a colleague of his due to their assumed homosexual orientation. In the case, the complainant proved the existence of the assumption with witnesses who could testify to the employer's statements at different meetings, and a recording of one staff meeting where he asked the employer why the employer thought that they were gay and whether this was the reason for the increasingly hostile working environment.<sup>36</sup>

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<sup>35</sup> Equal Treatment Authority, EBH/467/2016, 30 December 2016. Description of the case based on Equal Treatment Authority (2018), *EBH Booklet 5 – Multiple discrimination in the Equal Treatment Authority's case law*, Budapest, Equal Treatment Authority, pp. 39-40, case summary available at: <http://www.egyenlobanasmod.hu/hu/jogeset/ebh4672016>.

<sup>36</sup> Equal Treatment Authority, EBH/985/2010, date and link not available.

## b) Discrimination by association

In Hungary, discrimination based on association with persons with particular characteristics is not expressly prohibited under national law. Nonetheless, Article 8(t) (other situation, attribute or condition) provides protection for those discriminated against on the basis of association with members of a particular group.

The national law is in line with the judgment in *Coleman v. Attridge Law and Steve Law*, case C-303/06, handed down by the European Court of Justice.

An example is provided by Case No. 72/2008 decided by the Equal Treatment Authority.<sup>37</sup> The applicants stated that they had been regularly charged a higher price than other customers in a bar because of their Roma origin; one of the applicants stated that she received this treatment 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 of 'other characteristic' (association with a Roma person) in relation to the non-Roma applicant.

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

The Authority takes this recommendation into account. For instance, in Case No. EBH/23/2011,<sup>38</sup> the complainant claimed that her employer had terminated her contract during her probation period, because she had to take a leave of absence due to her two-year-old child's illness. The employer's defence was that both parties could 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.

The equality body and the courts apply the standard methods of gathering and assessing evidence when determining whether the discriminatory treatment was based on the victim's association with a third person (or group).

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

### a) Prohibition and definition of direct discrimination

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

As mentioned above, the definition of direct discrimination is set out in 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 (not in the sense of citizenship), belonging to a national minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, other situation, attribute or condition (hereinafter collectively referred to as characteristics) is

<sup>37</sup> Equal Treatment Authority, EBH/72/2008, 25 April 2008, link not available.

<sup>38</sup> Equal Treatment Authority, EBH/23/2011, February 2011, link not available.

treated less favourably than another person or group is, has been or would be treated in a comparable situation.

Both the Equal Treatment Authority and the courts regularly apply the concept of direct discrimination, and the application of this concept has become more or less unproblematic since the ETA came into force over 15 years ago. Some recent examples are listed below.

A Roma man filed a complaint with the Equal Treatment Authority, because when he was looking for an apartment to rent, the real estate agency provided him with a list of apartments meeting his demands concerning size and location, but some of the apartments in the list had a 'No Roma' remark attached to them. The Authority concluded that direct discrimination had taken place, banned the company from future violations, imposed a fine of EUR 310 (HUF 100 000) on the respondent, and published the decision on the Authority's website.<sup>39</sup>

In January 2017, Atlasz LGBTQI Sports Club contacted a swimming pool and sports complex with a request to rent out two lanes in the swimming pool for their event, the Annual Atlasz Sports Day. The company confirmed the availability of the two lanes via email, but when it found out that Atlasz was an LGBTQI sports club, it withdrew the confirmation. The sports club initiated an administrative procedure with the Equal Treatment Authority. In the course of proceedings, the company argued that the refusal was not based on sexual orientation or gender identity associated with Atlasz Sports Club, but that the pool was overbooked and Atlasz insisted on bringing in its own swimming instructor, which was not allowed by the pool's house rules. The Equal Treatment Authority found that neither the pool's occupancy nor ticket sales data supported the company's argument concerning overbooking. It also found that the house rules had been modified to exclude external swimming instructors only after the proceedings before the equality body had started. The Equal Treatment Authority therefore held that the company committed direct discrimination against the sports club on the basis of its members' sexual orientation. It imposed a fine of approximately EUR 3 125 (HUF 1 000 000) on the company and ordered that its decision be published on the Authority's and the company's website.<sup>40</sup> The company sought a judicial review of the decision, but in its judgment of 11 July 2018, the Metropolitan Court upheld the Authority's decision.<sup>41</sup>

In a third case, the visually impaired complainant was not allowed to enter a museum with his guide dog despite the clear legal provisions prescribing the access of guide dogs to various institutions, including public institutions. The Equal Treatment Authority concluded that discrimination had taken place, banned the museum from continuing the violation, ordered that the house rules banning guide dogs be amended and adequately publicised on the premises, and ordered the publication of its decision for 45 days.<sup>42</sup>

#### b) Justification for direct discrimination

Article 7(2) and (3) of the ETA contain the general exempting clause for 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 affected by the differentiating behaviour. The provision reads as follows:

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<sup>39</sup> Equal Treatment Authority, Decision No. EBH/70/2018, 9 January 2018, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh702018>.

<sup>40</sup> Equal Treatment Authority, Decision No. EBH/199/2018, July 2018, <http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh1992018>.

<sup>41</sup> Judgment of the Metropolitan Court (reference number not available), 11 July 2018, <http://hatter.hu/hirek/a-birosag-szerint-is-diszkriminalta-az-uszoda-az-lmbtg-sportegyesuletet>.

<sup>42</sup> Equal Treatment Authority, Decision No. 115/2018, 12 January 2018, <https://www.egyenlobanasmod.hu/hu/jogeset/ebh1152018>.



(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 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 b)-e) of Article 8 [racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority].

The explanation for the differentiation set out in Paragraph (3) is that when the Hungarian legislature 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, it removed the relevant grounds from the scope of Article 7(2) of the ETA.

However, the same has not been done with regard to the grounds listed in Directive 2000/78. By not doing so, the legislature 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 genuine and determining occupational requirement (GOR) and religious ethos provisions, 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 remove these grounds completely from the scope of Article 7(2) of the ETA.

The differentiation between a) and b) in 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>43</sup> it became necessary for the court to establish 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>44</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 the Hungarian legislature 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 in applying 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 an equal footing with other passengers), and hence the violation of his human

<sup>43</sup> Constitutional Court, 61/1992 (XI. 20.) AB határozat, 20 November 1992, <http://public.mkab.hu/dev/dontesek.nsf/0/7F28814984A06851C1257ADA00526FCE?OpenDocument>.

<sup>44</sup> Constitutional Court, 35/1994. (VI. 24.) AB határozat, 24 June 1994, <http://public.mkab.hu/dev/dontesek.nsf/0/5668A96A2701F0DBC1257ADA005276E5?OpenDocument>.



dignity. He lost the suit on both instances and his request for review by the Curia was also rejected.

In its Review Decision No. Pfv.IV.20.104/2013/4 dated 19 June 2013, the Curia<sup>45</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(2) of the ETA. Although there is a conflict between fundamental rights (the claimant's right to an accessible environment, and, more generally, to human dignity on the one hand, and the right to free movement by 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 a), but instead on the basis of 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 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(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 out in a), and can only apply the test of reasonability if no such restriction is involved in the case.

The relationship between this general justification and the Hungarian versions of the special exceptions stipulated by the directives 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 out in Article 7(2).

The ministerial comments attached to Act CIV of 2006 on the Amendment of the ETA<sup>46</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 under national law.

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

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<sup>45</sup> Curia, Pfv.IV.20.104/2013/4, 19 June 2013, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>46</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, <https://mkogy.jogtar.hu/?page=show&docid=a0600104.TV>.

Act CXXX of 2016 on the Code of Civil Procedure<sup>47</sup> is silent on the issue of situation testing, but based on its Article 263(1) (which claims that the court 'may freely rely on the testimonies of the parties and 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 do in fact use evidence originating from situation testing.

#### b) Practice

In Hungary, situation testing is used in practice.

Situation testing is used primarily by the Equal Treatment Authority. An example is provided by Case No. EBH/502/2012, in which the complainant applied for a position as a cleaner via telephone. When he stated his age, the employer's representative said: 'in that case, no'. In order to gather evidence, the Authority used situation testing: the 50-year-old tester called the employer, and when he stated his age, the employer's representative hung up the phone. The case ended with a friendly settlement: the employer apologised and promised to respect the requirement of equal treatment in its future recruitment procedures. The complainant accepted the apology.<sup>48</sup>

The results of situation testing are also accepted as evidence by the courts. In 2009, the Legal Defence Bureau for National and Ethnic Minorities (NEKI) filed a complaint with the Equal Treatment Authority, because it had received information that persons of colour were regularly refused service in a pub. It carried out situation testing, which confirmed the allegations. In its Decision No. EBH/416/2010, the Authority concluded that the pub engaged in a discriminatory practice of denying service to persons of colour. It obliged the pub to put an end to this practice and imposed on it a fine of EUR 1 560 (HUF 500 000).<sup>49</sup>

Following this decision, three of the refused guests sued the pub for damages. In its first instance judgment, the Metropolitan Court found in their favour and obliged the pub to pay each of them non-pecuniary damages in the amount of EUR 1 875 (HUF 600 000). In the procedure, the respondent argued that the testing result was questionable. The court rejected this argument and concluded that, while the testing was not a decisive piece of evidence in relation to the actual cases when the claimants themselves had been refused service, the testing result confirmed that these cases had not been isolated incidents based on a misunderstanding (which was the respondent's defence).<sup>50</sup> The court of second instance upheld the decision in full.<sup>51</sup>

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

#### a) Prohibition and definition of indirect discrimination

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

Article 9 of the ETA states: '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 a 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.'

<sup>47</sup> Hungary, Act CXXX of 2016 on the Code of Civil Procedure (2016. évi CXXX. törvény a polgári perrendtartásról), 2 December 2016, <https://net.jogtar.hu/jogszabaly?docid=A1600130.TV>.

<sup>48</sup> Equal Treatment Authority, EBH/502/2012, 16 October 2012, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh5022012>.

<sup>49</sup> Equal Treatment Authority, EBH/416/2010, 25 May 2010, <http://egyenlobanasmod.hu/hu/jogeset/ebh4162010>.

<sup>50</sup> Metropolitan Court, Judgment No. P.25969/2008/21, 4 May 2011.

<sup>51</sup> Metropolitan Appeals Court, Judgment No. 2.Pf.21.375/2011/4, 26 January 2012.

Both the Equal Treatment Authority and the courts regularly apply the concept of indirect discrimination. One recent example is an *actio popularis* case won (in the first instance) by the European Roma Rights Centre (ERRC).

In a decision of October 2018, the Miskolc Regional Court ordered the town's hospital to 'cease the practice of charging for mandatory maternity clothing for friends and family members of pregnant mothers.'<sup>52</sup>

The Court agreed with the European Roma Rights Centre's arguments that this practice directly discriminates against mothers living in poverty, and indirectly discriminates against Romani mothers who are disproportionately affected and often forced to give birth alone.

The hospital policy meant the companions of women giving birth had to wear a 'maternity garment' for hygiene purposes. This could only be purchased from the hospital for a price that was too expensive for low-income families in an underdeveloped region of Hungary where there is a high density of Romani families. The hospital claimed that their policy was to ask companions to offer a donation to the hospital's foundation in exchange for the maternity clothing. However, a survey carried out by a local organisation found that in practice, this donation was obligatory, and forced Romani mothers who were unable to pay to give birth alone. [...]

The court agreed in the first instance with the ERRC's requests for the immediate termination of this practice, [issued an] order to prohibit the hospital to continue it in future, and to pay a public [interest] fine [in the amount of EUR 15 625 (HUF 5 million)] calculated based on the number of births in the last two years and the estimated income from selling maternity garments.<sup>53</sup>

#### 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 pointed out above, Article 7(2) of the ETA states: '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 a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation.'

As 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 type of exemption covered by a), it can be said 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 types of exemption covered by b), it can be said that the 'objective reasonability' of the ground for differential treatment is obviously a test that is less strict

<sup>52</sup> Miskolc Regional Court, Judgment No. 10.P.22.249/2017/19, 15 October 2018, available at: [http://www.errc.org/uploads/upload\\_en/file/5102\\_file1\\_hungary-miskolc-court-decision-october-2018.pdf](http://www.errc.org/uploads/upload_en/file/5102_file1_hungary-miskolc-court-decision-october-2018.pdf).

<sup>53</sup> <http://www.errc.org/press-releases/errc-ends-discriminatory-hospital-charges-affecting-romani-mothers>.

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.

### 2.3.1 Statistical evidence

#### a) Legal framework

In Hungary, there is legislation regulating the collection of personal data.

According to Article 3 of Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information<sup>54</sup> (Data Protection Act), 'personal data' shall mean any data relating to a 'data subject', where a data subject is a natural person identified or identifiable on the basis of any information. Under Article 4, in the course of data processing, such data shall be considered to remain personal for as long as their relation to the data subject can be restored.

'Sensitive data' mean all data included in the special subcategories of personal data, such as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership. Also included are genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

Hence, data related to the ethnic or racial origin, disability, religion or belief or sexual orientation all belong to this special category. This is significant, since in terms of Article 5 of the Data Protection Act, the collection of such data is forbidden, unless

- processing is prescribed by law or decreed by a municipal council based on authorisation conferred by law with the aim of performing a task carried out in the public interest;
- processing is necessary and proportionate for protecting the vital interests of the data subject or of another person, or in order to prevent or avert an imminent danger posing a threat to the lives, physical integrity or property of persons;
- processing relates to data which are manifestly made public by the data subject and it is necessary and proportionate for the purpose of the data processing;
- processing is strictly necessary and proportionate for the implementation of an international agreement promulgated by an act of Parliament, or if prescribed by law in connection with the enforcement of fundamental rights afforded by the Fundamental Law, or for reasons of national security or national defence, or law enforcement purposes for the prevention, investigation or prosecution of criminal activities.

The practical result of these strict data protection rules is that public authorities have ceased collecting data concerning the sensitive grounds. This is obviously very detrimental from the point of view of monitoring discrimination in different areas of life. For instance, the latest official data concerning the numbers of Roma children in education date from 1993.

Under the General Data Protection Regulation,<sup>55</sup> the processing of personal data for scientific and statistical purposes is still allowed. However, this does not solve the problem,

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<sup>54</sup> Hungary, Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information (2011. évi CXII. törvény az információs 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).

<sup>55</sup> European Union, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

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. As a result, they need to make a serious effort to collect the data directly from data subjects. This of course makes such research very expensive and time-consuming, so national surveys are very rare. This in turn poses a major obstacle when assessing countrywide trends and problems and designing positive measures.

Various actors (both researchers and legislators) are forced to circumvent the problems created by the lack of data in different ways. An example is provided by the educational measures aimed at assisting 'disadvantaged' and 'multiply disadvantaged' pupils (see Section 3.2.8 for more details). While it is common knowledge that Roma children are highly over-represented among such pupils, the measures are formulated in terms of social characteristics and financial situation, and not as measures based on ethnicity. This approach may be explained by the intention to generate as little social tension as possible, while achieving the same goal, 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 available).

However, there are certain instances where sensitive data are officially collected, the most obvious being the regular censuses. The last census took place in 2011. According to Act CXXXIX of 2009 on the 2011 Census,<sup>56</sup> answering 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 about 9 938 000 citizens:

- about 8 314 000 declared themselves to be Hungarian, about 309 000 claimed affiliation with the Roma minority, and about 1 456 000 refused to answer;
- about 3 872 000 declared themselves Catholics, about 1 806 000 declared that they did not belong to any denomination, and about 2 700 000 refused to answer (this latter number had increased significantly since the 2001 census when only about 1 035 000 persons refused to answer this question);
- about 456 600 stated that they lived with a disability and about 1 648 400 claimed that they suffered from a long-term illness.

Census data do not always provide reliable information about the number of certain minority groups. For instance, although Roma activists conducted a solid campaign to convince Roma people to declare their Roma ethnicity during the 2011 census 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 significantly below the estimated number of Roma in Hungary.

There are also certain special measures – positive actions – which make it necessary to conduct some form of data collection.

*Ethnic origin in education:* The education system for minorities in Hungary is complex. According to Article 22(3) of the Act on Nationalities, based on the decision of their parents, children belonging to a nationality (not in the sense of citizenship, but in the sense of belonging to a recognised national minority) may receive (i) education in their mother tongue; (ii) bilingual education; (iii) Hungarian language education within the framework of which their 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 2016/2017 school year, 23 599 Roma,

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<sup>56</sup> Hungary, Act CXXXIX of 2009 on the 2011 Census (2009. évi CXXXIX. törvény a 2011. évi népszámlálásról), 15 December 2009, [http://www.ksh.hu/nepszamlalas/docs/jog/2009\\_evi\\_cxxxix\\_tv.pdf](http://www.ksh.hu/nepszamlalas/docs/jog/2009_evi_cxxxix_tv.pdf).

50 344 German, 1 078 Romanian and 3 697 Slovak pupils participated in primary minority education.<sup>57</sup>

Expert panels have recently begun to collect ethnic data when placing children with slight intellectual disabilities in special schools. The reason for this is that 'auxiliary schools' established for children with intellectual disabilities are often 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). For the purpose of collecting data on this subject, Act CXC of 2011 on National Public Education<sup>58</sup> (National Public Education Act) was amended in July 2014 to authorise expert panels (who decide on the placement of the children in special schools) to collect data concerning the ethnic affiliation of the child (based on the voluntary decision of the parent to answer this question) [Article 41(4a)].<sup>59</sup>

*Ethnic origin for the purposes of the election 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 minority's language and traditions.

Under Articles 86-87 of Act XXXVI of 2013 on the Election Procedure<sup>60</sup> (Election Procedure Act), any voter can request to be registered as a minority voter by filing a request with the National Election Office. This request must include (i) the national minority that they are a member of; (ii) a statement from the voter that they are affiliated with that national minority; and (iii) a statement from the voter on whether they wish to be regarded as a minority voter only in relation to minority self-government elections or also in relation to general elections (in which case they will not be eligible to vote on party lists at 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:* According to 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>61</sup> employers shall be obliged to pay a 'rehabilitation contribution' to the state budget if they have more than 25 employees and the proportion of persons with disabilities (persons who have officially been recognised as having an 'altered ability to work') within the workforce is below 5 %. This system naturally requires that records be kept of employees' disabilities. Accordingly, Article 23(7) of Act CXCI of 2011 stipulates that employers employing persons with disabilities shall keep records containing, among other information, 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 their health status deteriorated. The employer shall also keep copies of the documents proving these facts. Records and copies shall be preserved for five years after the end of the employment relationship.

<sup>57</sup> <http://www.kormany.hu/download/5/0a/81000/K%C3%B6znevel%C3%A9s-statisztikai%20%C3%A9vk%C3%B6nyv-2016-%C3%BAj.pdf>.

<sup>58</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>59</sup> This amendment was made 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>60</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>61</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).



*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 as a sensitive subject in Hungary, so a lot of statistics can be found on age-related issues. This is the only ground on which data may be collected without any difficulty.

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

Pursuant to Article 263(1) of the Code of Civil Procedure, the court 'may freely rely on the testimonies of the parties and any type of evidence that is useful for establishing the facts of the case'. Under Article 63(2) of Act CL of 2016 on the General Administrative Procedure<sup>62</sup> (GAP), 'in the proceedings of authorities all evidence may be relied on which is useful for 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 is used in practice to establish indirect discrimination.

Generally, there seems to be no reluctance to use statistical evidence. A decision by the Supreme Court in the Hajdúhadház case<sup>63</sup> has definitively 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.

*Dismissal of civil servants:* Civil servants dismissed from the regional office of a central administrative body filed a complaint with the Equal Treatment Authority, claiming that the large-scale dismissal 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 workforce reduction, the central organ demanded that the persons to be dismissed be selected in a way that the average budgetary saving per dismissed person would reach a certain monetary limit (approximately EUR 490 (HUF 147 600) per month). In the view of the complainants, by determining the minimum saving to be achieved per person, the employer practically restricted the circle of potentially 'dismissible' persons to highly qualified, middle-aged employees. (Civil servants' salaries are determined by their qualifications and length of service, which is obviously connected to their age.)

The Equal Treatment Authority examined whether discrimination on each ground (qualification and age) could 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 number and age distribution of all civil servants employed before the reduction, and the number 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 workforce (82.9 %). The question may be raised, however, on what basis the Authority drew the line at this age.

*The Rimóc case:*<sup>64</sup> This case concerned complaints about police action disproportionately targeting Roma. By conducting a statistical analysis of police fines, the Hungarian Helsinki Committee demonstrated that, while Roma people accounted for approximately 25 % of

<sup>62</sup> Hungary, Act CL of 2016 on the General Administrative Procedure (2016. évi CL. Törvény az általános közigazgatási rendtartásról), 14 December 2016, <https://net.jogtar.hu/jogszabaly?docid=A1600150.TV>.

<sup>63</sup> Supreme Court, Pfv.IV.20.936/2008/4, 19 November 2008, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>64</sup> Equal Treatment Authority, EBH/190/2012, <http://egyenlobanasmod.hu/hu/jogeset/ebh1902012>.

the village's population, 35 of the 36 fines issued for missing bicycle accessories were imposed on persons who (based on their name, mother's name, address) were likely to be of Roma origin. The organisation managed in this way to substantiate the claim that the police practice of imposing fines was ethnically disproportionate. The case ended with a friendly settlement in which the police agreed to ensure officers received non-discrimination training and provide data on fines for two more years.

*The Hajdúhadház case:*<sup>65</sup> In an *actio popularis* case initiated by the Chance for Children Foundation, statistical evidence was used and accepted by the court to prove segregation. The Chance for Children Foundation launched a claim against the local council of Hajdúhadház and the two primary 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 %, respectively), whereas in the supplementary buildings the proportion of Roma pupils was very high (86 % and 96 % in one school, and 100 % in the other). In the case of both schools, the central building was much better equipped than the supplementary buildings, where no gymnasium, library, computers or specialised classrooms could be found.

The above percentages 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 should 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 could be established with certainty, as well as an estimate as to the remaining number of Roma pupils. The court expressly requested the expert to also take into consideration those pupils who may be assumed to be Roma by the majority population.

The court accepted the percentages 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 under national law. It is defined.

Under Article 10(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'.

A recent example is Decision No. EBH/362/2018 of the Equal Treatment Authority. The complainant and his same-sex partner were sitting in a bar talking, and they kissed each other a few times. After about half an hour, the restaurant's security guards went up to them and told them to stop kissing, 'because this is not a place like this, you cannot do this here'. The guards referred to complaints from other guests, but there was hardly anyone in the bar. After the warning, the complainant and his partner drank up and left. The Authority concluded that, as persons acting on behalf of the bar, the guards had committed harassment based on the complainant's sexual orientation and prohibited the venue from committing further violations.<sup>66</sup>

<sup>65</sup> Supreme Court, Pfv.IV.20.936/2008/4, 19 November 2008, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>66</sup> Equal Treatment Authority, Decision No. EBH/362/2018, 5 November 2018, <http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh3622018>.



In Hungary, harassment explicitly constitutes a form of discrimination.

Article 7(1) of the ETA lists the behaviours violating the requirement of equal treatment. These are the following: direct and indirect discrimination; harassment; segregation; victimisation; instruction to engage in the above-named 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, it was uncertain for some time whether harassment can be committed against a group within the meaning of the ETA. The issue was settled by the Curia based on a reading of both Article IX(5) of the Fundamental Law and Article 1 of the ETA. In a case concerning anti-Roma statements made publicly by a town mayor, the Curia concluded 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 Law. It also concluded that if such inciting statements could not be sanctioned, it would contradict the objectives defined by these laws.<sup>67</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. According to Article 2:42(2) of the Civil Code, everyone shall respect human dignity and the inherent personal rights<sup>68</sup> stemming therefrom.

It follows therefore 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 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 goods; (iii) entrepreneurs, companies and other private legal entities availing themselves of state support; and (iv) employers (in the broad sense). In contrast, 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 the liability for damages, as described in the following subsection.

#### b) Scope of liability for harassment

In Hungary, in cases where harassment is perpetrated by an employee, 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 the employer fails to react to a complaint of harassment by an employee. However, employees can also be held liable under Article 2:42 of the Civil Code, which contains a 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, under Article 6:540 of the Civil Code, employers and not workers can be held liable for damage 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 or her own initiative.

While, in theory, the employer may reclaim part of the damages paid to the complainant from the employee, this rarely happens in practice. However, employees who harass others

<sup>67</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).

<sup>68</sup> 'Inherent' personal rights are rights that are inalienably attached to the human personality.

may face other legal consequences within the framework of labour law: according to the Labour Code, they can be held liable at their workplace 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 under national law. Instructions are not defined.

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

In Hungary, instructions 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 sanctions only apply 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, and is defined, but the provision is not unproblematic.

The term 'reasonable accommodation' expressly appears in the Labour Code. However, in the author's opinion, the duty of reasonable accommodation is still missing from the Hungarian system with regard to very important aspects of access to employment, while the obligation is more or less in place in relation to other aspects of employment. A short summary below outlines the relevant provisions that substantiate this opinion.<sup>69</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 occurs when a person with a disability is employed at a workplace where the decisive majority of their co-workers are not persons with disabilities.)

Under Paragraph (2), the employer employing a person with a disability is obliged to provide accommodation at the workplace to the extent necessary for the performance of the work, i.e. in particular to ensure the appropriate refurbishment of tools and machines. Support from the central budget can be requested to cover the expenses incurred by refurbishment. (Based on the text of the law, the employers of any employees with disability would be entitled to request such support. However, the relevant bylaws envisage such support only for employers of employees who have officially been recognised as

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<sup>69</sup> The European Commission seems to have a different view since it closed infringement procedures against Hungary concerning Directive 2000/78/EC on 28 January 2010.

persons with an altered ability to work.) The provision does not contain any reference to the issue of disproportionate burden.

The law refers to the adaptation of the 'workplace environment' (*munkahelyi környezet*). If this term is interpreted from a strictly semantic point of view, it does not contain accommodations such as alternative procedures, reallocation of tasks or a transfer to another position.

It is possible that the labour courts would be willing to accept a wider interpretation that would include the above-mentioned forms of accommodation. However, there is no case law on the basis of which this question could be answered positively.

Furthermore, if the text is interpreted literally, the conclusion shall be that if an employer does employ someone with a disability, the employer is obliged to take measures aimed at reasonable accommodation but only after the person with a disability gets the job. With regard to access to employment, the RPD Act states only 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 a person with a 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>70</sup> amended the RPD Act as of 1 January 2008, adding two paragraphs. Under Paragraph (3), the employer shall be obliged to provide an accessible environment in the course of the recruitment procedure in order to enhance the access to employment of persons with disabilities.

