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

COUNTRY REPORT 2007

Hungary

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State of affairs up to 29 February 2008

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

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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 between 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 Constitution, 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.

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 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.

- Due to the comprehensive material scope of Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities (Equal Treatment Act – hereinafter: 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).
- The obligation of reasonable accommodation has not been unambigously transposed into the Hungarian law. The problem is especially acute with regard to employing people with disabilities, in spite of a new 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.)

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

Hungary has not taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability.

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:

a) Name of the court
b) Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
c) Name of the parties
d) Brief summary of the key points of law (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 2 Directives, 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)

Supreme Court
BH 1995. 698 (Complex CD Corpus Iuris)

The plaintiffs were persons with disabilities who used wheelchairs. They claimed that the fact that the offices of the defendants (a bank and an insurance company) were not accessible to them, amounted to a breach of their inherent personal right to equal treatment.

The court held that there had been a breach of the plaintiffs' inherent rights (as set forth in Article 76 of the Civil Code[1]), and stressed that the occurrence of an actual disadvantage (such as a failed attempt by the plaintiffs to actually open a bank account) was not necessary for such a breach to be established.

Supreme Court
BH 2001. 366 (Complex CD Corpus Iuris)

The defendants in this case were skinheads who set the Roma plaintiffs' house on fire with Molotov cocktails. After the criminal court convicted the defendants, the plaintiffs brought a civil lawsuit against them for pecuniary and non-pecuniary (moral) damages.
The court established that the fact that the criminal offence was racially motivated in itself established a breach of the plaintiffs' inherent personal right to equal treatment, on which a claim for non-pecuniary damages can be based.

Supreme Court
EBH 2001. 515 (Complex CD Corpus Iuris)

The plaintiffs were Roma pupils of an elementary school, who –because of their lice infestation from time to time – were not allowed to use the Physical Education room for eight years which was maintained for the pupils, and as a deviation from the previous years' school practice, the plaintiffs had to attend a different "Farewell Ceremony" that was held separately from the "Hungarian" pupils finishing their education.
The court established that the segregation of the plaintiffs from the pupils of the school in this way was a discrimination against the Plaintiffs, and this was based on the origin and the nationality of the Plaintiffs. The segregation could not be adequately explained solely by the time-to-time lice infestation of certain Roma children. According to the court's argumentation, "the fact that the defendant local council (the maintainer of the school) and the school wanted to protect the health of the other pupils with this decision is irrelevant when the determination of the discrimination is assessed. It is clear that the school must protect the rights and interests of every pupil, but the school cannot comply with this obligation by regularly discriminating the minority to protect the majority. This cannot relieve them from the consequences of an illegal behaviour."

Supreme Court
EBH 2002. 625 (Complex CD Corpus Iuris)

The lawsuit was launched against a disco club where Roma youth were not allowed to enter because they did not have membership cards. At the same time, non-Roma matched pair testers were let in without any problem and were provided with their membership cards 20 minutes after the entry. The court established that providing membership on the basis of racial origin amounts to a breach of inherent personal right to equal treatment (Article 76 of the Civil Code). The case is described in more detail under Section 2.2.1.

[1] Act IV of 1959 on the Civil Code (Civil Code)

Supreme Court
BH 2003. 86 (Complex CD Corpus Iuris)

The Labour Code[2] prohibits discrimination among workers on the basis of circumstances not relating to employment. However, if discrimination is necessary or can be justified on the basis of objective facts, it does not amount to discrimination. The case relates to the termination of a man's employment based on gender – need for a female cabin controller - and the alleged restructuring of tasks within the defendant thermal bath. In case of a dispute relating to the termination of employment it falls to the employer to prove that the reasons given for termination are real and reasonable.
It shall be noted that none of the courts proceeding in this case allowed the defendant company's blank justification for discrimination based on economic and internal structural grounds. Holding that the reasons given for termination of his employment were not real, the Supreme Court found in favour of the plaintiff.
Under the Labour Code domestic courts had to shift the burden of proof as the plaintiff alleged that the ground given by the defendant company for dismissal was not real. Given that the relevant domestic provision requires workers simply to question whether the employers' action was real and reasonable to shift the burden of proof, it is in fact more preferable than are the directives' provisions on the burden of proof. The case will continue to be binding after transposition, as the Labour Code's relevant provision has remained unchanged. For further analysis please refer to Section 6.3.

