



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

COUNTRY REPORT 2011

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ANDRÁS KÁDÁR

State of affairs up to 1st January 2012

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

Human European Consultancy
Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the website of the European network of legal experts in the non-discrimination field:

<http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination>

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INTRODUCTION

0.1 The national legal system

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

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

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

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

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

0.2 Overview/State of implementation

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

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

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

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the



domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

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

- The corner stone of the regulation is the general anti-discrimination clause, Article XV of the Fundamental Law of Hungary.
- A comprehensive anti-discrimination code came into force on 27 January 2004. This is Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (ETA).
- The provisions of Act IV of 1959 on the Civil Code (Civil Code) on the protection of inherent personal rights (including the ban on discrimination) remain an important tool in the combat against discrimination in areas not covered by the ETA due to the restrictions of the law's personal scope.
- The protection provided by the ETA is amplified by sectoral laws. reinforcing the ban on discrimination and containing regulation on different bodies with a role in combating discrimination and specific rules related to the issue of non-discrimination.

Protected grounds

Discrimination on all of the grounds listed in Article 19 TFEU is expressly prohibited but Hungarian national law covers other grounds of discrimination as well. The ETA sets forth an open ended enumeration of protected grounds. The 19-item list includes – among others – sex, racial origin, colour, nationality, national or ethnic origin, mother tongue, disability, state of health, religious or other similar philosophical conviction, political or other opinion, sexual orientation, sexual identity and age. The last item is “any other status, attribute or characteristic”, which means that the list is non-exhaustive, so grounds not explicitly identified are also covered.

Scope of protection

The ETA prohibits any discrimination in the public sector, so with regard to this sector the statute's scope is broader than that of the equality directives. The same cannot be said with regard to the private sector, where only four groups of actors fall under the ETA's scope: (i) those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender; (ii) those who provide services or sell goods at premises open to customers; (iii) self-employed persons, legal entities and organisations without a legal entity receiving state funding in respect of their legal relations established in relation to the usage of the funding; and (iv) employers with respect to employment (interpreted broadly).



Definitions

The ETA introduced the following definitions: direct discrimination; indirect discrimination; segregation; harassment; and victimization. The definitions are largely based on the concepts used by the equality directives.

Exceptions

The ETA distinguishes between three types of exceptions: (i) a general exception; (ii) special exceptions; and (iii) positive action. After the December 2006 amendment of the ETA, the general exempting provision has become quite complex: when a differentiation concerns a fundamental right, it may only be exempted if its legitimate aim is the enforcement of another fundamental right, provided that the restriction caused by the differentiation is absolutely necessary, suitable for achieving the aim and proportionate with the aim. If no such right is restricted by the differentiation, it does not constitute a breach of the ban on discrimination, provided that it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation. Neither of the two exemptions may be applied in cases of differentiation based on racial or ethnic origin. This general exemption is paralleled by special exempting rules related to different sectors, such as employment (a version of the GOR rule) or education (e.g. a provision making it possible to set up separate classes for boys and girls). The third “exception” from the requirement of equal treatment is positive action.

Institutional framework

The Equal Treatment Authority is the Hungarian equality body with a very wide scope of authority. The Authority is an administrative authority functioning under the supervision of the Government with a competence to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.). Besides the competencies required by the Racial Equality Directive, the body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination.

Parallel to the operation of the Authority, organs that played a role in combating discrimination already before its establishment, continue to act in the field. Court procedures continue to be available for victims, and labour as well as consumer protection inspectorates have kept their authorisation to act against instances of discrimination. Victims are provided with the possibility to decide whether they seek remedy with the Authority, or other administrative organs with a mandate. The Parliamentary Commissioner for Fundamental Rights also remains authorised to investigate cases of discrimination.

The focus of anti-discrimination proceedings has mainly shifted to the Authority, however, court procedures have remained very important, as this is the only forum

where victims themselves can receive a monetary compensation and the scope of protection under civil law is wider than under the ETA.

Overall trends

Although (in spite of the significant improvement that was achieved through the December 2006 amendment of the ETA) the legislative framework is still not in complete harmony with the Directives, it can be said that the coming into force of the ETA and the Authority's operation have given an impetus to the fight against discrimination.

Public awareness of the issue has increased, more and more victims come forward with their complaints, and the levels of sanctions have also become higher than before: the Authority's workload had been increasing steadily until 2010, while there was some decrease in 2011.¹ The decrease is explained by the Authority with the fact that as a result of the referee system (see under Section 8.1.) and the growing awareness of the population of what can and what cannot be regarded as a discrimination case, fewer unfounded complaints are filed.²

Caseload of the Equal Treatment Authority, 2005 – 2010

Year	Number of complaints	Number of decisions establishing discrimination
2005	491	9
2006	592	27
2007	756	29
2008	1153	37
2009	1087	48
2010	1373	40
2011	cca. 1000	42

State of implementation

Whereas the Commission has closed the infringement procedures against Hungary under Directives 2000/43 and 2000/78; and has found that the Hungarian legislation is in accordance with the Directives, in the author's view in some areas full accordance is uncertain and is highly dependent on the judicial interpretation of the regulations in question. The areas in which possible breaches may occur are summarised below.

¹ Source: Website of the Equal Treatment Authority:
<http://www.egyenlobanasmod.hu/cikkek/beszamolok> and

http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf.

² See: http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf.

- Due to the comprehensive material scope of the ETA, the requirement of equal treatment as set forth by the ETA applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the Directives, the Hungarian law may be in breach of the *acquis*, as it does not impose on all persons of the private sector the obligation of non-discrimination. (For a detailed explanation see Section 3.2.).
- Article 7 Paragraph (2) of the ETA allows for objective justification in certain cases of direct discrimination, depending on the ground for discrimination and on the nature of the right concerned (fundamental right or not). For a detailed explanation see Section 2.2.
- The rules for the justification of indirect discrimination are also not fully in line with the Directives. (For a detailed explanation see Section 2.3).
- The so-called special exempting clauses also contain certain inconsistencies, unjustified distinctions between certain grounds and wider possibilities for exemption than allowed by the Directives (see for example Section 4.1 on the equal pay for equal work principle and Section 4.2 on employers with an ethos based on religion or belief). Depending on judicial interpretation, some provisions of the new law on churches and religion 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 obligation of reasonable accommodation has not been unambiguously transposed into the Hungarian law. The problem is especially acute with regard to employing people with disabilities, in spite of an amendment to Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities (hereinafter: RPD Act), which – if interpreted from a strict grammatical point of view – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure (i.e. primarily the job interview), but does not prescribe that reasonable efforts shall be made to adapt the workplace to the special needs of persons with disabilities to promote their actual employment. (The situation in this regard is rather complex – for details, see Section 2.6.).

0.3 Case-law

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

Name of the court

Date of decision

Name of the parties

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

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

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

→ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives.

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

Court decisions

Name of the court: Supreme Court

Date of the decision: 8 June 2005

Name of the parties: Háttér Társaság a Melegekért Egyesület v. Károli Gáspár Református Egyetem

Reference number: BH 2006. 14

Brief summary: In the case the Metropolitan City Court took stance in the conflict of a denominational university's freedom of expression (religious belief) and discrimination on the ground of sexual orientation, granting priority to the former. The decision (delivered in the first case ever emerging under the ETA) also touched upon some very important issues, such as the legal standing of NGOs in actio popularis claims, and whether sexual orientation may be regarded as an essential personal characteristic (which is a precondition for launching such a claim). For further description and analysis, please refer to Section 4.2.

Name of the court: Debrecen Regional Appeals Court

Date of the decision: 9 June 2006

Name of the parties: Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v. Miskolc Megyei Jogú Város Önkormányzata

Reference number:

ÍH 2006. 115 [Ítéletáblai Határozatok (Appeals Court Decisions), September 2006]

Address of webpage: http://www.cfcf.hu/?nelement_id=3&article_id=31

Brief summary: In April 2004 the local council of Miskolc (Northern Hungary) integrated seven schools without simultaneously re-drawing the catchment areas, and therefore maintaining the segregation of Roma children.

In June 2005 the Chance for Children Foundation (CFCF) brought an actio popularis claim against the local council, alleging that the council was indirectly responsible for segregation of Roma children in primary education. In November 2005, the Borsod-Abaúj-Zemplén County Court acknowledged the fact that Roma children were over-represented in some of the merged schools, but rejected the claim.

On appeal the Debrecen Appeals Court partially modified the first instance judgment. It found that as a result of the decision to integrate the schools without simultaneously re-drawing the catchment areas Miskolc maintained the segregation of Roma children, violating their right to equal treatment based on ethnic origin. The

court ordered Miskolc to publicise its finding through the Hungarian Press Agency. However, the court stated that it could not grant the order requested by CFCF to integrate Roma children into mainstream classes along the relevant provisions and ministerial guidance, as this would be beyond the civil court's scope of authority to instruct a public authority in detail on how such integration should be achieved.

Name of the court: Supreme Court

Date of the decision: 19 November 2008

Name of the parties: Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v. Hajdúhadház Város Önkormányzata, Bocskai István Két Tanítási nyelvű Általános Iskola, Dr. Földi János Általános és Művészeti Iskola

Reference number: Pfv.IV.20.936/2008/4.

Brief summary: The Chance for Children Foundation (CFCF) launched an actio popularis claim against the local council of Hajdúhadház and the two elementary schools providing education in the city claiming segregation and direct discrimination. Both schools have three buildings: one central and two supplementary buildings.

In the case of both schools the proportion of Roma pupils educated in the central building is relatively low (28 and 22 percent respectively), whereas in the supplementary buildings the proportion of Roma pupils is very high (86 and 96 percent in one school, and 100 percent in the other). In the case of both schools, the central building is much more well-equipped than the supplementary buildings, where no gymnasium, library, computers or specialised class rooms can be found.

In its decision no. 6.P.20.341/2006/50. delivered in May 2007, the Hajdú-Bihar County Court established that the situation described above amounts to segregation by the schools and the local council maintaining them. Furthermore, the Roma pupils have also been directly discriminated against due to the fact that in their segregated buildings the physical conditions are significantly worse than in the central ones. The Court ordered the defendants to terminate the violation by the beginning of the 2007/2008 academic year, and the local council was obliged to publish a letter of apology.

In its decision Pf.I.20.631/2007/8 delivered in December 2007 upon appeal, the Debrecen Regional Appeals Court partly overturned the decision, and concluded – in contradiction to its former jurisprudence – that for segregation to be established, it would have needed to be proven that the defendants have taken active measures to segregate the Roma pupils and had the intention to unlawfully separate them from their non-Roma peers.

In the absence of such evidence the court established no segregation. On the other hand, it stated that defendants directly discriminated Roma pupils, because the buildings where the majority of Roma pupils study and where almost exclusively Roma pupils study are much worse equipped than central school buildings where majority pupils study.

Upon the plaintiff's request for review, in its decision Pfv.IV.20.936/2008, the Supreme Court partly overturned the second instance court's decision. It pointed out that – in line with the first instance court's decision – neither the lack of space in the central buildings, the long-standing traditions, nor the launching of the so-called “Gipsy minority education” justified the segregation of the Roma pupils. Neither did the parents request separate placement of their children. Thus, the Supreme Court established that – besides the direct discrimination recognised by the court of second instance – segregation has also taken place and ordered the local council to publicise the decision through the Hungarian News Agency.

Name of the court: Supreme Court

Date of the decision: 2 June 2010

Name of the parties: A, B, C, D, E. v. the Local Council of Miskolc

Reference number: Pfv.IV.20.510/2010/3..

Address of webpage: www.birosag.hu

Brief summary: In 2006, based on the action popularis claim of the Chance for Children Foundation (CFCF), the Debrecen Appeals Court delivered a final and binding judgement in which it established that the local council of Miskolc (Northern Hungary) violated the requirement of equal treatment when it integrated seven schools without simultaneously re-drawing the catchment areas, and therefore maintaining the segregation of Roma children. Although the Court obliged the local council to put an end to the violation, the situation has not changed. Therefore, in 2007, the CFCF assisted five Roma pupils attending the segregated schools in launching a lawsuit. The plaintiffs claimed that the segregation violated their inherent personal rights protected by the Civil Code, and demanded non-pecuniary damages for the violation. Both the first and the second instance courts rejected the claim, on the basis that while the segregation could be established, the plaintiffs could not prove that they had suffered moral damages as a result. Therefore, the plaintiffs requested a review of the case from the Supreme Court.

Changing the judgements of the lower courts, in its decision of 2 June 2010, the Supreme Court granted non-pecuniary damages in the amount of HUF 100,000 (EUR 345) for each plaintiff. The Supreme Court stated that irrespective of whether and how the plaintiffs can continue their studies after primary school, the fact of segregation in itself substantiates non-pecuniary damages.

Name of the court: Supreme Court

Date of the decision: 24 November 2010

Name of the parties: Chance for Children Foundation v. City of Kaposvár

Reference number: Pfv.IV.21.568/2010/5.

Brief summary: The Chance for Children Foundation launched an *actio popularis* lawsuit against the city of Kaposvár claiming that the city as the maintainer of local schools had defined the school catchment areas in a way that the Roma neighbourhood fell within one catchment area resulting in segregation between the educational institutions, because the vast majority of Roma pupils have to go to the



school serving that particular area. Furthermore, the Foundation claimed that the education provided in that school is substandard, and not even comparable to the services offered by other schools of the city.

The Foundation requested the court to order the defendant to stop the violation and to put an end to the unlawful situation through closing the school and distributing the pupils among the other schools of the city.

The first instance court held that the city had segregated the Roma pupils and – through providing them with substandard education – also discriminated them. It ordered the defendant to stop the violation but rejected the plaintiff's request to order the city to close the school.

Upon appeal from both parties, the court of second instance partly modified the first instance decision. It found – in agreement with the first instance court – that by failing to take measures that could have offset the spontaneous segregation that had evolved as a result of segregation in housing, the city of Kaposvár had segregated the Roma pupils. On the other hand, it held that while results of the pupils had been worse in some respects than in other schools, this in itself cannot serve as the basis for establishing that the Roma pupils had been discriminated as well. The court of second instance held that the ordering of the termination of the violation was necessary, and – changing the first instance decision – also obliged the city to put an end to the unlawful situation, however without specifying how it should be done. I.e. the court did not oblige the city to close the school and distribute its pupils among other schools. The argument was that the segregation has developed in a public law context, and therefore, it cannot be handled within the framework of a civil lawsuit.

In its decision of November 2010, the Supreme Court partly changed the second instance decision. It shared the first and second instance courts' view that the defendant violated the requirement of equal treatment by segregating the Roma pupils. It approved of the second instance court's decision that direct or indirect discrimination in relation to the quality of education may not be established, however, mainly on a procedural basis (because the plaintiff's claim did not contain an *express* request for the court to establish the violation of the requirement of equal treatment in this respect). The Supreme Court accepted that the defendant could be ordered to terminate the violation, but came to a different conclusion with regard to ending the unlawful situation. It held that – irrespective of the fact that educational relations belong to the sphere of public law – a court can in principle oblige a defendant to terminate an unlawful situation in a way that it prescribes concrete steps. This can only be done however, if the plaintiff puts forth a claim in which realistic and executable steps are defined. The Supreme Court held that the steps requested by the Foundation (the closing of the school and the distribution of the pupils among other schools) are not realistic and executable, so it rejected that part of the claim in which the Foundation requested the court to order the city to put an end to the unlawful situation.



Name of the court: Metropolitan Regional Appeals Court

Date of the decision: 7 December 2010

Name of the parties: Sz. Sz. v. Csemege-Match Zrt.

Reference number: 2.Pf.21.104/2010/5.

Address of webpage:

http://helsinki.hu/dokumentum/Fovarosi_Itelet_SzSz_20101207.pdf

Brief summary: The visually impaired plaintiff wanted to enter a shop of one of the large supermarket chains of Hungary on 8 October 2009 with his guide-dog but the security guard told him that he had to leave the dog outside. The head cashier also confirmed that dogs may not be taken to the shop, consequently the plaintiff could not do the shopping himself. The plaintiff – represented by the Hungarian Helsinki Committee – requested the court to establish that this treatment amounted to the violation of his right to equal treatment. Furthermore, he asked the court – among others – to oblige the defendant to pay him non-pecuniary damages in the amount of HUF 500,000 (EUR 1,725). The defendant acknowledged that a violation had occurred, but contested that any non-pecuniary damage had occurred on the part of the plaintiff.

In its first instance decision of 18 March 2010 (no.: 40.P.26.486/2009/5), the Metropolitan Court, established that the plaintiff's right to equal treatment had been violated, forbade the future violation, obliged the defendant to apologize in a private letter and granted non-pecuniary damages in the requested amount for the plaintiff.

The court articulated a number of important principles in the decision. It emphasized that denying a blind person the right to enter with his/her guide-dog, amounts to denying him/her access to services on the ground of disability. Furthermore, the court pointed out that the violation of the requirement of equal treatment (as a form of inherent personal rights violation) inevitably causes non-pecuniary damages, and evidence concerning the degree of the moral harm is only necessary if the compensation claimed by the plaintiff seems excessive (compared to the general perception and sense).

The defendant appealed against the decision and while it acknowledged that the denial of access was not in line with the Hungarian laws, it requested that no compensation would be granted for the plaintiff, since the plaintiff had failed to prove the damages he had suffered as a result of the violation.

In its decision delivered on 7 December 2010, the Metropolitan Appeals Court upheld the first instance decision. It emphasised that it is common knowledge that for a person with a disability, the denial of access on the basis of the disability is extremely humiliating. Denial of the entry of the dog amounts to denial of entry on the basis of disability, since the dog and the owner constitute an inseparable unit. Therefore, the fact that non-pecuniary damages had been suffered could be established without any further evidentiary procedure, simply on the basis of common knowledge.

By referring to Article 8 of the ETA as the basis of their decisions, the courts expressed that they regard the incident as a form of direct discrimination committed through the failure to comply with a legislative measure aimed at levelling the opportunities for blind persons (namely the provision which states that guide dogs are exempt from the general ban on taking dogs into food stores, public baths and restaurants).

Name of the court: Supreme Court

Date of the decision: 16 March 2011

Name of the parties: Equal Treatment Authority v. the mayor of Edelény

Reference number: Kfv.II.37.551/2010/5.

Brief summary: At the local council meeting of Edelény (North-East Hungary), the town's mayor, Oszkár Molnár made the following statement: "in the neighbouring settlements, in settlements with a Gypsy majority, for instance in Lak, for instance in Szendrőlád, pregnant women take medication so that they would give birth to demented children so that they would be entitled to increased family allowance. Women during their pregnancy – I looked into this and it is true – keep hitting their bellies with rubber hammers so that they would give birth to disabled children." In its decision no. 1475/2009, the Equal Treatment Authority established that the mayor's statement amounted to harassment under Article 10 of the ETA. The Authority sanctioned the statement by ordering that its decision shall be made public for 90 days. The mayor filed for a judicial review against the decision, but the Metropolitan Court upheld the Authority's decision on 22 March 2010. The mayor filed for review by the Supreme Court.

In its decision of 16 March 2011, the Supreme Court quashed the decisions by the Authority and the Metropolitan Court, and terminated the case. The Supreme Court's argument was that Article 4 of the ETA states that mayors shall be obliged to observe the requirement of equal treatment in their legal relations, in the course of establishing legal relations and in the course of their proceedings and measures. Mayors – in this capacity – may only be in legal relations (i.e. legally regulated social relations) with the residents of their respective municipalities, and they may conduct proceedings and take measures also with regard to such residents. Since Oszkár Molnár is the mayor of Edelény, and his statements were made in relation to Roma women living in two other settlements, he did not fall under the scope of the ETA, therefore he could not be called to account for his statements. (For a more detailed analysis of the case, see Section 1.2).

Name of the court: Supreme Court

Date of the decision: 29 June 2011

Name of the parties: Chance for Children Foundation v. Local Council of Jászladány

Reference number: Pfv.IV.20.037/2011/4.

Address of webpage: http://www.cfc.hu/a-legfelsobb-birosag-kozlemenye_hu.html

Brief summary: With the declared intention to prevent majority parents from taking their children to schools located in other settlements, in 2002 the local council of



Jászladány decided to rent a part of the local school building to a foundation which was established to provide the legal framework for the launching of a private school requiring a tuition fee from its pupils. The local council asked for a symbolic rental fee from the foundation, while provided the private school with significant financial support. The school started its operation in 2003. While most of the Roma pupils (who could not afford to pay the tuition fee) remained in the local school, most of the majority pupils enrolled to the private school. In 2007, the Chance for Children Foundation (CFCF) launched an *actio popularis* claim against the local council and the foundation requesting the court – among others – to establish that the local council discriminated and segregated the Roma children, to oblige the defendant to refrain from future violation and to restore the situation that had prevailed before the violation started. The first and second instance courts rejected all the claims of CFCF.

In its decision, the Supreme Court found CFCF's claim partly substantiated. The court was of the view that the situation of the Roma children studying in the local school is not comparable to that of the pupils in the private school, since such a comparison may only be made in relation to schools maintained by the same entity. Since the local school is maintained by the local council, while the private school is maintained by the foundation, this criterion of comparability is not in place, in spite of the fact that the local council provides the private school with significant financial support, the foundation regularly updates the council on its activities, and several members of the council are also on the foundation's board. Therefore, the difference in the quality of education does not qualify as discrimination of the Roma pupils who study under much worse conditions.

On the other hand, the Supreme Court found that the existence of segregation may be established on the basis that the local council is the owner of the building in which both the local school and the private school operates. By renting out part of the local school building to the foundation, the local council contributes to the maintenance of a situation in which Roma pupils are segregated from their non-Roma peers. CFCF as the plaintiff fulfilled its obligations under the burden of proof regulations (existence of a protected ground and the disadvantage), while the local council could not point to the legal provision allowing for such a separation of the two groups of pupils. Since under the ETA, the general exempting rule is not applicable in cases of differentiation based on ethnicity, while the separation of groups of students is only allowed if it is specifically permitted by an Act of Parliament, the defendant's failure to be able to identify the legal basis of its action resulted in the Supreme Court establishing that the local council had been segregating the Roma pupils from their non-Roma peers. The Supreme Court therefore established the violation of the requirement of equal treatment and obliged the local council to refrain from future violation. The Supreme Court ordered the first instance court to carry out a new procedure to decide on the manner in which desegregation shall be carried out. In this respect, the Supreme Court indicated that it would regard a settlement between the parties desirable, but if no such agreement can be reached, ultimately the private school has to move out

from the local school's building. The first instance court held the first hearing in relation to the issue in March 2012. This case is still pending.

Name of the court: Supreme Court

Date of the decision: 18 October 2011

Name of the parties: Equal Treatment Authority v. the mayor of Kiskunlacháza

Reference number: Kfv.III.39.302/2010/8.

Brief summary: In 2009, the mayor of Kiskunlacháza (Middle-Hungary Region) in relation to a murder of a young girl (with regard to which at present the suspicion is that it was committed by a non-Roma person) spoke at a public demonstration about the settlement's population having had enough of 'Roma aggression' and made other statements – in the local newspaper and also in a national newspaper – giving the impression that in his view the murder had been committed by Roma people. Based on an *actio popularis* claim by the Hungarian Helsinki Committee, on 19 January 2010, the Equal Treatment Authority established that harassment had been committed, forbade the continuation of the violation and ordered that the decision be made public.

The mayor filed a request for judicial review of the decision. On 4 October 2010, the Metropolitan Court quashed the Authority's decision and ordered a new procedure. The court decision claimed that although the mayor had spoken and published using his official title of mayor, and although the demonstration was organized by the local council, the mayor's statements were not made in an official capacity. Furthermore, the Metropolitan Court stated the following: Article 4 of the ETA prescribes that the mayor shall be obliged to observe the requirement of equal treatment in his legal relations, and in the course of his proceedings and measures, but statements made at a rally or in newspapers may not be regarded as belonging to either of these three categories. Therefore, the mayor was not bound by the ETA in relation to his statements, so he cannot be held liable for harassment. The Authority and the Hungarian Helsinki Committee requested the Supreme Court to review the court's decision.

In its decision dated 18 October 2011, the Supreme Court upheld the MC's decision with amended reasoning. The SC established that the mayor had unquestionably made the statements in an official capacity. On the issue whether the making of such statements falls under any of the categories (legal relations, proceeding or measure) with regard to which the mayor shall respect the principle of equal treatment, the Supreme Court put forth that only those actions may be regarded as the proceedings or measures of the mayor (and/or the local council) that fall under their scope of competence in terms of the relevant laws. Therefore, in the repeated procedure, the Equal Treatment Authority shall examine and determine whether the making of public statements can be regarded as falling under any of the statutorily defined tasks/competences of the mayor and whether the making of such statements can be regarded as external acts that create "legally regulated social relations" between the members of the concerned group and the mayor. Furthermore, the Supreme Court instructed the Equal Treatment Authority to examine in the repeated procedure



whether harassment can be committed against a group, and expressed its doubts about the issue pointing out that while the definition of all other forms of discrimination contains reference to “groups”, the definition of harassment only mentions “person”.

Equal Treatment Authority

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 180/2006

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/477.pdf>

Brief summary: In response to a newspaper advertisement, the complainant called a company which was recruiting painters. He met the requirements set by the employer, but when he informed the employer that he was of Roma origin, he was rejected. In a procedure including testing, the Equal Treatment Authority found that the employer directly discriminated in breach of Article 8 ETA and imposed a fine of HUF 700,000 (EUR 2,415) on him.

Name of the body: Equal Treatment Authority

Date of the decision: March 2006

Name of the parties: X v. Pesti Központi Kerületi Bíróság

Reference number: 13/2006

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/zanza0307.pdf>

Brief summary: A person with disability filed a complaint with Equal Treatment Authority claiming that he had not been able to attend the court hearing held in his civil lawsuit because the Central District Court of Pest (CDCP) is not accessible for persons using wheelchairs, and the employees of the CDCP did not provide him with appropriate assistance. In the case, the Equal Treatment Authority did not accept the CDCP's reference for financial problems as an objective exempting factor, and obliged the CDCP to terminate the injurious situation within 60 days and ordered that its decision be published on its own website.

Name of the body: Equal Treatment Authority

Date of the decision: September 2006

Name of the parties: --

Reference number: 295/2006

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/295-2006.pdf>

Brief summary: The applicant is a visually impaired lawyer, who in the course of his search for a job, sent his CV to the defendant company. The company's representative called him and they agreed on an interview. Following this, the applicant realized that the fact that he was visually impaired was not included in his CV.

He immediately called the company's representative, who tried to dissuade him from the job, saying that he would have difficulties in fulfilling his obligations, but in the end they agreed to carry on with the interview.