Paragraph (4) states that this obligation shall be imposed on the employer if (a) the employer publicly advertised the vacancy; (b) when applying for the job, the person with a disability states their special needs relating to the job interview; and (c) the accommodation of 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 it impossible for the employer to continue operating.

In summary, if the text of the law is interpreted 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 stipulate 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 a situation could arise in which employers could be required to make any accommodation irrespective of the burden it poses on them).

Nor is the ambiguity resolved by the Labour Code. Under Article 51(5) of the Labour Code, 'when employing a person with a disability, the employer shall guarantee conditions for reasonable accommodation'.

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<sup>70</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).

In any case, based on the indirect effect of the anti-discrimination directives, it would most likely be possible for a person with a disability to act against a rejection that is based by the employer on the difficulties the employer would face in making a reasonable accommodation. However, it may be advisable in all cases 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 Directive 2000/78/EC.

Under Article 19(4) of Act XCIII of 1993 on Work Safety<sup>71</sup> (Work Safety Act), in relation to the creation of workplaces where employees with physical disabilities are employed, the physical environment (accommodation) must suit the changes in the character of the human body.

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

Thus, the Hungarian legal framework contains the obligation to accommodate the needs of persons with disabilities in the course of the recruitment procedure, and also to adapt the working environment to the needs of employees with disabilities who are already employed there. However, the legislation does not expressly state that the employer shall be obliged to adapt the working environment to the special needs of a person with a disability with a view to actually employing that particular person.

b) Practice and case law

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 it might not be possible for them 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) Failure to meet the duty of reasonable accommodation for people with disabilities

In Hungary, failure to meet the duty of reasonable accommodation in employment for people with disabilities does count as discrimination.

The detailed rules concerning reasonable accommodation in employment for persons with disabilities and the limitations of the legislation are described in detail above, under a).

While the failure to meet the duty of reasonable accommodation is not expressly regulated as a form of discrimination, it is sometimes regarded as such in practice (see e) below for

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<sup>71</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).

some examples). The logic behind the jurisprudence is outlined in Guideline No. 309/1/2011. (II.11.) TT issued by the Equal Treatment Advisory Board, which established that 'the failure to guarantee accessibility to 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 their access to services.'<sup>72</sup>

So, where there is a statutory obligation to provide reasonable accommodation, failure to meet this obligation 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 a disability), the failure to meet the obligation cannot be sanctioned by 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. a fine by the Equal Treatment Authority, damages awarded by the labour or civil court). For a 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). This would then place the burden on 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, it must be noted 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.

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

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

Examples of reasonable accommodation duties can be found in the area of education. Under Article 24(3) of Government Decree 423/2012 on the Admission Procedure of Universities,<sup>73</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 stipulates 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) states 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 'children with special educational needs', i.e. children who, under Article 4 of the National Public Education Act, 'are diagnosed by the specialised expert panel to have a locomotor, sensory, mental or speech disability, multiple disabilities, autism spectrum disorder or any other psychological development disorder (severe disorder of learning, attention or behaviour), and therefore require special attention'.

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<sup>72</sup> <http://www.egyenlobanasmod.hu/hu/jogszabaly/tanacsado-testulet-30912011-ii11tt-sz-allasfoglalasa-az-akadalymentesitesi>.

<sup>73</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).

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 (specialist teacher, speech therapist, conductive educator, etc.) with 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 as, under Paragraph 10 of the Article, the required specialist may be provided through the network of travelling specialist and conductive teachers. This network, as specified by Article 15/A, is operated by the regional state centre responsible for maintaining schools.

The Equal Treatment Authority has dealt with cases 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. In one case, for example, 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 fact that the child was not toilet-trained. In the settlement, the parties agreed that the parent would stay 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 was not toilet-trained.<sup>74</sup>

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

An example of healthcare-related case law is provided by Case No. EBH/10/2013 decided by the Equal Treatment Authority. It was an *actio popularis* claim against a healthcare institution that refused to provide stomatology treatment to HIV-positive patients and patients suffering from hepatitis and instead sent them to another hospital for treatment. The institution tried to defend its practice by referring to the fact that the extra protective measures it would need to take in order to treat such patients alongside other patients (and in this sense accommodate the specific needs stemming from their health status) would impose a disproportionate financial burden on the institution. 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>75</sup>

A housing case was initiated by a woman living in social housing with her two sons, both of whom had autism and one of whom also suffered from a serious kidney illness. The flat they were provided with 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 child's condition (e.g. housing that had an indoor toilet) 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. The case was finally closed with a friendly settlement after the municipality promised to provide the family with a two-room apartment (including a full bathroom) in a better state of repair.<sup>76</sup>

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<sup>74</sup> Equal Treatment Authority, EBH/121/2015, 16 February 2016, <http://www.egyenlobanasmod.hu/en/jogeset/ebh1212015>.

<sup>75</sup> Equal Treatment Authority, EBH/10/2013, March 2013, <http://www.egyenlobanasmod.hu/en/jogeset/ebh102013>.

<sup>76</sup> Equal Treatment Authority, EBH/934/2008, no date is available, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh9342008>.

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

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

### **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. 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 equal account shall be taken of individual features'. Thus, all natural persons fall under the ETA's protection irrespective of nationality/citizenship. This includes irregular migrants. This does not mean that the fact that someone is an irregular migrant cannot result in the justification of differentiation, e.g. because this fact makes the irregular migrant's situation not comparable to that of another person, or because the irregularity of his or her stay may be regarded as a reasonable ground for the differentiation. However, as a general rule, irregular migrants, as natural persons who are under Hungarian jurisdiction, are also protected by the ETA.

##### **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.

As mentioned 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 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 protection against the violation of inherent personal rights (which include the right to non-discrimination) apply to legal persons unless, due to the nature of the protection, it is limited to natural persons. For the purposes of protection, therefore, legal persons are generally 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.

For historical reasons, the ETA primarily lists (mostly public) legal entities in relation to liability. 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 the 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 to the public. The third group includes entrepreneurs, companies and other private legal entities (including educational institutions and their maintainers) availing of 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 the 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 those operations 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 that the ETA does not enumerate the fields falling under its scope: it approaches the issue of material scope from the perspective of personal scope when it says that the entities enumerated in Article 4 (see the 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 extends 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.

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

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

Nevertheless, the ETA puts special emphasis on five sectors, in relation to which special rules (e.g. special exempting provisions) are formulated. These sectors are: employment (Articles 21 to 23); social protection and healthcare (Articles 24 to 25); housing (Article 26); education and training (Articles 27 to 29); and access to goods and services (Articles 30 and 30/A). However, this does not mean that the requirement of equal treatment shall be respected only in these fields 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, the ETA is in breach of the *acquis* in the sectors included in the material scope of the directives as it does not prescribe the obligation of non-discrimination for all private actors. This omission is not compensated for by the fact that the ETA's material scope covers fields that do not fall under the scope 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. It is impossible to act under the ETA against co-workers in the case of harassment, 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 and they provide a different type of protection (see Section 6.1 on sanctions that can be applied 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 the private and public sector, including public bodies, for the purpose of ensuring protection against discrimination.

As 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 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 in the private sector for the purpose of liability for discrimination.

For historical reasons (as outlined above), the ETA lists primarily public legal entities under Article 4 in relation to liability, 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 by 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 provision governing the shifting of the 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 types of private and public employment, self-employment and occupation, including contract work, self-employment, military service and the holding of statutory office, for the five grounds.

Article 3 of the ETA defines labour relations (*foglalkoztatási jogviszony*) in such a way that they cover employment; public employment; the administrative service relationship in law enforcement bodies; the employment relationship within the armed forces; employment by court, the prosecution services and other bodies in the justice system; official and

contractual service relations in the armed forces and law enforcement; employment as an official foster parent; and the legal relationship between temporary work agencies and their clients.

Other relationships relating to employment (*munkavégzésre irányuló egyéb jogviszony*) include home working, the legal relationship of independent contractors, members of a specialised agricultural or producers' group, members of a cooperative, and the elements of an activity outlined in company or civil law that are related to the performance of work.

Under 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 relationships relating to 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 the private and public sector, 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 selection 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 working conditions, including pay and dismissals, for all five grounds and for both private and public employment.

As mentioned above, Article 3 of the ETA defines labour relations in such a way that they 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 relationships relating to 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.

### **3.2.4 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 prohibits discrimination in vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

As mentioned above, Article 3 of the ETA defines labour relations in such a way that they 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 relationships relating to 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 conducted before or 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 deemed to be covered.

In addition, Article 27 of the ETA (defining forms of education falling under the scope of the law) is so wide that all forms of vocational training will definitely fall under the law's definition of education. Under 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' within the meaning of the ETA, they will still be covered as a type of service accessible to 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>77</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.

### **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 area of 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.

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<sup>77</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).

Article 21 of the ETA expressly lists membership of 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, which defines the personal scope of the law. Such organisations are therefore obliged to abide by the requirement of equal treatment in all their actions, practices, policies and measures, which of course also include the benefits that they provide. 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.

'Public associations' (such as bar associations and various professional chambers) 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 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 far beyond their scope with respect to the number of protected grounds. All the information below is therefore to be interpreted to cover all the grounds included in the directives.

With regard 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 any form of financial or in-kind assistance is requested and provided that are financed from 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 healthcare: 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(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 healthcare.

Article 7(1) of Act CLIV of 1997 on Healthcare<sup>78</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 'requirement of equal treatment', this provision covers all the 20 grounds listed in Article 8 of the ETA.)

An example of recent jurisprudence in this area is the case of the mandatory maternity clothing for friends and family members of pregnant mothers, which disproportionately affected Roma women (described above in Section 2.3).

a) Article 3.3 exception (Directive 2000/78)

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<sup>78</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).

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 social advantages as formulated in the Racial Equality Directive. However, discrimination in this area can easily be argued to be unlawful under Hungarian non-discrimination legislation, 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 No. 68/2008 decided by the Equal Treatment Authority, in which the Authority established discrimination based on political opinion when the mayor of a village instructed the conductor on 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, and several conflicts had arisen between the two of them as a result.

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

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

In Hungary, national legislation prohibits discrimination in 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, attention should be drawn first of all to Article 7(1) and Article 10(2) of the ETA. Under Article 7(1), segregation shall be regarded as a breach of the requirement of equal treatment. Article 10(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' types of behaviour unlawful. If separation also entails some disadvantage (e.g. lower standard education for the separate Roma class within a primary school), it can be qualified as direct discrimination. If, however, it is difficult to prove in a given case that the separate group (the Roma class) suffers disadvantages other than those stemming from the nature of such separation, the provision on segregation may be relied upon. 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 regarding the provision of evidence compared to the reversed burden of proof (see Section 6.3).

In a chapter entitled 'Education and training', the ETA provides for the following: Under Article 27(1), the principle of equal treatment extends to any care, education or 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(2), the principle of equal treatment shall be enforced in relation to education as 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) evaluating performance; (iv) providing and using services related to education; (v) accessing benefits related to education; (vi) providing accommodation and subsistence in dormitories; (vii) issuing academic certificates and diplomas; (viii) accessing vocational guidance; and (ix) terminating the relationship related to participation in education.

Paragraph (3) not only prohibits segregation in an educational institution, or in a division, class or group within such an educational institution, but also 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 that pupils or students can expect to have a reasonable opportunity to prepare for state exams.

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

Pursuant to Article 28(1), the organisation of education for students of one sex 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. Like voluntary single-sex education, Paragraph (2) states that voluntary religious education may be taken to conform to the principle of equal treatment if in primary and secondary education, the parents voluntarily choose such an education and in college or university, the students themselves are voluntary participants, and the education based on religious or other ideological conviction is organised in a way that the goal or the curriculum of the education justifies the creation of separate classes or groups. It is an additional requirement that this shall not result in any disadvantage for those participating in such an education and the education shall comply with the requirements approved, laid down and subsidised by the state.

The ETA's provisions on education were augmented in response to an infringement procedure initiated by the European Commission against Hungary with a formal letter of notice on 26 May 2016, requesting that Hungary ensures the segregation-free education of Roma children. In addition to expressing concerns about the fact that Roma children are disproportionately over-represented in special schools for children with intellectual disabilities, the Commission urged Hungary to bring its national law on equal treatment and education and the implementation of its education policies in line with the Racial Equality Directive.<sup>79</sup>

Subsequently, references to national or ethnic minority education were removed from Article 28(2) (which now only contains provisions pertaining to religious education), and new provisions were inserted into Article 28.<sup>80</sup> The amendments entered into force on 1 July 2017 and read as follows:

(2a) The organisation of education based on religious or other ideological conviction as set forth in Paragraph (2) shall not result in segregation based on characteristics listed in Article 8 b) to e) [racial affiliation, colour of skin, nationality (not in the sense of citizenship) or belonging to a national minority].

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<sup>79</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm).

<sup>80</sup> Hungary, Act XCVI of 2017 on the Amendment of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities and Act CXC of 2011 on National Public Education (2017. évi XCVI törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény és a nemzeti köznevelésről szóló 2011. évi CXC. törvény módosításáról), 27 June 2017, <https://net.jogtar.hu/jogszabaly?docid=A1700096.TV&timeshift=ffffff4&txtreferer=00000001.TXT>.



(2b) If the education is organised on the basis of belonging to a national minority, the principle of equal treatment is not violated only if, in addition to meeting the requirements set forth in Paragraph (2), the following criteria are also met:

(a) acquiring the knowledge required by the core curriculum is guaranteed at the same level as in the majority education, and

(b) education based on belonging to a national minority complies with the requirements set forth in the Act on the Rights of Nationalities.

The codification of the exceptions allowed by Paragraphs (2) to (2b) was necessary to make separate religious and minority education possible (the Nationalities Act, for example, allows minority parents to initiate the formulation of separate 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.

It must be underlined, however, that such separate education is deemed compatible with the principle of non-discrimination only if participation is voluntary. At primary 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. Another condition is that such education shall be of equal value with ordinary (i.e. not separate) education. This is further detailed in relation to national and ethnic minority education by the new Paragraph (2b), which claims that such education shall guarantee that the acquisition of knowledge as required by the core curriculum is at the same level as the knowledge acquired in a majority education.

The National Public Education Act was also amended when Paragraphs (2a) and (2b) were inserted into Article 28 of the ETA. The new Article 34/A provides that, if, on the basis of Article 28(2) to (2b) of the ETA, an educational institution, class or pre-school group is created which provides education based on religion **and** belonging to a national minority, it shall meet the requirements pertaining to both religion- and nationality-based education as set out in the National Public Education Act and the Act on Nationalities.

While the law looks unproblematic on paper and it seems to guarantee that education organised on the basis of religion or belonging to a national minority would not result in segregation and that the quality of such education would meet national standards, the practice leaves much to be desired, as will be outlined below. In addition, educational experts have doubts about the ulterior rationale of inserting Article 34/A into the National Public Education Act (see the explanation below).

Under Paragraph (3) of Article 28 of the ETA, 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.

Under Article 29, a Government decree created pursuant to the law or the authorisation thereof may stipulate an obligation to discriminate positively in favour of a specified group of participants in education within or outside the school system in respect of education or training.

The grounds cited most often in relation to discrimination in education are disability and Roma origin (see below), 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. 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 school management, which confirmed that the teacher's decision was final. She then decided to initiate legal action against the school with the help of Háttér Society, an NGO providing legal assistance to LGBTQI people. In autumn 2014, the Equal Treatment Authority concluded that discrimination had taken place and imposed a fine of approximately EUR 170 (HUF 50 000) on the school.<sup>81</sup>

The parents also decided to sue the school for damages. In its decision of 24 June 2016, the Metropolitan Court of Budapest found in favour of the claimants, and established a violation of the mother's inherent personal right to non-discrimination.<sup>82</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 into the community of students.' The court awarded the mother approximately EUR 1 095 (HUF 350 000) as non-pecuniary damages, and ordered the school to cover the interests of this amount from the time when the violation was committed and legal fees.

#### a) Pupils with disabilities

In Hungary, the general approach to education for pupils with disabilities raises some problems.

Under Article 13(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, when it comes to practice, the 2010 shadow report prepared for the UN Convention of the Rights of Persons with Disabilities (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>83</sup>

In 2013, research was conducted into the vocational training of people with disabilities. Based on focus groups and interviews, it found that one of the biggest problems in relation to the education of people with disabilities was that, even when it is conducted in an integrated manner, it is 'cold integration', meaning that children with disabilities are educated together with their peers, but their special needs are not truly accommodated. (A telling example of this was provided by one of the interviewees, who had a hearing impairment. He recalled that one of his teachers regularly explained mathematical

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<sup>81</sup> Equal Treatment Authority, EBH/366/2014, autumn of 2014, available at: <http://www.egyenlobanasmod.hu/hu/jogeset/ebh3662014>.

<sup>82</sup> Metropolitan Court of Budapest, 31.P.25.499/2015/16/1, 24 June 2016.

<sup>83</sup> Hungarian Disability Caucus (2010), *Disability Rights or Disabling Rights? CRPD Alternative Report*, Budapest, SINOSZ, MDAC, FESZT, p. 153, available at: [http://mdac.org/sites/mdac.info/files/english\\_crp\\_d\\_alternative\\_report.pdf](http://mdac.org/sites/mdac.info/files/english_crp_d_alternative_report.pdf).

problems with his back to the class, facing the blackboard, and that he only received occasional extra help from some of his classmates).<sup>84</sup>

The 2017 annual report published by the Commissioner for Educational Rights shows that these conclusions are still valid. According to this report, 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, whose task it is to refer children with disabilities to educational institutions meeting their special needs.<sup>85</sup> Sometimes the reason is ignorance (e.g. in the case of a mathematics teacher who refused to allow the child with special needs the use of special equipment, saying that it was up to him to decide which parts of the expert panel's opinion he complied with).<sup>86</sup> Sometimes it is down to a lack of adequate resources. In one case, for example, the principal informed the complaining parent that, due to the school's scarce financial and human resources, they were unable to provide her child with the special developmental activities prescribed by the expert panel, as they had to make choices, and they wished to reserve the provision of such services to more indigent children.<sup>87</sup>

An additional problem, as the Commissioner's 2017 report emphasises, is that children with disabilities and their parents are often vulnerable since they are not able to exercise their rights, partly because of a lack of awareness of the relevant laws, and partly because institutions are also not aware of the legal norms that apply to children with disabilities.<sup>88</sup>

The Equal Treatment Authority has also dealt with several cases in which parents complain that educational institutions fail to provide their children with the special services that would enable them to participate effectively in integrated education. By way of example, the Authority concluded in a recent case that a school had violated the requirement of equal treatment when it denied speech therapy services to a child with psychosocial disorders and a speech impairment on the basis that the school's speech therapist was not qualified to treat the type of impairment that the child had. The Authority pointed out that, in such a case, the school should have requested a qualified therapist through the network of travelling specialist and conductive teachers, which is operated by the regional state centre responsible for maintaining schools. Furthermore, the Authority concluded that the school had committed discrimination when it did not allow the child to participate in one of the class's field trips on the basis that, due to his behavioural problems, the school could not guarantee his safety. The Authority did not accept this defence as it turned out that the child had been taken on similar field trips in the past.<sup>89</sup>

The above-mentioned problems and their long-standing 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 primary school level is around 40 %, whereas in the case of persons with disabilities it is above 50 %. Approximately 9 % of persons with

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<sup>84</sup> Tausz, K. (2013), *Fogyatékos emberek a szak- és felnőttképzés rendszerében* (Persons with disabilities in vocational and adult education), Budapest, MS Concord Bt, p. 21.

<sup>85</sup> Commissioner for Educational Rights (2018), *Az oktatási jogok biztosának beszámolója 2017. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2017), [https://www.oktbiztos.hu/ugyek/jelentes2017/ojb\\_2017\\_beszamolo.pdf](https://www.oktbiztos.hu/ugyek/jelentes2017/ojb_2017_beszamolo.pdf), pp. 94-101.

<sup>86</sup> Commissioner for Educational Rights (2018), *Az oktatási jogok biztosának beszámolója 2017. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2017), [https://www.oktbiztos.hu/ugyek/jelentes2017/ojb\\_2017\\_beszamolo.pdf](https://www.oktbiztos.hu/ugyek/jelentes2017/ojb_2017_beszamolo.pdf), p. 78.

<sup>87</sup> Commissioner for Educational Rights (2018), *Az oktatási jogok biztosának beszámolója 2017. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2017), [https://www.oktbiztos.hu/ugyek/jelentes2017/ojb\\_2017\\_beszamolo.pdf](https://www.oktbiztos.hu/ugyek/jelentes2017/ojb_2017_beszamolo.pdf), p. 95.

<sup>88</sup> Commissioner for Educational Rights (2018), *Az oktatási jogok biztosának beszámolója 2017. évi tevékenységéről* (The report of the Commissioner for Educational Rights about his activities in 2017), [https://www.oktbiztos.hu/ugyek/jelentes2017/ojb\\_2017\\_beszamolo.pdf](https://www.oktbiztos.hu/ugyek/jelentes2017/ojb_2017_beszamolo.pdf), p. 76.

<sup>89</sup> Equal Treatment Authority, Decision No. EBH/65/2018, 14 May 2018, available at: <http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh652018>.

disabilities have a university or college degree, compared to approximately 15 % of the total population.<sup>90</sup>

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

In Hungary, the education of Roma pupils is characterised by specific trends and patterns (whether legal or societal), such as segregation.

##### *Common patterns of segregation*

As stated above, the legal framework was amended in response to the infringement procedure initiated by the European Commission, with a view to strengthening compliance with the requirements of the Racial Equality Directive. However, despite the detailed legislative framework, segregation of Roma pupils in different forms is still widespread in Hungary, and the situation seems to be deteriorating.

While the changes in the definition of 'disadvantaged' and 'especially disadvantaged' children have made it more difficult to conduct comparable impact studies,<sup>91</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) increased nationally from 27.7 to 38.6 and from 26.6 to 36.4, respectively, between 2008 and 2016.<sup>92</sup>

The data show that segregation among schools has also been on the rise. Between 2008 and 2015, the inter-school segregation index increased from 18.9 to 31.31.<sup>93</sup>

The Hungarian educational system's ability to even out socio-economic inequalities is among the worst in Europe, most probably as a result of the increasing degree of segregation between disadvantaged and advantaged children. Among European countries, with the exception of Slovakia, the gap between the reading scores of advantaged students (students whose mother have at least a secondary education qualification) and disadvantaged students (students whose mother have at most a primary education qualification) was the highest in Hungary in the 2015 PISA test.<sup>94</sup>

The percentage of 'disadvantaged' and 'especially disadvantaged' students among those applying to higher education is also decreasing: in 2011, somewhat over 10 % of applicants belonged to one of the two categories, whereas by 2016, this percentage had dropped to about 2 %.<sup>95</sup>

The percentage of early school leavers has also been on the rise, partly as a result of reducing the compulsory school-leaving age from 18 to 16. In 2006, the figure was 12.5 %; by 2010, it had decreased to 10.5 %, but since 2010 it has returned to the 2006 level.<sup>96</sup>

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<sup>90</sup> Tausz K. (2013), *Fogyatékos emberek a szak- és felnőttképzés rendszerében* (Persons with disabilities in vocational and adult education), Budapest, MS Concord Bt, p. 11.

<sup>91</sup> Due to changes in legislation, certain categories of children who used to fall into the 'especially disadvantaged' group have been categorised as 'disadvantaged' since 31 August 2013. This blurs certain important differences and makes comparisons between the pre- and post-2013 periods very difficult.

<sup>92</sup> Hajdu, T., Hermann, Z., Horn, D. and Varga, J. (2018), *A közoktatás indikátorrendszere 2017* (The indicator system of public education 2017), [http://www.mtaki.hu/wp-content/uploads/2018/02/A\\_kozoktatasi\\_indikatorrendszer\\_2017.pdf](http://www.mtaki.hu/wp-content/uploads/2018/02/A_kozoktatasi_indikatorrendszer_2017.pdf), p. 147. (The index is 100 when disadvantaged or especially disadvantaged children are fully separated from their non-disadvantaged peers).

<sup>93</sup> <https://abcug.hu/csak-nem-akar-szarnyalni-az-oktatasi-rendszer/>.

<sup>94</sup> <https://abcug.hu/csak-nem-akar-szarnyalni-az-oktatasi-rendszer/>.

<sup>95</sup> Hajdu, T., Hermann, Z., Horn, D. and Varga, J. (2018), *A közoktatás indikátorrendszere 2017* (The indicator system of public education 2017), [http://www.mtaki.hu/wp-content/uploads/2018/02/A\\_kozoktatasi\\_indikatorrendszer\\_2017.pdf](http://www.mtaki.hu/wp-content/uploads/2018/02/A_kozoktatasi_indikatorrendszer_2017.pdf), p. 159.

<sup>96</sup> <https://abcug.hu/csak-nem-akar-szarnyalni-az-oktatasi-rendszer/>.

Three common patterns of segregation seem to prevail: (i) 'auxiliary schools' for children with intellectual disabilities, which 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 '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 of segregated units within the same school, while a January 2013 case adjudicated by the European Court of Human Rights (ECtHR) exemplifies type (i) segregation. In the case of *Horváth and Kiss v. Hungary*,<sup>97</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 intellectual disabilities' by the competent educational expert panels, although it was subsequently 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 intellectual disability' had not been accompanied 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 in the wider population and had received an education that 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 also the subject of a domestic case for which a first instance decision was handed down on 10 March 2016. The lawsuit was initiated by the Chance for Children Foundation and the European Roma Rights Centre against the Ministry of Human Capacities (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>98</sup> that the Pedagogical Service (which is responsible for the pedagogical panels that form 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 indirect discrimination against Roma pupils in Heves County since 2004 due to its practice of testing their suitability for school using diagnostic methods that were not culture-neutral. KLIK and EMMI were also found to be in violation of the requirement of equal treatment by failing to take the legally prescribed measures to monitor the activities of the Pedagogical Service, therefore contributing to 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 claimants had provided 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 met 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 service was particularly disturbing, since they had information about severe problems with the practice of the expert panels from their own background institutions.

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<sup>97</sup> European Court of Human Rights, *Horváth and Kiss v. Hungary*, Application No. 11146/11., judgment of 29 January 2013.

<sup>98</sup> Eger Regional Court, 12.P.20.166/2014/92, 10 March 2016.