Supreme Court
BH 2003. 150 (Complex CD Corpus Iuris)

The Roma plaintiffs launched a lawsuit against a pub where they were denied service. As it was a test case initiated by an NGO, the plaintiffs did not ask for a compensation for non-pecuniary damages, but requested the court to impose a so-called public interest fine on the pub's owner (such a fine is applicable under the Civil Code if the damages to be paid are insufficient in comparison with the severity of the behaviour causing the damage). The court established that the fact that the plaintiffs did not ask for damages to be paid does not exclude the possibility of imposing a public interest fine, and imposed a fine of HUF 100,000 (EUR 400) public interest fine on the defendant.

Supreme Court
BH 2004. 255 (Complex CD Corpus Iuris)

The plaintiff was a Roma woman who applied for the position of chambermaid at a hotel in Budapest. While waiting for the interview, she overheard the manager stating: "I do not hire Gypsies here, I hate them all". Although there was a significant amount of indirect evidence supporting her story, the courts of first and second instance rejected her claim. Eventually, the Supreme Court found in her favour, quashed the judgment of second instance and ordered retrial. Interpreting the Labour Code's burden of proof provision (since then amended by the ETA), the Supreme Court found that for courts to shift the burden of proof plaintiffs must establish that they suffered a disadvantage.

[2]Act XXII of 1992

The decision provides ordinary courts with guidance compatible with the directives, when clarifying that the rationale behind the reversal of the burden of proof is to persuade employers to come forward with evidence to exempt themselves from civil liability. The judgment explains how indirect evidence can form the basis of proof on the part of plaintiffs.

Supreme Court
BH 2006. 14 (Complex CD Corpus Iuris)

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 grounds 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.

Debrecen Regional Appeals Court
ÍH 2006. 115 [Ítélőtáblai Határozatok (Appeals Court Decisions), September 2006]

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.

Debrecen Regional Appeals Court
Pf.I.20.631/2007/8

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.
The case is pending judicial review at the supreme court and CFCF requested preliminary referral to the European Court of Justice.

Equal Treatment Authority
180/2006 (www.egyenlobanasmod.hu)

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 2,800) on him.

Equal Treatment Authority
13/2006 (www.egyenlobanasmod.hu)

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.

Equal Treatment Authority
295/2006 (www.egyenlobanasmod.hu)

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 3200) and ordered that its decision be published on its website for 30 days.

Equal Treatment Authority
44/2007 (http://www.egyenlobanasmod.hu/zanza/44-2007.pdf)

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 2,300) on the respondent and ordered the publication of the decision for 90 days on its website.

Equal Treatment Authority
94/2008 (http://www.egyenlobanasmod.hu/data/94-2008.pdf)

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 500,000 HUF (EUR 1900) and it found necessary to publish its decision for 90 days on the website of the Authority.

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

According to the available statistics, the trends and patterns have not changed with regard to the types of cases brought by Roma. The majority of cases still regards employment, access to services, education and housing. This is supported by the conclusions of the 2005 annual report of Equal Treatment Authority (the Hungarian equality body, for more details see Sections 6 and 7): "In general, the most problematic sector is employment, while discrimination concerning access to goods and services almost exclusively concerns Roma people. Accessibility of public buildings remains to be a problem."[3] In the Authority's report on the year 2006, similar conclusions were drawn: "Applications addressed mostly issues of the world of labour, more specifically finding jobs, termination of employment, remuneration for work, and access to services by the Roma and persons with disabilities. The act of refusing to provide services at commercial, entertainment and catering facilities continue to affect exclusively the Roma, similarly persons with disabilities continue to suffer legal injuries in access to other services."[4]

In 2007, the Equal Treatment Authority established racial discrimination in 8 cases. The breakdown of the cases is presented in the table below.