One day before the scheduled date, the applicant received an e-mail in which the interview was called off. The e-mail contained specific reference to the applicant's disability.

The Equal Treatment Authority established the violation of the principle of equal treatment, ordered the company to refrain from such behaviour in the future, obliged the company to pay a fine of HUF 800,000 (EUR 2,760) and ordered that its decision be published on its website for 30 days.

Name of the body: Equal Treatment Authority

Date of the decision: December 2007

Name of the parties: --

Reference number: 44/2007

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/44-2007.pdf>

Brief summary: The complainant turned to the police when he noticed a sign "We don't serve Roma" posted by the manager of a pub. After the intervention of the police, the sign was removed. The Equal Treatment Authority proceeded against the company operating the pub for violating the principle of equal treatment. The respondent admitted that he had posted that sign, but he also added that it was due to the complainant's offensive behaviour, which had also been reported to the police.

The Equal Treatment Authority established that the complainant suffered discrimination based on his ethnic origin. It declared that former incidents related to Roma people do not qualify as a justified reason to exclude all Roma persons from the access to goods and services provided by the pub. In this manner the manager of the pub excluded not just certain people from access to goods and services, but he discriminated his guests on the basis of their ethnic origin. The Authority established that the respondent had violated the principle of equal treatment, it banned the continuation of the practice, imposed a fine of HUF 600,000 (EUR 2,070) on the respondent and ordered the publication of the decision for 90 days on its website.

Name of the body: Equal Treatment Authority

Date of the decision: February 2004

Name of the parties: Sz-né B.M., M. S-né és M.R. v. B.Q.B. Kft.

Reference number: 94/2008

Address of webpage: <http://www.egyenlobanasmod.hu/data/94-2008.pdf>

Brief summary: Three complainants were provided with the phone number of an employer by an administrator of a Regional Labour Centre. They called the manager of the corporation, which registered itself in the Centre seeking for cleaning employees. During the call, the manager detailed the working conditions, they have arranged in starting the work next day.



At the end of the call, when the complainant asked whether their Roma origin was a problem for the employment, the manager hung up the phone.

Next day the complainants revisited the administrator of the Centre to tell him their case, whereof the administrator called the manager, who admitted that he did not want to employ Romas, because their employees did not like to work with them. Following that, the complainants with their lawyer turned to the Equal Treatment Authority, which launched a procedure against the corporation. The manager denied that he had arranged a meeting with the complainants and also added that the vacancies had been already filled with members of his family, when complainants had been applying for the job.

According to the burden of proof, the complainants proved that they had suffered a disadvantage when they were not employed, and they had a protected characteristic, which was their origin. The Authority stated that the respondent's arguments were contradictory, he could not prove that the vacancies had been filled before the complainants' application. The Authority found that the respondent had violated the principle of equal treatment, it banned the continuation of the practice, also imposed a fine of HUF 500,000 (EUR 1,725) and it found necessary to publish its decision for 90 days on the website of the Authority.

Name of the body: Equal Treatment Authority

Date of the decision: April 2008

Name of the parties: --

Reference number: 72/2008

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/72-2008.pdf>

Brief summary: The applicants stated that they had been regularly charged a higher price than other customers in a bar because of their Roma origin, and – one of the applicants – because she shared an apartment with her Roma friend. In the latter case, the applicant stated that she was overcharged only after it had become known where she resided. The manager of the bar argued that they had started to issue regular customers' cards, and that is the reason for the different prices. He also stated that they had issued such cards to several Roma customers as well. The manager claimed that the applicants had not been provided with cards because they were problematic guests: once even the police had to be called with regard to an incident involving one of them. The National Consumer Protection Authority carried out a test purchase at the bar, and the non-Roma tester had to pay half of the sum indicated on the price list and a regular customers' card was issued for her, although this was the first occasion she had ever visited the bar.

The Authority established that the bar did not have any internal regulation concerning the regular customers' cards, the cards were issued on an ad hoc basis, taking into account different, mostly arbitrary aspects.

The Authority established direct discrimination on the grounds of ethnic origin and the ground "other characteristic" (association with a Roma person). The Authority banned

the continuation of the violation, ordered the publication of the decision, and imposed a fine of HUF 1 million (EUR 3,450) on the bar.

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 1003/2008

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/1003-2008.pdf>

Brief summary: The complainant applied for a job as maintainer at a hypermarket. After submitting his curriculum vitae, he was called in to write a test, and based on the test result he was invited to a personal interview. He claimed that he was told only after the one-hour long interview that the vacancy had already been filled in. The complainant assumed that he did not get the job because he was more than 50 years old. The company submitted statistics about the age of the maintainers employed by the hypermarket and the contracts of the two persons who finally were employed for the advertised job. The company thus proved that 3 out of 4 maintainers at the hypermarket were over 50, and nationally, 16 out of 50 maintainers employed by the chain were older than 50 years. The respondent admitted that the complainant had not been told at the beginning of the interview that the vacancy had already been filled, but claimed that the complainant's age played no role in the fact that he did not get the job.

The Authority dismissed the claim due to the fact that by submitting the related statistics, the respondent successfully refuted the casual link between the complainant's protected characteristic (age) and the disadvantage he suffered.

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 588/2008

Address of webpage: www.egyenlobanasmod.hu/zanza/588-2008.pdf

Brief summary: The applicant stated that the principle of equal treatment was violated when a financial institution refused to issue a credit card for him because he was 68 years old, even though he was creditable with regard to his income and his financial situation.

The respondent admitted that it refused to issue a credit card because of the age of the applicant, but pointed out that in the meantime its credit conditions had been changed in this regard, in accordance with the recommendations of the National Financial Supervisory Authority. However, the respondent argued that the former credit conditions, excluding clients over a certain age, did not violate the principle of equal treatment, they were simply aimed at the elimination of 'natural risks'.

The Equal Treatment Authority established that the respondent violated the principle of equal treatment when refusing to issue a credit card solely on the ground of the



age of the applicant. The authority banned the continuation of the violation, ordered the publication of its decision, and imposed a fine of HUF 2 million EUR 6,900).

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 1054/2009

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/1054-2009.pdf>

Brief summary: A human rights NGO initiated an actio popularis case before the Equal Treatment Authority against a bar seeking a young female bartender in a newspaper advertisement. The owner of the bar tried to exempt the differentiation by claiming that they wished to employ a young person because the job requires significant physical endurance, and a woman because guests are more willing to frequent a place if they are received by a nice and kind person. The Authority established that the principle of equal treatment had been violated, and ordered that the decision establishing the fact of violation be made public. In the decision the Authority refused to accept either gender or age as genuine and determining occupational requirements for the job of a bartender.

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 234/2009

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/234-2009.pdf>

Brief summary: The applicant, who was working as an accountant in a forestry company, alleged that after his retirement in 2002 in the framework of an early retirement scheme, the company continued to employ him on an unfixed-term contract, but he received a lower salary than other accountants employed by the same company, because as opposed to the other accountants, his salary was not reviewed annually, so after a certain time it was significantly less than the other accountants' salary. Shortly after he made a complaint about the issue in December 2007, he was dismissed as of 31 March 2008.

The respondent argued that the applicant in fact did not perform some tasks that were listed in his job description, so his work could not be considered as equal to the other accountants' work, consequently the difference between the salary of the applicant and the other accountants was justified. The Equal Treatment Authority found that the applicant's tasks had not changed after his retirement, and although he continued to perform the same duties after he became a pensioner, a gap in the salaries evolved due to the fact that he was not granted the annual increase his colleagues were. Therefore, the Equal Treatment Authority – which did not look into the issue of possible victimization – established the violation of the principle of equal treatment, ordered the respondent to refrain from the violation in the future, ordered the publication of its decision and imposed a fine of HUF 500,000 (EUR 1,725) on the company. It needs to be noted that the Authority does not have the competence to

order the reinstatement of the applicant. In the Hungarian system, only labour courts are authorised to take such a measure.

Name of the body: Equal Treatment Authority

Date of the decision: 3 December 2009

Name of the parties: Menedék – the Hungarian Association for Migrants v. Café Rió

Reference number: --

Address of webpage:

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

Brief summary: The Menedék – the Hungarian Association for Migrants launched an actio popularis claim against Café Rio, a well known Budapest bar, because the bar regularly denied black people access or allowed them to enter only after humiliating proceedings. In May 2009, testers of the Association tried to enter the place. While the white testers were allowed entry without any difficulty, the black testers were sent away on the basis that they did not have a membership card. The Equal Treatment Authority imposed a fine of HUF 5,000,000 (EUR 17,250) on the bar. When assessing the amount of the fine, the Authority took into account that earlier, in 2007, it had already found that the bar had violated the requirement of equal treatment (vis a vis Roma guests). In 2007, the Authority did not apply a fine, hoping that the management would in the future respect the principle of equal treatment. Seeing that the discriminative practices are still in place, the Authority decided to impose a fine of record amount.

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 1079/2010

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/1079-2010.pdf>

Brief summary: A person in wheel-chair initiated a lawsuit against the public utility gas company that started a client service office in the settlement on 1 January 2010, because the company failed to make the service physically accessible for him. The company referred to the RPD Act that sets forth that public services that are operational on 1 April 2007, shall only be made accessible by 31 December 2013 (whereas public services that are started after this date shall be accessible from the beginning of their operation). The company claimed that since the client service office that it had opened on 1 January 2010 had operated as a client service office (of a public utility electricity company) beforehand, and already on 1 April 2007, the gas company's client service office cannot be regarded as a new public service. Therefore, it shall make the office accessible only by December 2013.

The Equal Treatment Authority rejected this argumentation. As the gas company purchased the building in 2009, and opened its client service office in January 2010, it cannot be regarded as a service already operational in April 2007, irrespective of the fact that at that time another company's public service office operated in the building. Since the company already started the works aimed at making the office

accessible during the proceeding, the Authority regarded it as sufficient to establish the violation of the requirement of equal treatment, and refrained from imposing any further sanction on the company.

Name of the body: Equal Treatment Authority

Date of the decision: --

Name of the parties: --

Reference number: 795/2010

Address of webpage: <http://www.egyenlobanasmod.hu/zanza/795-2010.pdf>

Brief summary: A company performing the value assessment of houses for bank loans placed the houses of two Roma families into the category “C” (“not negotiable or hardly negotiable”). They claimed that the reason for this was their Roma origin. During the investigation, it turned out that the company had categorised the real estates without actually visiting the scenes. The company claimed that the reason for this was that earlier they had performed assessments in the streets where the houses were located, and the low prestige of the neighbourhood substantiated the categorisation.

The Authority requested information from the bank which commissioned the company to perform the assessment. The bank stated that seven real estates had been assessed in the concerned streets, and only two had been placed in the category C. The Authority also visited the scene, and established that neither the neighbourhood, nor the condition of the houses substantiated the categorisation. Based on this, the Authority came to the conclusion that the reason for the disadvantageous categorisation was indeed the ethnic origin of the families living in the houses. The Authority refused to accept the company’s argument that no disadvantage was suffered by the families, as they were provided with a bank loan by another bank. In fact, the Authority regarded as further evidence that the houses were negotiable. Because of this, the Authority established the violation of the requirement of equal treatment, ordered the publication of its decision on its website, and imposed a fine of HUF 300,000 (EUR 1,035) on the company.

As to trends and patterns in cases brought by Roma, the following can be said.

According to the available statistics, the trends and patterns do not seem to have changed with regard to the types of cases brought by Roma. There are no detailed and reliable statistics, but from information made available to the public in the media, it may be concluded that the majority of cases still regards employment, access to services, education and housing.

The Authority’s *report about the year 2008* states the following: “Most complainants were discriminated against on the basis of their [...] disability, age, motherhood and ethnic affiliation.”³

³ See: <http://www.egyenlobanasmod.hu/data/2008beszamolo.pdf>.

In 2009, out of the 48 cases, in which the violation of the principle of equal treatment was established, ethnicity was the ground for discrimination in altogether 8 cases (17%), out of which 2 concerned the field of employment and 3 the field of access to services.⁴

According to the Authority's *annual report for 2010*, out of the 40 cases in which discrimination was established in 2010, racial or ethnic affiliation was the ground of discrimination in 7 cases (which means 17.5%).⁵ (The numbers for disability, age, political or other opinion and sexual orientation were 6, 4, 2 and 2 respectively.)

In the brief summary concerning the Authority's activities in the year 2011, it is stated that "as to the protected ground of the complainants, they most frequently believe that they have been discriminated against because of their motherhood or pregnancy (42 cases), health status (56 cases), age (38 cases), disability (114 cases) or ethnicity (118 cases)."⁶

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

⁴ See: http://www.egyenlobanasmod.hu/data/2009tevekenysege_szamok_tukreben.pdf; and information from staff of the Authority.

⁵ See: <http://www.egyenlobanasmod.hu/data/2010beszamolo2.pdf>.

⁶ See: http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatosag.pdf.



1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

The cornerstone of the existing system is the general anti-discrimination clause (Article XV of the Fundamental Law of Hungary):

- (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 promote the realisation of equal opportunities.
- (5) Hungary shall take special measures to protect children, women, the elderly, and persons with disabilities.

Hungary has a new Constitution, the Fundamental Law, which came into force on 1 January 2012. In the absence of jurisprudence it is impossible to know whether and to what extent the Constitutional Court will apply to the Fundamental Law the standards it developed with regard to the Old Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary). This has to be taken into consideration when reference to the Constitutional Court's decisions are made.

Paragraph (1) of Article 70/A (i.e. the non-discrimination clause of the Old Constitution) referred to human and civil rights only, however, in its decision No. 61/1992 (XI. 20.), the Constitutional Court extended the principle of non-discrimination to the whole legal system. It is expected that this interpretation will remain valid with regard to Paragraph (2) of Article XV of the Fundamental Law, which mentions only fundamental rights.

As it can be seen, the list of protected grounds has remained open ended, so the provision can be interpreted as covering all the grounds mentioned in the Directives (including sexual orientation) and beyond.

In its jurisdiction on Article 70/A of the Old Constitution, the Constitutional Court consistently regarded sexual orientation as being one of the "other grounds" listed by Article 70/A. In its decision 20/1999 (VI. 25.) on abolishing a discriminatory provision of the Penal Code, 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«. If this interpretation prevails (which is the most likely scenario), sexual orientation will be a constitutionally protected ground.

It needs to be noted however that Hungary has been criticised by domestic and international organisations for not expressly mentioning sexual orientation among the protected grounds. For example in its opinion on the Fundamental Law, the European Commission for Democracy through Law (Venice Commission) warns that “the Hungarian Constitution might create the impression that discrimination on this ground is not considered to be reprehensible. The Venice Commission however proceeds from the assumption that the Hungarian Constitutional Court will interpret the grounds for discrimination in a manner according to which Article XV prohibits also discrimination on grounds of »sexual orientation«. This is in line with the ECtHR case law [...]”⁷

Based on the opinion of the Venice Commission, on 5 July 2011 the European Parliament delivered a resolution on the Revised Hungarian Constitution. The resolution claims that “whereas the new Constitution fails to explicitly lay down a number of principles which Hungary, stemming from its legally binding international obligations, is obliged to respect and promote, such as [...] the prohibition on discrimination on the grounds of sexual orientation”, the European Parliament calls on the Hungarian authorities to “guarantee equal protection of the rights of every citizen, no matter which religious, sexual, ethnic or other societal group they belong to, in accordance with Article 21 of the Charter of Fundamental Rights, in the Constitution and its preamble.”

In their reactions, Hungarian officials claimed that they did not see the need to revise Article XV of the Fundamental Law in light of the European criticism.

b) Are constitutional anti-discrimination provisions directly applicable?

In practice constitutional anti-discrimination norms are still not directly applicable, but the Fundamental Law has brought along improvement in this matter by introducing the possibility of a real constitutional complaint, i.e. requesting the review of any judicial decision by the Constitutional Court if the complainant’s fundamental rights have been violated because the ordinary court has either applied an unconstitutional legal norm or applied a legal norm in an unconstitutional manner.

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

The possibility of a constitutional complaint exists with regard to lawsuits involving private parties, so not only in cases running against the State is this route available.

⁷ See: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-e.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf); §§ 76-80.



2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

The grounds of discrimination are listed in Article 8 of the ETA. These are:

- a) sex
- b) racial affiliation
- c) colour of skin
- d) nationality
- 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) sexual identity
- o) age
- p) social origin
- q) financial status
- r) part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof
- s) belonging to an interest representation
- t) other situation, attribution or condition (hereinafter together: characteristic),
- u) of a person or group.

The list covers significantly more grounds than the Directives and it is also non-exhaustive, thus providing sufficient flexibility and leaving open the possibility of prohibiting – if necessary – discrimination based on any “other characteristic” not included in the list.

On the other hand, the ground “other characteristic” also raises certain concerns. It constitutes the ground for discrimination in a significant portion of the cases where the Equal Treatment Authority establishes discrimination. In 2007 five out of the 29 decisions establishing discrimination, the differentiation was based on the ground

“other characteristic”.⁸ In 2008, out of the 37 decisions holding that discrimination has occurred, 9 was based on this ground.⁹

An overview of the Authority’s decisions showed that in several cases, discrimination based on the ground “other characteristic” is established even in instances when the feature serving as the basis for the disadvantageous treatment is not an essential human characteristic. Examples included a difference of opinion between the employee and the employer¹⁰ and the fact that the employee applied for a leading position within the workplace.¹¹

In 2009, the Authority seemed to have taken a new approach in order to avoid the dilution of the protection offered by the ETA, and the number of established instances based on “other characteristic” fell to 3 (out of 48)¹² and remained relatively low. According to the 2010 annual report, the ground “other characteristic” was the basis for discrimination in 4 out of the 40 cases in which the violation of the principle of equal treatment was established.¹³ (Examples of features that are regarded as “other characteristic” include citizenship, speech impediment, residing in a particular settlement.)

The issue is important because it raises the concern that claims of discrimination are used with a view to enjoy the benefits of the more advantageous burden of proof provisions even in cases when the ground of the injurious treatment is not one of those for the protection of which the special anti-discrimination provisions have originally been devised, thus diluting the system of protection in relation to the primarily protected grounds.

To shape the jurisprudence, the Equal Treatment Advisory Board (the six-member advisory board established to assist the work of the Equal Treatment Authority, see Section 7) adopted on 9 April 2010 Guideline No. 288/2/2010. (IV.9.) TT. on the definition of the ground “other characteristic”,¹⁴ in which it argued for a narrow interpretation of the term.

According to its 2010 annual report, the Authority is willing to take this view into consideration in developing its jurisprudence. In relation to labour related complaints the report states the following: “The application of the Advisory Board’s guideline on the ground other characteristic has unified and restricted the application [of this ground] by the Authority, as a result of which no decision establishing discrimination in employment on the basis of this ground has been delivered.”¹⁵

⁸ <http://www.egyenlobanasmod.hu/index.php?g=kozadat.htm#ie1>.

⁹ <http://www.egyenlobanasmod.hu/data/2008beszamolo.pdf>.

¹⁰ Case no. EBH 1/2008.

¹¹ Case no. EBH 704/2007.

¹² <http://www.egyenlobanasmod.hu/data/2009beszamolo.pdf>.

¹³ <http://www.egyenlobanasmod.hu/data/2010beszamolo2.pdf>.

¹⁴ http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf.

¹⁵ <http://www.egyenlobanasmod.hu/data/2010beszamolo2.pdf>.



2.1.1 Definition of the grounds of unlawful discrimination within the Directives

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

These terms are not defined in national law on discrimination. Most of the terms do not have a legal definition in other laws either, and there is some inconsistency in the terminology throughout the legal system. For details (including the question on the Hungarian concept of disability) see point b) below.

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

Racial or ethnic origin: Various terms cover these categories even within the ETA. "Race" (faj) and "colour" (szín) are mentioned by the Fundamental Law, whereas the ETA uses "colour of skin" (bőrszín), "racial affiliation" (faji hovatartozás), "belonging to a national minority" (nemzeti kisebbséghez való tartozás) and "nationality" (nemzetiség).

There is a statutory definition of national minorities (nemzeti kisebbség), which is set forth in Article 1 of Act CLXXIX of 2011 on the Rights of Nationalities (Nationalities Act): "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."

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

Article 148 also provides other groups with the possibility of being recognised as national or ethnic minorities: if a minority other than those listed above wish to prove that it meets the requirements specified in Article 1 of the Act, at least 1,000 voters who declare themselves members of this minority shall submit a petition for a



referendum to the Head of the National Election Committee. The final decision on the issue lies in the hands of the Parliament. In the course of the procedure the provisions of the law on referenda and petitions shall apply.

The other relevant terms used by the ETA (such as racial affiliation or colour of skin – see above under 2.1.) have no legal definitions. However, the fact that nationalities have a statutory definition does not mean that persons affiliated with these 13 minorities, are in a more advantageous position from the point of view of the ETA's application than others: if a person not belonging to any of the legally acknowledged nationalities is discriminated based on his/her racial or ethnic origin, the protection will be based on Article 8 Point b) (racial affiliation) or c) (colour of skin), or maybe even t) (other characteristic) of the ETA.

Religion or belief: Religious activities are defined by Article 6 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities. In terms of this definition, religious activities are activities linked to a worldview which is directed towards the transcendental, has a system of faith-based principles, the teachings of which are directed towards existence as a whole, and which embraces the entire human personality through specific requirements of conduct that do not offend morals and human dignity.

The legal meaning of the term “morals” in the text is completely vague: no explanation of its intended meaning is provided by either the reasons attached to the law, or the preparatory texts. A possible interpretation is the “general morals” of Hungarian society as perceived by the majority, which may prove to be highly problematic in the actual implementation of the law.

Disability: “Disability” also has a statutory definition.

Under Article 4 of the RPD Act, a person is disabled if he/she “has a fully or greatly restricted command of sensory, locomotive or mental abilities, or is greatly restricted in his/her communication, and this constitutes an enduring obstacle with regard to his/her active participation in social life”.

As it can be seen, the definition resembles to a great extent to the one adopted by the European Court of Justice in the *Chacón Navas* case. Although the Hungarian definition differs in that it refers to participation in social life, whilst the CJEU test refers to participation in “professional life”, the Hungarian expression is wider and includes all aspects of social life, including employment as well. This is substantiated by the fact that Chapter III of the RPD Act, which contains the regulation concerning the sectors where the provision of equal opportunities is required, the following fields are listed: healthcare, education, employment, housing, culture and sports.

Furthermore, due to the fact that the list of protected grounds is open ended (see Article 8 of the ETA above), the likelihood that someone who would fall under the



category of disability under the CJEU definition, would remain without protection in the Hungarian system is practically non-existent (health status is one of the expressly named grounds in the Hungarian law, so the issue raised in the Chacón Navas case would by all probability not have been referred to the CJEU in a similar Hungarian lawsuit).

The ground “other characteristic” also offers a solution for those who have had a disability in the past or who are likely to acquire one in the future. Protection for such people is possible under Article 8 of the ETA, as past or future disability may be regarded as “other characteristic”, and thus discrimination based on this shall fall under the scope of the ETA.

Recital 17 of Directive 2000/78/EC is not reflected in the national legislation against discrimination.

There are numerous statutes that attach certain consequences (such as tax benefits, different allowances, positive measures) to disability. These laws all have their own definition of what shall be regarded as disability from the point of view of their implementation.

The detailed enumeration of the variety of definitions used by different laws would exceed the framework of this report, especially because some of these use professional medical terminology. Therefore, we only refer here to Article 23 of the RPD Act.

Article 22 of the RPD Act sets forth the rules pertaining to disabled allowance. Disabled allowance is a monthly payment provided to maintain equal opportunities for severely disabled people. The aim of support is to provide financial compensation to mitigate the social disadvantages resulting from the severely disabled status, irrespective of the salary of the person with severe disability, i.e. all “severely disabled” people are eligible.

Article 23 defines who shall be regarded as “severely disabled”, and therefore eligible for the support. These are people

- a) “whose sight is totally missing and cannot be cured either surgically or with special treatment, or who – as partially-sighted – have a minimal capability of seeing and are therefore only capable of conducting a tactile-hearing way of life (visual impairment),
- b) whose loss of hearing is so severe that not even with a hearing aid are they capable of hearing speech, provided that
 - (a) their loss of hearing occurred before the age of 25, or
 - (b) besides the loss of hearing they are not capable of comprehensively pronouncing sounding-talk (hearing impairment),

- c) who suffer from a severe or medium-severe mental handicap due to genetic reasons, or in relation to a fetal damage or birth trauma, or as a result of a serious disease which occurred before the age of 14 (mental disability),
- d) whose condition may – on the basis of autonomy-tests – be qualified as severe or medium-severe, as a result of a disorder in personality formation [autism],
- e) who, due to a damage or functional disorder in his/her locomotive system, is not capable of changing place without the constant and necessary use of a medical aid device determined in a separate legal statute, or whose condition may not be influenced effectively with a medical aid device due to a locomotive disorder defined in a separate legal statute (mobility impairment),
- f) who suffer from at least two of the disorders listed above from (a) to (e) (multiple impairment),
- g) whose loss of hearing is so severe that they are incapable of hearing speech even with hearing aid, and additionally suffer from one of the disorders listed above under (a), or from c) to (e) (multiple impairment), provided in all the above cases that their condition continues to exist permanently or indefinitely, therefore they are not capable of living independently in the future or need permanent assistance from others.”

These definitions (along with ones contained by lower level norms, e.g. Government Decrees) could theoretically be used in the course of applying the ETA. However, in the practice of the Equal Treatment Authority, in cases related to disability the need to find a definition has not emerged yet. In the cases dealt with so far, the disability of the applicants could be established without any difficulty and was not challenged by the opposing party.

Age: Age has been included in the lists of protected grounds in various non-discrimination measures ever since its first appearance in 1991 (it was first listed among protected grounds in the Act on the Promotion of Employment).

Sexual orientation: Before the coming into force of the ETA sexual orientation was mentioned expressly in only one of the sectoral statutes: Act CLIV of 1997 on Healthcare (hereinafter: Healthcare Act). However, as was pointed out above, the jurisdiction of the Constitutional Court consequently regarded sexual orientation as being one of the “other grounds” listed by Article 70/A of the Constitution and is expected to do the same in relation to Article XV of the Fundamental Law. The ETA expressly covers but does not define sexual orientation.

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

There are there no restrictions related to the scope of ‘age’ as a protected ground.

- d) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of*

multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination. Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

There are no such rules and to our knowledge there are no plans for the adoption of such rules. We do not have knowledge of relevant case law either. A combination of grounds could be interpreted as an “other characteristic” under Article 8 point (t) of the ETA, therefore no specific national or European legislation would be necessary to facilitate the adjudication of such cases.

- e) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

We have no knowledge of such case law.