An important example of a segregated Roma school can be seen in the Chance for Children Foundation's lawsuit against the municipality of Nyíregyháza and the Greek Catholic Church. The Huszártelep school building 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 initiated by the Chance for Children Foundation 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 their parents (e.g. because the municipality stopped the school bus service that could take the children to the mainstream schools), 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>99</sup> It accepted that the majority of the pupils in the Huszártelep school were Roma, and that segregation was a disadvantage in itself. However, it concluded that, based on Article 28(2) of the ETA, the separation could be exempted, as the school offered religious education.

From a factual point of view, the main flaw in 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 a legal point of view, there is one very important flaw in the decision, namely that, for the exemption to be applicable, Article 28(2) requires that the education shall be 'organised in a way that the goal or the curriculum of the education justifies the creation of separate 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 2 out of the 15 parents enrolling their children attributed any importance to the school's religious affiliation.

This case shows that even when the legal guarantees are in place, judicial interpretation is of crucial importance in providing or withholding the protection implied in them. Therefore, while the 2017 amendments of the ETA appear to have added further safeguards, it is far from certain that the Curia would have come to a different conclusion on the basis of the new legislation. This is very relevant due to the role of denominational schools in segregation as outlined below.

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

As mentioned above, public schools were 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 the segregation of Roma children, KLIK instead left segregated schools intact, or even reversed desegregation processes that had already started (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).

A recent court judgment also clearly illustrates that centralisation has not resulted in effective action to combat segregation. In 2009, the Chance for Children Foundation initiated an *actio popularis* lawsuit against the then Ministry of Education and Culture (now: EMMI), as the entity ultimately responsible for the management of the Hungarian system of education. The foundation asked the court to conclude that by not taking effective action – directly and/or through the administrative bodies responsible for the operation of

<sup>99</sup> Curia, Pfv.IV.20.241/2015/4, 22 April 2015, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.



educational institutions – against the segregation of Roma children in education, the ministry failed to fulfil its obligations stemming from the ETA and the National Public Education Act, and thus violated the segregated Roma pupils' right to equal treatment. In its petition, the Chance for Children Foundation referred to research carried out in 2005 by sociologists Ilona Liskó and Gábor Havas. Commissioned by the ministry's predecessor, the research concluded that there were 44 schools where the proportion of Roma pupils exceeded 50 % (in some schools the figure was 80 %), and this number was on the rise. Segregation was accompanied by substandard physical conditions and a lower quality of educational services.

In its first instance judgment,<sup>100</sup> the Metropolitan Court

- concluded that the ministry had violated the requirement of equal treatment in relation to Roma pupils in 28 primary schools (10 in Budapest, 18 in various other Hungarian cities/towns) by keeping them segregated at school level from the 2003/2004 school year;
- ordered the ministry to ban the admission of new first-graders in those 13 schools where segregation was still in place (6 in Budapest, 7 in other cities/towns);
- ordered the ministry to instruct the competent Government offices to find a place for those first-graders who would otherwise start their primary school studies in the schools to which the above ban applied;
- ordered the ministry to instruct (within three months of the judgment becoming final and binding) the maintainers (i.e. the entities operating the schools) of the concerned schools to prepare, with the assistance of an educational equal opportunities expert, a desegregation plan aimed at assisting the integration of these first-graders into the schools where they would be enrolled after the school districts were redrawn;
- ordered the ministry to publish these desegregation plans on its website;
- ordered the ministry to continuously monitor the implementation of these desegregation plans for five years and publish the results on its website;
- ordered the ministry to amend its inspection guidelines for compliance with the requirement of equal treatment in a way that enables such inspections to estimate the proportion of pupils of Roma origin on the basis of their perceived ethnicity, and to instruct the competent Government offices to carry out inspections on the basis of this new methodology;
- ordered the ministry to pay a public interest fine of approximately EUR 156 250 (HUF 50 million) to be spent on the civil monitoring of desegregation programmes within the next five years.

As the respondent, the ministry did not question the fact that Roma pupils were highly over-represented in the schools identified by the Chance for Children Foundation. However, it denied responsibility for the violation of the requirement of equal treatment on the basis that (i) it exercised its rights and performed its duties regarding educational institutions not directly, but through lower-level administrative bodies and that (ii) due to the regulations pertaining to the protection of sensitive personal data, the ministry was not in a position to collect data on the ethnic origin of the pupils, so it could not take action against ethnically based segregation.

However, the court concluded that the ministry must have been sufficiently aware of the situation: the Havas-Liskó research was commissioned by its predecessor and its desegregation strategy was based on that research. It must also have been aware of the fact that the situation was not improving, and if it was not aware of that fact, it would mean that its monitoring mechanisms/guidelines were deficient, for which it would also be liable. As the entity ultimately responsible for the lawful operation of the Hungarian

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<sup>100</sup> Metropolitan Court, Decision No. 40.P.23.675/2015/84, 18 April 2018, <http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>.



educational system, the ministry was therefore certainly accountable for the fact that the statutory requirement of non-segregation was not met. The court also took the stance that when there is a conflict between fundamental rights, it is necessary to measure those rights against each other and make a decision on which one should prevail in order to avoid causing disproportionate harm. In this case, the right to the protection of sensitive personal data may conflict with the right to not be segregated, but the interests of the latter outweigh those of the former.

The court prescribed very detailed obligations for the ministry (a ban on establishing new first-grade classes; the redrawing of school districts; monitoring; the preparation of desegregation plans), because it found that the ministry's efforts to monitor and address the issue of segregation had not led to any improvements since the Havas-Liskó research had been published, more than ten years before that. Therefore, it would be meaningless if the court simply obliged the ministry to put an end to the violation without actually prescribing how that must be done.

The court determined the large public interest fine (EUR 156 250) on the basis of the prolonged nature of the violation and the severe consequences for those pupils who were impacted by the segregation. The court obliged the ministry to use some of this amount to fund NGOs to monitor the implementation of desegregation plans due to the fact that 'the present lawsuit, but also the results of other similar court cases, show that NGOs are particularly capable of demonstrating violations by the respondent and asserting the rights of marginalised groups'.

While the Metropolitan Appeals Court, acting as second instance court,<sup>101</sup> modified the first instance judgment significantly in relation to the sanctions imposed, it shared the first instance decision's assessment that the ministry had failed to make use of its powers to try to put an end to segregation in several schools, although it had been aware of the widespread existence of segregation in these educational institutions. The second instance court also agreed with the first instance court that this failure had amounted to a violation of the requirement of equal treatment.

### *Denominational schools*

Finally, mention must be made of the role of denominational schools in the education of underprivileged children (among whom Roma are highly over-represented). Recent statistical analyses<sup>102</sup> prove that the number of denominational schools and their share in the Hungarian educational system is rising steeply. The number of denominational schools increased by 68 %(!) between 2010 and 2014. This was inevitably reflected in an increase in the proportion of children studying in denominational schools (compared to the total number of school-going children): from 4.9 % to 13.8 % in general and from 4 % to 13 % in primary schools between 2001 and 2014 (with most of the increase taking place after 2010).<sup>103</sup>

One would therefore expect that the proportion of indigent pupils/students, i.e. disadvantaged (*hátrányos helyzetű*) and especially disadvantaged (*halmozottan hátrányos helyzetű*) children, also increased in such schools (and that their presence in denominational institutions was higher than the national average proportion of children studying in denominational institutions). However, the numbers show that the increase in

<sup>101</sup> Metropolitan Appeals Court, Judgment No. 2.Pf.21.145/2018/6/I, 14 February 2019.

<sup>102</sup> Hermann, Z. and Varga, J. (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), Budapest, TÁRKI, available at: <http://old.tarki.hu/hu/publications/SR/2016/15hermann.pdf>.

<sup>103</sup> Hermann, Z. and Varga, J. (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), Budapest, TÁRKI, available at: <http://old.tarki.hu/hu/publications/SR/2016/15hermann.pdf>.

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 in poor regions and smaller settlements prefer pupils who come from a relatively more favourable social background.'<sup>104</sup>

An example of this process can be seen in the situation in Nyíradony (eastern Hungary).<sup>105</sup> The school building located on the border between the 'Hungarian' part of the town and the Roma neighbourhood used to accommodate pupils in the first four grades, whereas the other building (located in the centre but belonging to the same educational institution) was used by the fifth- to eighth-graders. In both buildings, Roma and non-Roma children studied together.

In 2011, the Greek Catholic Church founded a school, which acquired the building in the centre (this was renovated using EU funding). Non-Roma families started to transfer their children to the denominational school in increasing numbers. Today, only Roma children attend the state school located between the Roma and non-Roma neighbourhoods (with the exception of five non-Roma pupils, all of whom are in state care), whereas only a handful of Roma children attend the denominational school (children of a few privileged Roma families). Local Roma people say that the reason they cannot enrol their children in the church school is the fact that a recommendation from the priest is required, which enables the church to handpick pupils. Moreover, the Roma families would find it hard to raise the denominational tax, even though it is not a significant amount.

An analysis published by the principal of a religious after-school programme for disadvantaged children<sup>106</sup> reveals that this is not a unique situation. The analysis describes the mechanism as follows: 'Let us see a hypothetical example! In a village there are two public schools. The proportion of low-status children is 25 % in each. The church takes over one of the schools from the state. The state school continues to have the obligation to admit everyone, but the denominational school may handpick its students. The proportion of disadvantaged pupils will decrease to 10 % in the denominational school, while it rises to 40 % in the state school. This means that it will be much more difficult to teach in the state school, the pupils' results will deteriorate, which means that the quality of education provided to the disadvantaged pupils will decrease [...]. Furthermore, due to the low salaries paid to teachers, there is a shortage of teachers in the disadvantaged regions, and the task is much more difficult, so the teachers will seek out the easier task for the same salary. Therefore, the denominational schools can handpick from among the teachers too, which further decreases the chances of disadvantaged pupils.'

The author of this analysis provides data relating to his own town, proving that this scenario is not entirely hypothetical (he does not identify the town by name, claiming that this is a general pattern): 'I have analysed the town's seven primary schools on the basis of the data of the National Competency Test. This shows that there is a great difference even between the denominational school and the best of the state schools. For instance, in the state schools, the proportion of those who have not reached level three of the eighth grade competency test in mathematics – i.e. they are functionally illiterate – is between 5.4 % and 25.2 %. In the denominational school, this proportion is 1.4 %.' The analysis also contains a table showing enormous differences between the pupils in the denominational school and the state institutions:

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<sup>104</sup> Hermann, Z. and Varga, J. (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), Budapest, TÁRKI, available at: <http://old.tarki.hu/hu/publications/SR/2016/15hermann.pdf>, p. 321.

<sup>105</sup> The description of the case is based on: <https://atlatszo.hu/2018/02/07/gettofelujitas-es-iskolai-szegregacio-egyhazi-segitseggel-unios-finanszirozassal-nyiradonyban-videoriport/>.

<sup>106</sup> Asztalos, G., 'A 22-es csapdája – őszintén az egyházi iskolákról' (Catch 22 – honestly about denominational schools), available at: [http://szemlelek.blog.hu/2018/02/10/oszinten\\_az\\_egyhazi\\_iskolakrol](http://szemlelek.blog.hu/2018/02/10/oszinten_az_egyhazi_iskolakrol).

Level 0-2 [lowest levels in the competency test] (%)		Level 6-7 [highest levels in the competency test] (%)		Family background index <sup>107</sup>	
Church school	State school	Church school	State school	Church school	State school
1.4	5.4-25.2	27.7	0.6-17.6	0.83	-0.06-0.37

Thus, it seems 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). This is exactly why experts are somewhat worried about the amendment to the National Public Education Act, which took place simultaneously with the insertion of Paragraphs (2a) and (2b) into Article 28 of the ETA. As explained above, the National Public Education Act's new Article 34/A provides that, if an educational institution, class or pre-school group is created which provides education based on religion **and** belonging to a national minority, it shall meet the requirements pertaining to both religion- and nationality-based education as set out in the National Public Education Act and the Act on Nationalities.

While on the surface, this provision seems perfectly neutral and simply reinforces some legal safeguards, its rationale is highly questionable. The functions and the organising principles of the two types of education are obviously different: one is aimed at strengthening religious conviction, the other national/ethnic identity. Roma people in Hungary have quite mixed religious affiliations, it cannot be said that they typically belong to one or other religion (according to a relatively recent study, 51 different (mostly charismatic) Christian denominations with Roma congregations were identified).<sup>108</sup> It is rather unlikely, therefore, that these two objectives will coincide very frequently, and such 'dual' education forms will be truly needed. On the other hand, such an amendment may be easily used to provide a legal basis for Huzártelep-types of segregation, i.e. a denomination establishing and running Roma-only schools in Roma neighbourhoods.

One final remark concerns after-school education programmes (AEPs). AEPs are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programmes, such as tutoring and community building programmes. They fill a crucial gap in the education system (namely that schools very rarely have the financial and human resources to effectively help underprivileged children to catch up and to promote their educational success). After a long period of uncertainty caused by ad hoc funding, an agreement was reached among educational actors on a more predictable and sustainable funding structure, and the most important rules for the operation of AEPs were outlined in a ministerial decree: Decree 40/2018 of the Minister of Human Capacities on the Professional Tasks and the Conditions of the Operation of Services Aimed at Enhancing Children's Opportunities.<sup>109</sup> Under Article 17 of the Decree, the Minister of Human Capacities shall prepare and publish methodological guidelines for AEPs, and while all AEPs will be obliged to comply with these guidelines, AEPs operated by denominations will be exempted from this obligation. This has been criticised by experts, who also point out that 25 % of children attending AEPs are served by denominational AEPs.<sup>110</sup>

<sup>107</sup> It is a complex index calculated on the basis of a questionnaire that is filled out when the child sits for the competency test. It is based on factors like the family's income, the parents' level of education, the number of books in the family home, etc. The average is 0; approximately 74 % of pupils are in the interval between -1 and +1, and an additional 11% fall into each of the +1 to +2 and the -1 to -2 intervals.

<sup>108</sup> <http://cimok.hu/node/16>.

<sup>109</sup> Hungary, Decree 40/2018 of the Minister of Human Capacities on the Professional Tasks and the Conditions of the Operation of Services Aimed at Enhancing Children's Opportunities (40/2018 (XII. 4.) EMMI rendelet a gyermekek esélyenövelő szolgáltatásainak szakmai feladatairól és működésük feltételeiről), 4 December 2018, <https://net.jogtar.hu/jogszabaly?docid=A1800040.EMM>.

<sup>110</sup> [http://www.tani-tani.info/stabil\\_bizonytalansag\\_vagy\\_optimista\\_jovokep](http://www.tani-tani.info/stabil_bizonytalansag_vagy_optimista_jovokep).

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

In Hungary, national legislation prohibits discrimination in the 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:

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 list in Article 30(1) is not exhaustive, so other forms of discrimination related to access to goods and services are also covered by the ETA.

Failure to adapt goods or a service to meet the needs of a person with a disability is regarded as a form of discrimination. To substantiate this, 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, 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 with sufficient time before the flight, which should have enabled the company to prepare for the accommodation.<sup>111</sup>

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<sup>111</sup> Equal Treatment Authority, EBH/146/2009, no date available, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh1462009>.

a) Distinction between goods and services available publicly or privately

In Hungary, national law distinguishes 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).

The reason for this is that private entities fall under the personal scope of the ETA only if they offer a public contract or make a public offer. If, however, a private association makes a public offer or advertises the possibility of joining the association with the prospect of obtaining the given service, then it will also fall under the ETA's scope and is bound by the requirement of equal treatment.

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

In Hungary, national legislation prohibits discrimination in the area of 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 to rent out a private apartment.

Discrimination in housing is forbidden by Article 26 of the ETA, which reads 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) affected by direct or indirect discrimination in respect of the granting of housing subsidies, benefits or 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 in 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 available housing publicly.

In this case, the act will fall under the ETA's scope 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 a recent case taken by the Equal Treatment Authority, a Roma man filed a complaint because when he was looking for an apartment to rent, the real estate agency provided him with a list of apartments meeting his demands concerning size and location, but some of the apartments in the list had a 'No Roma' remark attached to them. The real estate agency did not put forward any defence in the proceedings. The Authority concluded that discrimination had taken place, banned the company from future violations, imposed a fine of EUR 310 (HUF 100 000) on the respondents and published the decision on the Authority's website.<sup>112</sup>

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<sup>112</sup> Equal Treatment Authority, Decision No. EBH/70/2018, 9 January 2018, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh702018>.

a) Trends and patterns regarding housing segregation for Roma

In Hungary, there are trends and patterns in housing segregation and discrimination against Roma people.

The proportion of social housing (8 %) is far below the EU average (33 %).<sup>113</sup> The proportion of housing owned by local councils (providing a basis for social housing) decreased from 4.6 % in 2001 to 3 % in 2012.<sup>114</sup> The lack of social housing has a very negative impact on the housing conditions of the marginalised Roma groups, significantly reducing their chances of finding a way out from the segregated Roma neighbourhoods and settlements.

The housing situation of Roma is significantly worse than that of the average population. The Second European Union Minorities and Discrimination Survey claims that, while there have been improvements since 2011, the housing conditions of Roma people are still far below those experienced by the non-Roma population. By way of example, in 2016, 33 % of Roma people lived in households without tap water inside the dwelling. In contrast, practically everyone in the non-Roma population had access to tap water in their home. While only 4 % of the general population lived in dwellings without a toilet and shower or bathroom inside the dwelling in 2016, this proportion was 38 % within the Roma population. A total of 44 % of the Roma population lived in dwellings with a leaking roof or damp walls or other structural problems compared with 26.9 % of the general population.<sup>115</sup>

In 2016, complaints relating to housing filed with the Ombudsman's deputy responsible for minority affairs constituted the second-largest group of complaints after education.<sup>116</sup> In her 2018 annual report, the deputy also wrote that 'complaints concerning the social standards of living continued to be submitted primarily by marginalised Roma families in 2018. Most of the complaints concerned subsistence support, social allowances and assistance concerning the solution of their housing problems'.<sup>117</sup>

In recent years, municipalities have attempted to push out Roma persons/populations from the settlements and/or prevent them from moving in. A symbolic case in this regard is the 'Numbered Streets' case in Miskolc (northeast Hungary). In July 2014, the NGO NEKI filed an *actio popularis* complaint with the Equal Treatment Authority, claiming that the municipality of Miskolc was systematically terminating the social housing tenancies of persons living in the Numbered Streets area (a segregated Roma neighbourhood) without taking any measures to provide them with alternative housing and thus exposing them to the threat of homelessness.

In its Decision No. EBH/67/22/2015,<sup>118</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 against them on the basis of their social status, financial situation and Roma origin. The Authority obliged the municipality to put an end to the discriminatory situation by developing an action plan (by 31 December 2015) detailing where in Miskolc it would provide the tenants of the

<sup>113</sup> <http://www.mut.hu/?module=news&action=getfile&fid=114874>.

<sup>114</sup> [http://www.ksh.hu/thm/2/indi2\\_7\\_7.html](http://www.ksh.hu/thm/2/indi2_7_7.html).

<sup>115</sup> European Union Agency for Fundamental Rights (2018), *Second European Union Minorities and Discrimination Survey. Roma – Selected findings*, Luxembourg, Publications Office of the European Union, pp. 33-35.

<sup>116</sup> Commissioner for Fundamental Rights (2017), *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2016* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies 2016), p. 292.

<sup>117</sup> Commissioner for Fundamental Rights (2019), *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2018* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies 2018), p. 299.

<sup>118</sup> Equal Treatment Authority, EBH/67/22/2015, 15 July 2015, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh672015>.



Numbered Streets with adequate housing. The municipality was required to explain how it would do this and the resources it would use. The Authority also called on the municipality to cease its ongoing discriminatory practice until the action plan was prepared. Furthermore, the Authority obliged the municipality to prepare (by 30 September 2015) another action plan on how it would house those who had already become homeless or faced a direct threat thereof due to the discriminatory practice. Finally, the Authority imposed a fine of approximately EUR 1 670 (HUF 500 000) on the municipality.

In its Decision No. 6.K.33.048/2015/17, handed down on 25 January 2016,<sup>119</sup> the Metropolitan Administrative and Labour Court rejected the municipality's request for a judicial review and upheld every aspect of the Authority's decision. 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 with 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 decided upon by the municipality, e.g. the realisation of urban planning, was at least apparently neutral. However, 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, disadvantaged social status) in a disadvantageous manner, and therefore the alleged underlying 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 as the owner and the entity responsible for the social welfare of its residents. The parties are in a situation of structural imbalance, which fully justifies the restrictions on property rights necessitated by the principle of equal treatment.

The court also established that the municipality committed indirect discrimination by failing to take measures to protect those who were evicted from the Numbered Streets from becoming homeless. 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 was 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 that the municipality had, 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 Programme, which contained a section on 'solving the housing problems related to the elimination of the segregated neighbourhood of the Numbered Streets'.<sup>120</sup> However, as pointed out by several NGOs and experts active in the field, the only tangible element of the 'plan' was the creation of a Social Housing Society (to be operated by the Hungarian Charity Service of the Order of

<sup>119</sup> Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>120</sup> <https://docplayer.hu/23284887-Helyi-eselyegyenlosegi-program-miskolc-megyei-jogu-varos-onkormanyzata-miskolc-2016.html>, pp. 57-59.



Malta) vested with the task of managing 30 social housing units with the purpose of providing housing to families in need. Thirty units are obviously insufficient to provide housing for all affected and potentially affected residents in the Numbered Streets neighbourhood. The NGOs 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 realisation of the plan; (ii) any compensation envisaged 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>121</sup> NEKI also formally requested the Equal Treatment Authority to enforce the decision.<sup>122</sup> However, the Authority took the view that, by adopting an action plan, the municipality had met its obligations under the final and binding decision.

Subsequent developments substantiated the NGOs' concerns. In March 2017, 80 apartments were demolished in the area, and a high-ranking municipal official told the press that they would demolish all the apartments in 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. 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>123</sup> According to local Roma activists, no more than 10 % of all the people affected by the tearing down of the neighbourhood had actually been provided with accommodation by the municipality. The majority of the affected population have left Miskolc; some of them live in villages around the town, but many have left the country altogether, seeking employment in Germany, Austria or France.

The fact that legal victories are often unable to stop the segregation driven by local demands and policies is shown by the developments in another legal case filed against the Miskolc municipal council.

In March 2014, two NGOs (Hungarian Civil Liberties Union (TASZ) and NEKI) filed a complaint with the Commissioner for Fundamental Rights regarding the recurring and concentrated inspections carried out by the municipal authorities (e.g. public health, child protection, social administration authorities) of Miskolc (northeast Hungary) in the segregated, mainly Roma neighbourhoods, which, according to the complainants, amounted to racially based harassment.

In his 5 June 2015 report, the Ombudsman, who also criticised the negative tendencies concerning social housing in Miskolc, found that the practice of concentrated administrative inspections in segregated neighbourhoods caused a constitutional violation. He formulated a number of recommendations, including the termination of concentrated inspections and the establishment of cooperation with NGOs and professional bodies to resolve issues in a number of areas, such as the problem of social housing.

TASZ and NEKI subsequently submitted an *actio popularis* civil law claim to the Miskolc Regional Court, in which they challenged both the elimination of social housing and the concentrated and harassing inspection raids. In its decision of 12 December 2018, the Miskolc Regional Court concluded that the Municipality of Miskolc and the Miskolc Municipal Law Enforcement Body had violated the human dignity and the right to non-discrimination of the Roma population in Miskolc as a result of the raids held in the Roma neighbourhoods, the elimination of social housing without providing adequate guarantees against homelessness and the manner in which the municipality communicated the issue to the

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<sup>121</sup> <http://dev.neki.hu/a-szamozott-utcakkal-kapcsolatos-intezkedesi-terv-elfogadhatatlan/>.

<sup>122</sup> At the time, the first instance administrative body was obliged to take measures to enforce a final and binding decision if the obliged party failed to do so. In cases where the decision obliged a party to do something, one of the available means was to impose fines on the failing party until it met its obligation set out in the decision.

<sup>123</sup> [https://nepszava.hu/1124790\\_szamozott-utcak-nincstelensegbol-a-nyomorba-vezet-az-ut](https://nepszava.hu/1124790_szamozott-utcak-nincstelensegbol-a-nyomorba-vezet-az-ut).

public. The court found that these practices and this form of public communication amounted to harassment based on ethnicity. It obliged the respondents to publish an apology on the municipal website and through the Hungarian news agency, and also obliged the respondents to pay a public interest fine of EUR 31 250 (HUF 10 million).<sup>124</sup>

The municipality submitted an appeal against the decision and the mayor declared publicly that he had absolutely no intention of changing his policies. His statement included the following: 'I have some bad news for TASZ and NEKI: [...] they will not be able to tell us, residents of Miskolc, where and with what intensity we should take action to guarantee our own security. As we have done until now, we will continue to decide for ourselves, even if TASZ and NEKI stand on their heads. They may object to this, they may bring lawsuits, we will pay the fines if we must, like we have done in the past, but it is not TASZ and especially not NEKI who can tell us what we must do in Miskolc to protect public safety. We will see them in court!'<sup>125</sup>

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<sup>124</sup> Miskolc Regional Court, Judgment No. 13.P.20.601/2016/95, 12 December 2018.

<sup>125</sup> <https://borsodihir.hu/helyben-jaro/2018/12/miskolc-polgarmestere-elkuldte-a-jogvedoket-a-fenebe>.

## 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(1) of the ETA provides an exception for genuine and determining occupational requirements (GORs). It reads as follows:

The following shall not be regarded as a violation of the requirement of equal treatment:

- a) differentiation regarding access to employment, if by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, it is based on a genuine and determining occupational requirement, provided that its objective is legitimate and it is proportionate to that objective;
- b) differentiation that 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. In all probability, it is a result of hasty legislation aimed at transposing the EU acquis (Directives 2000/43/EC and 2002/73/EC), which was done inconsistently without due attention to the fact that Directive 2000/78/EC also excludes differentiation in pay on these grounds.

Article 22(1)(a) is 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).

Article 22(1)(a) was amended as of 1 January 2018 in a way that creates doubts regarding its full compliance with the acquis. Previously, the text was formulated in a way that could be interpreted to extend to all aspects of employment, whereas the new text seems to suggest that the exempting clause is only applicable at the time of recruitment ('differentiation regarding access to employment'). While this formulation seems to follow the solution applied in Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (where a differentiation can be allowed only in relation to access to employment, but not in relation to any other aspect of employment), the problem in the Hungarian context is that there are general exempting clauses (see Section 2.2 above), and therefore, a possible interpretation may be made according to which Article 22(1)(a) is a *lex specialis* only in relation to the recruitment process, whereas (in the absence of a *lex specialis*) the general exempting clause (Article 7(2) of the ETA) will become applicable with regard to all other aspects of employment. This would mean a simple reasonability test, providing the employer with a much more lenient possibility for exemption than the genuine occupational requirement test set forth by the Directives.

