

## **Executive Summary**

### **Country Report Hungary 2008 on measures to combat discrimination**

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#### **1. Introduction**

Hungary is a country of 10 million. Fifteen years after the political transition from a Socialist one-party system into democratic pluralism, Hungary became a member of the European Union. The creation of democratic laws and institutions has been paralleled by an increasing awareness of the principle of equal treatment and non-discrimination. There are however differences between the different grounds as to when this growing awareness resulted in legislative measures and other tangible achievements. (For instance, the principle of non-discrimination on the ground of religion was prescribed in a separate law as early as 1990, the first medium term action program for the social integration of the Roma was adopted in 1997, while discrimination on the ground of sexual orientation has only recently become a topical issue.)

The issue of discrimination came to the limelight in connection with the debates generated by the process leading to the adoption of a comprehensive anti-discrimination law in late 2003 (Equal Treatment Act – ETA). The law (which covers all the grounds covered by Article 13 EC) establishes the Equal Treatment Authority – an organ responsible for combating discrimination in all sectors and with regard to all grounds. The activity of the Authority, which started its operation on 1 February 2005, as well as strategic litigation cases taken by NGOs have further raised awareness concerning the issue and the situation of the groups most exposed to discrimination.

The most vulnerable group from the point of view of discrimination is that of the Roma. The only “visible” ethnic minority in Hungary constitutes 4–7 per cent of the country’s population. Despite recent positive legislative changes and significant amounts spent on integration programs, the Roma face deeply rooted discrimination in education, employment, health care, housing and access to goods and services. They are greatly over represented among the poorest layers of society. During 2008, the political and economic crisis caused the strong anti-Roma sentiments of the Hungarian society to surface in an unprecedented manner: while well-established parliamentary parties have started to use uncoded anti-Roma language, physical attacks against Roma people have become frequent, sometimes leading to deaths.

The present Government has so far done better than its predecessors with respect to dialogue and consultation with NGOs and social partners concerning the issue of discrimination (an example of this was the drafting of the ETA). The Equal Treatment Authority (which is embedded in the Governmental structure and functions under the supervision of the Ministry of Social Affairs and Labour) has established good relations with civil society and proved to be very open to different forms of cooperation with civil actors starting from joint trainings to involvement of NGO activists in matched pair testing exercises carried out by the Authority.



## 2. Main legislation

Hungary has ratified most of the major international instruments combating discrimination, including the UNESCO Convention against Discrimination in Education, ILO Convention No. 111, and the International Convention on the Elimination of Racial Discrimination. The country is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The country has signed but not yet ratified Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The corner stone of the regulation is the general anti-discrimination clause of the Constitution. The general ban on discrimination set forth by this constitutional provision is detailed by the ETA – the comprehensive anti-discrimination code that was adopted in late 2003, came into force on 27 January 2004 and was amended thoroughly to guarantee compliance with the EU acquis in late 2006. Sectoral laws (civil law, labour law, the laws on health care, education and so on) invoke the provisions of the ETA in all discrimination-related instances, thus creating a great degree of consistency within the system. The ETA covers all five grounds included in the Directives and in some respect (e.g. grounds covered and material scope) goes beyond the requirements of the Directives.

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

Regarding the practical enforcement of the laws, it can be said that in spite of the unquestionable commitment of the Equal Treatment Authority and the increasing willingness of courts to penalize discriminative acts, the sanctions applied may still not reach the level where they could be described as truly dissuasive, although in the year 2007 some very high fines have been imposed by the Authority. Furthermore on the positive side, more and more victims seem willing to come forth with complaints, and a growing number of NGOs are involved in strategic litigation, which entails the promise of the development of substantial case law eliminating the uncertainties of legal practitioners dealing with discrimination cases.

## 3. Main principles and definitions

The ETA contains the definition for both direct and indirect discrimination. The definitions are greatly but not fully based on the concepts used by the Directives. Harassment, instruction to discriminate and victimisation are defined and outlawed in the Hungarian system. The circle of exemptions may however be wider than allowed by the Directives.



The ETA distinguishes between three types of exceptions:

- i) a general objective justification;
- ii) special exceptions; and
- iii) positive action.

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

The third exception from the requirement of equal treatment is positive action. The ETA does not use the concept of reasonable accommodation. Although the Hungarian legal system does have institutions that have an effect similar to that of reasonable accommodation, this notion is still to be introduced.

Discrimination on all of the grounds listed in Article 13 EC is expressly prohibited but Hungarian national law covers other grounds of discrimination as well. The ETA sets forth an open ended enumeration of the protected grounds. The 19-item list includes – among others – sex, racial origin, 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, family status, motherhood (pregnancy) or fatherhood, age, and financial status. 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. This also solves the problem of discrimination by association, since this can be drawn under the scope of “other ground”.

The concept of multiple discrimination is not known in the Hungarian legislation, and there are no plans to adopt specific regulations addressing this issue separately.