2.1.2 Assumed and associated discrimination

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

Article 8 of the ETA expressly prohibits discrimination based on “real or assumed” characteristics (see text below, under Section 2.2.). This prohibition is reinforced by Article 19 Paragraph (1) Point (b), which provides for the reversal of the burden of proof on the basis of both the victim’s real protected characteristic or that “assumed by the perpetrator”.

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

National law does not expressly prohibit discrimination based on association with persons with particular characteristics. Nonetheless, Article 8 point t) (other situation, attribution or condition) provides protection for those discriminated on the basis of association with members of a particular group. This way national law is in line with the judgment in the Coleman case.

An example is provided by case no. 72/2008 of the Equal Treatment Authority. The applicants stated that they had been regularly charged a higher price than other

customers in a bar because of their Roma origin, and – one of the applicants – because she shared an apartment with her Roma friend. In the latter case, the applicant stated that she was overcharged only after it had become known where she resided. The Authority established direct discrimination on the grounds of ethnic origin with regard to the Roma complainants and on the ground “other characteristic” (association with a Roma person) in relation to the non-Roma applicant.

Guideline No. 288/2/2010. (IV.9.) TT. of the Equal Treatment Advisory Board recommends that in such cases the ground for discrimination should not be “other characteristic”, but the ground with which the victim is associated, and the Authority should expressly refer to the concept of discrimination by association. It still needs to be seen whether the Authority will comply with this recommendation.

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

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

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

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

Discriminatory job vacancies announcements are definitely capable of constituting direct discrimination in national law. This was already so before the coming into force of the ETA. A lawsuit related to employment was launched based on the Civil Code’s provisions on inherent personal rights, because in 1997 a company published a job advertisement for exclusively male assistants with a university degree, a good command of French, a driver’s license, good organisational skills, between age 25 and 35. Wishing to put forward a test trial, the Office of Equal Opportunities (a Department of the Ministry of Social and Family Affairs at the time) contacted an attorney and a woman who fit the description and brought a lawsuit against the company.

The court obliged the defendant to publish an advertisement claiming that in the future it would respect the constitutional principle of equality and it would not take into consideration circumstances which are not related to the job when deciding upon employment issues.¹⁶

Article 21 of the ETA [point (a)] expressly claims that “direct and indirect discrimination in relation to access to employment, especially in relation to public job vacancies announcements, recruitment and conditions of employing a worker, shall amount to a breach of the requirement of equal treatment”.

The Equal Treatment Authority has related jurisprudence, see for instance the case, when a human rights NGO initiated an *actio popularis* case before the Equal Treatment Authority against a bar seeking a young female bartender in a newspaper advertisement. The Authority established that the principle of equal treatment had been violated, and ordered that the decision establishing the fact of violation be made public.¹⁷

As to discriminatory statements, it depends on who the statement comes from. If such a statement is made by a public actor or one of those private actors who/which fall under the ETA’s personal scope (see the Section on personal scope), a discriminatory statement may be regarded as a breach of the requirement of equal treatment: most probably as harassment, i.e. an act creating a humiliating, degrading environment.

Jurisprudence in this regard is still in the phase of development, which seems to be pointing to a restrictive interpretation of harassment.

In June 2009 for instance, at the local council meeting of Edelény (North-East Hungary), the town’s mayor, Oszkár Molnár made the following statement: “in the neighbouring settlements, in settlements with a Gypsy majority, for instance in Lak, for instance in Szendrőlád, pregnant women take medication so that they would give birth to demented children so that they would be entitled to increased family allowance. Women during their pregnancy [...] keep hitting their bellies with rubber hammers so that they would give birth to disabled children.” The statement was widely covered by the national media. On 8 September 2009, the Equal Treatment Authority launched an *ex officio* proceeding against the mayor.

The mayor attempted to defend his statement through a number of – sometimes contradicting – arguments. He claimed that a) his words had been misinterpreted and he had not intended to claim that such practices were characteristic of Roma women only; b) he had already apologised to the towns he had named in the statement; c) he knew about actual cases when pregnant women had done what he had described

¹⁶ For more details see: Zoltán Peszlen: ‘Próbaper a diszkrimináció ellen’ (Test Trial against Discrimination), In: Vegyesváltó (Mixed Relay), Egyenlő Esélyek Alapítvány, Budapest, 1999, pp 138-149.

¹⁷ See: <http://www.egyenlobanasmod.hu/zanza/1054-2009.pdf>.

(but he refused to identify these actual cases); d) it is described in medical literature that Roma people often conduct a way of life (drink, smoke and take drugs) that is dangerous to the health of the fetus, therefore, he had made his statement in order to protect the equal opportunities of the babies to be born.

These explanations were not accepted by the Authority, which established that the mayor's statement was potentially capable of creating an hostile, degrading, humiliating and offensive environment for pregnant Roma women living in the two identified towns and their neighbourhood, and to exert a negative impact on the identity, personality and futures lives of these women, by contributing to their bad reputation and increasing the prejudices they face. Therefore, the mayor's statement was qualified as harassment under Article 10 of the Equal Treatment Act. The Authority sanctioned the statement by ordering that its decision shall be made public for 90 days. The mayor filed for a judicial review against the decision, but in its decision of March 2010, the Metropolitan Court rejected the mayor's claim.

As it is outlined above under Section 0.3, the Court's decision was overturned by the Supreme Court acting on the request of the mayor on the basis that since mayors – in this capacity – may only be in legal relations (i.e. legally regulated social relations) with the residents of their respective municipalities, and they may conduct proceedings and take measures also with regard to such residents, Oszkár Molnár – as the mayor of Edelény – is not in a legal relation with the Roma women living in the two settlements he named, and therefore, his statements did not fall under the scope of the ETA, so he could not be called to account for his statements under legislation concerning harassment.

Further restrictions seem to be stemming from the Supreme Court's other decision, which was delivered in the case of the mayor of Kiskunlacháza.¹⁸ In this case the mayor made public statements – at a demonstration and in local and national newspapers – in relation to a murder of a young girl (with regard to which at present the suspicion is that it was committed by a non-Roma person) giving the clear impression that in his view the murder had been committed by Roma people. Based on an *actio popularis* claim by the Hungarian Helsinki Committee, in January 2010, the Equal Treatment Authority established that harassment had been committed, forbade the continuation of the violation and ordered that the decision be made public. The case reached the Supreme Court in October 2011, which sent the case for retrial by the Authority and gave the guidance that harassment can only be established if the making of the public statements can be regarded as falling under any of the statutorily defined tasks/competences of the mayor and whether the making of such statements can be regarded as external acts that create “legally regulated social relations” between the members of the concerned group and the mayor. Furthermore, the Supreme Court instructed the Authority to examine in the repeated procedure whether harassment can be committed against a group, and expressed its doubts about the issue, pointing out that while the definition of all other

¹⁸ For details also see Section 0.3.

forms of discrimination contains reference to “groups”, the definition of harassment only mentions “person”.

These interpretations (i.e. that mayors can only commit harassment in relation to the residents of their respective municipalities; that they only fall under the ETA’s scope if they perform a statutorily enshrined function – participation in rallies, demonstrations, writing newspaper articles may not be seen as such; and that harassment can only be established in relation to individual victims but not to a group consisting of individuals negatively affected) are likely to restrict the scope of the application of the ETA’s provisions on harassment and make it practically impossible for the Authority and NGO’s to take action against incitement and defamatory statements concerning ethnic groups on this basis.

In addition, employers are among those private actors whose actions come under the ETA’s scope, whilst journalists, newspapers, media organs are not, so with regard to the latter group the application of the ETA’s harassment provisions cannot be raised even theoretically.

This however does not mean that no action may be taken against discriminatory statements made by them. Under the general terms of the Civil Code, such statements constitute a breach of inherent personal rights (the right to human dignity), but it has to be pointed out that due to the restrictive judicial interpretation of the law, this route can only be taken if the person or persons concerned by the discriminatory statement are clearly identifiable (i.e. a defamatory statement concerning the Roma as an ethnic group is non-litigable by a Roma individual on the basis that he/she belongs to that group).

If the statement concerns a larger social groups (such as the Roma, people with disabilities or gay and lesbian persons in general), actions under the Civil Code are not permitted against entities not falling under the scope of the ETA. (Statements concerning larger groups and coming from persons not falling under the ETA’s scope may only be sanctioned if they incite to hatred with a clear and present danger of actual violence, in which case punishment is possible under the Penal Code.)

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

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

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

- a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or
- b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation

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

Paragraph (3) is quite simple to explain: realizing that Directive 2000/43 does not allow for a general objective justification in the case of direct discrimination based on racial or ethnic origin, the Hungarian legislators removed the relevant grounds from the scope of Article 7 Paragraph (2) of the ETA.

What is difficult to understand is why they have not done the same with regard to the grounds listed in Directive 2000/78.

By not doing so, they 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 (see below, under Section 4.1) coincide to a great extent with the GOR and religious ethos provisions of Directive 2000/78, and therefore, it may be argued that in practice the general objective justification clause may not be applied in relation to employment (so the requirement set by the Directive is in fact met), it would have been a safer solution to fully take these grounds out of the scope of Article 7 Paragraph (2) of the ETA.

The differentiation between points a) and b) of Paragraph (2) reflects the practice of the Hungarian Constitutional Court. After extending the Constitutional ban on discrimination to the whole legal system (and not only fundamental rights) in its decision No. 61/1992 (XI. 20.), it became necessary for the Court to set up different tests for discrimination concerning fundamental human rights on the one hand and other rights on the other. In the first case the Court applies the test of necessity and proportionality, while in the latter a test defined in Constitutional Court Decision No. 35/1994 is applied: “the unconstitutionality of a measure unfavourably discriminating between persons and not concerning fundamental rights may be established if the infringement is related to one of the fundamental rights – and thus ultimately to the general right to human dignity – and the discrimination or restriction does not have an objectively reasonable ground, i.e. it is arbitrary.”

This is why Hungarian legislators made a distinction on the basis of whether a certain differentiation concerns a fundamental right (such as the right to education) or a right

that may not be regarded as such (e.g. access to services). In the former case the test is stricter (there has to be a legitimate aim – 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.

With regard to point a) exceptions (differentiation aimed at the enforcement of fundamental rights), there is no explanatory case law.

With regard to point b) exceptions (this was the old text of the ETA before the amendment), the following needs to be pointed out. Judicial practice has not so far accepted prospective economic loss as an objectively reasonable ground for differentiation. This is illustrated by the following case of racial discrimination [which under the new point a) would not be objectively justified anyway, however at the time it did].

Based on an advertisement, Gyula Csonka, a man of Roma origin, applied for a job at a security company. Mr. Csonka had all the necessary qualifications required for a security guard, however, he was turned down by an employee of the company who told him that they did not employ Roma people. Mr. Csonka filed a complaint with the Labour Inspectorate. During the proceedings, the owner of the company admitted the discrimination and expressed his regrets but said that the company's clients do not want Roma security guards. The Labour Inspectorate imposed a fine of HUF 100,000 (EUR 345) on the company.

With the help of the Legal Defence Bureau for National and Ethnic Minorities (NEKI) Mr. Csonka also brought an employment claim against the company for damages for so-called "non-pecuniary loss". His claim was based on the Labour Code and the Equal Treatment Act.

The Court of First Instance established that direct discrimination based on the plaintiff's ethnic origin took place, and awarded HUF 500,000 (EUR 1,725) to Mr. Csonka. The owner of the company – who admitted the fact of direct discrimination in the court – appealed with a view to reducing the amount of the damages, but the Court of Second Instance upheld the decision at first instance.

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

With regard to employment – Article 22

- 1) The principle of equal treatment is not violated if
 - a. the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of recruitment; or

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

With regard to education – Article 28

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

With regard to access to goods and services – Article 30

- 1) Entry into premises established for a group defined by characteristics listed in Article 8 for the purposes of preserving traditions or maintaining cultural and self identity and open to the immediate public may be limited or subject to membership or specific conditions.
- 2) The limitation in accordance with paragraph (2) must be obvious from the name of the establishment and the circumstances of the use of the service; and this shall not be done in a manner that may be humiliating and defamatory to individuals who do not belong to the particular group, and furthermore it must not provide an opportunity for an abuse of this right.

Article 30/A

- 1) In relation to insurance services and services based on the insurance principle, differentiation based on gender does not infringe the principle of equal treatment if
 - a. the risk-proportionate scale of premiums and benefits entails the setting up of groups based on risk factors, and
 - b. the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

- 2) Differentiation made with a view to costs related to pregnancy and maternity amounts to a violation of the requirement of equal treatment even if the conditions listed in Paragraph (1) prevail.

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

The Ministerial Comments attached to Act CIV of 2006 on the Amendment of the ETA 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.”

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

The ETA does not contain provisions specific to age discrimination, nor does it specify how a comparison in relation to age discrimination is to be made.

2.2.1 Situation Testing

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

An important legislative development was the statutory acknowledgment of situation testing by Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure (ETAD) adopted in December 2004.

Pursuant to Article 13 (1) of the ETAD, the Equal Treatment Authority may apply testing in the course of its investigations.

The statutory definition of testing is as follows: “in relation to the behaviour, measure, condition, omission, instruction or practice (hereinafter jointly: action) of the alleged discriminator the Authority puts into an identical situation persons who are different from the point of view of a characteristic, feature or status (hereinafter jointly: characteristic) defined in Article 8 of the ETA but are similar from the point of view of other characteristics, and it examines the action of the alleged discriminator in respect of these persons from the point of view of the respect for equal treatment.”

Article 13 (2) of the ETAD claims that “the result of testing may be used as evidence in proceedings launched due to the breach of equal treatment”.

Situation testing may be applied in relation to all discrimination grounds and in all sectors, but most publicised cases of situation testing have been applied in relation to discrimination based on ethnicity. There is one publicly available case in which testing was applied to prove discrimination based on disability, however in this case, the testing was unsuccessful. In 2006, a visually impaired complainant claimed that when he had applied for an advertised job at the employment agency bureau he had been informed that the company only employed people who had no visual impairment. The testing did not prove the discrimination as the visually impaired tester’s application was recorded, and he was informed that he was registered in the bureau’s data base.¹⁹

As the statutory definition of testing and the authorisation to use this method are not regulated in the ETA, but in the ETAD, which defines the specificities of the Authority’s procedures, these rules do not prevail in relation to court procedures. With regard to these, the relevant law is Act III of 1952 on the Code of Civil Procedure (Code of Civil Procedure). This is silent about the issue of situation testing, but based on its Article 3 (5) (which claims that “the court may freely rely on any type of evidence that is useful for establishing the facts of the case”) courts are not prevented from accepting this form of evidence, and – as outlined below in point c) – they indeed use evidence originating from situation testing.

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

Situation testing is primarily done by NGO’s in Hungary, especially NEKI. In some cases even the Equal Treatment Authority relied on the expertise and testers of NEKI.

NEKI has issued a very detailed methodological guide on situation testing.²⁰

Testing is prepared and coordinated by a testing coordinator. After carefully interviewing the complainant about the details of the case, the testing coordinator prepares the case: visits the scene and obtains additional information if necessary, and chooses the testers. He/she is also responsible for logistical matters (if for instance the tester needs to travel to the scene of the testing).

A contract is concluded with the tester: this contains – among others – that the tester undertakes to testify as a witness in the proceedings launched on the basis of the result of the testing, and that he/she consents that his/her sensitive data (such as ethnic affiliation, sexual orientation, health status) be disclosed to the authorities

¹⁹ <http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes07.htm>.

²⁰ <http://www.neki.hu/kiadvanyok/teszteles/Teszteles.htm>.

before which such proceedings are launched. The contract designates the place of the testing, describes the actual task and sets out the fee to be paid to the tester.²¹ The contract contains the NGO's obligation to provide legal assistance in case the tester's rights are violated during the testing. Furthermore, the tester undertakes the obligation of confidentiality.

The testers are carefully prepared for the task. The most important obligations (besides the ones outlined above) are the following:

- The tester should remain detached and objective, he/she may not give voice to his/her feelings during the testing;
- The tester shall cooperate with the suspected discriminator(s) (employer, security personnel, etc.);
- The tester shall record his/her observations shortly after the testing in a standard testing questionnaire, which is filled out in the presence and with the assistance of the testing coordinator.

The testing questionnaire is filled out by the testers, but also by the original complainant, so the experience of the testers' is measured against the complainant's impressions as well. The questionnaire is an important tool, not because it helps to objectify the experience, but also because sometimes a long time passes between the actual testing and the testimony of the tester in the proceeding.

The testing is done on the basis of a testing script prepared by the coordinator. If for instance the testing concerns recruitment to a job, and the suspicion of ethnic discrimination arises, it is always the minority tester who is sent first, because this is the most obvious way to refute the employer's argument that the minority tester was not offered a job because the vacancy has been already filled.

Due to the fact that testing can be very difficult from an emotional point of view (a "successful" testing means that the tester also has to experience discrimination), it is very important to a) properly assess the mental strength of the testers upon recruitment, and b) provide supervision and psychological help if the tester experiences discrimination.

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

For a long time situation testing was a highly debated legal instrument in Hungary. NGO's, primarily NEKI have for a long time applied situation testing to substantiate cases of individual victims.

²¹ NGO testers perform their tasks voluntarily or receive a symbolic fee of around EUR 60 per occasion. The fee is covered from project grants or the reserves of the NGO working on the case.



The usual practice was that if they received a complaint (usually about the denial of access to goods and services or recruitment-related breaches, in both cases based on ethnic origin, i.e. against Roma persons), they sent situation testers to the premises. The results of the testing were accurately recorded by the testers, and were used (along with the witness testimonies of the testers) as evidence in civil lawsuits launched on behalf of the original victim.

The problem with this approach was that in the interpretation of numerous judges, the result of testing performed this way may not be taken into consideration as evidence, because only the original, individual violation may be the subject matter of the lawsuit, and the testing is so distantly related to this subject matter that no conclusions can be retrospectively drawn from the result of the testing with regard to the original violation.

This forced NEKI to change the testing strategy. The new method is to have the original complainant go together with the testers, and if the discriminatory act (e.g. the denial to enter a bar) is repeated with regard to the complainant and also the Roma testers, while the non-Roma testers are let in, the lawsuit will not be launched for the first discriminatory act, but for the second, where the testers' testimonies can be used as direct, first-hand evidence.

Another criticism voiced by some judges was that testers are agents provocateurs paid by the plaintiff (or the NGO representing the plaintiff), so serious doubts are cast on their credibility. This consideration however did not prevent the Supreme Court from accepting the testimonies given by testers in a number of important discrimination cases [see below, under point d)].

To summarize, we can say that there is no judicial reluctance to accept the result of situational testing, but this is so only with regard to events at which the testers were actually present. Testing as a proof of a general discriminatory pattern is not accepted to substantiate an individual complaint if the testers are not direct witnesses of the behaviour complained about, or there are no other indirect pieces of evidence confirming the individual complaint.

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

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

The case of the K.L. discotheque:²² After complaints from the Roma minority self-government, NEKI decided to conduct situation testing at the K.L. discotheque in D. On 1 April 2000 D. M. and D. B. non-Roma and B. B. Roma volunteers travelled to the village.

²² Described on the basis of NEKI's White Booklet 2000, see: <http://www.neki.hu/indexeng.htm>.



They met several Roma youth, who reiterated the claims of discrimination. They recounted that every time they attempted to pay the entrance fee, they were sent away because they were not members. They inquired about how to obtain membership cards. They were told that two members' recommendation was needed to acquire the card. Sometimes, they were told to submit a CV on the basis of which their application would be evaluated. At other times, they were asked to pay a certain amount of cash in order to become members.

The two non-Roma volunteers purchased two tickets at the entrance without any trouble and went inside. They ordered beverages and sat down at a table. Twenty minutes later an employee went up to them to ask whether they had membership cards. He then issued the cards to them and registered their names and addresses in a book.

Meanwhile – without being asked – the employee told the non-Roma volunteers, that “the cards are necessary because it is the only way to prevent Gypsies from entering. Previously we had problems with the consumer inspection and the parliamentary commissioner.”

Thirty minutes later B. B., Roma volunteer and P. M., a local Roma youth also set out for the discotheque. They also wanted to buy two tickets at the door but were refused, as they did not have membership cards. They then asked how they could obtain the cards and were told to present a CV and recommendations from two members. B. B. then asked for the book of customers. He was told that it was not a discotheque but a club, therefore they did not have such a book. Fifteen minutes later three local Roma youths tried to get in, with no luck. Following their return, all volunteers filled out a detailed questionnaire and identified two local policemen whom they claimed were guarding the discotheque.

On 10 May 2000, represented by a lawyer paid by NEKI, two of the Roma youths who were not allowed to enter the disco filed a lawsuit against the company operating the place.

Both the court of first and second instance established the violation of the plaintiffs' inherent right to dignity and non-discrimination, and the company was obliged to pay damages. The defendant submitted a request for extraordinary remedy to the Supreme Court. In its decision (published under the number EBH 2002.625 in the official journal where decisions of outstanding theoretical importance are collected), the Supreme Court approved of the second instance decision and declared that the court of second instance established the facts of the case properly on the basis of the available evidence (including the testimonies of the testers).

Case 180/2006 of the Equal Treatment Authority:²³ In response to a newspaper advertisement, the complainant called a company which was recruiting painters. He

²³ See: <http://www.egyenlobanasmod.hu/zanza/477.pdf>.

met the requirements set by the employer, but when he informed the employer that he was of Roma origin, he was rejected.

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

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

Taking into consideration the result of the testing and other pieces of evidence (such as the itemised calling lists of an institution maintained by the local council, from where the complainant made the telephone calls) the Equal Treatment Authority found that the employer directly discriminated in breach of Article 8 ETA and imposed a fine of HUF 700,000 (EUR 2,415) on him.

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

A more recent case when testing was used to prove discriminatory practices is the case of the Budapest bar that regularly denied the entry of people of African origin.²⁴

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

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

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

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

²⁴ See under Section 0.3.



considered as an appropriate and necessary measure to pursue a legitimate aim?

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. 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.

There is still no judicial jurisprudence in relation to indirect discrimination, so the question what would be considered to be an appropriate and necessary measure to pursue a legitimate aim in this regard cannot be answered.

c) Is this compatible with the Directives?

As was pointed out above, in terms of Article 7 Paragraph (2) of the ETA, “unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if a) it restricts the aggrieved party’s fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation.”

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

With regard to the point b) types of exemption, it can be said that the “objective reasonability” of the ground for differential treatment is obviously a less strict test than the one used by the Directives.

This terminology may be interpreted as corresponding to the requirement of a “legitimate aim” (an aim that is found by objective consideration to have a reasonable ground can definitely be regarded as legitimate), however, the criteria of “appropriateness” and “necessity” are missing from the Hungarian legislation.

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

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

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

There were no such cases in which the issue of language use has been raised.

2.3.1 Statistical Evidence

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

The use of statistical evidence is not excluded by Hungarian law. Pursuant to the above quoted Article 3 (5) of the Code of Civil Procedure, the “court may freely rely on any type of evidence that is useful for establishing the facts of the case.” Under Article 50 (4) of Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities (GPSA), “In the proceedings of authorities such evidence may be relied on which is useful for the enhancement of establishing the facts of the case.” This means that both courts and public administrative authorities are free to accept all types of evidence.

The only criterion is that the evidence should be useful from the point of view of establishing the facts of the case, and enabling the court (authority) to come to a decision.

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

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

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

In the first case, civil servants dismissed from the regional office of a central administrative organ filed a complaint with the Equal Treatment Authority, claiming that the group reduction carried out by the administrative organ was discriminatory towards highly qualified, middle-aged employees. In a circular addressed to the regional offices on the conditions of the work force reduction, the central organ demanded that the persons to be dismissed shall be selected in a way that the average budgetary saving per dismissed person shall reach a certain monetary limit (HUF 147,600 – EUR 510 – per month). In the view of the complainants, by determining the minimum saving to be achieved per person, the employer practically

restricted the circle of potentially “dismissible” persons to highly-qualified, middle-aged employers. (Civil servants' salaries are determined by their qualifications, and length of service, which is obviously connected to their age.)

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

With regard to age discrimination, the Authority requested the following statistical data from the employer: the numbers and age distribution of all civil servants employed before the reduction, and the numbers and age distribution of dismissed civil servants. Although all the dismissed civil servants were older than 31, the Authority did not hold that indirect discrimination had taken place, due to the fact that before the reduction, their proportion was very high in the work force (82.9 percent).²⁵ The question may be raised though on what basis the Authority drew the line at this age.

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

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

The above proportions were established by a Roma education expert appointed by the Court upon the plaintiff's motion. The Court gave detailed instructions as to how the expert shall carry out the task.

The Court ordered among others that the expert should (i) involve in the work the local Roma minority self-government; (ii) personally visit the concerned schools and buildings; (iii) obtain all the available data from the schools and the minority self-government (e.g. the number of pupils participating in Roma minority education – see Point b) below); (iv) involve if necessary a sociologist expert.

²⁵ Source: <http://www.egyenlobanasmod.hu/>.

On the basis of the examination the expert was commissioned to define the number of Roma pupils or the smallest number of those whose Roma origin can be established with certainty, as well as an estimation as to the remaining numbers of Roma pupils. The Court expressly called the expert to take into consideration those pupils as well who may be assumed to be Roma by the majority population.

The Court accepted the proportions provided by the expert, and based the establishment of segregation mainly on this piece of evidence. However, in its decision Pf.I.20.631/2007/8 delivered in December 2007 upon appeal, the Debrecen Regional Appeals Court partly overturned the first instance decision, and concluded – in contradiction to its former jurisprudence – that for segregation to be established, it would have needed to be proven that the defendants have taken active measures to segregate the Roma pupils and had the intention to unlawfully separate them from their non-Roma peers. At the same time, the Appeals Court approved that part of the first instance decision which established direct discrimination against the Roma pupils educated in the supplementary buildings on the basis that these buildings are much worse equipped than the central ones, where the majority of pupils are non-Roma.

Thus, while the Appeals Court accepted the expert opinion as evidence of the proportions of Roma and non-Roma pupils, it only concluded that in the absence of evidence that the separation is intentional, segregation may not be established (because “the numerical data may be influenced by several factors: the distribution of the population within the town, the decisions of the parents, the physical and intellectual abilities and fields of interests of the children, etc.”). At the same time – although the decision does not expressly refer to this – the Appeals Court did accept the statistical data established by the expert, since otherwise it could not have established direct discrimination based on ethnicity.

The Supreme Court (which upon the plaintiff’s request for review, overturned the second instance court’s decision and established that segregation has taken place, as segregation does not require any intentional activity) expressly claimed that based on the expert’s estimations the fact that the distribution of pupils between the different buildings was highly disproportionate may undoubtedly be established.