It can of course be argued that even if this interpretation is valid, based on the principles first declared in the Mangold judgment,<sup>126</sup> Hungarian courts would be required to put aside

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<sup>126</sup> Judgment of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, C-144/04.

Article 22 of the ETA, and use Article 4 of Directives 200/43/EC and 2000/78/EC, to adjudicate any complaint concerning differentiation based on the grounds protected by these Directives and related to other aspects of employment (e.g. dismissal, promotion).

In the absence of related case law, it is not possible to say what kind of interpretation the courts would follow. However, it would certainly be more reassuring if the legislator amended the new provision in a way that makes it entirely clear that only a genuine occupational requirement may serve as an exemption for differentiations based on the protected grounds regarding any aspect of employment.

#### **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 for an ethos based on religion or belief. Article 22(1)(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(3) of the Act on Churches states that 'religious communities conduct their activities outlined in Article 9(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 recruitment 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 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, 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 the 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(1) of the National Public Education Act states 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 teachers' general right to carry out their educational work in accordance with their beliefs and 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 do not comply 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>127</sup> (the previous act on public education, parts of which were still in force on 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 provisions outlined above 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 remains to be seen how the relation between Article 32(1) of the National Public Education Act and Article 22(1)(b) of the ETA will be interpreted, as the interpretation will have a decisive impact on its conformity with Article 4(2) of the Directive. Article 32(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. It can therefore be interpreted in line with Article 22(1)(b) of the ETA and regarded as a declarative rule simply reinforcing those 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. 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 existing right, and therefore the legislator's intention behind the adoption of Article 32(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 conflict between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori*, this conflict could be resolved in favour of Article 32(1), since this is the norm that was adopted later. This interpretation opens the door for employment-related differentiation that goes far 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 to create an exception to the GOR provision of the ETA, which takes precedence over Article 22 of the ETA. The legislative reasons read 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 at the same time 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.'

A case taken by the Hungarian Helsinki Committee demonstrates that some schools themselves share this interpretation. In this case, a denominational school dismissed a boarding school 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

<sup>127</sup> Hungary, Act LXIX of 1993 on Public Education (1993. évi LXXIX. törvény a közoktatásról), 3 August 1993, <https://mkogy.jogtar.hu/jogszabaly?docid=99300079.TV>.

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 management had thought that this was possible under Article 22 of the ETA, it could have dismissed him before that. However, in all probability, the school was of the view that under the ETA it would have been difficult for it to substantiate that religiosity was a genuine and determining occupational requirement, as the teacher always saw to it that the students abided by the religious requirements and attended the school's religious events. In the labour lawsuit, no judicial decision was reached, because the school finally 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 and/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 scope. 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 Faculty of Theology 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. It requested 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 and pay punitive damages.

The first instance court came to the conclusion that the Faculty Council's declaration was an opinion protected by the freedom of expression and did not transgress the limits of constitutionality.<sup>128</sup> The decision was upheld by the second instance court with basically the same reasoning.<sup>129</sup> Háttér Társaság submitted a request for extraordinary review to the Supreme Court.

The Supreme Court rejected the claim on 8 June 2005.<sup>130</sup> The court took the view that the denominational university was exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule of the ETA [Article 7(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, a denominational university may objectively be considered to be reasonable to exclude homosexuals from theological education, taking into 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).

<sup>128</sup> Metropolitan Court, 19.P.21.788/2004, date and link not available.

<sup>129</sup> Metropolitan Appeals Court, 2.Pf.21.318/2004/4, date and link not available.

<sup>130</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). In this case, the denominational character of the school seemed to have played a role in the Curia's reluctance to look into whether the parents' actions were voluntary. However, it needs to be added that the decision does not conclusively claim at any point 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.

Furthermore, as described in Section 3.2.8, it seems that the increase in the number of denominational schools has contributed, at least in some parts of the country, to an increasing degree of segregation between advantaged and disadvantaged children (where Roma are highly over-represented in the latter group).

– Religious institutions affecting employment in state-funded entities

In Hungary, religious institutions are permitted to select people (on the basis of their religion) and to hire or to dismiss them 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 and social care homes. Under Article 5 of Act CXXIV of 1997,<sup>131</sup> such institutions receive per capita support under the same rules and on an equal footing with similar institutions maintained by local councils (based on the notion that these institutions perform state tasks, e.g. healthcare provision, education).

#### **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 a general 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>132</sup> (regulating organisations, such as the police, prison services, customs and excise guards, hereinafter referred to as the Law Enforcement Organisations Act) reads 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 or her professional qualities, training, experience, performance and service time.

Article 6 of Act CCV of 2012 on the Status of Military Personnel<sup>133</sup> (hereinafter referred to as the Armed Forces Act) claims that the state and the employer shall comply with the

<sup>131</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>132</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>133</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).



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.

However, this 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 out by the relevant statutes. Under Article 33 of the Law Enforcement Organisations Act, individuals who are older than 18 and at least 10 years younger than the upper age limit pertaining to the organisation and are suitable for service from a medical, psychological and physical point of view may enter service. Under Article 31 of the Armed Forces Act (regulating the army), individuals who are older than 18 and are suitable for service from a medical, psychological and physical point of view may enter service.

The detailed regulations are set out 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>134</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 her application, since, under its terms, a woman who is less than 162 centimetres tall may not become a police officer (for men, the minimum height 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(d) of the ETA mentions nationality (*nemzetiség*) among protected grounds, this expression does not refer to citizenship but is used to refer to affiliation with a national minority. However, differentiation based on nationality (as citizenship) is not excluded from the scope of the ETA: in fact, it is one of the 'other characteristics' to be protected by the ETA, as supported by the Equal Treatment Authority's case law.

For instance, in one case taken by the Equal Treatment Authority, a Polish citizen who had lived and worked in Hungary for years and spoke excellent Hungarian requested a credit card from his bank, but his request was rejected. In the procedure, the bank argued that the reason for the policy was that it was not able to check the foreign credit history of non-Hungarian citizens, and also the recovery of potential unpaid debts was much more

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<sup>134</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).

cumbersome abroad. Ultimately, the parties reached a friendly settlement, and the bank undertook to amend its credit card policy to allow foreigners to have credit cards. The Authority approved of the settlement.<sup>135</sup>

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

Due to the fact that members of the ethnic minority that is most often exposed to discrimination (i.e. 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 under national law if an employer only provided benefits to those employees who are married.

Such a differentiation could be challenged either as direct discrimination under the scope of 'other characteristic', or as indirect discrimination based on sexual orientation. However, the author has no knowledge of related case law.

b) Benefits for employees with opposite-sex partners

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

There are no explicit provisions under 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 No. 14/1995 (III. 13.), the Constitutional Court expressly declared that 'those (social and healthcare) benefits that are provided on the basis of partnership may not be made dependent on the sex of the partners.'<sup>136</sup> Although this was stated with regard to state social security arrangements, the Constitutional Court's view would in all probability also be taken into consideration in a legal dispute between an employer and an employee.

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

There are no cases like this, but analogous cases regarding state-provided benefits (e.g. exemption from tax inheritance fees)<sup>137</sup> or benefits provided to families by service providers (e.g. family ticket offered by a spa)<sup>138</sup> exist.

The first case concerned two surviving registered partners who were ordered by the National Tax and Customs Authority to pay inheritance tax, even though spouses have full inheritance tax exemption and under Article 3 of the 2009 law on registered

<sup>135</sup> Equal Treatment Authority, Decision No. EBH/74/2017, 27 March 2017.

<sup>136</sup> Constitutional Court, 14/1995 (III. 13.) AB határozat, 13 March 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/DA693CDE8BF08185C1257ADA005257FB?OpenDocument>.

<sup>137</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%A1rsakra+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%A1rsakra+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>138</sup> Equal Treatment Authority, Decision No. EBH/80/2019, 26 February 2019, <http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh802019>.

partnerships,<sup>139</sup> with few express exceptions, all legal provisions that apply to spouses shall also apply to registered partners. Following a report by the Ombudsman, the tax authority announced its decision to revise its earlier policy discriminating against same-sex registered partners in matters of inheritance and personal income tax.

In the other case, the complainant turned to the Equal Treatment Authority because the family ticket was offered by a spa only to married couples with children. In the proceedings before the Authority, the parties came to a friendly settlement. The spa undertook to offer the ticket to two adults with children, irrespective of their sex.

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

In Hungary, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78). However, these 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>140</sup> (hereinafter referred to as the Labour Suitability Decree) covers job- and profession-related suitability tests [Article 1(a) and (b)]. The former [Article 1(a)] serves to test whether the applicant can cope with the risks and effects resulting from the activity they need to perform as part of the job. The latter [Article 1(b)] 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(3) prescribes that employees may only be employed for work that may not entail disadvantageous effects for them, taking into consideration their physical features or maturity or health status. Taking into account the changes in the health status of the employee, the employer shall adjust the working conditions and the working hours of the employee concerned. Under Paragraph (4) of the same Article, the employer shall provide free labour suitability examinations before employment commences and at regular intervals subsequently.

The Labour Code here refers to examinations conducted under Article 10(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 breastfeeding 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(1) 'the encumbrances excluding or only conditionally allowing the employment of minors are listed in Annex 8'. Article 10/B(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 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 include microwave radiation, overpressure, exposure 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.

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<sup>139</sup> Hungary, Act XXIX of 2009 on Registered Partnership and the Amendment of Laws Related to This and the Facilitation of Certifying the Existence of Partnerships (2009. évi XXIX. törvény a bejegyzett élettársi kapcsolatáról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról), 8 May 2009, <https://net.jogtar.hu/jogszabaly?docid=A0900029.TV>.

<sup>140</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).

Definitions of terms 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. However, this 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 or her by pursuing a certain activity at a particular workplace in a particular job] or Article 22(1)(a) of the ETA (genuine and occupational requirement provision).

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

##### **4.7.1 Direct discrimination**

In Hungary, national law does not provide a specific exception for direct discrimination based on age, but, depending on judicial interpretation, age may be a ground for lawful differentiation on the basis of the general exempting clause of the ETA, and there are certain sectors (e.g. armed forces), where the pertaining legislation contains minimum and maximum age requirements.

##### **a) Justification of direct discrimination on the ground of age**

In Hungary, national law does not provide for justification for direct discrimination specifically on the ground of age. However, the ETA permits objective justification for direct discrimination in general with regard to all grounds (except for racial or ethnic origin), so it is possible that in a particular individual case when the respondent invokes the general exempting clause (Article 7(2)) in relation to age-based differentiation, the court or Equal Treatment Authority will accept it as justified. This possibility is not specific to age, however, and the same may happen when the ground for differentiation is sexual orientation, religion or disability. In this regard, therefore, this exempting clause does not rely on Article 6 of Directive 2000/78.

This is because, unlike the directives, the ETA attaches a general exemption clause to both indirect and direct discrimination and not only in relation to age as in Article 6 of Directive 2000/78, but in relation to all grounds with the exception of racial or ethnic origin.

As outlined above in Section 2.2, Article 7(2) of the ETA states: '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 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 against discrimination available for a person 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 using the stricter test (legitimate aim, necessity, suitability, proportionality), as the right to education is a fundamental right. 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.

Compatibility with Article 6 is very difficult to assess currently due to a number of undecided issues. As described above, there is a new version of Article 22(1)(a) (the Hungarian GOR clause). At the moment, it is not possible to say with certainty whether

this new version will be interpreted as relating only to access to employment or to all aspects of employment.

If it does relate to all aspects of employment, then Article 22(1)(a) is *lex specialis* compared to Article 7(2) in all aspects of employment, in which case the general exempting clause cannot be applied to labour cases, and age-based differentiation in the area of employment will be decided on the basis of the test of Article 22(1)(b). This test contains the elements of a legitimate aim and proportionality (which may be interpreted to cover both appropriateness and necessity). Therefore, any differentiation regarding any aspect of employment based on age will only be acceptable if it has a legitimate aim closely linked to the work and is a proportionate means to achieve that aim. In the view of the author, this satisfies the requirements of Article 6 of the Directive.

If Article 22(1)(a) only applies to recruitment, the general exempting clause (Article 7(2) of the ETA) will have to be applied to all aspects of employment. This contains two tests: one for fundamental rights and one for all other issues. The fundamental rights test again requires a legitimate aim, and allows for differentiation if it is absolutely necessary, suitable for achieving the aim and proportionate. This is again in line with Article 6. However, the other test only requires reasonability, so if that test – if that was to be applied – would not satisfy the requirements of Article 6.

While the Hungarian Fundamental Law contains the right to employment, it is regarded as a 'weak' right with limited enforceability. Therefore, it is possible that the more lenient test would be applied in a case where someone's employment-related rights were limited in a discriminatory manner. In this case, the Hungarian law would provide weaker protection against age-based discrimination than what is required by Article 6.

Thus, if an age-based employment discrimination case came before a court, two questions would need to be answered: first, if Article 22(1)(a) pertains to the case, and, second, if not, then whether employment falls under the strict or the lenient test in Article 7(2). In this process, the court would also need to take into account its obligation to interpret domestic law in line with the *acquis* if possible. In the absence of case law, it is not possible to say what the outcome of such a case would be.

#### b) Permitted differences of treatment based on age

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

Under Article 294 of the Labour Code, a 'young employee' is an employee who is below 18 years of age. The Labour Code contains numerous provisions aimed at protecting 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 the promotion of access to employment. For these, see the relevant parts of Section 4.

#### c) Fixing of ages for admission or entitlement 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, availing of the possibility provided for by Article 6(2).

Before January 2011, membership of a private pension fund was either compulsory (for young people starting out in a career and establishing an employment relationship for the first time, provided they were younger than 35 years of age) or voluntary (in January 2011, even those individuals for whom membership had been compulsory were allowed to leave private pension funds, and from this date there has been 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 Act LXXXII of 1997 on Private Pensions and Private Pension Funds<sup>141</sup> (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 pension age. This is defined in the law relating to state pensions (it is possible to request the pension at a date later than the pension age).

If an employee leaves an employer, and the fund established by the employer is a 'closed fund' (where only employees can be members), the former employee has to choose another private pension fund. In this case, the payments made to the fund up to the time that membership was terminated will be transferred to the new fund.

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

In Hungary, special conditions are set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

Article 2 of the Act 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 training is one of the available forms of support. Employees under the age of 25 and persons with caring responsibilities are expressly mentioned by Article 14 as groups for which training funding may be requested.

Article 16 makes it possible for the State Employment Service to provide employers with support amounting to 50 % or 60 % of the salary and social security payments of disadvantaged workers or workers with disabilities, respectively. This support is available for a maximum of one or – in cases concerning persons in a severely disadvantaged position – two years and is available if the employer a) undertakes to maintain the employment for the whole period for which support is provided; b) has not dismissed the employee with reference to circumstances concerning its own operation 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 as 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>142</sup> The categories include the following: (i) persons with primary education or lower; (ii) persons

<sup>141</sup> Hungary, Act LXXXII of 1997 on Private Pensions 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).

<sup>142</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).

over 50; (iii) young people up to the age of 25 starting out in a career; (iv) single parents of at least one child under the age of 18; (v) persons who within 12 months preceding the commencement of the employment were in prison or pre-trial detention.

Protection against dismissal for persons with caring responsibilities also exists in the Hungarian legal system. Under Article 65 of the Labour Code, employers shall not terminate an employment relationship by regular dismissal in, among others, the following circumstances: during an unpaid leave of absence when nursing or caring for a child; during pregnancy; during the 24-week-long maternity leave.

Protection against dismissal exists for older workers as well. Under Article 66(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 the old age pension by regular dismissal only in particularly justified cases. Under Article 77(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 their eligibility for the old age pension.

#### **4.7.3 Minimum and maximum age requirements**

In Hungary, various exceptions permit 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 16 years of age. During the school holidays, full-time pupils and students attending primary 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 subject to prior authorisation by the competent guardianship authority.

In addition to these general rules, minimum age requirements apply only to a very limited number 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 dealt with a number of cases that raise the question of whether it is legitimate to define a minimum or maximum age with regard to certain positions and occupations. In its Decision No. 857/B/1994, the court stated the following: 'the legislator is entitled to subject the exercise of certain professions and the filling of certain positions to age-related conditions, i.e. to set a lower and an upper age limit.'<sup>143</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 currently 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 pension age.

<sup>143</sup> Constitutional Court, 857/B/1994 AB határozat, 20 February 1995, <http://public.mkab.hu/dev/dontesek.nsf/0/C4B0DFED73219E48C1257ADA005294B9?OpenDocument>.



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 a pension if an individual wishes to work for 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 a public position, but if he or she wishes to work for longer, the pension can be deferred under certain circumstances.

Under Article 18 of Act LXXXI of 1997 on State Pensions<sup>144</sup> (State Pensions Act), the pension age in Hungary is currently 64 for both men and women, but this will be gradually raised to 65 by 2022. Notably, only workers with 20 years' service are eligible for a full old age pension, others can receive a partial pension. There is one significant exception: women with 40 years' service (including maternity leave 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 pension age. However, when they reach pension age, they are considered to be pensioners from the point of view of the Labour Code (Article 66), provided that they have the necessary number 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 pension age has to choose between collecting their pension or continuing to work (provided that, according to the rules pertaining to the individual, he or she has the choice to continue working – see below). Under Article 83/C of the State Pensions Act, 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) Government 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. This list is not exhaustive.

An intricate system regulates the amount of work that 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 was challenged before the European Court of Human Rights in the case *Fábián v. Hungary* (application no. 78117/13). In its judgment handed down on 15 December 2015,<sup>145</sup> the ECtHR concluded unanimously that there had been a violation of the applicant's rights under Article 14 in conjunction with his right to property. However, in its judgment of 5 September 2017,<sup>146</sup> the Grand Chamber overturned the first instance judgment. With a vote of 11 to 6, it held that, since the applicant had not demonstrated that as a member of the civil service whose employment, remuneration and social benefits were dependent on the state, he was in a relevantly similar situation to those pensioners who were employed in the private sector and the differentiation did not amount to discrimination.

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<sup>144</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).

<sup>145</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>.

<sup>146</sup> European Court of Human Rights, *Fábián v. Hungary*, [GC], Application No. 78117/13, 5 September 2017, [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"002-11655\"\]}](https://hudoc.echr.coe.int/eng#{\).



The ECtHR came to this conclusion on the following basis:<sup>147</sup>

Three of the elements to be taken into account had been widely reflected in a long-standing line of the Court's case-law recognising a distinction between civil servants and private employees. Firstly, Contracting Parties, by necessity, enjoyed wide latitude in organising State functions and public services [...]. Secondly, for institutional and functional reasons, employment in the public sector and in the private sector was typically subjected to substantial legal and factual differences [...]. Thirdly, it could not be assumed that the terms and conditions of employment, including the financial ones, or the eligibility for social benefits linked to employment, would be similar in the civil service and in the private sector, nor could it therefore be presumed that those categories of employees would be in relevantly similar situations in that regard. The applicant's case revealed a need to take a fourth factor into account, namely the role of the State when acting in its capacity as employer. In particular, as employers, the State and its organs were not in a comparable position to private-sector entities either from the perspective of the institutional framework under which they operated or in terms of the financial and economic fundamentals of their activities; the funding bases were radically different, as were the options available for taking measures to counter financial difficulties and crises.

Both State and private sector employees were affiliated to the compulsory social-security pension scheme to which they contributed in the same way and to the same extent. Nevertheless, that was not in itself sufficient to establish that they were in relevantly similar situations. Following the amendment to the Pensions Act 1997, it was the applicant's post retirement employment in the civil service that entailed the suspension of his pension payments. It was precisely the fact that, as a civil servant, he was in receipt of a salary from the State that was incompatible with the simultaneous disbursement of an old-age pension from the same source. As a matter of financial, social and employment policy, the impugned bar on simultaneous accumulation of pension and salary from the State budget had been introduced as part of legislative measures aimed at correcting financially unsustainable features in the pension system of the respondent State. That did not prevent the accumulation of pension and salary for persons employed in the private sector, whose salaries, in contrast to those of persons employed in the civil service, were funded not by the State but through private budgets outside the latter's direct control.

b) Occupational pension schemes

In Hungary, people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements at a standard age.

Under the provisions of Article 7 of the 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 supplement the payments made by employees into private pension funds. Private pension funds established by employers and other private pension funds operate in the same way. Employees may request that such private pension funds start to pay their pensions when they reach pension 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 continuing to work, but the restrictions referred to above and described in detail below also apply to employees who receive private pensions.

c) State imposed mandatory retirement ages

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<sup>147</sup> <http://hudoc.echr.coe.int/eng?i=002-11655>.

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

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

- Under Article 60(1)(j) of Act CXCIX of 2011 on Civil Servants,<sup>148</sup> the service relationship of civil servants ceases when they reach the general pension age (provided that they have 20 years of service). If they do not have 20 years of service, or if they receive 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>149</sup> (Judicial Status Act), judges have to retire when they reach the actual pension age. Although this was 62 at the relevant time, the Hungarian Government allowed judges who were older than 62 a transitional period in an attempt to comply with the decision of the CJEU (see below). At the moment, therefore, 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. In 2022, the mandatory retirement age for judges will coincide with the general pension 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>150</sup>
- Similar rules apply to notaries public under Article 22(1)(d) and Article 178 of Act XLI of 1991 on Public Notaries.<sup>151</sup>
- Under Article 80(1)(a) of the Law Enforcement Organisations Act, the service relationship of the professional member ceases once they reach the upper age limit of professional service. Under Article 81, the upper age limit coincides with the general pension age.

These provisions were not subject to debate during the transposition of the directives. However, they were subject to serious domestic and international criticism when the mandatory retirement age for judges and prosecutors (which was 70 before the entry into force of the Fundamental Law in April 2011) was abruptly reduced to the actual general pension age with an insufficient transition 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 it gives rise to unjustified discrimination and is neither appropriate nor necessary to achieve the allegedly legitimate objectives. The Commission's action also concerned prosecutors and public notaries. In its decision of 6 November 2012,<sup>152</sup> the CJEU established that the national scheme requiring the 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 transition period) and the simultaneous raising of the general pension age did not take sufficient account of

<sup>148</sup> Hungary, Act CXCIX of 2011 on Civil Servants (2011. évi CXCIX. törvény a közszołgálati 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>149</sup> Hungary, Act CLXII of 2011 on the Status and Remuneration of Judges (2011. évi CLXII. Törvény a bírák jogállásáról és javadalmazásáról), 2 December 2011, [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A1100162.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100162.TV).

<sup>150</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 ügyészi 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>151</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>152</sup> Judgment of 6 November 2012, European Commission v Hungary, Case C-286/12, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=20661>.

the interests of those affected 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>153</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 an employment contract can be terminated) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do not apply to all workers irrespective of age, even if they remain in employment after attaining pension age or any other age.

Under Article 66(9) of the Labour Code, the employer is not obliged to provide reasons for the dismissal if the employee has passed pension age. 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 pension age.

Another restriction is that employers are exempted from severance payment if they dismiss an employee after the employee has reached pension age. On the other hand, if the dismissal takes place within five years before the employee reaches pension 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 on mandatory retirement is in line with CJEU case law on age.

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 CJEU case law.

The domestic law clearly does not seem to be in line with the jurisprudence of the CJEU when it comes to the exclusion of employees beyond pension age from severance payment (cf. the CJEU's Andersen judgment<sup>154</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, nonetheless wish to waive their right to such a pension temporarily in order to continue with their career, the pertaining national law unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued).

#### 4.7.5 Redundancy

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<sup>153</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>154</sup> Judgment of 12 October 2010, *Ingeniørforeningen i Danmark v Region Syddanmark*, C-499/08.

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, it is possible to dismiss someone who has passed retirement age without having to provide reasons.

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 they have reached pension age (and has the necessary service time), they are not entitled to compensation. Otherwise, if a person is dismissed due to redundancy, they are entitled to compensation, and the amount of the compensation is dependent on the number of years they have 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 their retirement age, they shall be entitled to additional compensation amounting to up to three times their 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(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.

For instance, the Equal Treatment Authority heard a case in which the complainant launched a procedure because a public bath banned him from using the swimming pool because of the stoma seal he was wearing. The public bath argued that the complainant had been prevented from using the swimming pool because of the health risk it would have posed for the other guests. The Authority looked into the argument and concluded that, since the stoma seal had provided sufficient protection against leakage, the complainant's GP had confirmed that the complainant was a responsible user of the stoma seal and since other guests who do not have similar visible signs of their health conditions (e.g. persons with an STD or simply the flu) might also carry health risks when using the services of a bath, reliance on the protection of health as a ground for the differentiation was not acceptable.<sup>155</sup> The decision was upheld by the Metropolitan Court.

#### **4.9 Any other exceptions**

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

With regard to education – Article 28

(1) If the education is organised only 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 primary and secondary education, at the initiation and by the voluntary choice of the parents, or

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<sup>155</sup> Equal Treatment Authority, Decision No. EBH/95/2018, no date available, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh952018>.

b) in higher education, by the students' voluntary participation, education based on religious or other ideological conviction is organised in a way that the goal or the curriculum of the education justifies the creation of separate classes or groups and 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.

(2a) The organisation of education based on religious or other ideological conviction as set forth in Paragraph (2) shall not result in segregation based on characteristics listed in Article 8 b) to e) [racial affiliation, colour of skin, nationality (not in the sense of citizenship) or belonging to a national minority].

(2b) If the education is organised on the basis of belonging to a national minority, the principle of equal treatment is not violated only if it meets the requirements set forth in Paragraph (2) and

a) acquiring the knowledge required by the core curriculum is guaranteed at the same level as in the majority education, and

b) education based on belonging to a national minority complies with the requirements set forth in the Act on the Rights of Nationalities.

#### 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 provided for in Paragraph (2) must be obvious from the name of the establishment and the circumstances of the use of the service; 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 envisage specific exemptions allowing direct discrimination in connection with these fields. This may be a breach of the transposition obligation, which, however, could be remedied by applying the principles of the direct and indirect effect and the primacy of Community law.

## 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 under 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(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 under 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 impose an obligation to provide preferential treatment to a specified group of employees in respect of the labour relationship or other relationship relating to employment; (iii) ETA, Article 25(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 healthcare system, in accordance with the provisions herein; (iv) ETA, Article 29: A Government decree created pursuant to the law or the authorisation thereof may impose 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) Quotas in employment for people with disabilities

In Hungary, national law provides for a quota for people with disabilities in employment.