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[3] http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes06_EN.htm
[4] http://www.egyenlobanasmod.hu/data/EBH_angol.pdf

Table 1: Cases where ethnic discrimination has been established by the Equal Treatment Authority in 2007

Case No.	Field of discrimination	Sanction
271/2007	Employment	Fine of HUF 1,000,000 (EUR 4,000) and of HUF 2,000,000 (EUR 8,000) and publication of decision on the Authority's website for 90 days
44/2007	Access to services	Prohibition of the continuation of the unlawful conduct and publication of decision for 90 days
284/2007	Access to services	Fine of HUF 500,000 (EUR 2,000)
671/2007	Other (harassment)	Prohibition of the continuation of the unlawful conduct
3/2007	Employment	Prohibition of the continuation of the unlawful conduct and publication of decision for 90 days
346/2007	Employment	Fine of HUF 3,000,000 (EUR 12,000) Publication of order for 180 and another 90 days
3/48/2007	Employment	Prohibition of the continuation of the unlawful conduct; publication of order for 90 days
516/2007	Employment	Prohibition of the continuation of the unlawful conduct; publication of order for 180 days

Source: Interview with Judit Schvéger, members of staff at the Equal Treatment Authority

The case statistics of the Roma Anti-discrimination Network Service of the Ministry of Justice and Law Enforcement show that housing is also a sector where Roma face widespread discrimination.

Table 2: Monthly breakdown of discrimination cases taken by the Roma Anti-discrimination Network Service of the Ministry of Justice and Law Enforcement in 2007

	Discrimination cases in total	Labour-market cases	Education cases	Housing cases
January, 2007	10	2	0	3
February, 2007	3	0	1	1
March, 2007	8	2	0	0
April, 2007	13	0	2	4
May, 2007	14	6	1	1
June, 2007	11	1	0	3
July, 2007	7	1	1	2
August, 2007	8	1	2	1
September, 2007	15	2	2	4
October, 2007	9	0	0	4
November, 2007	6	0	1	1
December, 2007	8	3	2	1
Total	112	18	12	25

Source: Ministry of Justice and Law Enforcement

A number *actio popularis* lawsuits were initiated on counts of segregation in public educational institutions by the Chance for Children Foundation – a public interest law organization specializing in strategic litigation aimed at the desegregation of the Hungarian school system.

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

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 70/A) of Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter: Constitution):

1) The Republic of Hungary shall ensure human and civil rights for everyone within its territory without discrimination of any kind, whether based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or upon any other grounds.
2) Any discrimination described in Paragraph (1) shall be severely punished by law.
3) With, inter alia, measures aimed at the elimination of the inequalities of opportunity the Republic of Hungary assists in the realization of the equality of rights.

Although Paragraph (1) refers to fundamental human and civil rights only, in its decision No. 61/1992 (XI. 20.), the Constitutional Court extended the principle of non-discrimination to the whole legal system.

As it can be seen, the list is open ended, so the provision shall be interpreted as covering all the grounds mentioned in the Directives (including age, sexual orientation and disability) and beyond. For instance, the jurisdiction of the Constitutional Court consequently regards 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 (penalizing homosexual incest between siblings, while not rendering incest between heterosexual siblings punishable), 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«".

b) Are constitutional anti-discrimination provisions directly applicable?

Although Article 70/K of the Constitution provides that "claims arising from the violation of fundamental rights [...] may be enforced before the courts", the consistent judicial practice is that it is not possible to solely base a claim on the violation of any fundamental right. Unless channelled into the court procedure through a concrete provision of a sectoral statute (for instance the Civil Code or the Labour Code), such a claim would not stand before a Hungarian court and would be rejected due to the lack of a proper legal ground. Even the Constitutional Court have accepted this stance.[5]

[5] See e.g. decision 46/1994 (X. 21.)

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

There has been an on-going debate whether the Constitutional provision formulates an obligation only for the state or for private actors as well. Paragraph (2) may be interpreted as to cover private actors. If the term "discrimination described in Paragraph (1)" is taken to refer to the whole paragraph, the requirement of strict punishment concerns only the Hungarian Republic's violation of its obligation to guarantee the given rights without any discrimination; if however the term is interpreted as referring to only the second part of the paragraph (i.e. "discrimination of any kind, whether based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or upon any other grounds"), Paragraph (2) provides for the severe punishment of any kind of discrimination committed by any actor.

The ETA though (that expounds the constitutional ban on discrimination) covers not only state agents but certain groups of private actors as well (see below, under 3.1.2). Furthermore, the Civil Code's provisions (Articles 76 and 84) on so-called inherent personal rights (which are a certain translation of constitutional rights into civil law) create the possibility of taking action against private individual breaching the requirement of equal treatment (for more details, see Section 6.1).