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

In terms of Article 3 of Act CXIII of 2011 on the Right to Informational Self-Determination and the Freedom of Information (Data Protection Act), "personal data" shall mean any data relating to a specific person as well as any conclusion with respect to the data subject which can be inferred from such data. Under Article 4, in

the course of data processing, such data shall be considered to remain personal as long as their relation to the data subject can be restored.

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

Hence, data related to the ethnic or racial origin, disability, religion or belief or sexual orientation all belong to this special category. This bears significance, since in terms of Article 5 of the Data Protection Act special data shall not be processed unless

- (a) the data subject has given his/her written consent; or
- (b) regarding the types of special data set out in group (i) above, the processing is necessary for the implementation of an international treaty promulgated in an Act of Parliament, or it is prescribed by an Act of Parliament, either in order to enforce a fundamental right provided for in the Fundamental Law or in the interest of national security, crime prevention or criminal investigation, or national defence; or
- (c) in the case of data falling into group (ii) the processing is prescribed by an Act with an aim based on public interest.

Thus, unless a written consent is provided or an Act (the highest ranking legal statute in the Hungarian hierarchy of legal norms) prescribes that records be kept of such data, data collection regarded protected grounds is not possible.

The practical result of these strict data protection rules (that resemble to a great extent to the provisions of the previous Data Protection Act of 1992) is that public authorities have fully stopped collecting data concerning the sensitive grounds. This is obviously very detrimental from the point of view of monitoring discrimination in different fields of life.

For instance, the last official data concerning the numbers of Roma children in education are from 1993. Since that time, sociological researches have been the only source of information with regard to this crucial issue.²⁶

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

²⁶ E.g. the research by the Institute for Educational Research involving 192 elementary schools. For details see: Gábor Havas, 'Kitörési pont: az iskola' (Breaking point: the school), Beszélő, November 2000.



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

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

This forces legislators to go round the problems created by the lack of data in different ways. An example is provided by the program aimed at eliminating segregated Roma residential areas (for more details, see Section 5). In the 2008 call for tender, it is not stated that the program is a positive measure designed to promote the integration of the Roma, it is presented as an attempt “to eliminate segregated areas and to reduce the geographical concentration of the most indigent people”. The designers of the program regard to be segregated those settlements of areas of settlements, where “there is an above average proportion of undereducated and/or unemployed population”.

The objective of the program is to reach that by then end of the project the proportion of unemployed and inactive persons as compared to the total population should be the same in all areas of the given settlement.²⁷

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

There are certain instances though, where sensitive data are officially collected. The most obvious being the regular censuses. The last census took place in 2011, but its results are not available yet. The last census from which data are available is the one held in 2001. At this census, data on age, ethnic or racial origin, religion or belief and disability were collected.²⁸ Information on sexual orientation was not gathered.

Under Article 3 (2) of Act CVIII of 1999 on the 2001 Census, as opposed to other questions (to which answering could not be refused), answering to questions concerning health status (including disability), religion, mother tongue and ethnicity

²⁷ See for instance:

<http://www.romaweb.hu/doc/palyazatok/2008/TELEP/Palyazati%20felhivas%202008.doc>.

²⁸ The question concerning religion or belief was open ended: (“To which denomination do you belong?”) and there were three supplementary options: a) I do not belong to any denomination; b) I am an atheist; c) I do not wish to reply.

was voluntary. It needs to be pointed out that data from censuses do not always give a reliable estimation concerning the number of certain minority groups.²⁹

For instance, estimates based on 1992 and 1993 educational statistics and regarded as reliable by experts put the number of Roma in Hungary at about 460,000 or 4.2% of the population as early as 1998.³⁰ Although the proportion of Roma has in the opinion of all demographic experts increased within the total population of Hungary since that time, only 190,046 persons claimed affiliation with the Roma minority at the year 2001 census. During the 2001 census, Roma activists carried out a solid campaign to convince Roma people to declare their Roma ethnicity. In the absence of the results, it is still to be seen whether this has had an effect on the numbers related to ethnicity.

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

Ethnic origin in education: There is a complex system of minority education in Hungary.³¹ In terms of Article 22 (3) of the Act on Nationalities, based on the decision of their parents children belonging to a nationality may receive (i) education in the mother tongue, (ii) bilingual education, (iii) Hungarian language education in the framework of which his/her nationality language is taught, or (iv) Roma nationality education. In the system before 1 January 2012 (i.e. the coming into force of the Act on Nationalities), different forms of minority education also existed. The existence of these forms of education naturally creates statistics on the number of children participating in these forms of education.

In the 2009/2010 school year, 49,230 Roma, 45,296 German, 1,084 Romanian, 2,195 Croatian and 4,554 Slovakian pupils participated in elementary minority education.³²

²⁹ Act CXXXIX of 2009 on the 2011 Census Contains the same provision.

³⁰ See: Kertesi, Kézdi: A cigány népesség Magyarországon /The Gypsy Population in Hungary/, Socio-typo, Budapest, 1998.

³¹ Under Annex 2 point 1 of Decree 32/1997 of the Ministry of Education on the Guidelines for the Kindergarten Education of National and Ethnic Minorities and the Guidelines of School Education of National and Ethnic Minorities, five forms of minority school education exist: (i) education in the mother tongue (all subjects are taught in the minority language with the exception of Hungarian language and literature); (ii) bilingual minority education (education is bilingual upon the condition that – besides the minority language and literature – at least three subjects are taught in the minority language); (iii) language teaching minority education (besides the subjects taught in Hungarian, the minority language and literature are taught as a subject); (iv) Roma minority education; and (v) supplementary minority education (minority language, literature and culture is taught as a separate subject, otherwise subjects are taught in Hungarian).

³² See: http://www.nefmi.gov.hu/letolt/statisztika/okt_evkonyv_2009_2010_100907.pdf.

In the 2010/2011 school year, 53,054 Roma, 46,693 German, 1,248 Romanian, 2,220 Croatian and 4,489 Slovakian pupils participated in elementary minority education.³³

Ethnic origin for the purposes of minority elections: The 13 minorities recognised by the Act on Nationalities (see the list above, in Section 2.1.1) or later on by the Parliament have the right to form their local, regional and national self-governments, which have wide-ranging rights in relation to the preservation of the language and traditions of the given minority. Furthermore, local minority self-governments are foreseen by the law to have a say in all local issues concerning their respective minorities. Last but not least, minority self-governments receive public funding.

This gave rise to the so-called “minority business”, i.e. when candidates misuse their minority identity for the sake of political or economic ambitions.

To curb this phenomenon, a registration system was introduced in October 2005, when the Parliament passed Act CXIV of 2005 on the Election of Minority Self-Government Representatives and the Amendment of Certain Acts concerning National and Ethnic Minorities (Minority Elections Act). This Act has been repealed as of 1 January 2012 by the Act on Nationalities, but the system it introduced was mainly preserved. The main rules are the following.

One has the right to vote and run as a candidate if he/she is registered in the Nationality Election Register.³⁴

In order to be registered, one has to fill out the registration form, which contains the voter’s personal identification data (name, address and personal identification number), and his/her undersigned declaration concerning his/her affiliation with one of the 13 national and ethnic minorities recognised by the Act on Nationalities.³⁵ The examination extends to the formal criteria only: if the applicant meets these criteria, the application may not be rejected on the basis that the particular person’s affiliation with the given minority is doubtful.³⁶

The Nationality Election Register is not public. Only a very limited circle of people may look into the register (e.g. the court in an appeal procedure). After the result of the election has become final and non-appealable, the Nationality Election Register shall immediately be eliminated. On the other hand, the number of voters registered in the Nationality Election Register is to be regarded as public information, which is published by the National Election Office.³⁷

³³ <http://www.kormany.hu/download/4/45/50000/Oktat%C3%A1si%20C3%89vk%C3%B6nyv-2010.pdf>.

³⁴ Article 53, Act on Nationalities.

³⁵ Article 115/E of Act C of 1997 on the Election Procedure (Elections Act).

³⁶ Article 115/F, Elections Act.

³⁷ Article 115/G, Elections Act.



Numbers were registered at the 2006 and 2011 minority elections³⁸

Minority	Number of registered voters	
	2006	2010
Bulgarian	2 110	2 088
Roma	106 333	133 514
Greek	2 451	2 267
Croatian	11 090	11 571
Polish	3 061	3 052
German	45 983	46 627
Armenian	2 361	2 357
Romanian	4 404	5 277
Ruthenian	2 729	4 228
Serbian	2 143	2 432
Slovakian	15 049	12 280
Slovenian	991	1 025
Ukrainian	1 084	1 366
Total	199 789	228 084

Disability for the purposes of benefits in employment: In terms of Article 23 of Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws, employers shall be obliged to pay a so called “rehabilitation contribution” to the state budget if the number of their employees exceeds 25 and the proportion of persons with disabilities (persons with an altered ability to work) within the workforce is below 5 percent. On the other hand, under Government Decree 177/2005 on the Budgetary Support for the Employment of Workers with Disabilities, employers are entitled to support from the central budget if they employ persons with disabilities. This system naturally requires that record be kept of the disability of employees.

Data on age, disability, ethnic origin for the purposes of positive action at the workplace: Article 70/A § of Act XXII of 1992 on the Labour Code contains the rules pertaining to the so-called "equal opportunities plan".

In terms of the provision, the employer may – in agreement with trade unions represented at the workplace or, if there is no such trade union, with the works council – adopt an equal opportunities plan for a definite period of time. The aim of the plan is to improve the situation of "disadvantaged groups" at the workplace. The Labour Code contains a list of such groups. The following groups are included: (a) women, (b) employees older than 40, (c) Roma employees, (d) people with disabilities, (e) employees with two or more children under 10, single employees with a child under 10. The taxation however is open-ended. Paragraph 4 regulates that the equal opportunities plan shall contain: (a) special provisions for providing

³⁸ See: http://www.valasztas.hu/hu/onkval2010/483/483_4_index.html.

unobstructed access for persons with disability to their work places; and (b) internal regulations for the enforcement of the principle of equal treatment at the employer.

The plan shall contain the analysis of the work-related situation of disadvantaged groups, with special regard to their wages, promotion, training and child-related benefits. Furthermore, the plan shall include the employer's objectives related to the equality of opportunities, and the means for the achievement of these objectives, with special regard to training and work-safety programs.

Paragraph 3 of this Article prescribes that "special personal data necessary for the preparation of the equal opportunities plan shall be proceeded in on the basis of the voluntary permission of the concerned employee and only until the last day of the period concerned by the equal opportunities plan."

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

Recommendations of the Minorities Ombudsman and the Data Protection

Ombudsman: In November 2009, the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Parliamentary Commissioner for Data Protection issued a joint set of recommendations concerning the collection and/or registration of ethnic data in certain contexts. They identified four situations in which this would be desirable: criminal justice and positive measures on the one hand (where external perception should be decisive), and the exercise of cultural rights (such as the right to minority education) and participation in the representation of minorities, e.g. minority self-government elections (where the concerned person's own ethnic affiliation should be decisive). The recommendations contain a number of objective criteria based on which a person can, according to the authors, be identified as belonging to or perceived to be belonging to a given ethnic minority. The aim of the recommendations, which triggered heated public discussion, is to put an end to the situation in which discrimination cannot be measured due to the lack of reliable data.³⁹

2.4 Harassment (Article 2(3))

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

The concept of harassment was introduced into the Hungarian legal system by the ETA. Under Article 10 Paragraph (1) of Hungary's anti-discrimination code

³⁹ See: <http://www.kisebbsegjombudsman.hu/hir-477-jelentes-az-etnikai-adatok-kezeleserol.html>.

“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.”

While not falling within the scope of the Directives, it is worth mentioning briefly that as a response to extreme right wing paramilitary groups “patrolling” in villages densely populated by Roma people (allegedly with the purpose of protecting the residents against “Gypsy crime”), a new provision was inserted into the Penal Code as of 7 May 2011. Under Article 174/B (1a), the person who behaves in a flagrantly anti-social manner capable of inciting fear vis a vis another person due to his/her real or assumed affiliation with a national, ethnic, racial or religious group or a certain group of society, commits a criminal offence and shall be punishable with up to three years of imprisonment.

b) Is harassment prohibited as a form of discrimination?

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

It needs to be noted that due to the limited personal scope of the ETA (see below under Section 3), the liability for harassment of certain private parties (such as co-workers) will not be established under the ETA’s provision on harassment, but under the Civil Code’s general ban on the violation of inherent civil rights (including human dignity).

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

No such official codes of practice exist in Hungary.

2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case law) prohibit instructions to discriminate?
If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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

Given that the instruction to discriminate is defined as a form of discrimination, sanctions available against other, more common forms of discrimination can be sought here too. If the person giving the instruction is known, then civil law sanctions



for the violation of civil rights and sanctions that the Equal Treatment Authority has the power to impose are at hand (these latter only if the instructions come from someone who falls under the ETA's scope). In case the instructor remains unidentified, action can be taken against the entity.

The principle of holding superiors liable for their unlawful instructions or orders is widely accepted. In labour law (Article 104 of the Labour Code) workers are bound by their superiors' instructions. They have the obligation to call attention to damages that might result from compliance with instructions. However, under civil law (Article 348 of the Civil Code) employers and not workers can be held liable for damages so caused.

Damages can be sought from the employer, even if the instruction was not given by him/her but by another superior of the employee. This is preferential to the victim, who does not need to consider whether or not the employee acted upon an instruction or his/her own initiative.

Civil servants are also bound by their superiors' instructions but can express their dissent (even in writing) therewith or, ultimately refuse to abide by the instruction (Article 78 of Act CXCIX of 2011 on Public Service Civil Servants – hereafter Civil Servants Act).

The professional members of armed organs have the right to warn their superiors of unlawful orders but ultimately (and with the exception of the orders the carrying out of which would amount to a criminal offence), they may not refuse to comply in terms of Article 69 of Act XLIII of 1996 on the Service Relationship of Professional Members of Armed Organisations (covering among others the police, penitentiary personnel, fire fighters, etc. – hereafter: Armed Organisations Act).

In light of the above, what seems problematic is seeking to establish the liability of and sanction the individual superior who instructs to discriminate. Taking the analogy of cases relating to police ill-treatment or misconduct, it is argued that even if employers – especially public authorities, such as the police – pay civil law damages, they do not necessarily make sure that the employee giving the instruction is held liable for his/her conduct. Indeed, victims can have little impact on how disciplinary proceedings are conducted and whether or not disciplinary actions are taken. In some instances short deadlines open for the submission of complaints leading to disciplinary proceedings amount to a further and substantial limitation.

In relation to civil obligations, contractors, lawyers etc. act pursuant to instructions. Under Article 392 Paragraph (1) of the Civil Code, contractors must comply with the instructions of their customers. Under Paragraph (3) contractors are under the obligation to warn customers if their instructions are unreasonable or unprofessional. Failing to do so, results in their liability for damages. The same obligation of warning and the shift of liability for damages govern commissions (Article 476). Under Paragraph (4) contractors cannot carry out their work according to the instructions, if

this would lead to the violation of the law. To avoid liability for unlawful instructions contractors can terminate their contracts [Articles 395 Paragraph (1) and 483 Paragraph (2)]. It is clear, that these provisions put the person giving the instruction to discriminate in a more advantageous situation as compared to the person receiving the instruction. In comparison to the relations in employment – as described above – this works to the detriment of self-employed persons.

In criminal law if the discriminatory act amounts to a criminal offence, the person giving the instruction is liable under Article 21 of the Criminal Code.

There are no further specific provisions, the existing framework however seems sufficient to assert the liability of legal persons. An example is provided by case no. 171/2007 of the Equal Treatment Authority. In the case a company (Company A) engaged in the lease of workforce recruited workers for a job in Budapest. The three Roma complainants called the company and made an appointment with the director. At the meeting the director described the conditions and indicated that work should be started during the following week, and that another 7-8 workers would be needed. However, on the same day, he sent a message with another – non-Roma – candidate that only non-Roma people are needed, because the company to which the workers would be leased (Company B) indicated that it did not want Roma workers to be sent for the job. The Equal Treatment Authority established direct discrimination and imposed a fine of HUF 1,000,000 (EUR 3,450) on both companies.

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

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

An attempt has been made to transpose the reasonable accommodation provisions of the Directive 2000/78/EC into the Hungarian legal system by Act CXXI of 2007 on the Amendment of Certain Social Laws. This attempt however seems to have been based on a misinterpretation of a) the existing Hungarian legal framework, and/or b) the Article 5 of the Directive.



The term "reasonable accommodation" (or anything similar generally describing the obligation to make reasonable efforts to adapt to the specific needs of persons with disabilities) itself is still to be introduced. In the author's opinion, with regard to very important aspects of access to employment, the duty of reasonable accommodation is missing from the Hungarian system, in relation to other aspects of the employment of people with disabilities, the obligation is more or less in place. Below we give a short summary of the relevant provisions to substantiate this stance.⁴⁰

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.

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

The law speaks about the adaptation of the "workplace environment" [*munkahelyi környezet*]. If we interpret this term from a strict semantic point of view, this does not contain accommodations such as alternative procedures, reallocating tasks, transfer to another position etc.

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

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

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

Act CXXI of 2007 on the Amendment of Certain Social Laws amended the RPD Act as of 1 January 2008, adding two paragraphs. Under Paragraph (3), in order to enhance the access to employment of persons with disabilities, the employer shall be

⁴⁰ The European Commission seems to have a different view since on 28 January 2010 it closed infringement procedures against Hungary concerning Directive 2000/78/EC.



obliged to provide an accessible environment in the course of the recruitment procedure.

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

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

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

In 2010 the then Ministry of Social Affairs and Labour claimed that in their view Article 15 of the RPD Act imposes the reasonable accommodation duty on the employer in relation to all aspects of access to employment.

Organisations of disabled persons are of a different view and share the doubts concerning the proper transposition of the reasonable accommodation obligation. In August 2009, the National Federation of Disabled Persons' Associations turned to the Equal Treatment Authority and requested that using its statutory right the Authority together with its Advisory Board initiate legal amendments in order to introduce into the Hungarian legal system reasonable accommodation either in relation to employment or preferably as a general obligation (with a scope outside employment as well).

On 23 November 2009, the Equal Treatment Advisory Board adopted a resolution (no. 6/2009) on the need to amend Hungarian legislation in order to appropriately transpose the acquis. The resolution contains two versions for the amendment of the ETA: the first one concerns reasonable accommodation in the field of employment, the alternative recommendation – with a view to the foreseeable developments of the acquis – proposes the codification of a general obligation of reasonable

accommodation (for fields beyond employment).⁴¹ The resolution was sent to the Minister of Justice and Law Enforcement and the Minister of Social and Labour Affairs for consideration.

On 10 March 2010, the Minister of Justice and Law Enforcement replied that in his view there was no need to amend the legislation concerning the obligation of reasonable accommodation in employment, since the Hungarian legal framework is in harmony with the *acquis* in this regard, as proved by the fact that the infringement procedure launched against Hungary by the Commission partly in relation to the issue of reasonable accommodation was closed and no violation in this regard was established. With regard to the codification of reasonable accommodation in fields other than employment, the Minister was of the opinion that the question is not timely, as the process of drafting the new anti-discrimination directive is full of uncertainties.

In any case, based on the horizontal direct effect of the anti-discrimination directives (as established in the *Mangold* case), it would be possible for a person with disability to act against a rejection that is based by the employer on the difficulties he/she would face because of the need to make a reasonable accommodation. However, it may in all cases be advisable to formulate the law in a way that makes the reasonable accommodation obligation more explicit in relation to access to employment – e.g. by appropriately adapting Article 5 of the Directive 2000/78/EC.

Under Article 16, if the person with disability cannot be employed in the framework of integrated employment, his/her right to work must as far as possible be ensured through the maintenance of special work places. The central budget provides normative support to such protected work places.

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

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

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

⁴¹ See: http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_100226jj.htm.



As it was said before, under Article 4 of the RPD Act, a person is disabled if he/she “has a fully or greatly restricted command of sensory, locomotive or mental abilities, or is greatly restricted in his/her communication, and this constitutes an enduring obstacle with regard to his/her active participation in social life”. 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 the definition of disability for the purposes of claiming reasonable accommodation.

It needs to be pointed out though that people with lesser degrees of impairment may still need an accommodation, which is an additional argument for adopting a new and clear set of norms in this regard. It also needs to be mentioned that persons with certain illnesses might not fall under the RPD Act’s definition, so for them it might not be possible to claim reasonable accommodation (c.f. the terminological issue of the Chacón Navas case).

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

Under Article 13 Paragraph (2) of the RPD Act, 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 or school education.

In terms of Article 86 of Act LXXIX of 1993 on Public Education (Public Education Act), local and regional councils are under the obligation to guarantee kindergarten education and elementary education.

In terms of Paragraph (2) of the Article, this obligation includes the requirement to care for the education of children and pupils with special educational needs (i.e. with disabilities), provided that they can be educated in an integrated manner.

This in practice means that if in the given settlement there is even one child with disability who can be educated in an integrated manner, the local or regional council is under the obligation to create the guarantee to provide reasonable accommodation for the related needs in at least one of the schools it maintains.

The obligation to make public buildings accessible for people with disabilities [see below, under point (f)] should reduce the need for individualised reasonable accommodations, and meet some of the access needs of people with disabilities by anticipation outside the field of employment.



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

The Equal Treatment Authority has case law⁴² in relation to the accessibility of public buildings.

The Authority in this regard relies on Guideline No. 309/1/2011. (II.11.) TT of the Equal Treatment Advisory Board,⁴³ which established that “the failure to guarantee accessibility of buildings and equal access to public services amounts to a breach of the requirement of equal treatment, so the scope of the ETA covers this omission. The [...] failure to guarantee accessibility shall be regarded as direct discrimination under Article 8 of the ETA, because as a result of this failure, persons with disabilities are treated less favourably than people without disabilities in their movement, and access to services.”

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

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

There is no law expressly setting forth such an obligation.

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

The answer to this question is definite ‘no’. As outlined above, only through adapting the principles applied by the Equal Treatment Authority to the accessibility of public buildings, can we conclude that the failure to provide reasonable accommodation would amount to discrimination in the sense of the ETA. Thus, only through this interpretation of the law could we argue that the burden of proof is shifted in the case of complaints emerging on this basis. This in no way may be regarded as a “clear” formulation of the special rules of proof in relation to the reasonable accommodation duty.

⁴² See cases 13/2006 (<http://www.egyenlobanasmod.hu/jogesetek/hu/zanza0307.pdf>), 596/2006.

⁴³ See: http://www.egyenlobanasmod.hu/tt/TTaf_200802-2. The Guideline was revised after the cut off date of the report, but the quoted text has not been changed (see: Guideline No. 309/1/2011(II.11).TT. at http://www.egyenlobanasmod.hu/data/TTaf_20110211-1.pdf).



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

Under Article 29 (6) of the RPD Act, public buildings existing at the time of the law's coming into force (January 1999) ought to have been made accessible for persons with disabilities by 1 January 2005. Furthermore, Article 31 of Act LXXVIII of 1997 on Building Matters prescribed that after 1 January 1998 (i.e. the coming into force of the Act), the competent building authority may only issue a permission for the building and reconstruction of public buildings if they are accessible. These legal provisions were envisaged to guarantee that by 1 January 2005 all public buildings will be accessible to people with disabilities.

However, according to reliable estimates, people with disabilities could access only about 20 percent of Hungary's public buildings at the beginning of the year 2005.

In September 2005 the National Federation of Disabled Persons' Associations decided to launch a series of test trials against different types of public buildings built or reconstructed after 1998. The types of institutions included among others a surgery, a pharmacy, a town hall, an employment agency and a court.⁴⁴

To handle the situation, the RPD Act was amended by the Parliament through Act XXIII of 2007.

The new law inserted into the RPD Act, the new concept of “public services” and set out the right of persons with disabilities to equal access to public services. Under Article 4 Point (f) of the amended RPD Act, the term “public services” cover among others:

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

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

- a service is “equally accessible” if it is accessible, foreseeable, comprehensible, and perceivable – as independently as allowed by the given person’s status – for everyone, with special regard to people whose locomotive, visual, audio, mental or communicational functions are restricted;

⁴⁴ See: www.meosz.hu/index01.htm.

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

With regard to state provided public services that are operational on 1 April 2007, Article 7/B Paragraph (1) of the RPD Act prescribes that equal access to such services shall be provided by 31 December 2010. With regard to services provided by local councils, Paragraph (2) and the Annex to the Act set out a schedule for making them accessible (some services – such as health care – shall be made accessible by 31 December 2008, others – e.g. social services – by 31 December 2009, while the client services of local councils shall only be made accessible by the final deadline). Under Paragraph (4), client-based services of private actors (provided that they are already in operation on 1 April 2007) shall be made accessible by 31 December 2013.

These deadlines have not been fully respected. The Hungarian NGOs’ 2010 alternative report addressed to the CRPD, claims that “according to empirical data and surveys carried out in recent years by the regional organizations of MEOSZ [National Federation of Disabled Persons’ Associations], the national average for the physical accessibility of buildings open to the public is greater than 55 percent. However, this distribution varies greatly between towns and villages. Though there are only estimates in this regard, access in a comprehensive sense, which includes information and communication accessibility, is at a far lower level.”⁴⁵ According to the estimation of the president of MEOSZ, by the end of 2011, the percentage of accessible public buildings has risen to 65-70, but the distribution is still very much uneven.

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

⁴⁵ See: http://www.mdac.info/sites/mdac.info/files/english_crpd_alternative_report.pdf, p. 64.

making court buildings accessible. The CDCP went for judicial review in the case, but the ETA's decision was upheld by the court.

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

This practice was reinforced by Guideline No. 10.007/3/2006. of the Equal Treatment Advisory Body interpreting certain legal issues related to the obligation to make the environment accessible for people with disabilities, and stating that the failure to provide accessibility shall be regarded as a form of direct discrimination under Article 8 of the ETA, since it leads to a situation in which persons based on a protected characteristics (disability) are treated less favourably than another group in a comparable situation. This guideline was updated in 2008 and also in 2011 (see above), but the principle remained the same.

We have to point out that the amendment in the law (i.e. the change of the deadline to make buildings accessible from January 2005 to dates varying between December 2008 and December 2013) has changed the situation concerning accessibility complaints (for instance, before 1 January 2011, the CDCP could have exempted itself if a new complaint had been raised, as the deadline for the provision of accessibility was changed to the end of 2010 in its regard). Guideline No. 309/1/2011. (II.11.) TT of the Equal Treatment Advisory Body summarizes the most important consequences as follows: (i) public services that were not operational on 1 April 2007 are under the obligation to guarantee accessibility from the date they start to operate; (ii) public services that were operational on 1 April 2007 are not completely free from the obligation either: if the owner/maintainer makes significant investments to change the material, physical conditions of the service (e.g. refurbishes the building), he/she may not rely on the new deadlines to get exempted from the requirement to make the service accessible; (iii) cases that were in progress before the amendment's coming into force (1 May 2007), shall be adjudicated according to the regulations that were in force earlier.