A quota-type measure relating to the employment of people with disabilities 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>156</sup> With this measure, employers<sup>157</sup> shall be obliged to pay a 'rehabilitation contribution'<sup>158</sup> if they have more than 25 employees and the proportion of persons with disabilities within the workforce is below 5 %. According to analyses, this quota system, which has been in place since 1998, albeit with changing conditions and figures, 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

<sup>156</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>157</sup> The duty applies (under identical conditions) to both the private and the public sector, with some exemptions, including law enforcement bodies, companies established for the specific purpose of employing inmates and the army.

<sup>158</sup> The amount per unfilled position per year is nine times the minimum wage, in 2019 it was approximately EUR 4 200.

17 % to 40 % between 2008 and 2012.<sup>159</sup> The trend seems to be continuing, as, in 2015, the employment rate of persons with disabilities ('altered labour suitability') increased further to 20.8 %, <sup>160</sup> and according to a non-representative survey in 2017, the ratio of employers employing such persons increased to above 50 % in all sectors.<sup>161</sup>

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<sup>159</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>160</sup> Central Office of Statistics, *Munkaerőpiaci helyzetkép* (Labour Market Situation), October 2016. p. 18, available at: <https://www.ksh.hu/docs/hun/xftp/idoszaki/munkerohelyz/munkerohelyz15.pdf>.

<sup>161</sup> Megváltozott munkaképességű személyek foglalkoztatásának munkaerő-piaci előrejelzése. Prognózis| 2017 (Labour market forecast of the employment of persons with altered labour suitability. prognosis 2017). Szociális és Gyermekvédelmi Főigazgatóság Szakmatámogatási Főosztály Foglalkozási Rehabilitációs Osztály, Budapest 2017, p. 7, available at: [https://szgyf.gov.hu/phocadownload/foglalkozasi\\_rehabilitacios\\_informaciok/Prognosis%202017\\_12\\_20\\_vegleges.pdf](https://szgyf.gov.hu/phocadownload/foglalkozasi_rehabilitacios_informaciok/Prognosis%202017_12_20_vegleges.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 reads as follows:

- (1) A person whose inherent rights have been violated may – within the statute of limitation – demand the following on the basis of the violation and depending on the circumstances of the case:
- a) a court declaration of the occurrence of the infringement;
  - b) to have the infringement discontinued and the perpetrator banned from further infringement;
  - c) that the perpetrator provides adequate redress and publicises this fact at his or 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 caused to him or 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 violation of the inherent right.
- (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 or her environment.

Article 2:53 stipulates that a person who suffers pecuniary damages as a result of the violation of his or 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 regardless of the field or ground.

##### *Labour courts*

In Hungary, 'labour and administrative' courts, as they are known, 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 employment, Article 82 stipulates that the employer shall compensate the employee for the damage suffered. Full compensation is limited by Paragraph (2) of the provision, according to which a maximum of 12 months' salary may be claimed by the employee under the heading of lost income. Under Article 83, if the termination of employment constitutes a violation of the requirement of equal treatment, the employee may request the court to order their reinstatement (in other cases of unlawful termination of employment, this option is only available in exceptional cases, such as when the dismissed employee is 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, as set out in Article 167 of the Labour Code.

#### Administrative procedures

The Equal Treatment Authority has authorisation to act against any discriminatory act, irrespective of the ground of discrimination (e.g. sex, race, age) or the field concerned (e.g. employment, education, access to goods). In addition to 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 organisational structure of the Authority will be described in detail in Section 7.)

The establishment of the Authority did not mean that all the administrative organs that previously had authority to act in discrimination cases were deprived of their powers but it did make it necessary to create a system preventing a clash of authority. The most important administrative organs that have the power to act in discrimination cases are described below, and the distribution of authority between them is then outlined.

#### *Access to goods and services*

Under Article 45/A(2) of Act CLV of 1997 on Consumer Protection<sup>162</sup> (hereinafter referred to as the Consumer Protection Act), the consumer protection authority shall monitor provisions related to the requirement of equal treatment to ensure that they are respected in the course of access to goods and services. In the event that a breach is found, the authority shall conduct proceedings. Under Article 47, if the authority establishes a 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*

Under Article 79 of the National Public Education Act, the lawful operation of educational institutions is supervised by Government offices located in each county and the capital. If an office finds a violation, it may impose the following sanctions: (i) it calls on the head of the educational institution to end the violation and notifies the institution's maintainer; (ii) if the educational institution is not maintained by the state or a municipality, it may request the body paying financial support to the institution to review or suspend the support, or even to arrange the transfer of the relevant pupils to another institution; (iii) it may impose

<sup>162</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).

a fine of up to approximately EUR 3 125 (HUF 1 000 000); (iv) it may request the court to declare a decision handed down by the institution null and void.

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 fewer than 150 days have passed since the parent made the request), and can launch petty offence proceedings against the head of the educational institution. Following such a decision, the Government office monitors whether the educational institution is respecting the requirement of equal treatment. This monitoring is performed as needed but at least once every academic year.

#### *Distribution of powers*

If a service provider discriminates against a customer, both the Equal Treatment 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 to contact. 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 Equal Treatment Authority or b) another public administrative body that has been granted authority in a separate act to assess violations of the principle of equal treatment, as chosen by the offended party.

In order to avoid double procedures, Article 15 stipulates that the Equal Treatment Authority shall inform other organs, and other organs shall inform the Authority about the initiation and the outcome of a procedure relating to a case of discrimination, or about the outcome of the subsequent judicial review, if there is one. Furthermore, if a procedure relating to a case of discrimination has been initiated before any public administrative body, the other public administrative bodies a) may not proceed with the same case with regard to the same persons, and b) shall suspend their procedure initiated in relation to the same case with regard to any other person until a binding decision is made in the matter. If the case has been decided 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 Equal Treatment Authority or the consumer protection authority. If one of them turns to the Equal Treatment Authority, it shall notify the consumer protection authority, as the case falls under the consumer protection authority's remit as well. If another member of the group then files a complaint with the consumer protection authority, this organ may not proceed with regard to the first complainant, and shall suspend its procedure with regard to the second one. Once the Equal Treatment Authority has made a decision on the case, the consumer protection authority may continue its procedure, but it has to base its decision on the facts established by the Equal Treatment Authority.

The Equal Treatment Authority and a court (civil or labour) may not proceed simultaneously with a case. Under Article 15/B of the ETA, if the victim of discrimination also files a lawsuit with the court, the Equal Treatment 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 can then 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>163</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 a 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(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 of up to approximately EUR 470 (HUF 150 000). These proceedings shall be conducted by the Government offices located in Budapest and the counties. It should be noted that, under Article 19(3) of the ETA, the shifted burden of proof does not apply to these proceedings. The aggrieved party is not liable for any costs in such proceedings.

### Conciliation procedures

#### *General mediation procedure*

According to Article 1 of Act LV of 2002 on Mediation<sup>164</sup> (hereinafter referred to as the Mediation Act), the aim of the general mediation procedure is to facilitate the settling of civil and administrative law disputes arising 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 or the ETA, 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 75 of the GAP, public administrative authorities are obliged to try to resolve the conflict by forging an agreement between the parties, if the case is decided in a hearing. Pursuant to Article 83 of the GAP, if the parties reach an agreement at the hearing or otherwise, and the agreement complies with the laws and the Fundamental Law and contains adequate provisions concerning the deadline for compliance and the bearing of procedural costs, then the proceeding authority approves it and includes it in a formal decision.

As a public administrative body, the Equal Treatment Authority is also subject to the above obligations regarding friendly settlements. Under Article 16 of the ETA, the Equal Treatment Authority is obliged to try to forge a friendly settlement between the parties.

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<sup>163</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>164</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).

## Education

Decree 40/1999 of the Minister of Education established the Commissioner for Educational Rights.<sup>165</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, teachers, etc. have the right to complain, provided that all available administrative remedies have been exhausted and less than a year has elapsed since the measures complained of were handed down or carried out (Article 5).

Complaints not dismissed by the Commissioner are subject to the conciliation procedure. The Commissioner sends the petition to the institution about which a complaint has been made and requests a declaration. The Commissioner attempts to establish a consensus between the institution and the petitioner. In the event 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 the case of non-compliance, the Commissioner sends a recommendation to both the institution and its supervisory organ. The latter must 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 a 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 governed by Act CXI of 2011.<sup>166</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 have been exhausted or none exist. The Ombudsman can also proceed *ex officio*.

The Ombudsman can investigate any authority, including the armed forces, national security services and law enforcement organisations. He or she may request information, look into files, visit premises and can hear any employee of the examined authority. On 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. The Ombudsman may also (i) petition the Constitutional Court; (ii) initiate criminal or disciplinary proceedings; and (iii) propose that a legal provision be amended, repealed or issued. The Ombudsman's main publicity weapon is the annual report submitted to Parliament. He or she can also request parliamentary investigations and debates.

The ETA fails to settle potential clashes of authority between the Equal Treatment Authority and the Ombudsman, who also has the authority to conduct individual and comprehensive investigations into cases of discrimination. The ETA offers no solution for cases in which

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<sup>165</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>166</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).

the conclusion of and the sanction imposed by the Equal Treatment Authority is not in line with the opinion of the Ombudsman. It is limited to exempting the Ombudsman's decisions and measures from the Authority's investigation.

b) Barriers and other deterrents faced by litigants seeking redress

Under Article 72 of the new Code of Civil Procedure, legal representation is mandatory in courts as a general rule. Labour lawsuits are an exception, but civil lawsuits launched on the basis of the right to non-discrimination as an inherent right and the judicial review of decisions by the Equal Treatment Authority now require mandatory legal representation.

This can be highly problematic: although state-funded legal aid (including representation by a patron lawyer) is available for such cases, the indigence threshold is extremely low.

Under Article 5 of Act LXXX of 2003 on Legal Aid,<sup>167</sup> the state shall pay a party's legal fees if the party's monthly net income (wage, pension or other regularly paid cash allowance) does not exceed the actual amount of the minimum pension, and the party has no assets. The minimum pension has been EUR 90 (HUF 28 500) for over a decade now. If a person lives alone, the state pays for legal aid if his or her available income does not exceed 150 % of the minimum pension (EUR 135 or HUF 42 750).

Under Article 6, the state does not pay, but advances the legal fees if the monthly net income available to the party does not exceed 43 % of the national average of the gross monthly wage published by the Central Statistical Office for the second year prior (EUR 400 or HUF 127 710), and the party has no assets.

Article 8 prescribes that the party shall be regarded as eligible if his or her available income exceeds the above limits, but (i) he or she is prevented from exercising the right of disposal of their income to an extent that makes it impossible to use legal services; (ii) it is impossible for the party, even with an income in excess of the eligibility limit, to avail of legal services because of his or her specific personal circumstances, such as disability or the high costs of living in the area where he or she lives; (iii) the party is compelled to spend the income for purposes other than legal services, and failure to do so would result in an imminent threat to the life, limb, health or livelihood of the party or other persons living in the same household.

However, even with the availability of these exceptions, the indigence threshold is very low, and the inability to retain a lawyer may be a serious barrier to enforcing the right to non-discrimination.

Another deterrent may be that if the claimant loses the case, they have to pay the other party's legal costs.

With regard to labour court proceedings, it must be pointed out 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). Labour courts are 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 or her in person).

With regard to barriers and deterrents in administrative procedures, the following can be said. The administrative organs are obliged by Article 3 of the GAP to fully establish the facts of a given case. The role of legal assistance is therefore not as crucial as in court

<sup>167</sup> Hungary, Act LXXX of 2003 on Legal Aid (2003. évi LXXX. törvény a jogi segítségnyújtásról), 6 November 2003, <https://net.jogtar.hu/jogszabaly?docid=A0300080.TV>.

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, some statistics are available on the number of discrimination cases brought to justice. Such statistics are not available regarding court cases, but data related to the activities of the Equal Treatment Authority exist.

**Caseload of the Equal Treatment Authority, 2007-2017<sup>168</sup>**

Year	Number of complaints	Administrative decisions	Decisions establishing discrimination	Friendly settlements
2007	756	159	29	3
2008	1 153	256	37	23
2009	1 087	273	48	18
2010	1 373	377	40	36
2011	1 014	359	42	39
2012	2 772	213	31	28
2013	1 496	345	21	30
2014	1 005	251	23	27
2015	884	240	33	17
2016	1 017	278	31	28
2017	1 288	285	30	27
2018	786	315	36	30

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(1) of the ETA, 'non-governmental and interest representation organisations' and 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 established under the Act on the Right to Assembly, Public Benefit Status and the Operation and Funding of Non-governmental

<sup>168</sup> Source: Equal Treatment Authority website, Authority's annual reports are available at: <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/tajekoztato-az-egyenlo-banasmod-hatosag-2017-evi-tevekenysegerol> and: <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.



Organisations,<sup>169</sup> whose objectives set out in its articles of association or statutes include the promotion of equal social opportunities or the catching up by disadvantaged groups defined by an exact enumeration of the relevant protected ground(s) or the protection of human rights defined by an exact enumeration of the relevant protected ground(s). The exact enumeration of the relevant protected ground(s) means that, for instance, an LGBTQI organisation will not be authorised to launch *actio popularis* procedures against discrimination concerning persons with disabilities, unless its statutes contain a reference to disability. Based on the text of the law, the amendment should not prevent organisations aimed at protecting the rights of a particular group from taking action against intersectional discrimination if the protected ground that is relevant for them is among those that are concerned in the given case, but, in the absence of case law, it remains to be seen whether a flexible or restrictive interpretation will be adopted.

- A minority (nationality) self-government in respect of a particular national and ethnic minority.
- A trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions.

As outlined above, only those non-governmental organisations and foundations whose objectives set out in their articles of association or statutes include the promotion of equal social opportunities for disadvantaged groups or the protection of human rights are authorised to act on behalf or in support of the victims, and they may only act to promote the rights of those protected groups that are expressly mentioned in their articles of association. There are no further conditions for 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 can be established whether it is entitled to act in relation to the given complaint) and the authorisation signed by the individual victim.

As can be seen from the cases described in this report, many of which were initiated by human rights and equality NGOs as *actio popularis* claims or representatives of individual complainants, such organisations in Hungary are active in engaging on behalf of 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 can be difficult, e.g. from 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 (joining existing proceedings)

In Hungary, associations/organisations/trade unions are entitled to act in support of victims of discrimination.

Under Article 18(2) of the ETA, non-governmental and interest representation organisations are entitled to exercise the rights of the concerned party in administrative proceedings that are initiated due to the infringement of the requirement of equal treatment. This means that they can enter proceedings that are already under way to support the complainant, but cannot initiate proceedings if the victim has not already done so.

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<sup>169</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).

In relation to acting in support of victims, the same rules as those outlined under a) above apply.

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 against the infringement of inherent rights, a labour lawsuit or a lawsuit related to a civil service relationship 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.

Under Article 18(3), a non-governmental and interest representation organisation may – if the above conditions prevail – also choose to initiate proceedings before the Authority.

It should be noted that a specificity of such cases in relation to the burden of proof is that the danger of violation is sufficiently substantiated on the part of the complainant organisation (so no actual disadvantage needs to be substantiated).

The types of associations are the same as those described above. In proceedings before the Authority, such associations may seek all the sanctions that are generally applicable by the Authority (see Section 6.5). Before a civil court, they may – out of the list of sanctions applicable in lawsuits initiated for the violation of inherent personal rights – seek all the sanctions with the exception of damages.

The first case to arise under the ETA was the *actio popularis* claim brought by an LGBTIQI rights organisation against a denominational university (described in detail in Section 4.2).<sup>170</sup> The Chance for Children Foundation has launched a number of *actio popularis* claims with respect to the segregation of Roma pupils, one example being the Nyíregyháza case described in Section 3.2.8.

The right to bring *actio popularis* claims has been restricted by a decision of the Constitutional Court. Following the handing down 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 an end to the segregation) 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 affected by the actual individual case may file a constitutional complaint against a court decision. Since it is not the NGO that is actually affected by the segregation (in other words, the Curia's decision affects the constitutional rights of persons other than the NGO, i.e. the pupils), it has no standing before the Constitutional Court.<sup>171</sup> This interpretation was shared by the European Court of Human Rights, which rejected the Chance for Children Foundation's

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<sup>170</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>171</sup> Constitutional Court, IV/3311-9 /2012, 17 June 2013, [http://ccf.hu/sites/default/files/Gal%C3%A9ria/Gy%C5%91r\\_Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1g\\_2013.06.17.pdf](http://ccf.hu/sites/default/files/Gal%C3%A9ria/Gy%C5%91r_Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1g_2013.06.17.pdf).

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>172</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, however, that, while there is no separate set of rules for such cases, associations are not prevented from obtaining authorisation from more than one victim and initiating one single case on their behalf. Since the Hungarian legal system does not recognise the classic form of class action, the claims of each victim will be examined individually in such cases. As far as the author is aware, the question of giving wider effect to Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) was not raised as an issue during the codification process of the new Code of Civil Procedure in 2016. Nor is the author aware of any publicly announced plans to look further into the matter.

### 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 to 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 both real and 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 or her claims. Substantiation involves a lower level of certainty: if 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 assert 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 assumed to possess by the violator – 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 assert 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 offered by the directives: in the Hungarian system, the causal link between the protected ground and the disadvantage does not need to be

<sup>172</sup> European Court of Human Rights, *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v. Hungary*, Application No. 786/14, 25 March 2014.

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 link.

While this is the strictly literal interpretation, and the Equal Treatment Advisory Board (see Section 7) issued guidelines on the shift of the burden of proof in 2006 (revised in 2008) stating that it is not the complainant's obligation to prove that there is a causal link between the protected ground and the disadvantage,<sup>173</sup> the judicial practice took a different direction.

In the case serving as the basis for the Supreme Court's Decision No. Kfv.II.37.053/2010/8,<sup>174</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 maternity leave. In 2007, she wished to return, but her former position no longer existed, and her former tasks were being performed within the framework of a different position by a person employed for an indefinite term. The employer offered the complainant a lower-level position for a salary 15 % less than her previous salary. The complainant turned to the Equal Treatment Authority, claiming that she had been discriminated against on the basis of motherhood. In its decision of 7 August 2008, the Authority established discrimination based on motherhood and the ground 'other characteristic'. The employer requested a 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, even though replacement is generally dealt with in such cases by employing someone for a definite term to enable the return of the mother. The employer turned to the Supreme Court for a review of the Metropolitan Court's decision.

In its decision dated 6 October 2010, the Supreme Court quashed the decision handed down by the Authority and the Metropolitan Court on the basis that the Authority had failed to identify and set out in its decision the evidence proving that there was 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 was quashed and the Supreme Court prescribed that the complaint must be rejected as unsubstantiated in the repeated procedure. This decision was published as a leading judgment under the number EBH 2010.2272 and was followed by a series of similar decisions.

However, a shift took place in the jurisprudence in relation to a case where the complainant – the only female pool attendant at a public bath – claimed that she had been discriminated against on the basis of her gender, when the public bath dismissed only her out of the four head pool attendants in the course of a series of dismissals. In this case, the court of second instance justified the rejection of the claim – among others – by declaring that it was the claimant's obligation to substantiate not only the protected ground (gender) and the disadvantage (the dismissal), but also the fact that there was a causal relationship between the two.

The claimant requested a review by the Curia, challenging this approach on the basis of the law's literal interpretation and the Equal Treatment Advisory Board's guidelines. The Curia concluded the following: 'It is to be inferred from the above-quoted provisions [Article

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<sup>173</sup> <http://www.egyenlobanasmod.hu/index.php/hu/jogszabaly/tanacsado-testulet-2008-marciusi-allasfoglalasa-bizonyitasi-kotelezettseg-megosztasaval>.

<sup>174</sup> Supreme Court, Kfv.II.37.053/2010/8, 6 October 2010, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

19 of the ETA] that the claimant was obliged to only substantiate that she had suffered a disadvantage and that she had one of the protected characteristics listed in Article 8 of the ETA. The law does not put the burden of proving the causal link between the disadvantage and the protected ground on the claimant (the employee). Based on the specific rules of exculpation to be applied in discrimination cases, it fell on the employer to prove that there was no causality between the disadvantage and the protected ground, and therefore, it complied with the requirements of the ETA and Article 5 of the Labour Code. This [i.e. the Curia's] interpretation is aligned with the stance put forth in Guideline No 384/2008. (III. 28.) TT. of the Equal Treatment Advisory Board in this regard. The interpretation of the second instance court is therefore [...] erroneous.<sup>175</sup>

Although, in the actual case, the Curia found that the employer had been able to show that there had been no causal link between the claimant's gender and dismissal, the decision signalled an important shift in the jurisprudence. The decision was published as a leading judgment under the number EBH2015. M.24.

Finally, in its Summary Opinion on the Labour Courts' Jurisprudence Regarding the Violation of the Requirement of Equal Treatment (adopted in February 2017),<sup>176</sup> the Curia's jurisprudence analysis group seems to have concluded that this latter interpretation (i.e. that the claimant shall not be obliged to substantiate the causal link) is to be followed.<sup>177</sup> However, the group called attention to the need for further consultation on this matter between the administrative and the labour law branches of the Curia (as the two opposing judgments came from two different branches).<sup>178</sup>

#### **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(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 can be seen, the above definition extends the protection to persons providing any form of assistance to the victim.

In a recent case before the Equal Treatment Authority, the complainant was a 62-year-old forklift driver who worked as a temporary employee for over a year in a warehouse. During this time, the warehouse recruited a total of 10 permanent employees (partly from among its temporary employees), but the complainant's applications were repeatedly rejected despite meeting the requirements (more than a year of temporary work, good evaluations, no unjustified absences). He also filed two complaints with the employer (first via email, and then via certified mail), because he was of the view that as a temporary worker, he earned less than the permanent workers. A few weeks after he submitted the complaints, he was dismissed by the employer without justification (which was allowed under the terms of his temporary employment contract). The Equal Treatment Authority concluded that the warehouse had committed direct discrimination based on age when it did not employ the complainant as a permanent worker and was liable for victimisation when it dismissed him after he had filed complaints concerning his wages. Interestingly, the Authority did not find any significant wage differences between temporary and permanent workers. However, it

<sup>175</sup> Curia, Judgment No. Kúria Mfv. I. 10.517/2014, 2015 (no exact date available).

<sup>176</sup> Available at: [https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo\\_velemenye\\_egyenlo\\_banasmod.pdf](https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemenye_egyenlo_banasmod.pdf).

<sup>177</sup> Summary Opinion, Suggestions and Recommendations, Point 3.

<sup>178</sup> Summary Opinion, Suggestions and Recommendations, Point 10.

pointed out that the underlying discrimination complaint did not necessarily have to be well-founded for victimisation to be established. The warehouse requested a judicial review of the decision, but the court upheld it.<sup>179</sup>

## **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**

Section 6.1 outlined most of the sanctions that may be applied in discrimination cases (civil law sanctions, labour law sanctions, petty offence and administrative sanctions). This list is partly reiterated and partly supplemented below. A detailed description of only those remedial forums and legal institutions not described in Section 6.1 is provided.

#### General sanctions (applicable irrespective of sector)

In addition to the sanctions listed in Articles 2:51-2:53 of the Civil Code that can be applied by regular civil courts in lawsuits aimed at redressing the violation of the right to equal treatment as an inherent personal right (which include the possibility of awarding moral compensation to the victim), 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(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) stipulates that the legal consequences set out in Paragraph (1) shall be determined on the basis of all the 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 approximately EUR 155 (HUF 50 000) to approximately EUR 18 750 (HUF 6 million).

Under Articles 114 and 116 of the GAP, the Authority's decision may not be appealed within a public administrative procedure, but it may be subjected to a judicial review. Under Article 12(2) and Article 13(11) of Act I of 2017 on the Code of Administrative Litigation (CAL),<sup>180</sup> the lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Court. Under Article 7(2)(b), an appeal against the Metropolitan Court's judgment may be submitted to the Curia.

#### Education

Under Article 59(3) of the National Public Education Act, the kindergarten, school, dormitory and the organiser of occupational training are objectively and fully liable, regardless of their culpability, for damage caused to children and students in relation to their placement in kindergartens, studies in schools, membership of a dormitory and in relation to occupational training. The relevant provisions of the Civil Code shall be applied

<sup>179</sup> Equal Treatment Authority, Decision No. EBH/114/2017, 2017 (no exact date available), <http://www.egyenlobanasmod.hu/hu/jogeset/ebh1142017>.

<sup>180</sup> Hungary, Act I of 2017 on the Code of Administrative Litigation (2017. évi I. törvény a közigazgatási perrendtartásról), 1 March 2017, <https://net.jogtar.hu/jogszabaly?docid=A1700001.TV>.

in relation to damages, taking into account that the above organs may only be exempted from liability for damages if they prove that the damage 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.

In terms of damage caused by discrimination, this provision puts more responsibility on educational institutions than would normally be the case under the Civil Code. Under the normal rules, a party can be exempted from liability for damages if they can prove that they acted as 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 (these are indicated in the respective sections above).

As to the amounts awarded in civil court cases, the following can be said. According to Hungarian law (Articles 2:52 and 2:53 of the Civil Code), compensation for violating the requirement of equal treatment can be pecuniary (damages) and moral. Moral compensation is more usual in discrimination cases. Since moral compensation cannot be quantified, it is up to the court to decide on the compensation amount. While there is no upper statutory limit, Hungarian courts had a long-standing tendency to be rather cautious in establishing the amounts. In a number of cases concerning discrimination in access to services (most frequently cases in which Roma guests were denied entry to discos and bars), the compensation amount was fairly constant at around EUR 310 (HUF 100 000). Recently, however, the average amounts have started to rise. In some recent cases, discrimination based on racial or ethnic origin was sanctioned with non-pecuniary damages of around EUR 2 000, which is a promising change in the general judicial approach.

The situation is somewhat more complex in labour cases. As outlined above, under Article 82 of the Labour Code, if the discrimination is manifested in the unlawful termination of employment, the employer shall compensate the employee for the damage suffered. Under Paragraph (2), if the claimant demands lost income as an element of the damages, a maximum of 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 protracted lawsuits put employers in very difficult situations if, for instance, after three or four years they had to pay the full amount of the unlawfully dismissed employee's unpaid salary if the employee had not found a new job in the meantime. The change has a very detrimental effect on employees, as there is now a maximum 'penalty' that employers have to pay for unlawful dismissal. This may dissuade them from trying to reach a friendly settlement and may encourage them to extend the case for as long as possible by appealing the subsequent judicial decisions (since the delaying tactics will not have an impact on how much they have to pay in the end).