The place of the ETA in the system: The law transferring the constitutional ban on discrimination onto the level where it can be effectively enforced is the ETA, the single anti-discrimination code, which came into force on 27 January 2004. The law sets forth the requirement of equal treatment, defines the most important terms of the field (e.g. direct and indirect discrimination), introduces some new institutions into the Hungarian legal system (e.g. the possibility of *actio popularis* claims), extends the reversed burden of proof to all discrimination cases, and sets up an equality body with an 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.).

All the sectoral laws (e.g. the Labour Code, the Public Education Act,[6] the Health Care Act[7] and so on) that used to contain separate and sometimes inconsistent anti-discrimination provisions now simply refer back to the ETA, by saying that in that certain sector the principle of equal treatment shall be respected, while the previous non-discrimination clauses have been abolished. This technique creates a great degree of consistency throughout the legal system, as it guarantees that in all the sectors the terminology and institutions of the ETA are applied.

Let us give an example. Before the ETA came into force, the Civil Code (Article 76) set forth that "discrimination against private persons on the grounds of sex, race, nationality, or religion [...] shall be deemed as violations of inherent rights".

[6] Act LXXIX of 1993
[7] Act CLIV of 1997

The Labour Code (Article 5) prescribed that "in connection with an employment relationship, no employee shall be discriminated against on the basis of sex, age, family status, disability, nationality, race, origin, religion, political conviction or membership in organizations representing employees or activities connected therewith, as well as any other circumstances that have no relation to employment." Without going into further details concerning the inconsistencies, it is easy to see for instance that the list of grounds used to be much more extensive in labour law than in civil law.

These laws (along with several other sectoral laws) were amended when the ETA came into force (in fact, the ETA contained the amending provisions). Now the Article 76 of the Civil Code runs as follows: "The infringement of the requirement of equal treatment [...] shall be deemed as violations of inherent rights." The new Article 5 of the Labour Code claims: "The requirement of equal treatment shall be abided by in labour relationships."

Thus, the old texts containing the ban on discrimination and enlisting some grounds have been replaced with this reference to "the requirement of equal treatment", which is in place to invoke the ETA, as the statute regulating all issues concerning the requirement of equal treatment. If therefore, this requirement is infringed in the field of labour, based on Article 5 of the Labour Code, the provisions of the ETA shall be applied. The same is true for the field of civil law, education, health care and all the fields that are governed by a sectoral law containing such a reference. This way for example, it is not necessary to give a definition of direct and indirect discrimination in each sectoral law, as the definitions set forth in the ETA are invoked through these referring provisions. This system of references is confirmed by Article 2 of the ETA, which claims that "provisions on the requirement for equal treatment as laid down in other laws are to be applied in harmony with the provisions of the present law."

With regard to sanctions no such uniformity has been achieved, as the system of sanctions set up by the ETA is amplified by some sectoral provisions. The most important one may be Article 84 of the Civil Code, which prescribes specific sanctions for the infringement of so called "inherent rights", among which the right to equal treatment is one. Act LXXV of 1996 on Labour Inspection (hereinafter: Labour Inspection Act); and Act CLV of 1997 on Consumer Protection (hereinafter: Consumer Protection Act) also contain specific sanctions for violating the right to equal treatment in their respective fields.

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 or ethnic minority,
f) mother tongue,
g) disability,
h) health condition,
i) religion or belief,
j) political or other opinion,
k) family status,
l) maternity (pregnancy) or paternity,
m) sexual orientation,
n) sexual identity,
o) age,
p) social origin,
q) financial status,
r) part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof,
s) belonging to an interest representation,
t) other situation, attribution or condition (hereinafter together: characteristics),
u) of a person or group.

As we can see, 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 ground” not included in the list.

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 on 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'; or a "disability", sometimes defined only in social security legislation)?Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

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

There is a statutory definition of national or ethnic minorities (nemzeti vagy etnikai kisebbség), which is set forth in Article 1 of Act LXXVII of 1993 on the Status of National and Ethnic Minorities (Minorities Act): "A national or ethnic minority is any ethnic group with a history of at least one century of living in the Republic of Hungary, which represents a numerical minority among the citizens of the state, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate 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 Article 61 Paragraph (1), the Minorities Act itself recognizes 13 national and ethnic minorities (there is no statutory distinction between "national" and "ethnic" minorities). These are the following: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, Ukrainian. Paragraph (2) of the same Article also provides other groups with the possibility of being recognized 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 national or ethnic minorities have a statutory definition does not mean that persons affiliated with these 13 minorities, are in a more advantageous position from the point of view of the ETA's application than others: if a person not belonging to any of the legally acknowledged national or ethnic minorities 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 characteristics) of the ETA.