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

As it could be seen from what is said above, the Hungarian system is based on anticipation. The fields and the entities obliged are also detailed above, under Point (f).

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

The rights of people with disabilities are regulated in detail by the RPD Act. In fact, this is one of the two groups (along with acknowledged nationalities) with regard to which a separate law has been adopted. The law goes well beyond the simple prohibition of discrimination: it sets forth reasonable accommodation obligations in a number of fields and prescribes different other measures and structures aimed at the creation of equal opportunities for people with disabilities. On the other hand the law is often criticised for failing to set up a system of effective sanctions for cases of non-compliance. Breaches of the obligations prescribed in the RPD Act can be remedied under the Civil Code (as breaches of inherent personal rights) or under the ETA (as violations of the principle of equal treatment).

The RPD Act consists of the following parts:⁴⁶

Chapter I contains the general provisions including (i) the purpose of the Act; (ii) the basic principles; and the definitions of the specific terms used in the Act.

The basic principles (Article 2) contain some very important provisions such as the one prescribing that in the course of planning and decision-making processes the special needs of persons with disabilities shall be given particular attention and it must be taken into account that persons with disabilities are able to take advantage of the possibilities available to all only if special solutions are applied. Furthermore, when adopting decisions affecting persons with disabilities it must be taken into account that persons with disabilities are equal members of society and the local community and for this reason the conditions enabling them to participate in the life of society shall be created. Article 3 declares that due to their condition, persons with disabilities are less able to exercise the rights to which they are entitled in the same way as everyone else, and therefore it is justified that they should be supported with positive measures in every possible way.

Chapter II sets out the rights of persons with disabilities. These include the right to an accessible and safe environment; the access to information; equal access to public services (see in detail above, under point b); the right to accessible and safe transportation, including a special network and parking spaces and the right to supporting services and aids.

Chapter III defines the target areas for where special measures are required for the creation of equal opportunities. These are the following: health care; education and training; employment; accommodation; and culture and sports. In relation to education for example, the law prescribes (Article 13) that if it is advantageous for

⁴⁶ The description of the Act relies on a translation of the law published on the website of National Federation of Disabled Persons' Associations. See: <http://www.meosz.hu/>.



development of the capabilities of the person with disability – in keeping with the opinion of the expert and rehabilitation committee set up for this purpose – the person with disability shall take part in kindergarten training and school education in an integrated manner, i.e. together with other children and pupils, in the same group or school class.

The provisions relating to employment are described above, under point (a). (Here – as it was mentioned before – the rights based language gives way to softer norms, prescribing measures to be taken “if possible”.)

With regard to culture and sports the RPD Act prescribes that it shall be made possible for persons with disabilities to visit educational, cultural, sports and other community facilities.

Chapter IV deals with the issue of rehabilitation. Article 19 states that persons with disabilities have the right to rehabilitation. The exercise of this right is ensured by rehabilitation services and care.

In order to provide for these, the government is obliged under Article 20 to set up a public foundation vested with a number of tasks (listed in Article 21). These tasks include among others:

- the organisation of access to the services and benefits specified in the rehabilitation program;
- co-operation with the organisations and persons taking part in the process of rehabilitation, monitoring their rehabilitation activities;
- elaboration of guidelines for development of aids and the supply of aids;
- elaboration of professional-methodological recommendations based on the experiences gained in the rehabilitation process.

Chapter V regulates the rules for the so-called “disability allowance”: As it was outlined under Section 2.1.1, Article 22 of the RPD Act sets forth the rules pertaining to disabled allowance. Disabled allowance is a monthly payment provided to maintain equal opportunities for severely disabled people.

The aim of support is to provide financial compensation to mitigate the social disadvantages resulting from the severely disabled status, irrespective of the salary of the person with severe disability, i.e. all “severely disabled” people are eligible. Article 23 defines who shall be regarded as “severely disabled”, and therefore eligible for the support.

Chapter VI establishes the National Disability Council, an advisory body devised to assist the Government in carrying out its tasks related to disability issues. The Council’s tasks are to take initiatives, make proposals, give opinions and co-ordinate decision-making related to persons with disabilities; and to carry out analysis and evaluation in the process of implementation of decisions. In this capacity, the Council comments on draft laws and regulations affecting persons with disabilities; makes

proposals for decisions, programs and legal regulations affecting persons with disabilities; regularly informs the Government on trends in the situation of persons with disabilities; drafts the National Disability Program and monitors its implementation.

Different numbers of members are delegated to the Council among others by the national organisations representing the interests of people who are physically disabled, deaf, blind or intellectually disabled; the organisations of sheltered workplaces; and by non-profit organisations operating in the interest of persons with disability. The president of the Council is the minister appointed by the government (at present the Minister of Social and Labour Affairs).

Chapter VII of the RPD Act sets out the provision related to the National Disability Program drafted by the Council and adopted by the Parliament.

Under Article 26, the Program contains among others a presentation of the social situation of people with disabilities; the objectives related to rehabilitation; the tasks aimed at bringing about a favourable change in social attitudes affecting persons with disabilities; plans promoting the active participation in social life of persons with disabilities; the definition of the justified extent to be attained in the transformation of the transport systems, man-made environment, as well as special education and special employment, in line with the number of persons with disabilities and their socially recognised needs; specification of the necessary means and institutions, and the necessary financial sources for attainment of the goals set. The Government shall report to the Parliament on the implementation of the Program in every second year, whereas the Parliament shall re-examine the resolution adopting the Program at least once every four years.

Chapter VIII contains the declaration that any person suffering an unlawful disadvantage because of his/her disability shall be entitled to all the rights which apply in the case of violation of inherent personal rights (Article 27), while Article 29 defines the deadlines by which compliance with the provisions of the Act shall be achieved.

For example, with regard to transportation systems, this deadline was 1 January 2010. The deadlines for making public services are regulated in a separate Annex of the Act, as it was outlined above, under point d).

2.7 Sheltered or semi-sheltered accommodation/employment

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

As outlined above, under Article 15 of the RPD Act, persons with disabilities shall if possible be employed in integrated employment, or, in lieu of this, in sheltered employment. Under Article 16, if the person with disability cannot be employed in the

framework of integrated employment, his/her right to work must as far as possible be ensured through the maintenance of sheltered work places. The central budget provides normative support to such protected work places.

There are three categories of sheltered employment in the Hungarian system: (i) accredited employment; (ii) rehabilitation employment; and (iii) sheltered employment. The rules of accreditation are set forth by Government Decree 176/2005 on the Accreditation of Employers Employing Workers with Disabilities, and the Rules of Monitoring Accredited Employers (hereafter: Accreditation Decree). Under Article 5 of the Accreditation Decree, an employer may be recognised as an accredited employer if – among others – (i) it employs or wishes to employ workers with disabilities, (ii) provides “employment aimed at rehabilitation” in the framework of its normal activities; (iii) provides employment in a safe environment and (iv) with equipment that is adapted to the special needs of the workers with disabilities. (“Employment aimed at rehabilitation” means in the terminology of the Decree work activities that take into consideration the degree of disability but at the same time create values and are contribute to the success of the market oriented manufacturing or service-providing activities of the employer.)

Under Article 6 of the Accreditation Decree, an employer may be recognised as a rehabilitation employer if in the 3 months preceding the submission of the request for recognition the statistical average number of employees with disabilities reaches or exceeds 20 and the average percentage of workers with disabilities within the workforce reaches or exceeds 40%, provided that the employer meets a number of other conditions. By way of example, these conditions include the following: (i) over 50% of the workers with disabilities shall be employed in the framework of employment aimed at rehabilitation; (ii) the employer shall have an equal opportunities plan as set out by Article 70/A of the Labour Code; (iii) the employer shall provide support services and prepare a personal rehabilitation plan for each employee; (iv) the employer shall have a professional employment rehabilitation program and shall employ a person specializing in rehabilitation issues. Similar to accredited employers, rehabilitation employers shall provide a safe and accessible working environment for workers with disabilities.

Article 7 of the Accreditation Decree sets out the conditions an employer shall meet if it wishes to be recognised as a sheltered employer. Besides the conditions set for rehabilitation employers, sheltered employers are required to meet a number of other criteria.

By way of example, these conditions include the following: (i) in the year preceding the submission of the request for recognition the employer shall employ workers with disabilities above the required minimum level; (ii) in the 6 months preceding the submission of the request for recognition the statistical average number of employees with disabilities reaches 50 and at least 50% of the personnel are employees with disabilities; (iii) the employer provides workers with disabilities the possibility of qualified work; (iv) the employer provides those training opportunities



that are necessary for successful rehabilitation; (v) the employer provides if necessary a support person for going to work and for performing the tasks.

These employers may receive significant support from the state budget on the basis of the disabled workers they employ.

These forms of support are set forth by Government Decree 177/2005 on the Budgetary Support Available for the Employment of Workers with Disabilities.

b) *Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?*

Yes. The relationship between accredited, rehabilitation and sheltered employers on the one hand and their disabled employees on the other constitute a normal employment relationship regulated by the Labour Code. Therefore, the possibility of not being regarded as employment under the ETA is not raised.



3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

The ETA does not address the issue of nationality. In lieu of specific citizenship/nationality or even residence requirements, domestic law covers every person present in the territory of Hungary.

For instance, in the case 56/2007, the Equal Treatment Authority established direct discrimination by a company providing financial services because it rejected to provide a Romanian citizen settled in Hungary with a HUF 100,000 (EUR 345) loan for a home-cinema system on the basis that the foreign citizenship of the complainant increases the risks of non-payment and the possible costs of an enforcement procedure in the case of non-payment. The Authority established that the automatic exclusion of foreign nationals without any mechanism devised to examine thoroughly their relevant personal circumstances (job, salary, etc.) constitutes direct discrimination that may not be exempted by referring to increased risks and costs as objective justification.

As to immigration issues, the following can be said: Article 4 (c) of the ETA covers public authorities without a territorial limitation. It is therefore argued that domestic legislation covers immigration and decisions and practices of immigration authorities as well. The Equal Treatment Authority investigated a case relating to immigration, whereby a man living in same sex partnership alleged discrimination in comparison to heterosexual partners in relation to granting long term residence permits (*letelepedési engedély*). No violation was found in the case on the basis that the permit was rejected, because the applicant lacked sufficient financial resources and that the immigration authority required the same amount of income for this condition to be filled in the case of heterosexual couples as well.⁴⁷ (On the issue of nationality, see also Section 4.4.)

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

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

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

⁴⁷ See: <http://www.egyenlobanasmod.hu/zanza/278-2007.pdf>.



organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and the equal account shall be taken of individual features”.

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

Protection against discrimination can be sought under Article 76 of the Civil Code. Under Article 75 Paragraph (2) of the Civil Code, provisions relating to the protection against discrimination apply to legal persons unless due to the character of the protection it is limited to natural persons. For the purposes of protection, therefore, legal persons are in general included.

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

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

The following are expressly excluded from ETA’s scope (Article 6): (i) family relations, (ii) legal relations between relatives; (iii) issues relating to the faith of churches (to use the exact – and not entirely clear – wording of the Hungarian legislation: “a denominational legal person’s legal relationship directly related to the denomination’s religious activity”), (iv) the *internal* operations of NGOs, legal entities and political parties – except in the last instance for establishing and terminating membership and for differentiation based on religion (also see Section 4.2 on issues concerning religion).

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.



For a detailed explanation of the problem (which requires the parallel examination of personal and material scope), see Section 3.2 below.

3.1.3 Scope of liability

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

As was pointed out above, under Section 2.5, in terms of Article 348 of the Civil Code, employers and not workers can be held liable for damages caused. This applies for all fields covered by the Directives. According to Article 349 of the Civil Code, the same principle applies to damages caused by public authorities – including courts of law.

Service providers cannot be held liable for actions of third parties. In case they fail to act pursuant to an express complaint against a tenant, client or customer and their failure is severe they might be engaged as discriminators in their own right.

Individual harassers can certainly be held liable. In the field of labour it is worth noting that co-workers may not only be sued in civil court for breaching the civil rights of the person harassed, but they can also be held liable at their work place in disciplinary proceedings. At the same time, as it was outlined under the Section on harassment, since co-workers do not fall under the personal scope of the ETA, their liability will not be established under the ETA's provision on harassment, but under the Civil Code's general ban on the violation of inherent civil rights (including human dignity).

Trade unions and other professional organisations can only be held liable for actions of their members if those act pursuant to a contract of commission with the union or professional organisation. In this case liability is based on Article 350 of the Civil Code. No liability flows from actions of representatives appointed by law.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

General remarks on the material scope of the ETA



The ETA does not enumerate the fields falling under its scope: it approaches the issue of material scope from the direction of personal scope, when it says that the entities enumerated in Article 4 (see their list above, under 3.1.2) shall respect the requirement of equal treatment in all their actions and practices (no matter which sector they operate in).

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

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

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

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

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



Employment, self-employment, occupation:

National legislation covers all sectors of public and private employment and occupation, including contract work, self-employment and military service.

Article 3 of the ETA defines labour relations (*foglalkoztatási jogviszony*) so as to cover employment, public employment, employment by court, the prosecution services, the Ministry of Justice, official and contractual services (including in the armed forces) and employment as an official foster parent.

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

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

- access to employment, including public job announcements and selections criteria;
- actions leading up to employment in the wider sense;
- actions relating to the commencement and termination of employment;
- remuneration;
- working conditions;
- promotion and training;
- liability for damages and disciplinary actions.

with regard to both labour relations (i.e. employment based on a labour contract) and other relations aimed at employment (including contractual relations with self-employed people).

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

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

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



As to the specific issue: under Article 21 of the ETA (see above, under Section 3.2.1.), these issues are covered by the requirement of equal treatment with regard to both employment and self-employment.

No distinction is made between the private and public sector in the ETA in this respect, as employment related actions of all public entities are covered by the ETA, and employers (taken in the broad sense) are among those private actors who fall under the ETA's personal scope.

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

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

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

As it was outlined under Section 3.2.1, working conditions, including pay and dismissals are fully covered by the ETA in terms of its Article 21.

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

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

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



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

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses?

Article 21 of the ETA does not specifically include other relations aimed at employment in relation to access to vocational training, however the provision may be interpreted as including other relations aimed at employment as well. At the same time, Article 27 of the ETA (defining forms of education falling under the law’s scope) is so wide that forms of vocational training that may not be covered by the ETA’s employment related provisions, will definitely fall under the law’s definition of education. In terms of Article 27, “the principle of equal treatment extends to any form of care, education or training, which a) is carried out in accordance with requirements approved or prescribed by the State, or b) is supported by the State ba) by direct normative budgetary subsidy, or bb) indirectly, especially through tax benefits (hereinafter collectively: education)”.

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

In addition, the principle of non-discrimination in the course of vocational training provided in the framework of public education is established by the general anti-discrimination provision (Article 4/A) of the Public Education Act, which claims that the requirement of equal treatment shall be respected in the public education system.

Article 14 of Act IV of 1991 on the Promotion of Employment enumerates the forms of financial support that may be provided to those who participate in training programs 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) 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 relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.

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

So called public associations (such as the bar associations and different professional chambers) do fall under the personal scope of the ETA (see under 3.1.2).

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

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

As a general remark in relation to the paragraphs to follow, it needs to be pointed out that as it was set out in Section 2.1., the ETA covers all grounds covered by the Directives and goes way beyond their scope with respect to the number of protected grounds. Therefore, all the answers below are to be interpreted to cover all the grounds included in the Directives.

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

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

Article 25 Paragraph (2) allows for preferential treatment – based specifically on the state of health or disability – to be accorded in an act of parliament or a government

decree based on an act of parliament in both the fields of social security and health care.

Article 7 Paragraph (1) of the 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.

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)

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

National law does not specifically address social advantages, but discrimination in this area could easily be argued to be unlawful under Hungarian law, especially if the discriminator falls under the personal scope of the ETA.

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

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

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

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



The ETA devotes a chapter to education, as a result of which the bulk of anti-discrimination provisions are now to be found here. Some, however, remain in a further amended provision (Article 4/A) of the Public Education Act.

In the context of education first of all we have to call attention to Articles 7 (1) and 10 (2) of the ETA. In terms of Article 7 (1) segregation shall be regarded as a form of 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 Act to clearly deem “equal but separate” type of behaviours unlawful. If separation also entails some disadvantage (e.g. lower level education for the separated Roma class within an elementary school), direct discrimination can be applied, if however in a given case it is difficult to prove that the separated group (the Roma class) suffers disadvantages other than stemming from the nature of such separation, the provision on segregation may be relied on. This rule exempts the victims of such practices from the obligation to prove that segregation is in itself a disadvantage, therefore it may be regarded as a further easing of the rules of evidencing compared to the reversed burden of proof (see Section 6.3).

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

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

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

Paragraph (3) does not only prohibit segregation in an educational institution, or in a division, class or group within such an educational institution, but perceives as a form of discrimination education limited to a care or educational system, or a care or educational system or institution created or maintained according to standards that do not reach accepted professional requirements or do not meet professional rules,



and thus do not ensure a reasonably expectable opportunity to prepare for state exams.

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

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

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

Under Paragraph (3) a legal act may divert from the provision of free choice of parents in establishing single faith schools in respect of educational institutions serving the protection of linguistic or cultural identity or the purposes of a church, or a national minority.

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

What remains in the Public Education Act is Article 4/A, which reads as follows.



Article 4/A Paragraph (1): In relation to decisions and measures taken with regard to children and students, those participating in organising, managing and implementing public education shall have the duty to abide by the requirement of equal treatment. Paragraph (2) provides for education without discrimination, underlining the importance of provisions accorded on an equal footing. Pursuant to Paragraph (3) discrimination in a wider sense shall be remedied, which may not result in a breach of other children's and students' rights.

Paragraph (4) requires that remedies provided in the Public Education Act shall be sought against discrimination and provides for recourse to other remedies, such as a civil action for the breach of civil rights. Last, Paragraph (5) stipulates that when applying Article 4/A, the provisions of the ETA shall also apply.

Articles 83 and 84 of the Public Education Act provide for an administrative complaint mechanism against unlawful decisions of a school or the maintainer. Decisions that discriminate are null and void. Judicial review is available against such decisions. (For more details, see Section 6 on sanctions.) It shall be noted that sanctions available under Article 80 of the Public Education Act against unlawful acts of private schools seem far more effective than those available against public schools. In the end, public schools cannot be closed down, nor can state funding be withheld from them.

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

The Chance for Children Foundation's two cases described under Section 0.3 provide telling examples of types (ii) (Miskolc) and (iii) (Hajdúhadház).

In terms of Article 13 Paragraph (1) of the RPD Act, persons with disabilities have the right to participate in early development and care, kindergarten education, school education, developmental preparation, vocational training, adult training and tertiary education in accordance with their state and age and in line with the provisions of the relevant laws.

As it was outlined above, 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.



Until August 2010, Decree 14/1994 of the Ministry of Education on Educational Obligations and Pedagogical Services (hereinafter MKM Decree 14/1994) regulated the procedure of the expert panel vested with the task of examining children whose ability to cope with “ordinary” education seemed questionable.

Although this law was formulated in a way as to create the possibility of integrated education, and insert safeguards (such as strong parental involvement) aimed at guaranteeing that this possibility could be fulfilled, the expert panels’ practice was highly problematic. A country report written for the UNESCO by the Institute for the Research and Development of Education⁴⁸ described the situation as follows:

“In terms of the Hungarian laws, ‘children with special educational needs’ are pupils with physical, sensory or mental disabilities, speech disorder, autism, or suffering from more than one disability, also pupils who are severely and constantly hindered in the learning process by psychological developmental problems (e.g. children with dyslexia, dysgraphia, or hyperactive children).

According to the statistics of the Ministry of Education, in 2005, there were 57,000 children with special educational needs in Hungary.

The Hungarian educational system does not guarantee equal opportunities for such children. The majority of pupils with different forms of disability studies in specialised, segregated schools. Empirical research shows that this separation from society generates disadvantages in the labour market and hinders the integration of people with disabilities. The average level of education of people with disabilities is way below that of the general society. 70% of persons with disabilities over the age of 15 have only elementary schooling. [...]

The integrated education of pupils with special educational needs has been one of the main objectives of Hungarian educational policy since 2003. Based on data from a 2005 survey the OECD drew attention to the educational segregation of children with slight mental disabilities and suggested that, with the exception of children with severe mental or physical disabilities, pupils who are slower in learning should be educated in ordinary schools (Equity in Education, 2005).

However, the personal and material conditions of integrated education are missing from the Hungarian school system. The situation is aggravated by the fact that most parents and teachers have an aversion to the integrated education of pupils with special educational needs.

⁴⁸ Lilla Farkas, Zsófia Kardos, József Mayer, Szilvia Németh, Judit Szira: Diszkrimináció az oktatásban. UNESCO nemzeti jelentés – Magyarország. Oktatókutató és Fejlesztő Intézet, Budapest, 2008. pp. 17-18.

A survey by the National Institute for Education showed that integration usually takes place only in elementary schools and upon the initiative of the parents of such children.”

The new law regulating the procedure of the expert panels (Decree 4/2010 of the Ministry of Education and Culture on Pedagogical Services came into effect in August 2010. In the absence of comprehensive studies into the impact of the legislative amendments, it is still to be seen whether the above criticised practice will change significantly.

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

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

Discrimination with regard to access to goods and services is regulated by Article 30 of the ETA.

Paragraph (1) sets forth the following:

“It is considered a particular violation of the principle of equal treatment if at premises open to customers, particularly in catering, commercial, cultural and entertainment establishments, and based on a characteristic defined in Article 8,

- a) the provision of services or sale of goods is denied or neglected,
- b) the services provided and goods sold are not of the same quality as those normally available at the particular premises,
- c) a notice or sign is placed implying that a certain individual or individuals are excluded from the provision of services or sale of goods at the premises.”

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

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

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

The law does not expressly allow for such differences in treatment, and the Equal Treatment Authority has on a number of occasions established direct discrimination in relation to the denial of financial services on the basis of age. In a case for instance, the complainant was granted a loan by the respondent financial institution for purchasing goods in March 2006. He paid the installments regularly. Half a year later, in November 2006, he again submitted a request for a similar loan (again for purchasing goods but the amount was smaller than in March), but the respondent rejected the claim on the basis that in the meantime the complainant had passed 70 years of age.

The respondent acknowledged that the complainant's financial conditions were appropriate, but the number of loans granted by the respondent to older people had significantly increased thus increasing the risk level of the financial institution. The Authority established direct discrimination on the ground of age, and claimed that the proceeding before deciding on loan applications shall primarily focus on the financial conditions of the applicant and not on his/her age.⁴⁹

Differences of treatment based on age or disability in the provision of financial services may however be justified in actual individual cases on the basis of the general exempting rule, namely Article 7 Paragraph (2) b), which stipulates that differentiation found by objective consideration to have a reasonable ground directly related to the relevant legal relation shall not constitute discrimination, if the concerned person's right limited by the differentiation is not one of the fundamental rights. This more lenient test may be applied in such cases, as access to goods and services is not regarded as a fundamental right (as opposed to the right to education or employment, for instance).

There is one particular situation in which the law expressly makes differentiation based on risk assessment relying on relevant and accurate actuarial or statistical data justifiable: under Article 30/A of the ETA, in relation to insurance services and services based on the insurance principle, differentiation based on gender does not infringe the principle of equal treatment if a) the risk-proportionate scale of premiums and benefits entails the setting up of groups based on risk factors, and b) the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.

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

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

⁴⁹ Case no. EBH 14/2007. See. <http://www.egyenlobanasmod.hu/zanza/14-2007.pdf>.



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

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

As we can see, 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) may also fall under the scope of the ETA, provided that the given private actor advertises the housing possibility publicly.

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

With regard to the issue of housing it needs to be pointed out that in Hungary, the proportion of social housing (8%) is way below the EU average (33%).⁵⁰ The lack of social housing has a very negative impact on the housing conditions of the marginalised Roma groups, significantly reducing their chances to find a way out from the segregated Roma neighbourhoods and settlements, the total number of which exceeds 500 according to governmental sources.⁵¹

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

In 2008, 13% of the complaints submitted to the Minorities Ombudsman concerned (mainly municipal) housing. While the Ombudsman could not in any of the cases establish beyond reasonable doubt that discrimination based on ethnicity had taken place, some cases raised the strong suspicion of ethnic discrimination, such as the one in which a Roma family’s rental contract was terminated by the local council based on the ground that they had not respected the rules of cohabitation, although they had always paid the rent and other costs in a timely manner and with the

⁵⁰ http://www.jogvedok.hu/hirek_01/kisebsegi_ombudsmann.doc.

⁵¹ <http://www.romnet.hu/hirek/hir07021202.html>.



exception of one non-Roma family (which had on numerous occasions expressed their anti-Roma sentiments) no neighbour had ever complained about their behaviour (in fact, one of the non-Roma neighbours contacted the local council in favour of the Roma family, when plans to terminate their contract became known). After the Minorities Ombudsman's intervention the local council revised their decision, and reinstated the Roma-family's rental contract.⁵²

Although in terms of Article 17 of the RPD Act, persons with disabilities shall be entitled to choosing the form of housing that best suits their type of disability and personal circumstances, this provision is not properly implemented in practice.

In case no. 934/2008 for instance, a complainant – a single mother raising two children with autism – turned to the Equal Treatment Authority, because the local council was not willing to provide her with appropriate social housing. They were already living in social housing, however, the apartment was extremely small (34 sq. meters) and had no bathroom and toilet (only outside in the yard), whereas one of the children suffered from a persistent disease of the kidney. When the complainant requested the local council to provide her with housing which has a toilet inside, the council rejected her saying that there were no alternative social housing apartments. At the same time the head of the council's social committee said in an interview that there are empty apartments in the district but they are maintained to civil servants and employees who work hard for the district.

After the complaint was made to the Authority the mayor expressed his willingness to reach a friendly settlement, and after appropriate housing was offered to the complainant, she agreed to the resolution of the case through settlement.⁵³

⁵² See: http://3ddigitalispublikacio.hu/media/ombudsman/2008/beszamolo_2008.pdf.

⁵³ <http://www.egyenlobanasmod.hu/zanza/934-2008.pdf>.



4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

- “The principle of equal treatment is not violated if
- a) the differentiation is proportionate, justified by the characteristics or nature of the job and is based on all relevant and legitimate terms and conditions that may be taken in consideration in the course of employment; or
 - b) the differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.”