Under Article 83, if the termination of employment constitutes a violation of the requirement of equal treatment, the employee may request the court to order their reinstatement. If the claimant is reinstated, it will mean that their employment has to be regarded as continuous, so they shall receive their lost income as 'unpaid salary' and not as 'damages', and so the cap does not apply. In any case, if the victim of the discriminatory dismissal does not claim reinstatement, there is definitely a 12-month cap on the lost income they can demand even if the lawsuit lasts longer than a year.

With regard to the Authority's sanctioning practice, it can be said that it applies fines of between approximately EUR 310 and EUR 15 600 (HUF 101 050 and HUF 5 085 103,



respectively).<sup>181</sup> In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1 310 (HUF 426 809) and EUR 1 600 (HUF 521 293) respectively. A fine of approximately EUR 14 060 (HUF 4.5 million) was imposed on an employer who committed indirect discrimination (against people taking sick leave either because of their own illness or to care for their sick children) by reducing the salary of those who spent less than 85 % of their working time in the workplace.<sup>182</sup> The highest amount ever was imposed on a bar found to be discriminating, for the second time, on the basis of ethnicity in relation to entry to the bar. In this case, the Equal Treatment Authority imposed a fine of approximately EUR 16 625 (HUF 5 million) on the bar.<sup>183</sup>

### c) Assessment of the sanctions

Sanctions are regulated in such a way that they could meet the requirements set forth by the directives. In terms of practice, the situation varies. While the number of cases in which a fine was imposed was trending downwards for a number of years (e.g. in 2012, the Authority imposed a fine in only two cases<sup>184</sup> compared to 11 cases in 2011<sup>185</sup> and 20 in 2010),<sup>186</sup> the trend seems to have changed. The summary of the Authority's annual activities for 2014 states that every third decision establishing discrimination (there were 23 such cases) imposed a fine on the discriminator; in 2015, a fine was imposed in 17 out of the 33 cases where discrimination was established.<sup>187</sup> In 2016, the Authority imposed fines in 13 out of 31 cases, while in 2017 this number was 15 out of 30. In 2018, discrimination was established in 36 cases, out of which 18 ended with a fine,<sup>188</sup> so the percentage of cases in which a fine was applied remained the same. It means that in recent years the Authority deemed it necessary to impose a fine in approximately half of the cases in which discrimination was established.

The average fine amount has also been increasing. In 2016, the total fine amount came to EUR 13 435 (HUF 4.3 million) in 13 cases (an average of EUR 1 035 or HUF 330 800 per fine). In 2017, the Authority imposed a fine in 15 cases, and the aggregate amount was EUR 24 685 (HUF 7.9 million), an average of EUR 1 645 (HUF 526 700) per fine. In 2018, the 18 fines imposed amounted to a total of EUR 19 065 (HUF 6 100 000),<sup>189</sup> resulting in an average of EUR 1 060 (HUF 338 889) per fine. Thus, while the Authority still seems somewhat cautious in using its most effective sanctioning tool, it has moved towards a practice that has more potential to be effective and dissuasive.

A positive development in the jurisprudence must be mentioned in relation to the decisions made by the civil courts in school segregation cases. The Chance for Children Foundation has won numerous *actio popularis* cases against segregated schools and the municipalities maintaining them. However, for a long time, courts simply declared that a violation had taken place and called on the discriminators in very general terms to put an end to the discrimination. They were 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) to take to achieve desegregation.

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<sup>181</sup> <http://www.egyenlobanasmod.hu>.

<sup>182</sup> <http://www.egyenlobanasmod.hu/hu/jogeset/ebh7002007>.

<sup>183</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>184</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2012-evi-tevekenysege-szamok-tukreben>.

<sup>185</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2011-evi-tevekenysege-szamok-tukreben>.

<sup>186</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/tajekoztato-az-egyenlo-banasmod-hatosag-2010-evi-tevekenysegerol>.

<sup>187</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-szamok-tukreben>.

<sup>188</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>189</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

A change came about with the Kaposvár case, described in Section 3.2.8.<sup>190</sup> In this case, the second instance court banned the competent respondents from admitting first-grade pupils to the segregated school from the 2017/2018 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 were in the school's catchment area. A review by the Curia was requested by the respondents. In its Judgment No. Pfv.IV.20.085/2017, the Curia upheld the decision of the Pécs Appeals Court and also upheld the sanctions that it had imposed. The Curia held that courts can do more than simply declare that a violation has taken place and order in general terms – without specifying the 'how' – that the defendant should put an end to the violation: they may also order specific measures to be taken in order to enforce the requirement of equal treatment.<sup>191</sup>

Similarly, in the Numbered Streets case in Miskolc, described in Section 3.2.10, the Metropolitan Administrative and Labour Court<sup>192</sup> dismissed the Miskolc municipality's arguments. These arguments – among others – challenged the Equal Treatment Authority's decision on the basis that the Authority was 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 it is impossible to execute the decision. 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. The Authority was therefore 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 to come up with the details.

As also described in Section 3.2.8, the Metropolitan Court, in its first instance judgment,<sup>193</sup> prescribed several steps to be taken with the aim of eliminating segregation in the case launched by the Chance for Children Foundation against EMMI (as the ministry responsible for education) for failure to take action against segregation in 28 schools. These steps included (i) banning 13 segregated schools from admitting new first-graders; (ii) assigning the concerned first-graders to other schools; (iii) preparing and publishing desegregation plans; (iv) monitoring the implementation of these plans; (v) amending the methodology of inspecting educational institutions' compliance with the principle of non-discrimination; and (vi) paying a public interest fine of approximately EUR 156 250 (HUF 50 million) to be spent on the civil monitoring of desegregation programmes within the next five years.

Although the Metropolitan Appeals Court, acting as the second instance court, shared the first instance decision's assessment that the ministry's failure to take sufficient action against segregation had amounted to a violation of the requirement of equal treatment, it took a very different view on what types of actions may be prescribed for the ministry, given the obligation to put an end to the violation.

The court of second instance was of the view that the ministry could not be obliged to order a ban on admitting new first-graders to those 13 schools where segregation was still in place. The court's reasoning was that such a ban (which eventually leads to the closing of

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<sup>190</sup> Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016, available at: <http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf>.

<sup>191</sup> Curia, Pfv.IV.20.085/2017/9., 4 October 2017, available at: [http://cfcf.hu/sites/default/files/Kaposvar2\\_Kuria.pdf](http://cfcf.hu/sites/default/files/Kaposvar2_Kuria.pdf).

<sup>192</sup> Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>193</sup> Metropolitan Court, Decision No. 40.P.23.675/2015/84, 18 April 2018, <http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>.

the given school) may only be imposed on the basis of a detailed, individualised examination that takes local specificities into account. The appropriate form of such an examination is the creation of a desegregation plan that relies on a careful mapping of the local situation and is based on the cooperation of experts, teachers, local politicians and parents. Without such an individualised desegregation plan, a general ban on establishing new first-grade classes in certain schools is deemed to fail. The court of second instance therefore quashed the first instance court's decision in this regard. Accordingly, there was also no need to find a place for those first-graders who were about to start their studies in the segregated schools.

The second instance court also quashed the ministry's obligation to monitor the implementation of the desegregation plans and to publish the conclusions of the monitoring on its website. The basis for this decision was that the monitoring of the implementation of similar plans is generally a task for school district centres and Government offices, so this obligation may not be placed on the ministry.

The appeals court also quashed the ministry's obligation to amend its guidelines for inspecting compliance with the requirement of equal treatment. The reason for this was that the lawsuit concerned 28 specific individual schools, whereas the amendment of the guidelines would have a general impact on all schools inspected in the future, which meant that the prescription of such an obligation would exceed the framework of the actual lawsuit.

Finally, while the court of second instance approved the imposition of a public interest fine, it held that courts do not have statutory authorisation to determine what the public interest fine must be used for. Thus, while the ministry is still obliged to pay the sum prescribed by the first instance court, this amount will accrue to the state budget without any specific indication of what the money should be spent on.

These new cases seem to imply that, after a long time, courts will move in a direction where they take more responsibility for not only concluding that systemic discrimination has taken place, but will also prescribe steps to address this systemic discrimination.

## **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 began operation on 1 February 2005. Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure<sup>194</sup> (ETAD) was adopted on 26 December 2004 (its provisions were integrated into the ETA on 1 July 2013). The legislation governing the Authority, its structure, statutes and operations was moved from one legal norm to another on many occasions. The most important rules can currently be found in Article 8 and Articles 14-17/D of the ETA.

Hungary's Ombudsman, 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 issues relating to such discrimination. The Ombudsman has a very limited ability to assist victims in pursuing their complaints, and the scope of the Ombudsman's investigation is restricted to state authorities and public service providers. As mentioned above, the status and proceedings of the Ombudsman are governed by Act CXI of 2011 on the Parliamentary Commissioner for Human Rights.

Since the Equal Treatment Authority is the designated equality body and since most discrimination complaints are filed with the Authority, this analysis will focus on the Authority's status and activities.

The Equal Treatment 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 (not in the sense of citizenship), 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, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, any other situation, attribute or condition of a person or group) or the field concerned (e.g. employment, education, access to goods). In addition to the authorisations required by the Racial Equality Directive, the Authority is vested with the right to impose severe sanctions on persons and entities that violate the ban on discrimination.

- b) Political, economic and social context for the designated body

As far as the general attitude to equality and diversity is concerned, it can be said that Hungarian society has become largely suspicious of diversity, mainly as a result of the current Hungarian Government's persistent campaign against liberal democratic values, emphasis on the majoritarian elements of democracy and repeated denunciation of minority protection.

In February 2018, at a meeting for municipal leaders, Prime Minister Viktor Orbán expressly rejected diversity: 'Diversity is not a value, it is a given. We must declare it: we do not want to become diverse in a way that we get mixed, our colour, our traditions, our

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<sup>194</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>.

national culture get mixed with others. We don't want that. [...] We want to stay like we have been for 1 100 years here in the Carpathian Basin.'<sup>195</sup>

Several quotes from high-ranking politicians or well-known public figures affiliated with the ruling party can be cited from the past couple of years to illustrate that minorities characterised by the grounds protected by the EU *acquis* have been repeatedly presented in a degrading, hostile manner. A number of examples are outlined below.

Since 2015, the Hungarian Government has been conducting an intensive nationwide campaign against migration and migrants of Muslim origin. In October 2015, Prime Minister Viktor Orbán told the German news journal *Focus* that, while it is not inevitable that Muslims could not be integrated into European societies, experience shows that 'so far, it has not been possible to do so'. He said that 'Islam has never been a part of Europe, it just came here' and it does not belong to Europe in a spiritual/intellectual sense.<sup>196</sup> A year later, in September 2016, at the opening session of the Hungarian Parliament, the Prime Minister said: 'Terror and violence have become parts of everyday life in Europe.' He also contended that what happened in Belgium, Germany and France could happen anywhere and that if European politics continued as it was, 'the numbers of Muslims will keep growing, and we will hardly recognise Europe'.<sup>197</sup>

As part of the anti-migration campaign, the Government also conducts a campaign against George Soros, a Jewish billionaire financier of Hungarian origin, accusing him of trying to implement a 'plan' that facilitates migration in order to undermine European and Christian values. In the autumn of 2017, a so-called national consultation was conducted on what the Government dubbed the 'Soros Plan'. The leaflets that were sent to all households painted migrants as individuals posing financial risks to Hungarians or posing a risk to European languages and culture. The following were some of the claims made by the 'consultation': '1. George Soros wants Brussels to resettle at least one million immigrants per year onto European Union territory, including in Hungary. [...] 4. Based on the Soros Plan, Brussels should force all EU Member States, including Hungary, to pay immigrants HUF 9 million in welfare. [...] 6. The goal of the Soros Plan is to push the languages and cultures of Europe into the background so that integration of illegal immigrants happens much more quickly.'<sup>198</sup>

NGOs providing assistance to asylum seekers were also targeted not only by hate propaganda and intimidation, but also by legislation, which, while it has not yet been applied to the NGOs, is looming over them and has a serious chilling effect. In January 2017, the vice-president of the governing party expressed his view that the NGOs that 'make up the Soros empire operate in order to compel national governments to serve the interests of global big capital and to succumb to the values of political correctness' must be 'forced to back down at any price' and need to be swept out of the country.<sup>199</sup> On 15 March 2018, the Prime Minister promised to get even with those whom he regarded as his opponents: 'We are a tame and jovial people, but we are neither blind nor [gullible]. Naturally, after the elections, we will get our satisfaction – moral, political and legal satisfaction – but we cannot waste our energy or time with this right now.'<sup>200</sup> A few days later, the Government press office issued a press release stating that 'the operation of Soros organisations *must be banned*, the operation of organisations focusing on immigration must be made dependent on the permission of the state, and the Stop Soros

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<sup>195</sup> <https://budapestbeacon.com/orban-uses-conference-mayors-vow-protect-hungarys-ethnic-group/> and [https://www.youtube.com/watch?v=-xyutFLn\\_8E](https://www.youtube.com/watch?v=-xyutFLn_8E).

<sup>196</sup> [https://hvg.hu/itthon/20151016\\_Orban\\_Az\\_iszlám\\_soha\\_nem\\_volt\\_Europa\\_resz](https://hvg.hu/itthon/20151016_Orban_Az_iszlám_soha_nem_volt_Europa_resz).

<sup>197</sup> [http://index.hu/belfold/2016/09/12/orban\\_viktor\\_beinditja\\_a\\_politikai\\_oszt/](http://index.hu/belfold/2016/09/12/orban_viktor_beinditja_a_politikai_oszt/).

<sup>198</sup> <https://budapestbeacon.com/soros-plan-national-consultation-questions/>.

<sup>199</sup> <https://444.hu/2017/01/10/nemeth-szilard-minden-eszkozzel-el-kell-innen-takaritani-a-civil-szervezeteket>.

<sup>200</sup> <https://budapestbeacon.com/orban-promises-to-exact-vengeance-after-general-election/>.

legislative package [...] must be passed by the Parliament immediately after the elections'.<sup>201</sup>

The said legislation was indeed passed, which entailed among other things the insertion of an article into the Criminal Code ('Facilitating or supporting illegal immigration'), rendering punishable with the deprivation of liberty anyone who engages in organising activities in order to facilitate (a) the initiation of asylum proceedings in Hungary by persons who are not persecuted in their country of origin or in the country through which they arrived to Hungary, or whose reason to fear direct persecution is not well-founded; or (b) the initiation of a procedure aimed at acquiring a title of residence by persons entering or staying illegally in Hungary.

The law has been criticised by various international bodies, including the Council of Europe's constitutional advisory body (the Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, which concluded in a joint report that the law 'infringes upon the right to freedom of association and expression and should be repealed', as it criminalises organisational activities that 'are fully legitimate including activities which support the State in the fulfilment of its obligations under international law'.<sup>202</sup>

A week after this legislation was passed, Government politicians and activists placed stickers with the text 'Organisation supporting immigration' on the doors of NGOs dealing with migration-related matters. After participating in one such action, the spokesperson of Fidelitas (the youth branch of the ruling party) said that 'the Helsinki Committee and several other organisations work to turn Hungary into an immigrant country' and 'Europe into an immigrant continent'.<sup>203</sup>

A month after Stop Soros law was adopted, another piece of legislation targeting NGOs dealing with migration-related matters was passed.<sup>204</sup> This law imposes a 25 % tax on financial support provided for any 'immigration-supporting activity' in Hungary or on the operations of any Hungarian organisation 'that carries out activities to promote migration'. Immigration-supporting activity is 'any programme, action or activity that is directly or indirectly aimed at promoting immigration' and is realised by (i) conducting media campaigns and media seminars and participating in such activities; (ii) organising education; (iii) building and operating networks; or (iv) engaging in propaganda activities that portray immigration in a positive light.

This law was again criticised by international bodies, including the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights, which concluded that 'the special tax on immigration constitutes an unjustified interference with the rights to freedom of expression and of association of the NGOs affected. The imposition of this special tax will have a chilling effect on the exercise of fundamental rights and on individuals and organisations who defend these rights or support their defence financially. It will deter potential donors from supporting these NGOs and put more hardship on civil society engaged in legitimate human rights' activities. For all these reasons, the provision as examined in the present opinion should be repealed'.<sup>205</sup>

In addition to the hostility generated against Muslims by the general anti-migration campaign, the anti-Soros campaign has also triggered anti-Semitic sentiments. This is clearly shown by the amount of anti-Semitic graffiti drawn on the Government's anti-Soros

<sup>201</sup> <http://www.kormany.hu/hu/miniszterelnoki-kabinetiroda/hirek/reagalas-a-migration-aid-mai-nyilatkozata>.

<sup>202</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e).

<sup>203</sup> <http://polgarportal.hu/fidelitas-a-magyar-helsinki-bizottsag-bevandorlast-tamogato-szervezet/>.

<sup>204</sup> Hungary, Act XLI of 2018 on the Amendment of Certain Tax Laws and Other Related Laws and the Special Tax on Immigration (2018. évi XLI. törvény az egyes adótörvények és más kapcsolódó törvények módosításáról, valamint a bevándorlási különadóról), 25 July 2018, <https://net.jogtar.hu/jogszabaly?docid=A1800041.TV>.

<sup>205</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e).



billboards located throughout the country.<sup>206</sup> While the Government emphasises its good relations with Israel and denies any intention to stir anti-Semitic sentiments, there are certain gestures that cast a shadow of doubt on these statements, e.g. in March 2019, a prestigious state award was given to the writer Kornél Döbrentei who is known for his anti-Semitic statements, e.g. 'Jews did not appear as a group of amiable patriots'.<sup>207</sup>

The level of xenophobia has been increasing steadily in Hungary, most probably as a result of the campaign. By January 2016, according to the research institute TÁRKI, the level of xenophobia in the country had reached an all-time high. For more than two decades now, the institute has been measuring xenophobia and 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 high, whereas the proportion of xenophiles (those who think that all asylum seekers should be accepted) decreased practically to zero (thus reaching an all-time low).<sup>208</sup> According to research conducted in 2018, Hungarians express the most hostility to migrants in Europe, with 48 % of the population categorised as xenophobes, whereas in Estonia, the second country in the list, this proportion was only 29 %.<sup>209</sup>

The Roma issue has also been linked to migration on a number of occasions. In May 2015, Justice Minister László Trócsányi said that Hungary was unable to take in economic migrants, because it had to facilitate the catching up of 800 000 Roma.<sup>210</sup> In September 2016, the Prime Minister delivered a speech to ambassadors in Hungary, depicting the Roma population as nothing but a burden on Hungarian society: 'No matter what one thinks, [...] the fact is that, historically, Hungary has had to live and continues to live with a couple of hundred thousand Roma. This was decided by someone, somewhere. We inherited this situation, it's our situation. This is an attribute. No one can object to it. We are the ones who have to live with this. And we do not demand from anyone, especially not from the West, that they should live together with a large Roma minority.'<sup>211</sup>

In 2016, the Hungarian Order of Merit was awarded to journalist and writer Zsolt Bayer, a prominent supporter of the Government with a long track record of publishing incendiary articles against Roma, Jews, migrants and liberals. In a 2013 op-ed for instance, he wrote the following in relation to a murder case where the suspects were of Roma origin: 'A large segment of the Gypsy population is unfit for cohabitation. They are unfit to live among human beings. This part of the Gypsy population are animals, and they behave like animals. [...] These Gypsies are unable to communicate in any human manner. [...] The only thing they understand is violence. [...] We must not tolerate and understand them, we must take revenge [...]. The animals should not exist. In any way. This is what we must take care of – immediately and through any means!'<sup>212</sup>

Anti-LGBTQI statements are also made by high-ranking public figures. In May 2017, Miklós Soltész, then State Secretary responsible for denominational, national minority and civil society affairs said the following in Parliament on the occasion of Mothers' Day: 'In addition, there are unfortunately organisations and thinkers within this society, who question the

<sup>206</sup> <http://www.independent.co.uk/voices/hungary-government-george-soros-viktor-orban-antisemitism-a8089621.html>.

<sup>207</sup> <https://444.hu/2019/03/12/a-kormany-baberkoszorut-nyujtott-at-az-ironak-aki-szerint-a-zsidotorvenyek-a-zsidok-erdekeit-szolgaltak>.

<sup>208</sup> Simonovits, B., Bernát, A., Szeitl, B., Sik, E., Boda, D., Kertész, A., Tóth, F.M. and Barta, J. (2016), *The Social Aspects of the 2015 Migration Crisis in Hungary*, Budapest, TÁRKI Social Research Institute Inc., available at: [http://old.tarki.hu/hu/news/2016/kitekint/20160330\\_refugees.pdf](http://old.tarki.hu/hu/news/2016/kitekint/20160330_refugees.pdf).

<sup>209</sup> <https://qubit.hu/2018/03/02/a-magyarok-gyulolnek-a-legjobb-mindenki-mast-europaban>.

<sup>210</sup> <https://infostart.hu/belfold/2015/05/22/trocsanyi-a-balkanrol-erkezo-menekultaradat-a-prioritasunk-728248>.

<sup>211</sup> <https://444.hu/2016/09/14/a-fidesz-azt-uzeni-a-ciganyoknak-hogy-a-migransok-elveszik-a-segelyuket>.

<sup>212</sup> [https://mandiner.hu/cikk/20130105\\_bayer\\_zsolt\\_ki\\_ne\\_legyen](https://mandiner.hu/cikk/20130105_bayer_zsolt_ki_ne_legyen).



role of mothers and women or have a completely different view thereof. I want to tell them that pro-choice persons are abortion-survivors. The unnatural advocates of gender theory were born from the relationship between a man and a woman, from a mother. Those too who support, teach this pseudo-science [...]. LGBTQ, and so it goes, XYZ, who knows what might be behind what abbreviations or words – it doesn't really matter. Senseless craziness.<sup>213</sup>

The political and social context is thus not conducive to the work of the Authority. Interestingly, however, the Authority has not been attacked despite the fact that it has found in favour of complainants belonging to or representing societal minorities in a number of sensitive cases. Examples include the above-mentioned case of the Numbered Streets, where the municipal council is led by representatives of the ruling party, and a relatively recent case in which the Authority found that the Ministry of Human Capacities (EMMI) had engaged in discrimination. The ministry's website listed certain benefits related to family status and provided information about who was eligible for these benefits. However, in relation to one such benefit (a tax deduction), the ministry's website only mentioned married couples as being eligible, but did not state that this benefit was also available for registered (same-sex) partners.<sup>214</sup>

No political pressure or hostility is perceivable from the trends concerning the Authority's budget either. According to its website,<sup>215</sup> the Authority's budget increased gradually between 2013 and 2017. In 2013, the budget amounted to approximately EUR 665 625 (HUF 213 million); in 2014, EUR 830 625 (HUF 265 800 000); in 2015, EUR 991 250 (HUF 317 200 000); in 2016, EUR 1 044 375 (HUF 334 200 000); and in 2017, EUR 1 201 250 (HUF 384 400 000). Inflation during this period was approximately 4 %, whereas the budget increased by 80 %. After 2017, there was a significant drop to EUR 1 012 185 (HUF 323 900 000) in 2018, which was followed by an increase again to EUR 1 073 435 (HUF 343 500 000) for 2019.

The reasons for these fluctuations are difficult to explain, as there have not been highly visible public statements from any political sides that would have signalled either support or hostility towards the Authority.

c) Institutional architecture

In Hungary, the designated body does not form part of a body with multiple mandates.

d) Status of the designated body/bodies – general independence

i) Status of the body

Article 33 of the ETA defines the Authority as an autonomous administrative body with overall responsibility for ensuring compliance with the principle of equal treatment. The autonomous nature of the Authority means that it is not subordinated to any other body within the administrative system.

Under Article 14(1)(e) of the ETA, the President of the Authority informs the national Parliament on a regular basis about the current situation regarding equal treatment. However, this cannot be perceived as accountability per se.

Before 1 February 2012, the Authority performed most of its duties in cooperation with an advisory board (the Equal Treatment 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 Equal

<sup>213</sup> [http://www.parlament.hu/naplo40/221/n221\\_0014.htm](http://www.parlament.hu/naplo40/221/n221_0014.htm).

<sup>214</sup> <http://hatter.hu/hirek/sajtokozlemenyei/ebh-nem-rejtegetheti-tovabb-az-emmi-a-szivarvanycsaladokat>.

<sup>215</sup> <http://www.egyenlobanasmod.hu/index.php/hu/gazdalkodasi-adatok>.

Treatment Advisory 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>216</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. This opportunity was lost with the dissolution of the Board.

ii) Independence of the body

The independence of the Equal Treatment Authority is expressly stipulated by the ETA. Under Paragraph (3) of Article 33 of the ETA, 'the Authority is independent, it is subordinated only to the laws, it shall not be instructed in relation to the exercise of its duties; it performs its activities independently of all other organisations and without any external influence. Only an act of Parliament can stipulate 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 for in elections (this includes having a clear criminal record); (iii) outstanding expertise in the field of human rights or the prohibition of discrimination; (iv) successful completion of a bar exam and (v) at least five years of practice in the legal field or in public administration. The President may not be a member of any party and may not pursue political activities. He or she may not pursue paid activities with the exception of educational, scientific and art-related undertakings. He or she may not occupy a leading position in an economic enterprise.

The President can only be dismissed under very specific conditions: (i) if a conflict of interest arises and they fail to terminate the cause within 30 days; (ii) if they are unable to perform their duties for over 90 days; (iii) if they intentionally provide false data in their financial statement (which they are obliged to submit annually). This is a positive development compared to the previous situation, when the President could be dismissed by the Prime Minister at any time without any justification.

Under Article 45 of the ETA, the President of the Authority exercises employer's rights over members of the Authority's staff. It means that the President has the power to recruit and manage personnel.

Budgetary independence is guaranteed by Article 34 of the ETA, which states that the Authority is a central budgetary institution vested with 'chapter authorisations'. Since 1 January 2013, its budget has been included in the Parliament's budget (this is also a positive development compared to the situation that prevailed up to 31 December 2012, when the Authority's budget was a chapter in the budget of the ministry supervising the Authority).