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

The ETA approaches the issue of scope from the personal, instead of the material aspect. It prohibits any discrimination in the public sector, so with regard to this sector the statute's scope is in fact 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 (regardless of the field concerned):

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

Although it is not easy to identify a field listed in the Directives, where a private actor who falls under the personal scope of the Directives in a given field does not fall under the personal scope of the Hungarian legislation, such discrepancies may arise (e.g. with regard to racial discrimination in fully private education or harassment by colleagues). Therefore, this issue may require further consideration.

## 5. Enforcing the law

When there is a case of discrimination, victims may choose from among a number of options to seek remedy, depending partly on the field where discrimination has occurred. They can turn to

- i) the civil court;
- ii) the labour court (if discrimination occurs in connection with employment);
- iii) the Equal Treatment Authority (since 1 February 2005);
- iv) the administrative bodies authorized to sanction discrimination in their specific fields (e.g. the Consumer Protection Inspectorate in the field of access to goods and services or the Labour Inspectorate in the field of employment);
- v) to the local notary (in order to initiate a petty offence procedure in a number of fields, such as health care or employment).

It is possible for a victim of discrimination to initiate the procedure of the Equal Treatment Authority, or any other administrative organ before bringing a lawsuit based on the Civil Code or the Labour Code. If however, one starts a case before an ordinary or a labour court, administrative organs, including the Equal Treatment Authority will not conduct proceedings.

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

In practice, Labour Inspectorates, Consumer Protection Inspectorates and local notaries have proven to be rather inactive in cases of discrimination. Until the establishment of the Equal Treatment Authority, lawsuits brought before civil courts and labour courts were the forms of remedy most victims of discrimination had resorted to.



The setting up of the Equal Treatment Authority has modified this tendency. It seems that complainants first initiate proceedings before the Equal Treatment Authority, which carries out its investigations and arrives at a decision relatively quickly (within 75 days).

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

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

The ETA has significantly changed the situation by claiming that any social and interest representation organisation with a legitimate interest, as well as the Equal Treatment Authority may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Furthermore, 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.

Another instrument in the hands of social and interest representation organisations is the possibility to launch an *actio popularis* claim. If the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by any social and interest representation organisation (as well as the Public Prosecutor and the Equal Treatment Authority), provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. (Thus, in this case the possibility to initiate a lawsuit only prevails if not all the individual victims may be identified.) This instrument has been resorted to in a number of cases, the very first one initiated by a gay and lesbian rights protection organization against a denominational university issuing a declaration on the exclusion of homosexual students from theological education, and other ones launched by a foundation aimed at the desegregation of education against local councils failing to take measures against the segregation of Roma pupils in their schools.

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

Before the coming into force of the ETA, the shift of the burden of proof in discrimination cases existed only in the field of labour law. Its application by labour court judges was not without problems, some significant case law started developing. The ETA extended this legal institution to all discrimination cases but at the same time somewhat restricted the criteria of its application.

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

Until the establishment of the Equal Treatment Authority, the civil and labour courts had most frequently been addressed by victims of discrimination, while other possibilities had rarely been resorted to due to the reluctance of the organs entitled to apply them. NGOs and human rights activists also often voiced the criticism that damages applied by courts are not dissuasive enough. In spite of this fact, courts have so far been the most effective guards of the principle of non-discrimination (at least in comparison to other competent organs). With the establishment of the Equal Treatment Authority this has changed, but due to the reasons outlined above (individual financial compensation can still only be provided by the courts), the role of the courts has not been significantly modified.

There have been some positive developments in connection with matched pair testing. For a long time this was a highly debated legal instrument in Hungary. NGO's have for a long time been trying to apply situation testing to substantiate cases of individual victims, however, in the interpretation of numerous judges, the result of testing performed days after the incident complained about may not be taken into account as evidence concerning the original infringement, because no conclusions can be retrospectively drawn from the result of the testing with regard to it.

In this situation the statutory acknowledgment of situation testing by Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure adopted in December 2004 was an extremely important development. The Decree expressly authorizes the Equal Treatment Authority to conduct testing in the course of its investigations and to take its result into regard as a piece of evidence when making a decision.

## **6. Equality bodies**

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin (Equal Treatment Authority) started its operation on 1 February 2005. The Authority is a public administrative body with the overall responsibility to ensure compliance with the principle of equal treatment. It is a budgetary organ working under the instruction of the Government, supervised by the Minister of Social and Labour Affairs (hereafter: Minister). It however may not be instructed in relation to the exercise of its duties defined in the ETA.

The Authority deals with discrimination based on any of the characteristics protected under the ETA (this means that the scope of the grounds protected by the authority goes way beyond what is prescribed by the Directives – see the last paragraph of Section 3), but its activities are limited to ensuring equal treatment.

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

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

As it was outlined above, the Authority functions under the supervision of the Ministry of Social Affairs and Labour, however the Ministry may not instruct the Authority in relation to the exercise of its duties defined in the ETA. There are still two crucial problems regarding the Authority's independence:

- i) its President can be dismissed by the Prime Minister at any time without any justification;
- ii) despite increases in its budget and staff for 2008, the Authority's financing still does not seem sufficient for the full performance of all its tasks. In spite of these structural problems, there have not been attempts to intervene with the Authority's work in the first three years of its operation.

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