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

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

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

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

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

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

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

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

It is doubtful whether this is fully in line with the Framework Directive, as it 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. Furthermore, according to the Directive, a differentiation based on the religious ethos of an organisation may only be based on the religion of a person subjected to the differentiation, and not on any other characteristics (e.g. sexual orientation), whereas the Hungarian regulation does not impose this restriction on the application of this exempting clause.

Article 12 Paragraph (2) of Act CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (in force as of 1 January 2012) sets forth that “since church institutions are ideologically committed, such conditions may be determined concerning recruitments and the establishment, maintenance and termination of the legal relationship of employment that are necessary to preserve their specific identity.”

It still needs to be seen how the relation of this new provision to Article 22 Paragraph (1) Point (b) is interpreted, which has a decisive impact on its conformity with Article 4(2) of the Directive. Article 12 of Act CCVI does not specify what types of special conditions may be set, therefore, it can be interpreted in line with Article 22 Paragraph (1) Point (b) of the ETA and regarded as a declarative rule simply

reinforcing those already existing special rights of organisations based on a religious ethos that were put in place by the ETA. The same interpretation would follow from the principle of indirect effect of the EU acquis, i.e. the domestic authorities' obligation to interpret domestic laws in a way that is compatible with the acquis.

However, another interpretation is also possible. One can argue that there would have been no point in re-declaring an already existing right, and therefore the legislator's intention behind the adoption of Article 12 of Act CCVI must have been to make it possible for church institutions to set conditions going beyond those that were already permitted under the ETA. In this case there would be a collision between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori*, this collision can be solved in favour of Article 12, since this is the norm that was adopted later. This interpretation opens the door for employment-related differentiation that goes way beyond what is allowed by the Directive.

Based on the court' unwillingness to interfere with the decisions of denominational institutions (see the Károli case described in detail below), there is a not insignificant chance that this latter line of thought will be followed. However, this needs to be seen as related individual cases come up.⁵⁴

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

The 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' Theological Faculty published a general declaration on 10 October 2003, claiming that "the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life."

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

⁵⁴ Commissioner Viviane Reding promised further inquiry into the compatibility of the new church law with the Directive. See: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-001428&language=EN>.

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

The Supreme Court rejected the claim on 8 June 2005. The Court accepted the claimant's argument that even the proving of an abstract disadvantage may be sufficient for the establishment of discrimination and the shifting of the burden of proof. However, it took the stance that the denominational university is exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule of the ETA [Article 7 Paragraph (2)], according to which an action based on a protected characteristic "shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation". In the Supreme Court's view, in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking in consideration the fact that later on they may become pastors (although this is not inevitable, as students with a degree in theology do not automatically become pastors). Since Article 7 Paragraph (2) has been amended, and with regard to differentiation concerning fundamental rights (such as education), a stricter test (legitimate aim, necessity, suitability and proportionality) is applied, it is not certain that the Supreme Court could easily come to the same conclusion based on the new text of the law.

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

Churches in Hungary do receive some state funding (on the basis of the number of people who offer 1% of their taxes to a particular church), and so do certain institutions maintained by churches: denominational schools, hospitals, social care homes: under Article 5 of Act CXXIV of 1997, such institutions receive a per capita support under the same rules and on equal footing with similar institutions maintained by local councils (based on the notion that these institutions perform state tasks: health care provision, education, etc.).

There are two exemptions concerning churches and denominational legal entities in the ETA. Under Article 6 of the ETA (according to which a denominational legal person's legal relationships directly related to the denomination's religious activity are excluded from the scope of the law), churches enjoy complete freedom with regard to the employment of priests and pastors. In all other legal relationships (e.g. with regard to the education of a child in a denominational school or the provision of

healthcare to a patient in a denominational hospital, which are not relationships directly related to religious activities), denominational institutions receiving state funding are not exempt from the obligation to comply with the requirement of equal treatment. In the Károli case it was expressly stated by the court that a denominational university cannot be exempted from the scope of the law on the basis of Article 6.

On the other hand, the religious ethos exemption applies to denominational institutions as employers, so in such institutions (which also receive funding from the state, although they are run by a denomination), leadership can select employees on the basis of their religion (whereas this would not be the case with regard to pupils, patients, persons receiving social care, etc.). The Hungarian legislation does not specify whether any employees can be selected on this basis or only employees who have a responsibility in running the organisation, but Article 22 (b) of the ETA only allows for ethos based differentiation where it is proportional and justified by the nature of the employment activity or the conditions of its pursuit, so it may be argued that employees whose position does not legitimately require the application of the exemption may not be lawfully rejected on the basis of their religion.

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

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

National anti-discrimination law does not provide for a particular exception for the armed forces in relation to age or disability discrimination, but the statutes regulating the status of armed forces contain provisions on age limits and physical suitability. These are explained below.

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

Article 6 of the Armed Organisations Act runs as follows:

- (1) "With regard to the service relationship the requirement of equal treatment shall be met.
- (2) The armed organ guarantees without discrimination the advancement of its professional member, based exclusively on his/her professional qualities, experience, performance and service time and with regard to the criteria of ranking."

Article 6 of Act XCV of 2001 on the Status of Professional and Contracted Soldiers of the Hungarian Armed Forces (hereafter: Armed Forces Act) claims that with regard to the service relationship the requirement of equal treatment shall be met.

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

Under Article 37 of the Armed Organisations Act (regulating armed organisations, such as the police, prison services, customs and excise guards, etc.), those may enter service who are older than 18 and younger than 35, and are suitable for service from a medical, psychological and physical point of view.

In terms of Article 41 of the Armed Forces Act (regulating the army), those may enter service who are older than 18, and are suitable for service from a medical, psychological and physical point of view.

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

The Equal Treatment Authority had a related case. A woman filed a complaint because she was refused admission to the Police College due to her height. The College used the exemption that it was obliged by the Decree (i.e. a statutory norm) to reject the application, since under its terms, a woman who is less than 162 centimetres tall may not become a police officer (for men, the limit is 168 centimetres). Consequently, the Authority had to reject the complaint, but indicated to the Ministry of Justice and Law Enforcement that a revision of the Decree is necessary.⁵⁵ (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 (Art. 3(2))

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

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

⁵⁵ www.egyenlobanasmod.hu (report on 2006).



Although the English text of Article 8 (d) of the ETA mentions nationality (“nemzetiség”) among protected grounds, this expression does not refer to citizenship, it is used to refer to affiliation with a national minority. However, differentiation based on nationality (citizenship) is not excluded from the scope of the Act: in fact, it is one of the “other characteristics” to be protected by the Act, as supported by the case law of the Equal Treatment Authority (see the case of the Romanian complainant under Section 3.1.1.). Statelessness would similarly be an “other characteristic” protected by the ETA.

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

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

Domestic law does not contain exceptions that rely on Article 3(2). Indeed, concerns with regard to the potential impact on immigration of the lack of such exceptions did not surface during the legislative process. Only some cases have emerged where the protected ground was nationality and none of these were related to entry and residence.

Cases involving nationality include the case referred to above (Romanian national settled in Hungary was rejected when he applied for a bank loan for a home-cinema system on the basis of his foreign citizenship), and a case in which a spa offered reduced price tickets only to those local residents who are of Hungarian citizenship: an Austrian citizen with a registered address at the given settlement filed a successful complaint with the Equal Treatment Authority.⁵⁶

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

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

See below, under point b).

⁵⁶ Case no. EBH 10/2006.



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

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

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

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

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

See below, under point b).

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

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

Some provisions that primarily concern the employment of women and minors can be found in the Labour Code. Article 75 Paragraph (1) prescribes, for instance that “Women and minors may not be employed in work that may be detrimental to their health or development. Such jobs, and jobs that can only be performed if specific

working conditions are provided or on the basis of a preliminary medical examination, shall be determined by law.”

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

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

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

There are no exceptions relating to health and safety law in relation to ethnic origin or religion.

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

4.7.1 Direct discrimination

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

Not only on the ground of age, but generally the ETA permits objective justification for direct discrimination. Unlike the Directives, the ETA attaches a general exemption clause to not only indirect but also to direct discrimination. As pointed out above, under Article 7 Paragraph (2) of the ETA, “unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if

- a) it restricts the aggrieved party’s fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or
- b) in cases not falling under the scope of point a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation.

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

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

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

Whether the Mangold test would be passed, depends on the type of the right the differentiation concerns. If it is a fundamental right (such as the right to employment), the stricter test [Article 7 Paragraph (2) Point a)] will be applied, so the requirements of “appropriateness” and “necessity” will be taken into consideration.

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

Under Article 72 Paragraph (3) of the Labour Code, a “young employee” is an employee who is below 18 years of age. The Labour Code contains numerous provisions aimed at the protection of young employees. These are mostly related to employment and working conditions. For instance, young employees may not be employed for night shifts (Article 129/A), they are entitled to five extra days off per year (Article 132), and so on.

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

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

The Hungarian system concerning private pension funds (including pension funds established by employers or professional chambers) and the state pension fund is quite complex. Membership in a private pension fund was before January 2011 either obligatory (for career beginners establishing an employment relationship for the first time provided they are younger than 35 years of age) or voluntary (in January 2011 even those were allowed to leave private pension funds, for whom membership had been compulsory, and from this date there is no compulsory membership).

In either case, the pension fund itself may not fix an age for admission.

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

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

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

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

There are some special statutory provisions aimed at the *promotion of vocational integration* of all the three categories, i.e. young workers, persons with caring responsibilities and older workers as well.

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

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

Article 16 makes it possible for the State Employment Service to provide employers for a maximum of 1 or – in cases concerning persons unable to find employment for over 2 years – 2 years with support amounting to 50% or 60% of the salary and social security payments of disadvantaged workers or workers with disabilities respectively, if the employer

- a) undertakes to maintain the employment for the whole period of the provision of the support;
- b) has not dismissed with reference to circumstances concerning its own operation the employee within 12 months preceding the submission of the request for support; and
- c) undertakes not to dismiss the employee with reference to circumstances concerning its own operation during the time the support is being provided.

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

- persons with primary education or below;
- persons over 50;
- career beginners up to the age of 25;
- single parents of at least 1 child below 18;
- persons who within 12 months preceding the commencement of the employment were in prison or pre-trial detention.

Act CXXIII of 2004 on the Promotion of the Employment of Career Beginners, Employees over 50 and Persons with Caring Responsibilities and on Internships contain further schemes aimed at the promotion of employment of career beginners and persons with caring responsibilities. Employers employing such persons (and also persons whose education does not exceed the primary level) are entitled for a reduction in the social security contributions they are obliged to pay after the employee. The law furthermore contains the possibility of an internship of career beginners with a university of college diploma.



Protection against dismissals for persons with caring responsibilities does exist in the Hungarian legal system. Under Article 90 of the Labour Code, employers shall not terminate an employment relationship by regular dismissal during – among others – the period of sick pay for the purpose of caring for a sick child; during a leave of absence without pay for nursing or caring for a close relative; during pregnancy, for three months after giving birth, or during maternity leave; during a leave of absence without pay for the purpose of nursing or caring for children.

Protection against dismissals exists for older workers as well. Under Article 89 Paragraph (7) of the Labour Code, employers shall be allowed to terminate an employee's employment relationship within a five-year period preceding the employee's eligibility for old age pension by regular dismissal only in particularly justified cases. In terms of Article 95 Paragraph (5), the amount of severance pay shall be increased by three months average earnings if the employee's employment relationship is terminated within a five-year period before his/her eligibility for old age pension.

4.7.3 Minimum and maximum age requirements

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

According to Article 72 of the Labour Code, all persons entering into an employment relationship as employees shall be at least sixteen years of age. During the school holidays, full-time pupils and students attending elementary school, vocational school or secondary school may also enter into an employment relationship. Under the same Article, full-time pupils younger than 15 years of age may also be employed for the purposes of performance in artistic, sports, modelling or advertising activities upon prior authorisation by the competent guardianship authority.”

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

Examples of a maximum age requirement also exist: for instance, with regard to the service relationship of the members of armed organisations (e.g. police) it is 35 years of age. These ages are only applicable to initial recruitment.

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



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

4.7.4 Retirement

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

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

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

Until 1997 the pensionable age was 60 for men and 55 for women. In order to guarantee a smooth transition, a complex system of retirement schemes was developed with different options depending on sex and age, but from 1 January 2009, the retirement system has been basically unified.

Under Article 18 of Act LXXXI of 1997 on State Pensions, the pensionable age in Hungary is at this moment 62 for both men and women, but will be raised to 65 gradually by 2022. Notably, only workers with twenty years in service are eligible for a full old age pension, others can receive a partial pension.

Employees are not obliged to begin to collect their state pensions and they can continue working after pensionable age, however when they fulfil the pensionable age, they will be qualified as pensioners from the point of view of the Labour Code (Article 87/A) provided that they have the necessary amount of service years. This means that their protection against dismissal and redundancy ceases, as explained below.

Penalties are not imposed on employees who work beyond pension age. There is no cap on the number of working hours and the salary of pensioners. An intricate system regulates the length of work incapacitated pensioners can perform and the salary they can receive without being disqualified from their pension: the lower the level of incapacity, the higher the number of limitations.



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

In Hungary private pension schemes may complement the state pension scheme.

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

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

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

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

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

- Under Article 15 Paragraph (1) Point (j) of Act XXIII of 1992 on Civil Servants, the service relationship of civil servants ceases when they reach the general pensionable age (provided that they have 20 years of service time). If they do not have 20 years of service time, or if they receive a special permission from their superior, they may continue to work, but not after reaching the age of 70.
- Under Article 90 Point (ha) of Act CLXII of 2011 on the Status and Remuneration of Judges, if a judge reaches the actual pensionable age, he/she has to retire. At present the pensionable age is 62 and it will be gradually increased to 65 by 2022. The mandatory retirement age will follow this gradual rise.
- Under Article 34 Point (d) of Act CLXIV of 2011 on the Status of the Chief Public Prosecutor, Prosecutors and Other Prosecutorial Employees and the Prosecutorial Career, if a prosecutor reaches the actual pensionable age, he/she has to retire. At present the pensionable age is 62 and it will be

gradually increased to 65 by 2022. The mandatory retirement age will follow this gradual rise.

- As of 1 January 2014, in terms of Article 22 Paragraph (1) Point (d) of Act XLI of 1991 on Public Notaries (which now claims that the mandatory retirement age of notaries is 70) the mandatory retirement age will coincide with the general pensionable age pertaining to the given notary.
- Under Article 59 Paragraph (1) Point (a) of the Armed Organisations Act, the service relationship of the member of the professional personnel ceases once he/she reaches the upper age limit of professional service. Under Article 52 the upper age limit coincides with the general pensionable age.

These provisions were not subject to debate during the transposition of the directives, they have however come under domestic and international serious criticism when the mandatory retirement age for judges (which was 70 before the coming in to force of the Fundamental Law in April 2011), was abruptly reduced to the actual general pensionable age (currently 62) with an insufficient transitory period.

The European Commission expressed the opinion that “EU rules on equal treatment in employment (Directive 2000/78/EC) prohibit discrimination at the workplace on grounds of age, which also covers a reduction of the retirement for one profession without an objective justification. Following the Commission’s letter of formal notice of 17 January, Hungary only proposed a clause that would allow to extend in individual cases the retirement age of a judge beyond 62 if the judge passes a review by the National Judicial Council of his »professional and medical aptitude« and within the limit of a pre-determined annual quota. This proposal does not comply with EU law because such extensions may be arbitrary, apply only in individual cases and they do not address the Commission’s main concern: the transitional periods must be sufficiently long to protect the judges’ legitimate expectations and avoid the contradictory effect of a sudden drop (in 2012) and then a slow rise (as from 2014) of the mandatory retirement age.”⁵⁷ Consequently, on 7 March 2012, the Commission sent Hungary a reasoned opinion in relation to the matter.⁵⁸

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

As it is outlined in detail below, under Point e), after a person reaches the pensionable age, his/her protection from dismissal will come to an end. This age however is set by law and not by the employer.

⁵⁷ See:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/165&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁸ http://www.deljpn.ec.europa.eu/modules/media/news/2012/120307d.html?ml_lang=en.



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

Workers as a rule can continue working after they reach pensionable age. They however are not entitled to the same protection after reaching the pensionable age. As was pointed out above, Article 90 of the Labour Code provides an absolute protection against regular dismissal during certain periods (e.g. sick leave, maternity leave, etc.). In terms of Article 90 Paragraph (3), the employee is not entitled to this protection if he/she has passed pensionable age.

Furthermore, in terms of Article 89 Paragraph (6), the employer is not obliged to provide the reasons for the dismissal if the employee has passed the pensionable age, although in all other cases reasons shall be provided, and if a dispute arises, the employer shall be obliged to prove that the reasons are real and relevant. On the other hand, it needs to be mentioned that only an exceptionally reasonable justification may be acceptable if the dismissal takes place within five years before the employee reaches the pensionable age.

Another restriction is that employers are exempted from severance payment if they dismiss an employee after he/she has reached the pensionable age. On the other hand, if the dismissal takes place within five years before the employee reaches the pensionable age, an additional three months' salary shall be paid in addition to the severance payment prescribed by law.

4.7.5 Redundancy

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

Formally, national law does not permit age to be taken into account in selection for redundancy, however, as was pointed out above, if someone has passed the retirement age, his/her dismissal is possible without reasons provided.

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

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

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

Furthermore, if an employee is dismissed within the five year period preceding his/her retirement age, he/she shall be entitled to an additional compensation amounting to three times his/her monthly salary (Article 95 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)

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

National law does not include any exceptions that expressly seek to rely on Article 2 (5) of the Framework Employment Directive, however, these grounds could be referred to when claiming that a certain action falls under Article 7 Paragraph (2) of the ETA, i.e. it serves the enforcement of a fundamental right and is necessary, suitable and proportionate, or it is found by objective consideration to have a reasonable ground.

4.9 Any other exceptions

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

As was outlined above, special exempting rules apply to education and access to goods and services (for the text see Section 2.2). These may be problematic with regard to racial or ethnic origin, as the Racial Equality Directive does not allow for specific exemptions of direct discrimination in connection with these fields. This may be a breach of the transposition obligation, which however could be remedied through applying the principles of the direct and indirect effect and the primacy of community law.



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

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

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

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

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

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

No case law has evolved in this regard.

- b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five*

grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

Positive action measures in the wider sense do exist in Hungary, especially with regard to the Roma. In this regard we have to emphasise that there has been a shift from the ethnic approach to targeting such measures at socially disadvantaged groups (in which the Roma are overrepresented). This was motivated by a number of factors, including indications of inefficiency of programs expressly targeting Roma people.

The Institute for Development and Methodology of the National Audit Office for instance voiced criticism of the inefficiency of substantial Government spending on Roma programs between 1990 and 2008. In its report, the Institute pointed out the following main deficiencies:

- Lack of the exact definition of goals;
- Different definition of the target group by the different Ministries;
- Lack of efficient monitoring systems and consistent indicators (partly due to the difficulties posed by data protection rules);
- Improper coordination between the Ministries, lack of efficient coordinating mechanisms and bodies;
- Lack of continuity between the different programs, lack of evaluation and failure to try to multiply the successful initiatives.⁵⁹

Besides the indications of inefficiency, further arguments for the shift were: a) this would generate less tension within society and b) problems faced by indigent non-Roma people are often very similar to the ones faced by the Roma, so this would be a more just solution any way. This shift has been criticized by some Roma leaders as disguising the plight of Roma as well as by the UN Independent Expert on Minority Issues.⁶⁰

An example for narrowly tailored preferential treatment is offered by Article 22 of Government Decree 237/2006 on the Rules of Admission Procedures of Universities, under which 20 points shall be added to the number of points achieved by a socially disadvantaged applicant, in a system where the maximum number of points is 480, and admission is based on the number of points. Further 20 points (so altogether 40 points) shall be added to the results of students with so-called “aggravated social disadvantage” (the term is defined in the Act on Public Education and refers to socially disadvantaged students whose parents have a low level of education).

⁵⁹ See: [http://www.asz.hu/ASZ/Tanulm.nsf/0/2036D01DEFE98909C125744200469FC9/\\$File/t206.pdf](http://www.asz.hu/ASZ/Tanulm.nsf/0/2036D01DEFE98909C125744200469FC9/$File/t206.pdf).

⁶⁰ “While the government policy with respect to desegregation must be commended, it is clear that the current approach based on financial incentives is grossly inadequate to match the non-Roma citizen resistance at the municipal level.” (See: <http://daccessdds.un.org/doc/UNDOC/GEN/G07/100/83/PDF/G0710083.pdf?OpenElement>).



In the field of employment, it is worth mentioning that in October 2009, Government published a tender with the aim of employing 200 Roma persons with university degrees in the public administrative sector.⁶¹ In this program, ethnic affiliation was openly made a criterion, otherwise, in relation to employment, a similar shift was conducted as in the case of education: instead of “Roma” programs, programs focusing on disadvantaged groups, persons in long-term unemployment were started.

A type of quota measure in relation to the employment of disabled persons is constituted by Article 23 of Act CXCI of 2011 on the Benefits of Persons with an Altered Ability to Work and the Amendment of Certain Laws, in terms of which employers shall be obliged to pay a so called “rehabilitation contribution” if the number of their employees exceeds 25 and the proportion of persons with disabilities within the workforce is below 5 percent.

Under Article 22 of the above mentioned Government Decree 237/2006 on the Rules of Admission Procedures of Universities, 40 points shall be added to the number of points achieved by a disabled applicant.

The wide range of broader policy measures aimed at promoting the access to employment of persons with disabilities (e.g. rehabilitation allowance, budget support to employers employing workers with disabilities, etc.) are described under the relevant sections (see for instance Section 4.7.2).

⁶¹ See: http://www.nek.gov.hu/id-1184-diplomas_roma_munkavallalok.html.



6 REMEDIES AND ENFORCEMENT

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

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

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

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

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

Judicial procedures

Civil courts

Victims of discrimination may sue in civil courts based on Articles 75 and 76 of the Civil Code, claiming that inherent rights are protected by the Civil Code, and that the right to equal treatment is an inherent right. The possible remedies applicable by the court are listed under Article 84 of the Civil Code:

- (1) “A person whose inherent rights have been violated may have the following options under civil law, depending on the circumstances of the case:
 - a) demand a court declaration of the occurrence of the infringement,
 - b) demand to have the infringement discontinued and the perpetrator restrained from further infringement;
 - c) demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution;
 - d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature;
 - e) file charges for damages in accordance with the liability regulations under civil law.
- (2) If the amount of damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct, the court shall also be entitled to penalize the perpetrator by ordering him to pay a fine to be used for public purposes.”

These provisions provide victims of discrimination with a flexible instrument, as they apply to all types of discrimination no matter which field or ground is at issue.

There is no obligation to retain a lawyer, but professional legal assistance may mean a significant advantage, since the court is bound by the petitions of the plaintiff (in relation to both the claim and the evidentiary motions). State funded legal aid (including representation by a patron attorney) is available, but the indigence threshold is very low: the state pays for the legal aid if the party's monthly per capita income does not exceed the minimum old age pension (HUF 28,500, or EUR 100), or – if the party lives alone – his/her monthly net income does not exceed 150% of the minimum old age pension (HUF 42,750, or EUR 145) and advances the fees and costs of the legal aid provider if the party's income does not exceed 43% of the gross average national salary of the second year preceding the year in which the legal aid is provided (HUF 87,118, or EUR 300).⁶² Another deterring factor may be that if the plaintiff loses the case he/she has to pay the other party's legal costs.

Lawsuits launched due to the violation of inherent rights fall into the competence of county courts located in county seats, which means that if the plaintiff 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 plaintiff is only obliged to appear in court if the court wishes to hear him/her in person). Furthermore, civil proceedings can be very lengthy: up to 3-4 years.

Labour courts

In Hungary, so called “labour and administrative” courts apply the Labour Code. The most important remedies in labour law are the following: (i) the declaration of an agreement as null and void (Article 8); (ii) order to continue employment [Article 100 Paragraph (1)]; (iii) reinstatement and the payment of average earnings for a maximum of twelve months [Article 100 Paragraph (4)]; (iv) employer's full liability for damages (Article 174) including the payment of lost income, material damages and justified expenses (Article 177). As to the barriers and deterring factors, the same can be said as in relation to civil court cases.

Administrative procedures

Before the ETA came into force, procedures used to be field-specific. Different administrative organs had powers to act in the different sectors. With the coming into force of the ETA, this has partly changed. The Equal Treatment Authority (hereafter: Authority) has authorisation to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.).

Besides the authorisations required by the Racial Equality Directive, this body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination. (Section 6.5 will deal with the sanctions that the Authority is

⁶² Articles 5 and 6 of Act LXXX of 2003 on Legal Aid.



entitled to impose, and the Authority's organisation will be described in detail in Chapter 7.)

The establishment of the Authority did not mean that all the administrative organs that used to have authority to act in discrimination cases were deprived of their powers. This made it necessary to create a system preventing a clash of authority. Below we describe the most important administrative organs having powers in discrimination cases, and then we outline the distribution of authority between them.

With regard to barriers and deterring factors, the following can be said. The administrative organs are obliged by Article 3 of the Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities (GPSA) to fully establish the facts of a given case, therefore, the role of legal assistance is not as crucial as in court cases, although the involvement of a lawyer is obviously an asset. Furthermore, administrative proceedings are significantly shorter than court cases. On the other hand, administrative bodies may not grant compensation to the victim and may not oblige the discriminator to apologise or provide moral remedy in any other way.

Access to goods and services

Under Article 45/A Paragraph (2) of Act CLV of 1997 on Consumer Protection (hereafter: Consumer Protection Act), the consumer protection authority shall monitor that provisions related to the requirement of equal treatment are respected in the course of access to goods and services, and in the event that a breach is found, the authority shall conduct proceedings. Under Article 47, if the authority establishes the breach of the provisions guaranteeing consumers' rights (including the requirement of non-discrimination), it may apply a number of sanctions, including a fine, the maximum amount of which is determined by the annual revenue of the service provider concerned.

Education

In terms of Article 84 of the Public Education Act, the decision of an educational institution or its maintainer shall be null and void, if it violates the requirement of equal treatment. Those can request that a discriminatory decision be declared null and void, who are concerned by the decision. If it may not be established who is concerned, anyone can request that the decision be declared null and void. Depending on who delivered the discriminatory decision, the person entitled to request that a decision is declared null and void may turn to a) the maintainer of the educational institution (most frequently the local council) or the court. In the procedure aimed at establishing that a decision is null and void the burden of proof is reversed, i.e. the decision maker shall be obliged to prove that the decision is not null and void.