Thus, in terms of the legal framework, the Authority's budgetary independence is secured. However, with regard to actual financial resources, the Authority's budget for staff costs was clearly insufficient for a long time despite a noticeably growing workload. Due to severe cuts between 2009 and 2012, staff had to be

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<sup>216</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>.

dismissed. However, the Authority's budget has been on the rise in recent years (see Section b above). The number of employees was 27 in the last quarter of 2018,<sup>217</sup> the number of lawyers engaged in case work fluctuates at around 10. In this regard, it should be noted that the salaries of staff members (who are Government civil servants on a fixed salary scale) are quickly losing their comparative value due to the general increase in salaries triggered by a reduced labour force in certain sectors of the economy (according to news reports, for instance, manual workers in certain supermarket chains earn more than civil servants with comparable lengths of service),<sup>218</sup> which increases the difficulty of finding competent lawyers.

In recent years, as mentioned above, the Authority has handed down a number of decisions in politically sensitive cases that clearly have not favoured the current Government and governing parties. In the author's opinion, therefore, the Authority can be described as independent in practice.

e) Grounds covered by the designated body/bodies

The Authority has a mandate to deal with all the grounds contained in the open-ended list of the ETA (sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), 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, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, any other situation, attribute or condition of a person or group). Its mandate therefore extends to all possible grounds on the basis of which unlawful differentiation may be made.

As a result of the Authority's quasi-judicial character, the level of attention given to the grounds depends mainly on the number of complaints concerning the different grounds. It should be noted, however, that in the course of performing its task to promote equal treatment, the Authority may emphasise one ground or another. For example, the Authority has published a series of booklets, known as 'EBH Booklets' which focus on the issues that the Authority finds to be the most pressing, based on its case work.<sup>219</sup> The Authority has published five booklets so far: on workplace harassment; harassment in education; the jurisprudence concerning the ground 'other characteristic'; discrimination in education (including segregation); and multiple discrimination.

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

In Hungary, the designated body does have the competence to provide independent assistance to victims.

Article 14(1)(g) of the ETA gives the Authority a mandate to provide independent assistance to victims of discrimination (it shall 'continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment').

In practice, since the Authority's primary function is the quasi-judicial adjudication of discrimination complaints, it is rather restricted in the assistance

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[http://egyenlobanasmod.hu/sites/default/files/gazdalkodasi\\_adatok/Honlapra%20%202018.%20IV.%20n%C3%A9%20szem%C3%A9lyi%20adatok.pdf](http://egyenlobanasmod.hu/sites/default/files/gazdalkodasi_adatok/Honlapra%20%202018.%20IV.%20n%C3%A9%20szem%C3%A9lyi%20adatok.pdf).

<sup>218</sup> [http://hvg.hu/kkv/20180109\\_Keres\\_On\\_annyit\\_mint\\_egy\\_Aldis\\_penztaros](http://hvg.hu/kkv/20180109_Keres_On_annyit_mint_egy_Aldis_penztaros).

<sup>219</sup> <http://www.egyenlobanasmod.hu/hu/ebh-fuzetek>.

it provides to victims (in forms other than investigating and deciding their grievances).

On its website, the Authority provides general information on the procedure (what the protected grounds are, who can initiate the procedure, what the petition should contain, what sanctions the Authority may impose, etc.).<sup>220</sup> It also provides two-page information leaflets on certain typical forms and areas of discrimination (such as discrimination in services,<sup>221</sup> discrimination against women<sup>222</sup> and discrimination in education).<sup>223</sup>

As described in Section 6.1, the Authority is obliged to try to forge a friendly settlement between the parties (alternative dispute resolution) as part of its quasi-judicial proceedings, and will only hand down a binding decision if that proves to be impossible.

As described below, the Authority has standing to bring discrimination complaints to court on behalf of identified victims and intervene in legal cases involving discrimination. However, due partly to its restricted staffing and partly to its different focus (quasi-judicial role), it has hardly ever exercised these rights.

The help provided by the Authority through its referee network, established in September 2009, is an important form of assistance. The 19 referees working across the country provide assistance to the complainants in formulating their discrimination complaints and forwarding them to the Authority. The referees are practising lawyers contracted by the Authority to work for approximately 16 hours per month as referees. Their mandate extends only to providing assistance in formulating complaints addressed to the Authority, but the referees also provide basic legal advice to complainants whose cases do not fall under the scope of the ETA.

Caseload of the Equal Treatment Authority's referee network

<b>Year</b>	<b>Number of clients served</b>	<b>Number of complaints forwarded to the Authority</b>
2014 <sup>224</sup>	1 835	110
2015 <sup>225</sup>	1 848	84
2016 <sup>226</sup>	1 905	73
2017 <sup>227</sup>	1 618	73
2018 <sup>228</sup>	1 576	64

The numbers indicate that the referee system improves access for complainants who otherwise would have difficulties in turning to the Authority, although there is no information publicly available regarding what happens to the cases that

<sup>220</sup> <http://www.egyenlobanasmod.hu/hu/gyik>.

<sup>221</sup> [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH\\_Szolgalatasok.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_Szolgalatasok.pdf).

<sup>222</sup> [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH\\_Nok.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_Nok.pdf).

<sup>223</sup> [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH\\_Oktatas.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_Oktatas.pdf).

<sup>224</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2014-evi-tevekenysege-szamok-tukreben>.

<sup>225</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-szamok-tukreben>.

<sup>226</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2016-evi-tevekenysege-szamok-tukreben>.

<sup>227</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2017-evi-tevekenysege-szamok-tukreben>.

<sup>228</sup> <http://egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

are not referred to the Authority. The author is not aware of any systematic qualitative assessment of the network's efficiency.

Other (non-legal) assistance is not provided by the Authority (for forms of legal assistance see the subsequent sections).

ii) Independent surveys and reports

In Hungary, the designated body does have the competence to conduct independent surveys and publish independent reports.

The right to conduct independent surveys is not explicitly formulated, but the possibility of doing so is implicitly included in the ETA. Under Article 14(1)(e), the Authority shall 'regularly inform the public and the Parliament about the situation concerning the enforcement of equal treatment'. Article 14(1)(h) states that the Authority shall 'provide assistance in the preparation of governmental reports to international organisations, especially to the Council of Europe, concerning the principle of equal treatment'. According to (i) in 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.

The mandate to publish independent reports concerning discrimination is set forth by Article 14(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(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').

For a long time, circumstances prevented the Authority from fulfilling this task beyond the preparation and publication of its annual report.

This situation was changed by a five-year grant (2009-2014) from the European Social Fund and the Hungarian state. This enabled research to be conducted in seven areas:<sup>229</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 ensuring proper working conditions; (v) extent of knowledge of one's rights as a victim of discrimination – with a special focus on women, Roma, people with disabilities and LGBTQI people; (vi) discriminatory mechanisms in public administration and legislation at the municipal level; (vii) the increase in awareness of equal treatment between 2010 and 2013.

As the grant period has expired, the problem is that fewer resources are available to continue the survey activities. As a result, there has been a decrease in these types of activities, although research activities have not come to a complete halt. For example, in 2017, the Authority published a survey on legal awareness of the right to equal treatment. The survey marked the third phase of a longitudinal study examining personally experienced discrimination, the social perception of discrimination and awareness of and attitudes

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<sup>229</sup> [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/TAMOP\\_zarokiadvany.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/TAMOP_zarokiadvany.pdf).

concerning the legal framework of equal treatment, as well as awareness of the Equal Treatment Authority.<sup>230</sup>

The Authority publishes an annual report in March or April of each year. The report usually contains basic statistics, summaries of the Authority's most relevant and important cases and information on the Authority's international relations and communication activities.

### iii) Recommendations

In Hungary, the designated body has the competence to issue independent recommendations on discrimination issues.

The mandate to make recommendations concerning discrimination are set forth by Article 14(1)(c) of the ETA (the Authority shall 'review and comment on drafts of legal acts and reports concerning equal treatment'); Article 14(1)(d) of the ETA (the Authority shall 'make proposals concerning Governmental decisions and legislation pertaining to equal treatment'); and finally Article 14(2) of the ETA ('in order to continuously inform the public, the Authority shall regularly publish its reports, proposals and detailed information concerning its activities on its website').

Issuing independent recommendations is not a priority for the Authority. Although the Authority occasionally comments on legislative proposals and in the course of this activity formulates recommendations (mainly when requested to do so by Government entities preparing legislation), its annual reports generally do not even refer to this type of work or the actual recommendations the Authority issued during the given year. This is most probably because the Authority views this kind of activity as secondary compared to its quasi-judicial function of adjudicating discrimination complaints.

### iv) Other competences

The Authority's competences are set forth by Article 14 of the ETA. In addition to the Authority's quasi-judicial competences, its right to launch *actio popularis* legal proceedings, and the competences discussed above, the list includes the following:

- cooperating with non-governmental and interest representation organisations and the relevant state bodies;
- informing the public and the Parliament at regular intervals about the situation concerning the enforcement of equal treatment;
- providing assistance in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment;
- providing assistance in the preparation of reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment.

As mentioned above, the key element of the Authority's activities – both according to law and the Authority's own perception of its role – is investigating and deciding on individual instances of discrimination. As a result, and also because of the relative scarcity of the Authority's resources (despite the increase in recent years), no significant emphasis is placed on the additional functions.

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<sup>230</sup> [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH\\_7\\_kiadvany\\_Final\\_20130619.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_7_kiadvany_Final_20130619.pdf).



In addition to conducting surveys and issuing reports summarising survey results, the Authority has also been relatively active in the area of communication and awareness-raising. For instance, in 2018, the Authority conducted a number of different activities (broadcasting short awareness-raising films in cinemas and publishing online advertisements) aimed at raising awareness about the issue of discrimination and the ways in which the right to equal treatment can be enforced.<sup>231</sup>

g) Legal standing of the designated body/bodies

In Hungary, the designated body has legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination (not as a formal intervener, but by submitting *amicus curiae* letters).

Under Article 14(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, the Authority may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment, provided it has been authorised by the victim to do so.

Furthermore, the Authority shall be entitled to exercise the rights of a party in administrative proceedings launched due to the violation of the principle of equal treatment.

Under Article 20 of the ETA, if the principle of equal treatment is violated, a lawsuit for the infringement of inherent rights, a labour lawsuit or a lawsuit related to a civil service relationship 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 launched one *actio popularis* lawsuit so far, and intervened in only one case during its entire history.<sup>232</sup>

The intervention concerned a segregation case, in which the municipal council of Jászladány rented out one half of the local school building to a private foundation (where families had to pay a tuition fee, which prevented most of the local Roma children from attending the school), thus contributing to the segregation of local Roma and non-Roma children. The lawsuit was launched by the regional Office of Public Administration against the municipal council with the aim of ending the segregation situation, and the Authority intervened in favour of the Office. Although, in another lawsuit (launched by an NGO), the Supreme Court eventually declared that the municipal council was liable for the segregation, the Office of Public Administration's petition was rejected by the court in that

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<sup>231</sup> See <http://egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>232</sup> Information from Authority staff.



particular procedure, so the Authority's intervention was unsuccessful. The intervention took place in 2005, the Authority has not intervened in any legal proceedings since then.<sup>233</sup>

The *actio popularis* case was launched on the basis of a food company's sexually charged advertisement. The company advertised its products by depicting virtually naked women covered in different types of food (e.g. pasta, raw meat products, vegetables). However, the courts of first and second instance concluded that no harassment had taken place. The Metropolitan Appeals Court was of the view that the advertisements 'did not depict the women in a humiliating, demeaning situation. Presenting the female body together with food is not inevitably humiliating or demeaning; the advertisements [...] do not create a connection or identify the meat or other food to be eaten with the female body, they do not present the human body as a product.'<sup>234</sup>

#### h) Quasi-judicial competences

In Hungary, the body is a quasi-judicial institution.

Under Article 14(1)(a) 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 hand down a decision on the basis of the investigation.

Proceedings usually start with a complaint (*ex officio* investigations are rare; on average, between one and four are conducted each year),<sup>235</sup> which the Authority communicates to the other party. The other party responds to the complaint in writing. The complainant has the opportunity to comment on the other party's response, and at this point the Authority usually conducts a hearing where both parties are present. A decision may also be handed down without a hearing. (Before 1 January 2018, it was mandatory as a rule to conduct a hearing. As of that date, under Article 74 of the GAP, decisions are usually made without a hearing. However, the Authority's actual practice has not changed.)

The Authority is obliged by law to discover and establish all 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; these are the methods it most frequently applies.

Based on the results of the proceedings, the Authority hands down a binding 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 approximately EUR 155 (HUF 50 000) to approximately EUR 18 750 (HUF 6 million).

There is thus a relatively wide variety of sanctions set by law that may be effectively imposed by the Authority. Actual practice is described below.

The trends in sanctioning are described in detail in Section 6.5. Here it is suffice to reiterate that, in recent years, the Authority has been imposing fines in about half of the cases where it has concluded that discrimination has taken place: in 2017, a fine was imposed

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<sup>233</sup> The Authority's 2006 annual report, p. 58. See <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/tajekoztato-az-egyenlo-banasmod-hatosag-2016-evi-tevekenysegerol>.

<sup>234</sup> <https://drive.google.com/file/d/1wVlbHojxtASIs6WwvOIdrVfrR9zz0UOi/view>.

<sup>235</sup> Information from Authority staff.

in 15 out of 30 cases, whereas in 2018, discrimination was established in 36 cases, out of which 18 ended with a fine.<sup>236</sup>

The average fine amount has also been increasing, although not steadily, and the average fine still remains close to the lower end of the scale. In 2018, for example, the 18 fines imposed amounted to a total of EUR 19 065 (HUF 6 100 000), resulting in an average of HUF 338 889 (EUR 1 060).<sup>237</sup>

As far as non-pecuniary sanctions are concerned, the court decision handed down in the Numbered Streets case opened up a number of possibilities for the Authority. As discussed above, in its Decision No. EBH/67/22/2015,<sup>238</sup> the Authority established that the municipality of Miskolc (northeast Hungary) subjected the residents of a segregated, mostly Roma neighbourhood to the threat of homelessness or having to move to other segregated areas through a series of highly controversial measures. By doing so, the municipality discriminated against the residents on the basis of their social status, financial situation and Roma origin. In addition to other sanctions, the Authority obliged the municipality to put an end to the discriminatory situation by developing an action plan detailing where it could provide the tenants of the Numbered Streets with adequate housing in Miskolc. The municipality was required to explain how it would do this and the resources it would use. The Authority also obliged the municipality to prepare another action plan detailing how it would provide housing to those who had already become homeless or faced a direct threat of becoming so due to the municipality's discriminatory practices.

The municipality challenged the court's decision, claiming – among other things – that the ETA's provision mandating the Authority to oblige discriminators to terminate a violation does not allow the Authority to prescribe specific obligations for the party it finds to be at fault. In its Decision No. 6.K.33.048/2015/17, handed down on 25 January 2016,<sup>239</sup> the Metropolitan Administrative and Labour Court rejected the municipality's request. The court pointed out that the statutory possibility of obliging the discriminator to terminate the injurious situation would be devoid of meaning when the violation is an omission 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.

As explained above, under Articles 114 and 116 of the GAP, the Authority's decision may not be appealed within a public administrative procedure, but a judicial review of the decision is possible. Under Article 12(2) and Article 13(11) of Act I of 2017 on the Code of Administrative Litigation (CAL),<sup>240</sup> the lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Court. Under Article 7(2)(b), an appeal against the Metropolitan Court's judgment may be submitted to the Curia.

The Authority does not usually take specific follow-up measures to track and ensure implementation of its decisions.

If a respondent fails to comply with the Authority's decision, the decision may be executed by the National Tax and Customs Authority in accordance with the general provisions applying to the execution of administrative decisions.

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<sup>236</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>237</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>238</sup> Equal Treatment Authority, EBH/67/22/2015, 15 July 2015, <http://www.egyenlobanasmod.hu/hu/jogeset/ebh672015>.

<sup>239</sup> Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara> using the search function.

<sup>240</sup> Hungary, Act I of 2017 on the Code of Administrative Litigation (2017. évi I. törvény a közigazgatási perrendtartásról), 1 March 2017, <https://net.jogtar.hu/jogszabaly?docid=A1700001.TV>.

The fines imposed by the Authority are usually duly paid by the respondents. If they are not paid, it is usually possible to have the sanction executed by means of encashment (i.e. by approaching the concerned party's bank and requesting that the fine amount be transferred from the party's account).

However, respect for the Authority's decisions is not unproblematic when the execution of a decision would require more complex actions and a meaningful change in attitude on the part of the respondent (e.g. the changing of discriminatory practices). See the example of the Numbered Streets, described above in Section 3.2.10. Here, the municipality of Miskolc formally complied with the Authority's decision to adopt an action plan, but continued to demolish the houses in the segregated Roma neighbourhood without actually providing alternative accommodation for the Roma families. The complainant NGO, NEKI, was of the view that the action plan was not actually viable and was adopted in a manner that did not take into account the interests of the Roma families. When it formally requested the Authority to enforce its decision, the Authority took the view that the municipality had met its obligations under the final and binding decision by adopting an action plan.

i) Registration by the body/bodies of complaints and decisions

In Hungary, the body registers the number of complaints of discrimination made, and decisions (e.g. by ground, field, type of discrimination).

These data are available and relatively easily accessible to the public on the Authority's website as part of the Authority's annual report.<sup>241</sup> A brief summary of the most basic statistics about the Authority's activities in the previous year is issued in February or March each year. This is then followed by a detailed annual report in March or April. If someone wants to get up-to-date information and numbers, they must submit a freedom of information request to the Authority. According to the relevant Hungarian laws, the Authority is obliged to respond within 15 days (a deadline that can be extended by an additional 15 days).

In 2017, the Authority received 1 288 complaints and carried over 135 cases from the previous year. The Authority handed down 285 decisions and concluded the case with a 'letter of information' (usually directing the client towards a different administrative or other body) in 1 003 cases. In 135 cases the proceedings continued into 2018.<sup>242</sup>

In 2018, the Authority received 786 complaints and 135 cases were still pending from 2017. The Authority handed down 315 decisions and issued letters of information in 448 cases to conclude these cases.<sup>243</sup>

j) Stakeholder engagement

In Hungary, the designated body engages with stakeholders as part of implementing its mandate.

The Equal Treatment Authority engages with civil society associations, business/employer networks, public bodies, local Government entities and trade unions as part of implementing its mandate.

The Authority's 2018 report is not out yet; its 2017 annual report summarises the Authority's activities in this area as follows:

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<sup>241</sup> The Authority's annual reports are available at: <http://www.egyenlobanasmod.hu/hu/eves-tajekoztatol>.

<sup>242</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2017-evi-tevekenysege-szamok-tukreben>.

<sup>243</sup> <http://egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

'In March we held a training on case-law and procedural law for students studying at the IBS' [International Business School] department of human resources, which also featured a technical consultation as well as an analysis of the patterns of discriminatory mechanisms as they emerged from the Authority's research programme. We used our publications and our promotional items aimed at raising awareness about equal treatment to support – among others – the regional court for Budapest's 2nd and 3rd districts, which participated in the event series entitled Óbuda Day; the BMSZKI (the Budapest Methodological Social Centre and its Central Institutions) in its performance of its professional responsibilities; the "NO means NO!" event hosted by the Eötvös Loránd University's Gusztáv Bárczi Faculty of Educational Therapy and the Student Council, where we discussed the institution of university ombudsman; and the information presentation about equal pay for equal work at an event hosted by the Women's Section of the MASZSZ (Hungarian Federation of Trade Unions).

Our publications and awareness-raising promotional items were also distributed in September at the I Won't Give Up – 4. Rehab Critical Mass march and the accompanying events [...]; at the programmes held in the framework of the Momentous Autumn event on 7 October; among the participants of the Fifth Roma Pride Day – March for Human Rights [...]; on 11 October at the Coming Out event of the parents and supporters of [LGBTQI] children [...]; on 14 October at the Seventh Housing March – We Are Only Strong When We Unite event held in the framework of the Week of Dignified Livelihood action by the Hungarian Anti-Poverty Network [...]; and on the same day at the Fodisz Equal Opportunity Race held in the framework of the 32nd Spar Budapest Marathon [...].<sup>244</sup>

#### k) Roma and Travellers

As outlined above, the Authority is an administrative decision-making body that investigates complaints, hands down decisions and imposes sanctions on the perpetrators. It does not set its own agenda and priority issues, but rather acts reactively – in accordance with the types of complaints it receives. Consequently, it may not be said that the Equal Treatment Authority is consistent in its approach. This 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>245</sup> if the Authority is not provided with sufficient resources to be able to focus on analysing the problems related to discrimination based on racial or ethnic origin, studying possible solutions and providing concrete assistance for the victims, in addition to its quasi-judicial functions. 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 2015, disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination (74 and 64, respectively).<sup>246</sup> No statistics are available on the number of complaints broken down by ground in 2016, but out of the 32 cases in which it was concluded in 2016 that discrimination had taken place, the unlawful differentiation was again most often based on disability and affiliation with a national minority (7 cases on each of the two grounds).<sup>247</sup> In 2017, out of the cases where discrimination was found to have occurred, disability was the concerned ground in 6 cases,

<sup>244</sup>

[https://www.egyenlobanasmod.hu/sites/default/files/tajekoztatok/EBH%20eves%20jelentes%202017%20EN\\_final.pdf](https://www.egyenlobanasmod.hu/sites/default/files/tajekoztatok/EBH%20eves%20jelentes%202017%20EN_final.pdf), p. 61.

<sup>245</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>246</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-szamok-tukreben>.

<sup>247</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/tajekoztato-az-egyenlo-banasmod-hatosag-2016-evi-tevekenysegerol>.

whereas the discrimination was based on affiliation with a national minority, parenthood and health status in 4 instances with regard to each of the three grounds.<sup>248</sup> In 2018, affiliation with a national minority was the concerned ground in only 3 out of the 36 cases where discrimination occurred. The largest number of such cases (8) concerned disability.<sup>249</sup>

Some of the investigations launched *ex officio* by the Authority concern Roma persons (for instance, the Rimóc 'bike' case concerning disproportionate fining practices applied by the local police in relation to petty offences committed by cyclists). Furthermore, the research mentioned above focused mainly on the situation of Roma people in the labour market, which also demonstrates that the Authority is aware of the special situation of Roma. In addition, one of the leaflets that the Authority published on typical forms of discrimination discusses discrimination against Roma.<sup>250</sup>

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<sup>248</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/tajekoztato-az-egyenlo-banasmod-hatosag-2017-evi-tevekenysegerol>.

<sup>249</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>250</sup> [https://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH\\_Romak.pdf](https://www.egyenlobanasmod.hu/sites/default/files/kiadvany/EBH_Romak.pdf).

## 8 IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

Since it was established, the Authority, which as a Government agency works 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 within the framework of the Social Renewal Operative Programme 5.5.5 (herein after referred to as the TÁMOP project). The TÁMOP project was financed by the European Social Fund and the Hungarian state; it ran from 2009 to 2014.<sup>251</sup> The total TÁMOP project budget was approximately EUR 3 000 036 (HUF 911 million).<sup>252</sup>

As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (lawyers, solicitors) were initially based in the 'Houses of Opportunities' (a regional equal opportunities network) in every county seat and in the capital. Since 2011, a more diverse system has been in place, and the referees are now available for consultations in the offices of NGOs, Government offices and community centres. They forward complaints of discrimination, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system. In 2017, the referee system served 1 618 clients and forwarded 73 complaints to the Authority.<sup>253</sup> In 2018, these numbers were 1 576 and 64, respectively.<sup>254</sup>

The TÁMOP project consisted of three further elements.

The first element was a series of campaigns, aimed at raising awareness among the general public. Its activities included the following:

- forwarding the Authority's newsletter to over 2 500 addresses;
- organising 10 workshops for 100 participants each (6 in universities) participating in over 350 events (conferences, workshops) aimed at transferring knowledge about the issue of non-discrimination;
- arranging 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 was later turned into a travelling exhibition; and a design competition);
- placing over 23 000 posters and 200 giant posters and circulating over 80 000 leaflets.

Many of the workshops and training events organised within the framework of the programme were attended by NGO workers and activists and trade union representatives.

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<sup>251</sup> For information on the project grant, see <https://www.palyazat.gov.hu/doc/1311>.

<sup>252</sup> Unless indicated otherwise, the results of the programme are presented on the basis of its closing study, available at: [http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/TAMOP\\_zarokiadvany.pdf](http://www.egyenlobanasmod.hu/sites/default/files/kiadvany/TAMOP_zarokiadvany.pdf).

<sup>253</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2017-evi-tevekenysege-szamok-tukreben>.

<sup>254</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.



The second element consisted of a series of training events 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 awareness raising and legal knowledge transfer) was developed, and a total of 80 training events were held. The series of training events ended in March 2014; altogether over 1 500 people completed the training.

Seven research studies and a final study constituted the third element of the project: four research studies dealt with discrimination in the field of employment; one analysed clients' awareness of their rights; and the remaining two examined discriminatory practices within the public administration system.

While the Authority could not continue to disseminate information and engage in dialogue with NGOs and social partners with the same intensity when the extra funding came to an end, it still places emphasis on its awareness-raising activities. See Section 7 k) above for details on the Authority's awareness-raising and outreach activities in 2017. In addition, the Authority's awareness-raising film was broadcast in cinemas where it was seen by 272 308 viewers; its online advertisement reached 283 836 people; it created 36 social media posts; and the media covered the Authority's activities 41 times.<sup>255</sup>

A number of state structures were established specifically to address the problems faced by Roma. In 2010, a Secretariat of State for Social Inclusion was set up. It operates within the Ministry of Human Resources and is responsible for the social inclusion of Roma, but also of indigent people, people living in disadvantaged regions, people with a low level of education and persons who cannot be employed due to their health status.<sup>256</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 a person appointed by the Prime Minister. Its members are the Minister of Human Capacities, the Minister of the Interior, the Minister of Economy and the Minister heading up the Prime Minister's Office. The Chair is entitled to invite any other person whose presence is deemed to be necessary.

On 2 December 2011, Hungary was the first country to submit its national strategy (the National Social Inclusion Strategy) within the EU framework for National Roma Integration Strategies. While welcoming the efforts that had been made, 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 and suggested changes to the strategy.<sup>257</sup>

The *Civil society monitoring report on implementation of the national Roma integration strategy in Hungary*, prepared in 2018 by 12 Roma civil society organisations as part of a systematic coordinated civil monitoring effort covering issues that are crucial for the integration of Roma populations, shows that problems are still abundant seven years into the inclusion strategy's implementation and that the situation has further deteriorated in certain areas. Besides education, where the degree of segregation has increased (see above), the monitoring report calls specific attention to the malfunctioning of the National Roma Self-Government; the clientelist relationship between Roma residents and the local authorities preventing the Roma communities from having a meaningful political impact;

<sup>255</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

<sup>256</sup> <http://www.kormany.hu/hu/emberi-eroforrasok-miniszteriuma/szocialis-ugyekert-es-tarsadalmi-felzarkozasert-felelos-allamtitkarsag>.