2) *Religion or belief*: Neither on a statutory level nor in the relevant jurisprudence are these terms defined but both are covered in the ETA, and religion is listed in the Constitution.

3) *Disability*: The express protection on the ground of disability is a relatively new development. The first Act to list this ground was the Labour Code of 1992. Unlike in the case of most grounds, the term "disability" does have 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 ECJ 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 ECJ definition, would remain without protection in the Hungarian system is practically non-existent.

The same is true 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 situation", 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, the author will restrict himself to a few examples.

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 the severely disabled. 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
(ba) their loss of hearing occurred before the age of 25, or
(bb) 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 from (a) 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 are further refined by Government Decree 141/2000 on the Rules Pertaining to the Assessment and Supervision of Severe Disability and the Payment of Disability Allowance, which defines in strict medical terms who shall fall into these categories (for instance, a hearing impairment shall be established if a person's hearing threshold is above 80 dB in the speech frequencies).

Decree 15/1990 of the Minister of Social Affairs and Healthcare on the Assessment and Verification of Severe Disability defines severe disability from the point of view of taxation (who shall be entitled for benefits based on disability regarding his/her personal income tax). This decree uses a different (wider) definition, which includes – among other things – cardiac illnesses and certain forms of diabetes.

For the purposes of "rehabilitation allowance" (a form of support aimed at reintroducing workers with disabilities to the labour market) yet another definition is applied. Under Article 3 of Act LXXXIV of 2007 on Rehabilitation Allowance, those shall be entitled to the rehabilitation allowance who have suffered a 50-79% health damage and as a result of this damage without rehabilitation they are not suitable for employment in their original job or any other job for which they are qualified; and

a) they are not employed, or

b) they are employed in a job where their salaries are at least 30% lower than the 4-month average they received before the damage occurred.

It is also a criterion that a) their conditions shall allow for rehabilitation, and b) they shall have the required service time (i.e. required number of years in employment or time spent outside employment but recognised by the law as "service time").

Act IV of 1991 on the Promotion of Employment and Support for the Unemployed, hereinafter: Act on the Promotion of Employment) provides for support aimed at the reintegration of disadvantaged workers and workers with disabilities into the labour market (for more details see Section 4.7.2.). Under 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, for the purposes of this support, besides people entitled to rehabilitation allowance, the following categories shall qualify as workers with disabilities:

- persons in the case of whom the degree of the decrease of labour suitability reaches 40% according to the expert opinion of the National Expert Institute of Rehabilitation and Social Affairs
- persons in the case of whom the degree of health damage reaches 40% according to the expert opinion of the National Expert Institute of Rehabilitation and Social Affairs

All these definitions 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.

4) *Age*: It is a relatively new protected ground, but it has been included in the non-discrimination lists ever since its first appearance in 1991 (it was first listed among protected grounds in the Act on the Promotion of Employment), which shows an increasing awareness of age discrimination.

5) *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. 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.*

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.

2.1.2 Assumed and associated discrimination

a) *Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect 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* <u>*or case law*</u> *prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

National law does not expressly prohibit discrimination based on association with persons with particular characteristics. Nonetheless, the express prohibition of discrimination based on assumed characteristics can be interpreted as to cover discrimination based on association. Furthermore, Article 8 point t) (other situation, attribution or condition) may also provide protection for those discriminated on the basis of association with members of a particular group.

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) 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 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 –, while 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 400) 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 2,000) 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. It shall, however, be noted, that the employment related exemption clause bears closer resemblance with Article 4 of both directives and as lex specialis could in theory take priority over the general exemption clause. 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 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

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

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

Article 30/A

(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 intended relation between the general justification and these special justification rules is unclear. The Ministerial Comments attached to the ETA do not touch upon the issue. A possible interpretation is offered by 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).

However, in its decision on the Karoli case (see in more detail under Section 4.2) the Supreme Court ignored the possibility of such an interpretation, and applied the general exemption clause of Article 7 Paragraph (2) in an education case in spite of the fact that there is a specific exempting clause for education. Although Article 7 Paragraph (2) has been amended as outlined above, this does not concern the possible relation between the general and the specific exempting clauses, and the Supreme Court's decision gives ground to the assumption that judicial practice will interpret the general and specific exempting clauses as complementing each other.

c) *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

- *Does national law permit the use of 'situational 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 all grounds are not included, what are the reasons given for this limitation?*

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 form 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 no publicised cases of situation testing applied in relation to discrimination grounds other than ethnicity are available.