Distribution of powers

If a service provider discriminates against an employee, both the Authority and the consumer protection authority has competence to examine the case and impose sanctions on the discriminator. It was therefore necessary to devise a system for distributing the cases. The key principle is that it is up to the victim to decide which authority he/she wishes to turn to:

Under Article 169/C Paragraph (1) of the GPSA, a violation of the principle of equal treatment within the scope of the ETA shall be investigated by a) the Authority or b) another public administrative body that has been granted authority in a separate act for assessing violations of the principle of equal treatment, as chosen by the offended party.

In terms of Article 169/C of the GPSA, in order to avoid double procedures, the Authority shall inform other organs, and other organs shall inform the Authority about the initiation of a procedure into a case of discrimination, as well as the procedure's outcome, or about the outcome of the subsequent judicial review, if there is one. Furthermore, if a procedure has been initiated before any public administrative body into a case of discrimination, the other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall suspend their procedure initiated in the same case with regard to any other person until a binding decision is made in the matter. If the case has been judged by any public administrative body, then other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the former public administrative body.

This means the following. If for example a group of Roma people are denied access to a pub, the members of the group can decide whether they turn to the Authority or the consumer protection. If one of them turns to the Authority, it shall notify the consumer protection, as the case falls into the consumer protection's authority as well. If then another member of the group files a complaint with the consumer protection, this organ may not proceed with regard to the first complainant, and shall suspend its procedure with regard to the second one. Once the Authority has made a decision on the case, the consumer protection may continue its procedure, but it has to base its decision on the facts established by the Authority.

The Authority has some degree of dominance though, as under Article 169/C Paragraph (6), the Authority may participate as an interpleader in the judicial review of a public administrative decision brought by another public administrative body concerning the principle of equal treatment.

No parallel proceeding of the Authority and a court (civil or labour) is possible. In terms of Article 169/F of the GPSA, if the victim of discrimination also files a lawsuit with the court, the Authority shall suspend its procedure until the case is adjudicated,



and notifies the court about the suspending decision. When the court case is closed, the court notifies the Authority about its decision. The Authority then can proceed but is shall do so on the basis of the facts of the case as established by the court. If the case has been judged by the court before the victim turns to the Authority, the Authority a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the court.

Petty offence proceedings

Petty offence proceedings in the Hungarian legal system are quasi criminal proceedings devised for small scale violations. Their procedural rules are set out in Act LXIX of 1999 on Petty Offences. Some petty offences are punishable with detention of up to 60 days, but none of the offences related to discrimination fall into this category.

Petty offences are decided upon by the general petty offence authority (the local notary) or a specialised authority. The decision is subject to two levels of judicial review. At first, the court reviews the decision on the basis of the case file, but if the person under proceeding wishes to challenge the judicial decision delivered this way he/she may request a hearing. The judicial decision delivered after the hearing may not be appealed.

Discrimination in a number of fields qualifies as a petty offence. The relevant offences are presented below. It has to be noted that under Article 19 Paragraph (3) of the ETA, the shifted burden of proof does not apply to these proceedings. No costs on the part of the aggrieved party emerge in such proceedings.

Employment

Under Article 93 of Government Decree 218/1999 on Petty Offences (hereinafter: Petty Offences Decree), the employer who refuses to hire a person owing to his/her gender, age, affiliation with a national minority, race, origin, religion, political conviction, belonging to a trade union or activities related thereto, or any other ground that is not relevant from the point of view of the occupation, or discriminates between employees on the basis of such grounds is liable to be fined up to HUF 100.000 (345).

Under Article 96 of the same Decree, if a private employment agency differentiates between employees on the basis of gender, age, family status, disability, affiliation with a national minority, race, origin, religion, political conviction, belonging to a trade union or activities related thereto, or any other ground that is not relevant from the point of view of the occupation, is liable to be fined up to HUF 60.000 (EUR 205).



Education

Under Article 142 Paragraph (5) of the Petty Offences Decree, the person who, by deliberately violating legal provisions relating to public education discriminates against a child or student is punishable with a fine up to HUF 100,000 (EUR 345). The proceeding shall be conducted by the Government Offices seated in Budapest and the counties.

Health care

Under Article 101 Paragraph (1) Point (b) of the Petty Offences Decree, the person who – in relation to health care, child protection and social care services – discriminates against the person using the service on the basis of his/her gender, ethnic origin, nationality, religion or other opinion, origin, financial status or restricted legal capacity, shall be punishable with a fine up to HUF 50,000 (EUR 175). The proceeding is conducted by the local notary.

Conciliation procedures

General mediation procedure

Act LV of 2002 on Mediation (hereinafter: Mediation Act) entered into force on 17 March 2003. Under Article 1 of the Act, its aim is to facilitate the settling of civil law disputes emerging in connection with the personal and property rights of private and other persons in cases where the parties' right of determination is not limited by law. As no such limitation exists in relation to Article 76 of the Civil Code on the ban on discrimination, victims of discriminatory acts are entitled to resort to the mediation procedure, once the statute enters into force.

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 plaintiffs are liable to pay all costs.

Mediation by the Equal Treatment Authority

Under Article 64 of the GPSA, public administrative authorities are authorised to try to resolve the conflict through forging an agreement between the parties, if the circumstances of the case seem to allow it. Pursuant to Article 75 of the GPSA, if the parties reach an agreement in the course of the complaints procedure, the proceeding authority includes the agreement in a formal decision. If the attempt to have the parties reach an agreement is not successful, the authority continues its proceeding, and – depending on the result of the investigation – decides on the case.

As a public administrative body, the Equal Treatment Authority also has the above authorisations regarding friendly settlements. As of 1 October 2009, under Article 9



Paragraph (3) of the ETAD, the Equal Treatment Authority is obliged to try to forge a friendly settlement among the parties.

Although it is not expressly forbidden by the GPSA, the Authority's practice does not allow for friendly settlements including a financial compensation for the victim.⁶³

Education

Decree 40/1999 of the Minister of Education established the Commissioner for Educational Rights. Under Article 1 of the Decree, the Office of the Commissioner for Educational Rights is an independent, internal organisational unit of the Ministry of Education that promotes citizens' rights concerning education. The Decree establishes a special conciliation procedure.

Parents, students, teacher etc. have the right to complain, provided that all available administrative remedies are exhausted and less than a year has elapsed since the measures complained of (Article 5). Complaints relating to Articles 70/F and 70/G of the Old Constitution (right to education, right to the freedom of teaching), public education, higher education and vocational education and training can be brought to the Commissioner (Article 3). The explicit inclusion of Article 70/A of the Constitution in the scope would be highly advisable.

Complaints not dismissed by the Commissioner undergo the conciliation procedure. The Commissioner sends the petition to the institution complained of for a declaration and initiates that consensus be reached with the petitioner. In case of an agreement the Commissioner prepares a report and sends it to the parties concerned. If no consensus is reached, the Commissioner prepares a report on the results of the conciliation and calls on the institution to terminate the infringement. In case of non-compliance the Commissioner sends a recommendation to both the institution and its supervisory organ. The latter have the duty to respond within 30 days. The Commissioner reports to the Minister of Education (Article 7).

Other forums to be approached in cases of discrimination

The "Ombudsman"

Before 1 January 2012, there were four ombudspersons in Hungary: the Ombudsman for Civil Rights (General Ombudsman), the Ombudsman for Future Generations, the Ombudsman for the Rights of National and Ethnic Minorities (Minorities Ombudsman) and the Ombudsman of Data Protection. At present, there is one Ombudsman, the Commissioner for Fundamental Rights, who has two deputies responsible for the right of future generations and minorities respectively.

⁶³ Information from the Authority's staff.

Under Article 30 of the Fundamental Law the Ombudsman (who is appointed by two-thirds parliamentary majority vote for six years) investigates violations of fundamental rights and initiates general or individual measures to remedy such violations.

The status and proceedings of the Ombudsman is regulated by Act CXI of 2011. Any victim of acts or omissions of public authorities or public service providers can complain to the Ombudsman's office, provided that all administrative remedies are exhausted or none exist. The Ombudsman can also proceed *ex officio*.

The Ombudsman can investigate into any authority, including the armed forces, national security services, and policing organisations. He/she may request information, look into files, visit premises and can hear any employee of the examined authority. When finding a violation, the Ombudsman issues recommendations, to which the supervisory body of the authority found to be in breach of fundamental rights shall respond within 30 days. Further, the Ombudsman may (i) petition the Constitutional Court; (ii) initiate criminal or disciplinary proceedings; and (iii) propose that a legal provision be amended, repealed or issued.

The Ombudsman's main publicity weapon is the annual report submitted to Parliament. Further, he/she can request parliamentary investigations and debates.

The GPSA fails to settle potential clashes of authority between the Authority and the Ombudsman who also has the authority to conduct individual and comprehensive investigations into cases of discrimination. The ETA contains no solution for cases in which the conclusion of and the sanction imposed by the Authority is not in line with the opinion of the Ombudsman. It only restricts itself to exempting the decisions and measures of the Ombudsman from the Authority's investigation.⁶⁴

b) Are these binding or non-binding?

The binding or non-binding nature of the decisions by the above listed bodies are also set out above.

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

The different proceedings have different time limits. The most important ones are the following:

- A civil lawsuit based on the violation of inherent personal rights can be launched without any limitation, however, damages may be requested only if the lawsuit is launched within five years from the violation. After five years only so-called "objective" sanctions (e.g. an apology) can be asked for.

⁶⁴ Article 169/B, Paragraph (3), GPSA.

- The statute of limitation for labour lawsuits is three years, however, in certain cases (e.g. dismissals), a lawsuit may only be launched within 30 days from being informed about the employer's decision.
- Under Article 169/H, the Equal Treatment Authority's procedure may only be initiated within 1 year after the concerned person became aware of the violation, and within 3 years after the violation took place. Under Article 14/B of the ETAD, the Authority may only impose a fine in proceedings that are launched within one year from the discriminatory behaviour. In ex officio proceedings, a fine may be imposed only if the Authority launches its proceeding within three months from being informed about the violation. Other sanctions may be applied without time limitations.
- In petty offence procedures, the statute of limitations is six months, however, measures taken by the petty offence authority interrupt the lapse of this period, and it starts again. Even in such cases, no sanction may be imposed after two years from the violation.

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

Yes, this is possible. Under Article 349 (2) (a) of the Code of Civil Procedure, labour lawsuits also include those lawsuits that are related to the employment even if the lawsuit is launched after the employment relationship has ended. As outlined above, the statute of limitations for claims arising from an employment relationship is three years (Article 11 of the Labour Code). However, with regard to certain types of legal disputes the Labour Code (Article 202) limits the period open for initiating a lawsuit to 30 days after the injurious measure.

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

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

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

Under Article 3 of the ETA, a “**social and interest representation organisation**” means:

- **Any social organisation or foundation** whose objectives set out in its articles of association or statutes include the promotion of equal social opportunities of disadvantaged groups or the protection of human rights. (As of 1 February 2012 it is added to the definition that the protected ground shall be explicitly mentioned in the statutes, which means that for instance an LGBT organisation will not be authorised to launch procedures against discrimination concerning persons with disabilities, unless its statutes contain reference to disability. Based on the text of the law, the amendment should not prevent organisations

aimed to protect the rights of a particular group from taking action against intersectional discrimination if the protected ground that is relevant for them is among those that are concerned in the given case, but – in the absence of case law – it still needs to be seen whether a flexible or restrictive interpretation will be adopted.).

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

In terms of the ETA, **social and interest representation organisations** are entitled to act on behalf or in support of the victims of discrimination (see below). In addition, under Article 18 of the ETA, besides social and interest representation organisations, the **Equal Treatment Authority** is also allowed to – based on an authorisation by the victim – engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment.

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

As it is outlined above, three types of organisations (plus the Equal Treatment Authority) have been granted this kind of standing.

Under Article 3 of Act CLXXV of 2011 on the Right to Association (Act on Association), everyone has the right to form associations, provided that (i) the organisation is not aimed at or engaged in the violent seizure or exercise, or the exclusive possession of power; (ii) it is not aimed at or engaged in criminal activities; (iii) it is not aimed at or engaged in the violation of the rights and freedoms of others.

In terms of Article 4, an association shall be registered by the competent county court and is to be regarded as existing only if the court has registered it. In terms of Article 30 of Act CLXXXI of 2011 on the Court Registration of NGOs and the Procedural Rules Pertaining Thereto, the court shall not refuse to register a social organisation if it meets the legally required conditions.

Nationality self-governments exist by the power of law. Article 10 of the Nationalities Act authorises the minority communities to establish their self-governments.



Trade unions are social organisations organised for the protection of the interest of the employees. They are established along the same lines as other social organisations in accordance with the provisions of the Act on Association.

As it is outlined above, only those social organisations and foundations are authorised to act on behalf or in support of the victims, whose objectives set out in the articles of association or statutes include the promotion of equal social opportunities of disadvantageous groups or the protection of human rights, and they may only act to promote the right of those protected groups that are expressly mentioned in their articles of association. There are no further conditions for the legal standing.

Minority self-governments and trade unions have a legal standing only in a limited circle of cases (also outlined above).

Under Article 18 Paragraph (1) of the ETA, unless stipulated otherwise by the law, any social and interest representation organisation, as well as the Authority may – based on an authorisation by the victim – engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment.

In terms of Article 169/D Paragraph (2) of the GPSA, “social and interest representation organisations” are entitled to the rights of the concerned party in administrative proceedings initiated due to the infringement of the requirement of equal treatment, which means they can enter already running proceedings to support the complainant, but cannot initiate the proceeding if the victim has not done that.

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

When such organisations act in support of the victim by entering the proceeding, they do not need an authorisation.

In order for them to act on behalf of the victim, they need an authorisation in line with the general rules pertaining to authorisations (as prescribed by Article 196 of the Code of Civil Procedure). The usual practice is that they either give an authorisation to an attorney at law who is commissioned by the social and interest representation organisation, or they authorise an employee of the organisation in a way that in the authorisation it is indicated that that person is representing the victim on behalf of the organisation.

Unfortunately there no special provisions on victim consent in cases, where obtaining formal authorisation is problematic, e.g. of minors or of 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.

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

Action by all associations is discretionary.

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

The associations may not engage in criminal proceedings.

In administrative proceedings initiated due to the infringement of the requirement the above quoted Article 169/D Paragraph (2) of the GPSA expressly authorises "social and interest representation organisations" to engage in the proceedings and exercise the rights of the concerned party.

In civil lawsuits associations may act on the basis of an authorisation from the victim [based on Article 67 Paragraph (1) Point (j) of the Code of Civil Procedure and Article 18 Paragraph (1) of the ETA], but do not have an express right to act in support of the victim. Under Article 54 of the Code of Civil Procedure, anyone who has a legal interest in the outcome of the procedure may enter a lawsuit as an interpleader with the aim of assisting the party with whom their interests coincide. For an association to be able to enter the proceeding on this basis, a **legal** interest shall be substantiated, which – if interpreted narrowly – will be difficult in most cases.

We do not have knowledge of related case law.

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

Associations may not seek and obtain remedies independently from the victim.

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

There are no special rules on the shifting burden of proof where associations are engaged in proceedings.

- h) *Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of*

proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.

The possibility of bringing an *actio popularis* claim was introduced into the Hungarian system by Article 20 of the ETA. If the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by a) the Public Prosecutor; b) the Authority, or c) any social and interest representation organisation, provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. A social and interest representation organization may – if the above conditions prevail – also choose to launch a proceeding before the Authority. It needs to be noted that a specificity of such cases in relation to the burden of proof is that the substantiation of the danger of violation is sufficient on the part of the complainant organization (so no actual disadvantage needs to be substantiated).

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

The first case ever emerging under the ETA was the *actio popularis* claim brought by an LGBT rights organisation against a denominational university (and described in detail under section 3.2.8). The Chance for Children Foundation has launched a number of *actio popularis* claims with respect of the segregation of Roma pupils, one example being the Hajdúhadház case described under Section 2.3.1.

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

There is no separate set of rules for such cases, but nothing prevents associations from obtaining authorisations from more than one victim and launch one single case on their behalf. It needs to be added that since the Hungarian legal system does not recognise the classic form of class action, in such cases the claims of each victim will be examined individually.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of

existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Article 19 of the ETA provides for the shift of the burden of proof. It is applicable on all grounds of discrimination, in all fields and all types of procedures, except for criminal and petty offence proceedings. It shall be noted that Article 19 of the ETA addresses data protection concerns, when taking into consideration not only real but also assumed ethnic origin.

The test for the shift of the burden of proof only requires that the allegedly injured party substantiates, rather than proves, his/her claims. Substantiation involves a lower level of certainty: if therefore the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or the other party must have assumed so), then the burden of proof is shifted. The provision reads as follows:

- (1) In procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to launch an actio popularis claim shall substantiate that
 - a) the injured person or group has suffered a disadvantage, or – in a case of actio popularis claims – there is a direct danger thereof; and
 - b) the injured party or group possesses – or is by the violator assumed to possess – characteristics defined in Article 8.
- (2) If the case described in Paragraph (1) has been substantiated, the other party shall prove
 - a) that the circumstances substantiated by the injured party of the entity entitled to launch an actio popularis claim do not prevail; or
 - b) that it has observed or, in respect of the relevant relationship, was not obliged to observe, the requirement of equal treatment.

This provision is more advantageous for the victim than the Directives. The Hungarian solution requires plaintiffs or complainants to substantiate the disadvantage and protected characteristic – real or supposed by the perpetrator.

This is more generous than the solution applied by the Directives, because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way, whereas the Directives require that facts substantiating discrimination, i.e. a disadvantage caused because of the existence of a protected ground also be established. In the Hungarian system it is the task of the other party to prove that there is no such a link.

On 13 January 2006, the Equal Treatment Advisory Board (see Section 7.b below on the status of the Board) issued guidelines (revised in March 2008) on the shift of the burden of proof, setting it out in clear terms that it is not the complainant's obligation to prove that there was a causal link between the protected ground and the

disadvantage: the burden of not being able to prove that there was no such causal link shall fall on the alleged discriminator.⁶⁵

After certain misinterpretations, and difficulties in the beginning, the judicial practice seemed to accept the notion – judgments of higher courts provided positive examples of applying the difficult concept of the shifted burden of proof.⁶⁶ However, as late as 2010 (i.e. 5 years after the coming into force of the ETA), one can come across Supreme Court decisions that give rise to concerns as to the consistency of the application of the notion.

In the case serving as the basis of Decision no. Kfv.II.37.053/2010/8 of the Supreme Court, the complainant worked on the basis of an indefinite term contract as a financial director at the respondent until 2004, when she went on a maternity leave. In 2007, she wished to return, but her former position had been terminated by the time, and her former tasks were performed in the framework of a different position by a person employed for an indefinite term. The employer offered a lower level position to the complainant for a salary 15% less than the previous one. The complainant turned to the Equal Treatment Authority claiming that she had been discriminated on the basis of her motherhood. In its decision of 7 August 2008, the Authority established discrimination based on motherhood and the ground “other characteristic”. The employer requested judicial review from the Metropolitan Court, but the court upheld the Authority's decision on the basis that the new position offered by the employer was significantly different from the previous position, which was filled by a person employed for an indefinite term, although in such cases replacement is generally solved by employing someone for a definite term to enable the return of the mother. The employer turned to the Supreme Court for the review of the MC's decision.

In its decision dated 6 October 2010, the Supreme Court quashed the decision of the Authority and the Metropolitan Court on the basis that the Authority had failed to identify and set out in its decisions the evidence proving that there is a causal link between the complainant's motherhood and the disadvantage she had suffered. Referring to Article 4 of Directive 97/80/EC, the Supreme Court claimed that complainants are obliged to put forth evidence that make it at least likely that they have suffered a disadvantage because they belong to a certain group. Since the complainant in this case did not come up with such evidence and the Authority did not look into the issue, its decision shall be null and void, and in the repeated procedure the complaint shall be rejected as unsubstantiated.

The Supreme Court's decision fully disregards that the Hungarian regulation on the shifting of the burden of proof differs from that of the Directives in a way that is more advantageous for the complainants. As outlined above, the complainant shall only substantiate the disadvantage and the protected ground. If it is done, it is presumed

⁶⁵ See: http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_200804.htm.

⁶⁶ See for instance the decision of the Debrecen Regional Appeals Court (published as ÍH 2006. 115).



that there has been a causal link between the two, and it will be the respondent's task to prove the lack of the link. When the Authority did not require the complainant to provide evidence for the link, it proceeded in full accordance with the ETA. While the regulation can be criticised for making anti-discrimination regulation open to abuses, it is rather worrying that the Supreme Court did base its decision on the Directives instead of the Hungarian laws providing a higher level of protection to complainants.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

Before the ETA came into force, no general definition of victimisation existed in Hungarian law.

At present, victimisation is prohibited by Article 10 Paragraph (3) of the ETA, which claims that “victimisation is a conduct that causes infringement, is aimed at causing infringement, or threatens with infringement, against a person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts.”

In a case of victimisation, the same sanctions may be applied against the perpetrator as against discriminators. As we can see, the above definition extends the protection to persons providing assistance to the victim in any form.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

The system of sanctions has not become much more consistent with the coming into force of the ETA. Under Section 6.1 we already outlined most of the sanctions that may be applied in discrimination cases. Below we partly reiterate and partly supplement the list. We give a detailed description of only those remedial forums and legal institutions which are not described under Section 6.1.

General sanctions (applicable irrespective of the sector)

Besides the sanctions listed in Article 84 of the Civil Code applicable by regular Civil Courts in a lawsuit aimed at redressing the violation of the right to equal treatment as an inherent personal right (which include the possibility of awarding to the victim non-pecuniary damages), the sanctions imposed by the Equal Treatment Authority can be used to redress discrimination in any sector and based on any ground.



Under Article 169/I Paragraph (1) of the GPSA, 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 (2) prescribes that the legal consequences set out in Paragraph (1) shall be determined taking into consideration all circumstances of the case, with particular regard to those who have been affected by the violation of law, the consequences of the violation of law, the duration of the situation constituting a violation of law, the repeated demonstration of conduct constituting a violation of law and the financial standing of the person or entity committing such a violation.

Under Paragraph (4), the sum of the fine imposed by the Authority can range from HUF 50,000 (EUR 175) to HUF 6,000,000 (EUR 20,700).

Under Article 169/J, the decision of the Authority may not be appealed within a public administrative procedure, but its judicial review is possible according to the general rules applicable to public administrative decisions. The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Court. The Metropolitan Court shall proceed through a panel comprised of three professional judges (instead of the normal proceeding when only one judge is deciding on the case), if the plaintiff or the Authority requests so.

Education:

Besides Article 142 of the Petty Offences Decree (see under Section 6.1), two possibilities shall be mentioned.

Under Article 77 Paragraph (3) of the Public Education Act, the kindergarten, school, dormitory and the organiser of occupational training are objectively and fully liable regardless of their culpability for damages caused to children and students in relation to their placement in kindergartens, studies in schools, membership in a dormitory and in relation to occupational training. In relation to damages the relevant provisions of the Civil Code shall be applied, taking into account that the above organs may only be exempted from liability for damages if they prove that the damages occurred outside of their sphere of operation and were caused by an unavoidable reason. No damages shall be paid if they occurred as a result of the unavoidable conduct of the person injured.

This provision puts a higher degree of responsibility on educational institutions that they would normally have under the Civil Code with regard to damages caused through discrimination. Under the normal rules a party can be exempted from liability

for damages if he/she proves that he/she acted as it can be generally expected in the given situation, whereas educational liability is close to being objective.

As was outlined under Section 3.2.8, discriminatory educational decisions can be declared null and void, and in the last instance judicial review of the relevant decisions is available. Under Article 84 Paragraph (14) of the Public Education Act, if a discriminatory educational decision is declared null and void, the court may

- a) oblige the perpetrator to have the infringement discontinued and refrain from further infringement;
 - b) oblige the perpetrator to make restitution in a statement or by some other suitable means and to make, at his own expense, an appropriate public disclosure for restitution;
 - c) oblige the perpetrator to restore the state preceding the infringement, and to eliminate or deprive of its infringing nature, at his own expense, any object produced as the result of the infringement;
 - d) oblige the perpetrator to pay any annual saving achieved as a result of the infringement into the Public Education Development Fund;
 - e) oblige the maintainer to define the catchment area of the school in a way that it should meet the legal requirements aimed at reducing segregation (see Section 3.2.8.);
 - f) forbid for a definite period of time or until certain conditions are met the admission of new pupils or students, provided that their education can be solved in another educational institution within the perimeters of the same settlement.
- b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

Compensation (non-pecuniary damages granted by the court) is not capped: there is no upper limit. With regard to fines that can be imposed by administrative and petty offence authorities, the laws define the highest possible amounts (which are indicated in the respective sections above).

As to the amounts awarded in civil court cases, the following can be said. According to the Hungarian law, damages can be both pecuniary and non-pecuniary. In discrimination cases non-pecuniary damages are obviously more characteristic.

Since non-pecuniary damages cannot be quantified, it is up to the Court to decide about the quantum of the compensation. There is no upper statutory limit, however, Hungarian Courts for a long time tended to be rather cautious in establishing the amounts. In a number of cases concerning discrimination in access to services (most frequently the denial of Roma guest to enter discos and bars), the amount of compensation was quite steadily around HUF 100,000 (EUR 345). This is less than double of the current legally set monthly minimum wage, i.e. not a very dissuasive sanction.



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.

Punitive damages do not exist, but a so-called “fine to be used for public purposes” may be imposed by the Court if the amount of the damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is however payable to the State and not the victim, and is seldom applied.

With regard to the sanctioning practice of the Authority, it can be said that it applies fines between EUR 1,000 and 17,000.⁶⁷ In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1,400 and EUR 1,700 respectively. An EUR 1,550 fine was imposed for age-related discrimination on a travel agency, which dismissed several employees who were over 50, and within six months employed 4 new staff members, all of whom were around 30. A HUF 4,500,000 (EUR 15,500) fine was imposed on an employer who committed indirect discrimination (against persons going on a sick leave either because of their own illness or in order to care for their sick children) by reducing the salary of those who spend less than 85% of their working time in the workplace.⁶⁸

The highest amount ever was imposed on a bar found to be discriminating on the basis of ethnicity in relation to entry for the second time. In this case the Equal Treatment Authority imposed a fine of HUF 5,000,000 (EUR 17,250) on the bar.⁶⁹

It has to be noted that the sanctions imposed by the Authority have also shown a tendency of increase in the past years.

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims?*
- *the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

Information on the sanctions applied by the Authority is provided in the last paragraph of point b) above. With regard to courts, no statistics are available. Sentencing trends are also outlined under point b) above.

⁶⁷ See: <http://www.egyenlobanasmod.hu/kozadat.htm#ie1>.