<sup>257</sup> Balogh L., Daróczy G., Ivány B., Moldova Zs., Novoszádek N., Kelemen Á., Koltai L., Somogyi, E., Szendrey O. and Teller N. (2013): *Civil Society Monitoring Report on the Implementation of the National Roma Integration Strategy and Decade Action Plan in 2012 in Hungary*, Budapest, Decade of Roma Inclusion Secretariat Foundation, 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).



the discrimination suffered by Roma in numerous areas of life ranging from police practices through employment and housing to education and the lack of public support for anti-discrimination efforts; and finally the problem of approaching anti-Gypsyism in a manner that fails to assign the brunt of the responsibility for Roma/non-Roma relations to the more privileged majority.<sup>258</sup>

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Mechanisms**

Under 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 deemed null and void. Contracts that are manifestly immoral are also deemed null and void.

Furthermore, under Article 27 of the Labour Code, an agreement (individual or collective) that violates labour law regulations shall be deemed null and void. If annulled or successfully contested, the agreement shall be deemed invalid (Article 28). If invalidity results in damages, these shall be paid (Article 30).

Furthermore, as 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. If their internal rules violate this principle, a complaint may be filed with the Equal Treatment Authority. However, the internal operations of other associations and legal entities – with the exception of establishing and terminating membership – are expressly exempted by the ETA from the requirement of equal treatment, so if such rules are contrary to the principle of non-discrimination, they may not be challenged through legal means.

### **b) Rules contrary to the principle of equality**

In the areas covered by the directives, most legislation is in line with the principle of equal treatment. There are a number of statutes with regard to which the infringement of the principle of equal treatment may be argued. Municipal councils increasingly use their statutory authorisation for adopting decrees governing certain aspects of local societal life to pass sometimes overtly discriminatory 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 nationwide) 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>259</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 or her) the Constitutional Court and ask the court to abolish the provision or quash the judicial decision.

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<sup>258</sup> *Civil society monitoring report on implementation of the national Roma integration strategies in Hungary. Focusing on structural and horizontal preconditions for successful implementation of the strategy*, Brussels, Directorate-General for Justice and Consumers, pp 7-11, <http://autonomia.hu/wp-content/uploads/2018/07/rcm-civil-society-monitoring-report-1-hungary-2017.pdf>.

<sup>259</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).

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 does not allow the individual to request a constitutional review if he or she suffers the consequences of the unconstitutional legislation more than 180 days after the law comes 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.

In a 2017 case where the constitutionality of an amendment to a municipal decree was at stake, the Ombudsman exercised the above-mentioned power and turned to the Constitutional Court. The amendment banned certain religious activities (muezzin prayer calls) and religious clothing (burqas, chadris, niqabs) and the expression of support for homosexual marriage. In its Decision No. II/2034/2016 handed down on 11 April 2017,<sup>260</sup> the Constitutional Court declared the amendment null and void with a retroactive effect. It pointed out that under Article I(3) of the Fundamental Law, fundamental rights and duties shall be regulated in acts of Parliament. While the authorisation of municipal councils to adopt decrees on the norms of communal cohabitation may inevitably concern fundamental rights, municipal councils are not authorised to adopt legislation (decrees) that would directly impact or limit the exercising of such rights. On this basis, the amendment passed by the Ásotthalom municipal council was unconstitutional, therefore it must be declared null and void with retroactive effect. It is important to emphasise that the Constitutional Court avoided the substantive issues raised by the decree (e.g. freedom of religion and expression, non-discrimination): the decision was made on a fully formal, procedural basis.

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 Constitutional 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>260</sup> Constitutional Court, Decision No. II/2034/2016, 11 April 2017, <http://public.mkab.hu/dev/dontesek.nsf/0/47B426E665B28347C125808E00439F1D?OpenDocument>.

## 9 COORDINATION AT NATIONAL LEVEL

The Ministry of Justice, the Ministry of Human Capacities and the Equal Treatment Authority are primarily responsible for dealing with or coordinating issues regarding anti-discrimination 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. In addition to the Consultation Council for Roma Affairs mentioned above (in Section 8.1), mention may be made of the Roma Coordination Council established by Government Resolution 1102/2011. (IV.15.), which is tasked with monitoring the progress of the inclusion policies. Another body is 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 aimed at promoting the social integration of people living in extreme poverty and improving their living conditions and social situation. 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 various issues, including regional development, employment policy, education policy, social policy and healthcare.

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 nominated by the largest disability organisations or by an alliance of smaller disability organisations. 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 sanctions if the NDC's advice is not taken into account. The NDC also serves as the focal point of the Convention of the Rights of Persons with Disabilities Committee.

This abundance of coordination bodies does not necessarily result in efficient operation, as shown by what happened to the Anti-Segregation Roundtable. The roundtable was established in June 2013 with the declared aim of monitoring and discussing important issues related to educational integration and segregation (e.g. participation of civil society and churches, professional standards). It was envisaged that it would enhance communication between governmental and civilian actors. However, two representatives of the civil sector, a head of an after-school education programme (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 at all productive.<sup>261</sup> In April 2017, another two very experienced and credible desegregation experts – the leader of the *Tanoda Unions* and a social policy expert and AEP organiser – followed their example, claiming that, although constructive work was possible in the roundtable, the Government's intimidating attitude towards civil society and hostility towards the EU made it impossible for them to continue to participate.<sup>262</sup>

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<sup>261</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).

<sup>262</sup> <http://m.magyarharsncs.hu/belpol/eddig-es-ne-tovabb-ketten-is-fakepnel-hagytak-balog-zoltan-kerekasztalat-103680?pageId=9>.

## 10 CURRENT BEST PRACTICES

- *Testing by the Equal Treatment Authority:* Both NGOs and the Equal Treatment Authority (based on a specific statutory authorisation in the case of the latter) use testing to establish discrimination in cases that allow for this type of evidence to be gathered.
- *The referee system established by the Equal Treatment Authority:* As a Budapest-based administrative organisation, complainants outside the capital found it very difficult to access the Authority. This realisation motivated the setting up of a system of referees in each county in Hungary. The referees meet with clients in different locations (NGO offices, Government offices, community centres), provide them with free legal advice, and, in cases where discrimination is suspected, help them to prepare 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>263</sup> In 2017, the referee system served 1 618 clients and forwarded 73 complaints to the Authority.<sup>264</sup> In 2018, these numbers were 1 576 and 64, respectively.<sup>265</sup> It should be mentioned that even the use of referees has not fully resolved the access problem: as the referees meet clients in county seats and other larger towns, most indigent victims of discrimination (many of whom live in rural areas) may still find it difficult to avail themselves of the network's services.
- *After-school education programmes (tanodas):* AEPs are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programmes, such as tutoring and community building programmes. They fill a crucial gap in the education system (namely that schools very rarely have the financial and human resources to effectively help underprivileged children to catch up and to promote their educational success). However, no normative support is available for them, they have been supported on a project-by-project basis in several different rounds of applications since 2002. This has created temporal gaps in funding and significant uncertainties concerning sustainability. Despite negotiations regarding potential normative funding, ultimately it was decided that the funding would be application-based, but continuous. The call for applications regarding the first funding period (up to the end of 2019) was published in December 2018, and a ministerial decree was issued on the detailed requirements set for AEPs.
- *Evolving jurisprudence concerning ways to end systemic discrimination:* Following the Curia's Judgment No. Pfv.IV.20.085/2017<sup>266</sup> upholding a judicial order to close down a segregated school, Hungarian courts seem to be moving away from the interpretation that they may only declare the existence of systemic discrimination and order in general terms – without specifying the 'how' – that the respondent should put an end to the discrimination. In an increasing number of cases, courts have started to prescribe specific measures to be taken in order to enforce the requirement of equal treatment.

<sup>263</sup> <http://www.egyenlobanasmod.hu/hu/kiadvany/tamop-555081-zarokiadvany>, p. 16.

<sup>264</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2017-evi-tevekenysege-szamok-tukreben>.

<sup>265</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-szamok-tukreben>.

<sup>266</sup> Curia, Pfv.IV.20.085/2017/9., 4 October 2017, [http://ccfc.hu/sites/default/files/Kaposvar2\\_Kuria.pdf](http://ccfc.hu/sites/default/files/Kaposvar2_Kuria.pdf).

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

While the Commission closed the infringement procedures launched against Hungary for the ETA's non-compliance with Directives 2000/43 and 2000/78 (in 2007 and 2010 respectively), and found that Hungarian legislation was in accordance with the Directives, it is the view of the author that full compliance is uncertain in some areas 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, Hungarian law may be in breach of the *acquis*, as it does not impose the obligation of non-discrimination on all persons in the private sector. (For a detailed explanation, see Section 3.1.2.)
- Article 7(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 '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 and the new regulation of genuine and determining occupational requirements). 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 Labour Code's capping of the damages that may be granted if an employee is dismissed in a discriminatory manner and does not request their reinstatement seems to contradict the relevant jurisprudence of the CJEU. (For a detailed analysis, see Section 6.5.)
- The exclusion of workers of pension 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 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 strictly literal 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**

- Public premises and services are still far from being completely accessible, even though 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 reached is still very low compared to the overall number of complaints to the Authority (in 2018, the combined number

was 66 for about 921 complaints, see Section 6.1). The most probable explanation for this phenomenon is a low level of awareness among the population about the area of non-discrimination and the Authority's scope of activity, and also the fact that many potential complainants come from marginalised groups that have little ability to assert their rights. While the Authority's network of referees has definitely extended the Authority's outreach (see above, in Section 10), further efforts are needed to achieve a significant increase in numbers.

- It should be pointed out that – mostly due to insufficient staff numbers – the Equal Treatment Authority carries out very few *ex officio* procedures (which is problematic precisely due to the above-mentioned low level of awareness and assertiveness on the part of victims). Furthermore, following the end of the four-year TÁMOP programme (see Section 8), which provided the Authority with substantial extra funding, it cannot continue to perform some of its very important core functions (such as conducting surveys and raising awareness), and definitely cannot continue to perform them at the previous level.
- As shown by the Miskolc case – where the municipality's actions were deemed unlawful by several authorities, including the Ombudsman, the Equal Treatment Authority and different courts, but, according to information from local Roma activists, the irreversible expulsion of the Roma population has continued, and former residents of the Numbered Streets have been forced to leave the town (see Section 3.2.10) – serious doubts can be raised as to whether the existing system of remedies can be regarded as truly adequate and whether the conditions of greater reliance on interim measures to be prescribed by courts could and should be put in place through amending existing non-discrimination legislation.
- There is a general climate of intolerance, xenophobia and hostility to 'otherness', most powerfully expressed by the Prime Minister, who openly stated that 'we [Hungarians] do not want to become diverse in a way that we get mixed, our colour, our traditions, our national culture get mixed with others. We don't want that. [...] We want to stay like we have been for 1 100 years here in the Carpathian Basin.'

## 12 LATEST DEVELOPMENTS IN 2018

### 12.1 Legislative amendments

From a substantive point of view, the most important legislative amendment was the amendment of Article 22(1)(a) of the ETA. The amendment was adopted in 2017, but took effect only in 2018. As explained in Section 4.1, this provision was amended by Article 226 of Act L of 2017<sup>267</sup> in a way that creates doubts regarding its full compliance with the *acquis*. The text was previously formulated in a way that could be interpreted to extend to all aspects of employment, whereas the new text seems to suggest that the exempting clause is only applicable at the time of recruitment ('differentiation regarding access to employment'). This might open the way to the application of the general exempting clause of the ETA (Article 7(2) of the ETA) – and hence a simple reasonability test – to all aspects of employment other than recruitment. However, in the absence of related case law, it is not possible to say what kind of interpretation the courts would follow in this regard.

With the coming into force of GAP (Act CL of 2016 on the General Administrative Procedure),<sup>268</sup> the procedural rules of the Equal Treatment Authority have changed in a number of ways. However, these changes do not seem to have a significant impact on the Authority's actual practice (see Section 7 h)). Under Article 72 of the new Code of Civil Procedure (Act CXXX of 2016 on the Code of Civil Procedure),<sup>269</sup> legal representation has become mandatory as a general rule in the civil courts, which is likely to have a longer-term impact on complainants. Labour lawsuits are an exception, but both civil lawsuits launched because of the right to non-discrimination as an inherent right and the judicial review of decisions by the Equal Treatment Authority now fall under mandatory legal representation. This can be highly problematic: although state-funded legal aid (including representation by a patron attorney) is available for such cases, the indigence threshold is extremely low. For more details see Section 6.1.

### 12.2 Case law

**Name of the court:** Metropolitan Court

**Date of decision:** 18 April 2018

**Name of the parties:** Chance for Children Foundation v. Ministry of Human Capacities

**Reference number:** 40.P.23.675/2015/84

**Address of the webpage:** <http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-%20Nemzeti%20Er%C5%91forr%C3%A1s%20.pdf>

**Brief summary:** In 2009, the Chance for Children Foundation initiated an *actio popularis* lawsuit against the then Ministry of Education and Culture (now: EMMI), as the entity ultimately responsible for the management of the Hungarian system of education. The foundation asked the court to conclude that by not taking effective action against the segregation of Roma children in education, the ministry failed to fulfil its obligations stemming from the ETA and the National Public Education Act, and thus violated the segregated Roma pupils' right to equal treatment. In its first instance judgment, the Metropolitan Court

- concluded that the ministry had violated the requirement of equal treatment in relation to Roma pupils in 28 primary schools (10 in Budapest, 18 in various other

<sup>267</sup> The ETA was amended by Hungary, Act L of 2017 (2017. évi L. törvény az általános közigazgatási rendtartásról szóló törvény és a közigazgatási perrendtartásról szóló törvény hatálybalépésével összefüggő egyes törvények módosításáról), 25 May 2017, <https://net.jogtar.hu/jogszabaly?docid=A1700050.TV&timeshift=ffffff4&xtreferer=00000001.TXT>.

<sup>268</sup> Hungary, Act CL of 2016 on the General Administrative Procedure (2016. évi CL. törvény az általános közigazgatási rendtartásról), 14 December 2016, <https://net.jogtar.hu/jogszabaly?docid=A1600150.TV>.

<sup>269</sup> Hungary, Act CXXX of 2016 on the Code of Civil Procedure (2016. évi CXXX. törvény a polgári perrendtartásról), 2 December 2016, <https://net.jogtar.hu/jogszabaly?docid=A1600130.TV>.



- Hungarian cities/towns) by keeping them segregated at school level from the 2003/2004 school year;
- ordered the ministry to ban the admission of new first-graders in those 13 schools (6 in Budapest, 7 in other cities/towns) where segregation was still in place;
  - ordered the ministry to instruct the competent Government offices to find a place for those first-graders who would otherwise start their primary school studies in the schools to which the above ban applied;
  - ordered the ministry to instruct (within three months of the judgment becoming final and binding) the maintainers (i.e. the entities operating the schools) of the concerned schools to prepare, with the assistance of an educational equal opportunities expert, a desegregation plan aimed at assisting the integration of these first-graders into the schools where they would be enrolled after the school districts were redrawn;
  - ordered the ministry to publish these desegregation plans on its website;
  - ordered the ministry to continuously monitor the implementation of these desegregation plans for five years and publish the results on its website;
  - ordered the ministry to amend its inspection guidelines for compliance with the requirement of equal treatment in a way that enables such inspections to estimate the proportion of pupils of Roma origin on the basis of their perceived ethnicity, and to instruct the competent Government offices to carry out inspections on the basis of this new methodology;
  - ordered the ministry to pay a public interest fine of approximately EUR 156 250 (HUF 50 million) to be spent on the civil monitoring of desegregation programmes within the next five years.

The ministry did not question the fact that Roma pupils were highly over-represented in the schools identified by the Chance for Children Foundation. However, it denied responsibility for the violation of the requirement of equal treatment on the basis that (i) it exercised its rights and performed its duties regarding educational institutions not directly, but through lower-level administrative bodies and that (ii) due to the regulations pertaining to the protection of sensitive personal data, it was not possible to collect data on the ethnic origin of the pupils, so it could not take action against ethnically based segregation.

However, the court concluded that the ministry must have been sufficiently aware of the situation and it must also have been aware of the fact that the situation was not improving. If it was not aware of that fact, it would mean that its monitoring mechanisms/guidelines were deficient, which would also fall under its remit. The ministry was therefore accountable for the fact that the statutory requirement of non-segregation was not met. The court prescribed very detailed obligations for the ministry (a ban on launching new first-grade classes, the redrawing of school districts, monitoring, the preparation of desegregation plans), because it found that the ministry's efforts to monitor and address the issue of segregation had not led to any improvements. Therefore, it would be meaningless if the court simply obliged the ministry to put an end to the violation without actually prescribing how that must be done.

While the Metropolitan Appeals Court, in its second instance judgment of February 2019,<sup>270</sup> significantly modified the first instance judgment in relation to the sanctions imposed – leaving intact only the obligation to prepare desegregation plans and to pay a public interest fine (without specifying what the fine should be spent on) – it shared the first instance decision's assessment that the ministry had failed to make use of its powers to try to put an end to segregation in several schools, although it had been aware of the widespread existence of segregation in these educational institutions. The second instance court also agreed with the first instance court that this failure had amounted to a violation of the requirement of equal treatment.

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<sup>270</sup> Metropolitan Appeals Court, Judgment No. 2.Pf.21.145/2018/6/I, 14 February 2019.

**Name of the court:** Metropolitan Court

**Date of decision:** 11 July 2018

**Name of the parties:** Atlas LGBTQI Sports Club v. District 12 Sports Hall and Sports Center Ltd

**Reference number:** Not available

**Address of the webpage:** <http://hatter.hu/hirek/a-birosag-szerint-is-diszkrimalta-az-uszoda-az-lmbtg-sportegyesuletet> (press release);

<http://www.egyenlobanasmod.hu/index.php/hu/jogeset/ebh1992018> (the Equal Treatment Authority's summary of the case)

**Brief summary:** Atlasz LGBTQI Sports Club offers an LGBTQI-friendly environment for LGBTQI people where they can engage in sporting activities. In January 2017, the club contacted a swimming pool and sports complex (MOM Sports Pool and Sports Complex), operated by a subsidiary company of the municipality of Budapest's 12th District (District 12 Sports Hall and Sports Center Ltd.) with a request to rent out two lanes in the swimming pool for their event, the Annual Atlasz Sports Day. The company confirmed the availability of the two lanes via email, but when it found out that Atlasz was an LGBTQI sports club, it withdrew the confirmation. With the legal assistance of Háttér Society (an NGO protecting the rights of LGBTQI people), the sports club initiated an administrative procedure before the Equal Treatment Authority. In the course of proceedings, the company argued that the refusal was not based on sexual orientation or gender identity associated with Atlasz Sports Club, but that the pool was overbooked and Atlasz insisted on bringing in its own swimming instructor, which was not allowed by the pool's house rules.

The Equal Treatment Authority found that neither the pool's occupancy nor ticket sales data supported the company's argument concerning overbooking. It also found that the house rules had been modified to exclude external swimming instructors only after proceedings before the equality body had started. The Equal Treatment Authority therefore held that the company discriminated against the sports club on the basis of its members' sexual orientation and gender identity. It imposed a fine of approximately EUR 3 125 (HUF 1 000 000) on the company and ordered that its decision be published on the Authority's and the company's website.

The company sought a judicial review of the decision. However, in its judgment of 11 July 2018, the Metropolitan Court upheld the Authority's decision, concluding that the Authority had thoroughly and accurately established the facts of the case, and assessed the available evidence and the circumstances with due care.

**Name of the court:** Miskolc Regional Court

**Date of decision:** 15 October 2018

**Name of the parties:** European Roma Rights Centre v. Borsod-Abaúj-Zemplén County Hospital

**Reference number:** 10.P.22.249/2017/19

**Address of the webpage:**

[http://www.errc.org/uploads/upload\\_en/file/5102\\_file1\\_hungary-miskolc-court-decision-october-2018.pdf](http://www.errc.org/uploads/upload_en/file/5102_file1_hungary-miskolc-court-decision-october-2018.pdf)

**Brief summary:** The respondent hospital introduced a policy of charging for mandatory maternity ward clothing (i.e. protective clothing that reduced the risk of visitors spreading contagious diseases to the babies) for friends and family members wishing to visit pregnant women.

The hospital policy meant that the companions of women giving birth had to wear a 'maternity garment' for hygiene purposes. This could only be purchased from the hospital for a price that was too expensive for low-income families in an underdeveloped region of Hungary where there is a high density of Roma families. The hospital claimed that its policy was to ask companions to offer a donation to the hospital's foundation in exchange for the maternity clothing. However, a survey carried out by a local organisation found that, in

practice, this donation was obligatory and forced Roma mothers who were unable to pay to give birth alone.

The court concluded that this practice directly discriminated against mothers living in poverty, and indirectly discriminated against Roma mothers who are disproportionately affected and often forced to give birth alone.

The court ordered the immediate termination of this practice, prohibited the hospital from continuing it in the future, and obliged it to pay a public interest fine (in the amount of EUR 15 625 (HUF 5 million), calculated based on the number of births in the last two years and the estimated income from selling maternity garments.

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

**Date of decision:** 12 January 2018

**Name of the parties:** Not available

**Reference number:** EBH/115/2018

**Address of the webpage:** <https://www.egyenlobanasmod.hu/hu/jogeset/ebh1152018>

**Brief summary:** A visually impaired complainant was not allowed to enter a museum with his guide dog despite the clear legal provisions governing guide dog access to various institutions, including public institutions.

The Authority concluded that discrimination had taken place, banned the museum from continuing the violation, ordered that the house rules banning guide dogs be amended and adequately publicised on the premises, and ordered the publication of the decision for 45 days.

#### *Trends and patterns in 2018 in cases brought by Roma and Travellers*

According to the available statistics, the trends and patterns have not changed with regard to the types of cases brought by Roma. There are no detailed and reliable statistics, but it may be concluded from information made available to the public in the media that the majority of cases still relate to employment, access to services, education and housing.

As outlined above (in Section 7 h)), disability and ethnic origin were the grounds that were most frequently referred to by the complainants as the basis for discrimination in 2015 (74 and 64, respectively).<sup>271</sup> Unfortunately, after 2015, the Authority stopped publishing a breakdown of all the complaints based on the protected ground concerned. Since 2016, only the ground-based breakdown of the cases where discrimination is found to have occurred is available. In 2016, out of the 32 cases in which it was concluded that discrimination had taken place, unlawful differentiation was again most often based on disability and affiliation with a national minority (seven cases based on each of the two grounds).<sup>272</sup> In 2017, out of the cases where discrimination was found to have occurred, disability was the protected ground in six cases, whereas discrimination based on affiliation with a national minority, parenthood and health status occurred in four instances based on each of the three grounds.<sup>273</sup> In 2018, affiliation with a national minority was the protected ground in only 3 out of the 36 cases where discrimination occurred. The largest number of such cases (8) concerned disability.<sup>274</sup>

There are still no statistics available on legal proceedings launched by Roma people before the courts.

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<sup>271</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2015-evi-tevekenysege-szamok-tukreben>.

<sup>272</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/az-egyenlo-banasmod-hatosag-2016-evi-tevekenysege-szamok-tukreben>.

<sup>273</sup> <http://www.egyenlobanasmod.hu/hu/eves-tajekoztato/egyenlo-banasmod-hatosag-2017-evi-tevekenysege-szamok-tukreben>.

<sup>274</sup> <http://www.egyenlobanasmod.hu/index.php/hu/hirek/az-egyenlo-banasmod-hatosag-tevekenysege-2018-ban>.

According to the Ombudsman's 2018 annual report, 178 (46 %) of the 385 complaints that concerned national or ethnic minorities came from Roma persons. This indicates a significant over-representation of this minority among complainants (the proportion of Roma within the entire Hungarian population is estimated to be around 8 % to 10 %). Most of the complaints submitted by Roma people were related to the requirement of equal treatment. The fields primarily concerned by the discrimination complaints were social security and benefits, child protection, housing and criminal proceedings.<sup>275</sup>

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<sup>275</sup> Commissioner for Fundamental Rights (2019), *Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről 2018* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies 2018), pp. 288-291.

## 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:** 31 December 2018

<p><b>Title of the law: Fundamental Law of Hungary (Article XV)</b> Abbreviation: Fundamental Law Date of adoption: 25 April 2011 Latest relevant amendment: N/A 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</p>
<p><b>Title of the law: Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities</b> Abbreviation: ETA Date of adoption: 28 December 2003 Latest relevant amendment: 01 January 2018 Entry into force: 27 January 2004 Web link: <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 a 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 on discrimination</p>
<p><b>Title of the law: Act V of 2013 on the Civil Code</b> Abbreviation: Civil Code Date of adoption: 26 February 2013 Latest relevant amendment: N/A Entry into force: 15 March 2014 Web link: <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 on discrimination</p>
<p><b>Title of the law: Act I of 2012 on the Labour Code</b> Abbreviation: Labour Code Date of adoption: 06 January 2012 Latest relevant amendment: 01 January 2018 Entry into force: 01 July 2012 Web link: <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: All</p>

Principal content: Employment
<p><b>Title of the law: Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities</b></p> <p>Abbreviation: RPD Act</p> <p>Date of adoption: 01 April 1998</p> <p>Latest relevant amendment: 01 April 2017</p> <p>Entry into force: 01 January 1999</p> <p>Web link:  <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></p> <p>Grounds covered: Disability</p> <p>Civil and administrative law</p> <p>Material scope: Numerous fields including education, employment, cultural activities, accessibility of public services, transportation</p> <p>Principal content: Setting out the most important principles in relation to the inherent rights of people with disabilities; reasonable accommodation provisions (limited in scope)</p>
<p><b>Title of the law: Act CXI of 2011 on the Commissioner for Fundamental Rights</b></p> <p>Abbreviation: N/A</p> <p>Date of adoption: 26 July 2011</p> <p>Latest relevant amendment: 19 December 2013</p> <p>Entry into force: 01 January 2017</p> <p>Web link:  <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></p> <p>Grounds covered: All</p> <p>Constitutional law</p> <p>Material scope: Acts of public entities and public service providers in all fields</p> <p>Principal content: Creation of an organ with a role in combating discrimination</p>

## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country:** Hungary

**Date:** 31 December 2018

<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</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	04.11.2004	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</b>	<b>Date of ratification</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>
n 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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