⁶⁸ See: <http://www.egyenlobanasmod.hu/zanza/700-2007.pdf>.

⁶⁹ 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.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly).

For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

- a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin is the Equal Treatment Authority (hereafter: Authority) established by Article 13 of the ETA. It started its operation on 1 February 2005. Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure (ETAD) was adopted on 26 December 2004.

It needs to be pointed out that the Minorities Ombudsman also performs some of the functions required by Article 13 of Directive 2000/43: he conducts independent surveys concerning discrimination, publishes independent reports and makes recommendations on any issue relating to such discrimination. The Ombudsman has a very restricted possibility to assist victims in pursuing their complaints, and the scope of the Ombudsman's investigation is restricted to authorities and public service providers. For a detailed description of the Ombudsman's status and authorisations, see Section 6.1.

The Authority – which is the designated body according to the transposition process – is vested with the right and duty to act against any discriminatory act irrespective of the ground of discrimination (sex, racial or ethnic origin, age, etc.) or the field concerned (employment, education, access to goods, etc.). Besides the authorisations required by the Racial Equality Directive, the body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination.

The caseload of the Authority for the years 2005-2010 is summarised in the table below.

	2005	2006	2007	2008	2009	2010
Complaints of discrimination	491	592	756	1153	1087	1373
Decision on the merits of the case	144	212	186	356	351	224
Decisions establishing discrimination	9	27	29	37	48	40
Friendly settlement	6	13	3	23	18	36

Approximately 1,000 complaints were filed with the Authority in 2011. Discrimination was established in 42 cases, while a friendly settlement was reached in 39 cases. The aggregate amount of sanctions was HUF 9,150,000 (EUR 31,550), the average amount was HUF 830,000 (EUR 2,850).⁷⁰

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

Article 33 of the ETA defines the Authority as an autonomous administrative body with the overall responsibility to ensure compliance with the principle of equal treatment. In terms of Paragraph (3) of the Article, “the Authority is independent, it is subordinated only to the laws, it shall not be instructed in relation to the exercise of its duties; and performs its activities independently from all other organisations and without any external influence. Only an act of Parliament can set forth further tasks for the Authority”.

A recent legislative amendment changed the status of the Authority’s president, which was highly problematic from the point of view of the body’s independence, because the President (appointed for an indefinite term by the Prime Minister) could be dismissed at any time without justification. This is what happened not long after the new Government of Hungary was formed in May 2010. Although she had two years until retirement, the first President of the Authority (appointed in 2005) was dismissed as of 15 September 2010 without any justification, and a new President was appointed, although no professional criticism was formulated with regard to the first President’s activities. In its concluding observations on Hungary’s 5th country report under the International Covenant for Civil and Political Rights, the UN Human Rights Committee (HRC) expressed its concerns with regard to this issue.⁷¹

Under the newly adopted Article 35 of the ETA, the President of the Republic appoints the Authority’s President for nine years upon the recommendation of the Prime Minister. The criteria for the position are the following: (i) Hungarian citizenship; (ii) eligibility to be voted on in elections (this includes – among others – a clear criminal record); (iii) outstanding expertise in the field of human rights or the prohibition of discrimination; (iv) a bar exam and (v) at least five years of practice in the legal field or in public administration. The President may not be the member of any party and may not pursue political activities. He/she may not pursue paid activities with the exception of educational, scientific and art-related ones. He/she may not fill leading positions in economic enterprises.

The President can be only dismissed under very specific conditions: (i) if a conflict of interest arises and he/she fails to terminate the cause within 30 days; (ii) if he/she is

⁷⁰ http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf.

⁷¹ See: <http://www2.ohchr.org/english/bodies/hrc/hrcs100.htm>.

unable to perform his/her duties for over 90 days; (iv) if he/she intentionally provides false data in his/her financial statement (that he/she is obliged to make annually).

Budgetary independence is guaranteed by Article 34 of the ETA, which claims that the Authority is a central budgetary institution vested with so called “chapter authorizations”, which means that although its budget is included in the budget of the Ministry supervising the Authority, it is in charge of its own finances. In terms of Paragraph (2) of the Article, the Authority’s main budget lines of income and expenditures may only be reduced by the Parliament (with the exception of temporary measures necessitated by natural disasters threatening life and property).

This means that on the level of the legal framework, the Authority’s budgetary independence is secured. As to the actual financial resources however, we can say that despite a clearly growing work load, the Authority’s budget has been substantially decreased in the past years. The budget allocated for the year 2009 was HUF 207,500,000 (EUR 715,500),⁷² which was decreased to HUF 201,500,000 (EUR 695,000) for 2010.⁷³ This was further reduced by Annex 1 of Act CLXXXVIII of 2011 on Hungary’s Central Budget for 2012. HUF 86,700,000 (approx. EUR 300,000) are appropriated for staff costs, as opposed to the 2011 budget, which contained HUF 138,700,000 (EUR 478,000) for such costs. This is a close to 40% decrease. The material costs have also been reduced, although to a lesser extent: from HUF 32,900,000 (EUR 113,500) to HUF 25,100,000 (EUR 86,500) constituting a 24% cut.

According to information from the Authority, as a result of the cuts, the total number of staff had to be reduced from 31 (on 31 December 2010) to 22, but it was added that only 17 members of staff are covered by the appropriated budget, and the leadership of the Authority is seeking ways to keep the additional 5 persons.

It has to be noted that in 2009 the Authority received additional funds of HUF 911 million (EUR 3,141,000) in the form of grant financed by the European Social Fund and the Hungarian State. The grant is to be used over 4 years, and is to be spent on the setting up of (i) a regional system of lawyers providing potential complainants with legal advice and assistance in formulating their petitions; (ii) research activities; as well as (iii) training and awareness raising (for details see Section 8.1).

Under Article 14/A of the ETAD, the Authority may spend 50% of the imposed fines on certain aspects of its own operation, which – although it provides additional resources – is a highly questionable solution from the point of view of the Authority’s perception as a fully impartial body.

Before 1 February 2012, the Authority performed most of its duties in co-operation with an advisory board (the Equal Treatment Advisory Board, hereinafter: Advisory Board) whose members had extensive experience in the protection of human rights

⁷² www.egyenlobanasmod.hu.

⁷³ Information by Judit Demeter, President of the Authority.

and in enforcing the principle of equal treatment. The primary role of the Board was to assist the Authority's work with legal opinions on issues arising in the Authority's practice. The mandate of the previous Board expired in May 2011, and although new members should have been appointed by the Prime Minister within 30 days of the expiry, no steps were taken to do so.

Act CLXXIV of 2011 (adopted in December 2011) completely abolished the Equal Treatment Advisory Board as of 1 February 2012. The reasons attached to the amending Act state: "by now the opinions of the Board have provided guidance in all those issues that might have triggered debates in the Authority's work in relation to the ETA's application in the past years. In addition, the Metropolitan Court and The Supreme Court also set forth firm opinions on the provisions of the ETA in their judgments, so the courts play an important role in the ETA's interpretation, so there is no need for the Advisory Board."

This reasoning is questionable, as in the changing legal and social context, new problems may always emerge. Under the old rules, members of the Board were appointed following consultation with public bodies and NGOs participating in the implementation of equal treatment. As a result of this, some Board members came from the NGO community, which made it possible to channel the specific and very direct experience and knowledge of anti-discrimination NGO's into the work of the Board, and thus of the Authority. This possibility is not there anymore.

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The Authority is authorised and obliged to act against any discriminatory act irrespective of the ground of discrimination (sex, race, age, etc.) or the field concerned (employment, education, access to goods, etc.). The Authority's scope of competence extends to all the grounds and fields covered by the ETA (see above, under the relevant sections).

The competences of the Authority are set forth by Article 169/B of the GPSA and Article 14 of the ETA. They include the following:

- (a) based on a complaint or ex officio, the Authority shall conduct an investigation to establish whether the principle of equal treatment has been violated, or based on a complaint conduct an investigation to establish whether employers obliged to adopt an equal opportunities plan have abided by this duty, and deliver a decision on the basis of the investigation;
- (b) may initiate an actio popularis claim with a view to protecting the rights of persons and groups whose rights have been violated;
- (c) review and comment on drafts of legal acts and reports concerning equal treatment;

- (d) make proposals concerning governmental decisions and legislation pertaining to equal treatment;
 - (e) regularly inform the public and the Government about the situation concerning the enforcement of equal treatment;
 - (f) in the course of performing its duties, co-operate with the social and representation organisations and the relevant state bodies;
 - (g) continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment;
 - (h) provide assistance in the preparation of governmental reports to international organizations, especially to the Council of Europe concerning the principle of equal treatment;
 - (i) provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment;
 - (j) shall prepare an annual report to the Government on the activity of the Authority and its experiences obtained in the course of the application of ETA.
- d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

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

The right to conduct independent surveys is not explicitly formulated, but the possibility to do so is implicitly included in the ETA. In terms of Article 14 Paragraph (1) Point (e), the Authority shall “regularly inform the public and the Government about the situation concerning the enforcement of equal treatment”. Article 14 Paragraph (1) Point (h) claims that the Authority shall “provide assistance in the preparation of governmental reports to international organizations, especially to the Council of Europe concerning the principle of equal treatment”, in terms of Point (i) of the same Article, the Authority shall “provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment”. This is obviously only possible if the Authority possesses information about the nationwide situation concerning discrimination. Therefore, in the author’s view, the Authority’s right to carry out such surveys is not to be questioned. As to the practical possibility (financial and human resources), the circumstances for a long time prevented the Authority from fulfilling this task. This situation was changed by a 4-year grant of HUF 911 million (EUR 3,141,000) from the European Social Fund and the Hungarian State, in the framework of which altogether seven researches have been or will be carried out. The following ones have already been accomplished: (i) Gender Wage Gap and Segregation in Contemporary Hungary;⁷⁴ (ii) Employee Selection Practices in the Light of

⁷⁴ http://www.egyenlobanasmod.hu/tamop/data/TAMOP_EBH_1_english.pdf.

Discrimination;⁷⁵ (iii) Impact of the Equal Opportunity Plan;⁷⁶ (iv) Relations between Employers' Attitudes, Labour Market Employment of Employees with Protected Characteristics and Insuring Proper Working Conditions;⁷⁷ (v) Extent of Gaining Knowledge of One's Rights as a Victim of Discrimination – With Special Focus on Women, Roma, People with Disabilities, and LGBT people.⁷⁸

The mandate to publish independent reports and make recommendations concerning discrimination are set forth by Article 14 Paragraph (1) Point (d) of the ETA (The Authority shall “make proposals concerning Governmental decisions and legislation pertaining to equal treatment”), Article 14 Paragraph (1) Point (e) of the ETA (The Authority shall “regularly inform the public and the Government about the situation concerning the enforcement of equal treatment”, and Article 14 Paragraph (1) Point (j) of the ETA (The Authority “shall prepare an annual report to the Government on the activity of the Authority and its experiences obtained in the course of the application of ETA”), and finally Article 16 Paragraph (1) of the ETAD (“In order to continuously inform the public, the Authority shall on its website regularly publish its reports, proposals and detailed information concerning its activities”).

The key element of the Authority's activity is none of the three tasks envisioned by the Racial Equality Directive, but investigating into and deciding on individual instances of discrimination. In terms of Article 169/B of the GPSA, the Authority has the mandate to conduct independent investigations both *ex officio* and also based on individual complaints (“The Authority shall, based on a complaint or – in cases defined herein – *ex officio*, conduct an investigation to establish whether the principle of equal treatment has been violated, [...] and make a decision on the basis of the investigation”).

This is a quasi judicial function, so in this regard the service provided by the Authority goes beyond simple assistance in asserting claims. On the other hand, due to the scarce financial and human resources this function may in practice prevent the Authority from actually fulfilling the other tasks (with the exception of the annual report, the preparation of which is an obligation).

As to the legal sanctions applicable if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, see Section 6.5.

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

⁷⁵ http://www.egyenlobanasmod.hu/tamop/data/2.2_english_summary.pdf.

⁷⁶ http://www.egyenlobanasmod.hu/tamop/data/eselyegyenlosegiterv_vegleges_english.pdf.

⁷⁷ http://www.egyenlobanasmod.hu/tamop/data/2.4_english_summary.pdf.

⁷⁸ http://www.egyenlobanasmod.hu/tamop/data/MTA_1hullam_english_summary-2.pdf.

The most severe problems related to the Authority's independence (insufficient funding, the status of its President and its place within the governmental structure) have been described in great detail above, under point b). These factors obviously concern all the activities performed by the Authority.

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

This possibility exists. Under Article 14 Paragraph (1) (g) of the ETA, the Authority "shall continuously provide information to those concerned and provide assistance with regard to acting against the violation of equal treatment"

Under Article 18 of the ETA, unless stipulated otherwise by the law, based on an authorisation from the victim, the Authority may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Furthermore, in administrative proceedings launched due to the violation of the principle of equal treatment, the Authority shall be entitled to exercise the rights of a party.

As was outlined above, in terms of Article 20 of the ETA, if the principle of equal treatment is violated, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by – among others – the Authority, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.

Due to the above outlined problems of staffing, these types of activities are rather rare. The Authority has never launched an *actio popularis* lawsuit, and intervened in only one case during its history.⁷⁹

g) *Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).*

As outlined above, under Article 169/B of the GPSA, the Authority shall, based on a complaint or *ex officio*, conduct an investigation to establish whether the principle of equal treatment has been violated, and deliver a decision on the basis of the investigation.

The proceeding usually starts with a complaint (*ex officio* investigations are rare, their number is 3-4 per year on average),⁸⁰ which the Authority communicates to the other

⁷⁹ Data from Edit Gyarmati, Head of the Administrative and Legal Unit at the Authority.

⁸⁰ Data from Edit Gyarmati, Head of the Administrative and Legal Unit at the Authority.



party, which reacts to the complaint in writing. The complainant has the possibility to put forth comments in relation to the other party's reaction, and usually at this point the Authority holds a hearing where both parties are present. A decision may also be delivered without a hearing, but under Article 9 of the ETAD, this is an exceptional possibility. Under Article 10 of the ETAD, upon express request, there is a possibility to hear the complainant in the other party's absence.

The Authority is obliged by law to fully discover and establish the facts of the case, so it does not only rely on evidence put forth by the parties. It may resort to different sources of evidence, witnesses, documents and expert opinions being the most frequently applied methods.

Based on the results of the proceeding, the Authority delivers a decision. Under Article 169/I Paragraph (1) of the GPSA, 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.

Paragraph (2) prescribes that the legal consequences set out in Paragraph (1) shall be determined taking into consideration all circumstances of the case, with particular regard to those who have been affected by the violation of law, the consequences of the violation of law, the duration of the situation constituting a violation of law, the repeated demonstration of conduct constituting a violation of law and the financial standing of the person or entity committing such a violation. The sanctions can be applied jointly.

Under Paragraph (4), the sum of the fine imposed by the Authority can range from HUF 50,000 (EUR 175) to HUF 6,000,000 (EUR 20,700).

Under Article 169/J, the decision of the Authority may not be appealed within a public administrative procedure, but in accordance with the general rules applicable to public administrative decisions, the judicial review of the Authority's decision is possible. The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Court.

Under Article 169/G of the GPSA, the costs of the proceeding are advanced by the Authority and (with regard to its own costs) the respondent. If the complaint is rejected, the complainant is only obliged to pay the procedural costs if he/she has acted in bad faith.

In the court phase, the court fee is advanced by the state. If the plaintiff's (either the complainant or the respondent's) claim is rejected he/she has to repay both the court fee and the costs of the other party/parties (the Authority as defendant and the other party in the original proceeding as intervener).



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

As was outlined above, the Authority is an administrative decision-making body investigating complaints, delivering decisions on them and imposing sanctions on the perpetrators. Therefore, it does not set its own agenda and priority issues, it acts retroactively – in accordance with the types of complaints addressed to it. Consequently, we may not speak about a consistent approach on the part of the Equal Treatment Authority, though due to the structural characteristics of discrimination in Hungary, a large proportion of its complainants come from the Roma minority (see the quotes from the Authority's annual reports).

Furthermore, the researches mentioned under point d) focused greatly on the situation of the Roma in the labour market.



8 IMPLEMENTATION ISSUES

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

Describe *briefly* the action taken by the Member State

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

Since it was established, the Authority – which as a governmental agency is working under the supervision of the Government – has been active in disseminating information about the legal protection against discrimination. The President and staff of the Authority have been very open towards initiatives aimed at informing the wider public about the Authority's work as well as the possible remedies available for victims of discriminatory acts.

The Authority's website (www.egyenlobanasmod.hu) contains a lot of information, including the relevant legislation, a brief and clearly formulated description of the Authority's scope of competence and the Authority's case law.

Mention has to be made of a grant provided to the Authority with the aim of enhancing its effectiveness and accessibility in the framework of the so-called Social Renewal Operative Program 5.5.5 (hereafter: TÁMOP project). The TÁMOP project is financed by the European Social Fund and the Hungarian State, it lasts for 46 months, and was started in 2009.⁸¹ The total TÁMOP project budget is HUF 911 million (EUR 3,141,000).

As the first element of the project, an equal treatment referee system was established in September 2009. The 20 referees (lawyers, attorneys at law) are seated in the so-called Houses of Opportunities (a regional equal opportunities network) in every county and in the capital. They are forwarding discrimination complaints, provide assistance to the complainants in formulating their petitions and operate as a kind of filtering system. In 2010, 1226 complainants were served by the system,⁸² whereas in 2011, 2,936 persons turned to the referees for assistance.⁸³

The TÁMOP project consists of three further elements. The first element is a series of campaigns, aimed at sensitising the general public.

The second element consists of trainings held by the Authority for teachers, social workers and the media, combined with workshops with NGOs and public administration staff members. A training module has been developed and by the end

⁸¹ For the project grant see http://www.nfu.hu/megjelent_a_tamop_5_5_5_kiemelt_projekt.

⁸² http://www.egyenlobanasmod.hu/data/2010tevekenysege_szamok_tukreben.pdf.

⁸³ http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf.

of 2010, 152 persons,⁸⁴ in 2011 another 463 persons⁸⁵ accomplished the Authority's training, which is a combination of sensitisation and legal knowledge transfer.

As it was also mentioned above, seven researches and a final study constitutes the third element of the project: four researches has dealt with discrimination in the field of employment, one has analysed clients' awareness of their rights and the remaining two will look into discriminatory practices within the system of public administration. In the framework of the project surveys have been and will be conducted testing the social attitudes towards non-discrimination and diversity.

The project also contains a travelling exhibition of works of young people related to the issue of non-discrimination. The exhibition's aim is to raise the awareness of youth about this problem.⁸⁶

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

The Authority has been quite active in dialogue with NGOs as well. Its President and other staff members have participated in several NGO forums and trainings disseminating information about the Authority's work and practices, and trying to establish contacts with NGO representatives.

NGO activists have participated in significant numbers in the training program described above under point a).

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Trade union representatives have participated in significant numbers in the training program described above under point (a), but apart from that little has been done in this area.

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

After the change of government, a Secretary of State for Social Inclusion has been appointed within the Ministry of Administration and Justice.⁸⁷ He is responsible for the social inclusion of the Roma, but also of people living in disadvantaged regions, people with low level education and persons who cannot be employed due to their health status.

⁸⁴ http://www.egyenlobanasmod.hu/data/2010tevekenysege_szamok_tukreben.pdf.

⁸⁵ http://www.egyenlobanasmod.hu/data/EgyenloBanasmodHatosag_2011_jogtudatossag.pdf.

⁸⁶ <http://www.egyenlobanasmod.hu/tamop/#vandorkiallitas>.

⁸⁷ <http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/tarsadalmi-felzarkozasert-felelos-allamtikarsag/felelossegi-teruletek>.

According to its website, the State Secretariat sees the Roma education grant programs and other educational initiatives as its top priority. It needs to be seen in what direction the Secretariat's activities will develop.

The secretariat has launched a number of initiatives to improve the situation of the Roma (specifically, or in the framework of programs aimed at marginalised social groups in general). An example is the HUF 275.500.000 (EUR 950,000) support for innovative methods aimed at promoting the successful elementary education of disadvantaged children.⁸⁸ In the area of housing, mention may be made of the complex program aimed at the elimination of segregated Roma settlements distributing HUF 4.7 billion (EUR 16.2 million) from primarily EU sources among 30-50 projects.⁸⁹ As these programs have been launched in February 2012, it is still to be seen what results they will yield.

It also needs to be mentioned that 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.⁹⁰ While welcoming the effort, NGO's active in the field prepared a critical analysis of the document and suggested changes to the National Social Inclusion Strategy.⁹¹

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

In terms of Article 200 of the Civil Code, contracts that are contrary to a law, or are concluded with the intention of circumventing a legal obligation shall be null and void. Contracts that are manifestly immoral are also null and void.

Furthermore, under Article 8 and 13 of the Labour Code an agreement (individual or collective) that violates labour law regulations shall be null and void. If annulled or successfully contested, the agreement shall be invalid (Article 9). If invalidity results in damages, these shall be paid (Article 10).

⁸⁸ <http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/huszonhatan-nyertek-az-iskola-halo-programban>.

⁸⁹ <http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/komplex-telepfelszamolasi-programot-indit-a-kormany>.

⁹⁰ <http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/tarsadalmi-felzarkozasert-felelos-allamtitkarsag/hirek/az-europai-unio-tagallamai-kozul-magyarorszag-nyujtotta-be-elsokent-felzarkozasi-strategiajat>.

⁹¹ <http://tasz.hu/node/2600>.

b) *Are any laws, regulations or rules that are contrary to the principle of equality still in force?*

There are a number of statutes though with regard to which the infringement of the principle of equal treatment may be argued (for instance, differences in the status of married couples and life partners, taking into consideration the fact that the possibility of getting married is not open for homosexual couples) .

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, the latter 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 the 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 decision is served to him/her) the Constitutional Court and ask the court to abolish the provision or quash the judicial decision. If there is no judicial remedy, it is also possible to petition the Constitutional Court within 180 days of the coming into force of the norm in question. The unconstitutional statute loses effect on the day of the publication of the Constitutional Court's decision and from this day on, it may not be applied. In certain cases the Court may abolish norms retroactively or *pro futuro*, leaving time for the legislator to amend it, or adopt new legislation.



9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

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

The Ministry of Administration and Justice, the Ministry of National Resources and the Equal Treatment Authority are primarily responsible for dealing with or coordinating issues regarding antidiscrimination on the grounds covered by this report.

According to his website, the areas of responsibility of the Secretary of State for Social Inclusion mentioned under 8.1, also include the ban on discrimination on the grounds of racial or ethnic origin, religion or other belief, disability, age and sexual orientation.⁹²

There is no comprehensive anti-racism or anti-discrimination National Action Plan at present.

⁹² <http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/tarsadalmi-felzarkozasert-felelos-allamtikarsag/felelossegi-teruletek/eselyegyenloseg>.



ANNEX

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

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: Hungary

Date: 01 January 2012

Title of Legislation (including amending legislation)	Date of adoption: Day/mont h/year	Date of entry in force from: Day/mo nth/year	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.					e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Fundamental Law of Hungary (Article XV)	25/04/2011	01/01/2012	All	Constitutional law	All	prohibition of discrimination
Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities	28/12/2003	27/01/2004 with modifications	All	Civil and administrative	All, with special focus on: employment (public and private), social	prohibition of direct and indirect discrimination, victimisation, instruction to

					protection and healthcare, housing, education, access to goods and services	discriminate, harassment etc.; creation of a specialised body; shift of the burden of proof; legal standing of associations; sanctions of discrimination, etc.
Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Provisions of its Proceedings	26/12/2004	01/01/2005 with modifications	All	Administrative	All	creation of a specialised body
Act IV of 1957 on the Civil Code (Art's 75, 76 and 84)	11/08/1959	01/05/1960 with modifications	All	Civil	All (with certain exceptions, where sectoral provisions are in place)	prohibition of discrimination, sanctions of discrimination
Act CLV of 1997 on Consumer Protection	23/12/1997	01/03/1998 with modifications	All	Administrative	Access to goods and services	creation of an organ with a role in combating discrimination, sanctioning of discrimination

Government Decree 218/1999 on Petty Offences (Art's 93, 96, 101 and 142)	28/12/1999	01/03/2000	Varied (sex, age, nationality, race, origin, religion, political opinion, belonging to a trade union, any ground not related to employment, financial status, etc.)	Petty offence law	Employment, health care and education respectively	sanctioning of discrimination
Act XXII of 1992 on the Labour Code	04/05/1992	01/07/1992 with modifications	All	Labour law	Employment	prohibition of discrimination, sanctions of discrimination
Act LXXIX of 1993 on Public Education	03/08/1993	01/09/1993 with modifications	All	Administrative law	Education	prohibition of discrimination, sanctions of discrimination
Act CXI of 2011 on the Commissioner for Fundamental Rights	26/07/2011	01/01/2012	All (primarily racial or ethnic origin)	Constitutional law	Acts of public entities and public service providers in all fields	creation of an organ with a role in combating discrimination,

Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities	01/04/1998	01/01/1999 with several modifications	Disability	Civil law	Numerous fields including education, employment, cultural activities, accessibility of public services, transportation	Setting out the most important principles in relation to the inherent rights of people with disabilities, reasonable accommodation provisions (limited in scope)
Act CXL of 2004 on the General Rules of the Proceedings and Services of Public Administrative Authorities	28/12/2004	01/09/2005 with several modifications	All	Administrative	All	Procedural rules of the Equal Treatment Authority



ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Hungary

Date: 01 January 2012

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	06/11/1990	05/11/1992	--	Yes	Theoretically yes, practically with some difficulties
Protocol 12, ECHR	04/11/2000	Not ratified	--	--	--
Revised European Social Charter	07/10/2004	20/04/2009	--	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	--	Yes	Theoretically yes, practically with some difficulties
Framework Convention for the Protection	01/02/1995	25/09/1995	--	--	Theoretically yes, practically with some difficulties



Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
of National Minorities					
International Convention on Economic, Social and Cultural Rights	25/03/1969	17/01/1974	--	--	Theoretically yes, practically with some difficulties
Convention on the Elimination of All Forms of Racial Discrimination	15/09/1966	04/05/1967	--	Yes	Theoretically yes, practically with some difficulties
Convention on the Elimination of Discrimination Against Women	06 /06/1980	22/12/1980	--	Yes	Theoretically yes, practically with some difficulties
ILO Convention No. 111 on Discrimination	not indicated on ILO website	20/06/1961	--	--	Theoretically yes, practically with some difficulties
Convention on the Rights of the Child	14/03/1990	07/10/1991	--	--	Theoretically yes, practically with some difficulties



Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of Persons with Disabilities	30/03/2007	20/06/2007	--	Yes	Theoretically yes, practically with some difficulties