- *Is there any reluctance to use situational 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 the Legal Defence Bureau for National and Ethnic Minorities (NEKI) have for a long time been trying to apply situation testing to substantiate cases of individual victims.

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 c)].

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.

- *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:[8] 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. At the flat of the minority self-government's president 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.

[8]Described on the basis of NEKI's White Booklet 2000, see: http://www.neki.hu/indexeng.htm

At 20:30 the two non-Roma volunteers left for the discotheque. They later recounted that they 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:[9] In response to a newspaper advertisement, the complainant called a company which was recruiting painters. He met the requirements set by the employer, but when he informed the employer that he was of Roma origin, he was rejected. The complainant turned to the NGO 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 2,800) on him.

[9]See: http://www.egyenlobanasmod.hu/zanza/477.pdf

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. (This has been achieved for instance in disco and pub entry cases, by repeating the situation: i.e. if a person complained that he/she had not been allowed to enter, on the next occasion he/she attempted to enter the place in the company of or observed by testers. In this case however, the testimony of the testers was taken into account, even though they did not witness the actual infringement and therefore they could only substantiate the claim indirectly.)

- *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

Situation testing is used by both NGO's and the Equal Treatment Authority. For specific examples, see point b) and c) above.

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 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 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 of 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 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

- *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 Article 3 (5) of Act III of 1952 on the Code of Civil Procedure (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.

- *Is the use of such evidence commonly used? 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?*

Generally, there seems to be no reluctance to use statistical evidence, although the Debrecen Regional Appeals Court's decision in the Hajdúhadház case raises serious questions as to its judicial interpretation (see the description of the case and the problem below).

- *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 discriminative 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 590 – 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 establish 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).[10]

In the other case, statistical evidence was used in a different way, i.e. to prove that persons affected by a potentially discriminative measure (omission) of the Miskolc Local Council, actually belong to one of the protected grounds. In April 2004 the Local Council of Miskolc (Northern Hungary) brought a decision to integrate certain schools from an economic and administrative point of view. This meant that schools that used to be separate institutions, were turned into single economic and administrative units operating in different buildings. Three such integrations took place, one concerning three schools, the other two concerning two schools. The integration decision however did not concern the so called "area of registration" of the schools that were integrated. Under Hungarian education legislation, the enrolment of children who reside in the area of registration may not be refused. Due to the high degree of segregation in housing, schools are also strongly segregated in Miskolc. The school integration in all three instances took place in a way that segregated Roma schools were integrated into predominantly non-Roma, elite schools.

[10] Source: http://www.egyenlobanasmod.hu/

However, since the areas of registration remained intact, in spite of the economic and administrative integration of the educational institutions, this did not mean that Roma pupils had become entitled to continue their studies in the elite schools. It needs to be added that both physical conditions and the quality of the curricula are inferior in the predominantly Roma schools.

To remedy the situation, the Chance for Children Foundation (CFCF) launched an *actio popularis* claim against the Local Council, claiming that by integrating the schools and simultaneously maintaining their areas of registration, the Local Council contributed to maintaining the segregation of Roma and/or indigent pupils, and thus violated the requirement of equal treatment. In the plaintiff's assessment, the Local Council committed indirect discrimination, as its apparently neutral decision put Roma and/or indigent pupils into a disproportionately disadvantageous situation.

Article 20 of the ETA sets forth the rules pertaining to *actio popularis* claims: if the principle of equal treatment is violated, a lawsuit for the infringement of inherent rights may be brought by any social and interest representation organisation (as well as the Public Prosecutor and the Equal Treatment Authority), provided that (i) the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and (ii) the violation affects a larger group of persons that cannot be accurately determined.

Due to the very strict Hungarian data protection legislation, the question how it can be proved that pupils attending to the lower quality schools are predominantly Roma appeared to be very problematic, since there were no individual plaintiffs who could make a statement on their ethnic identity. This is seen in the Hungarian system as an inalienable right of the individual, whereas no other person or entity shall be allowed to establish or assess an individual’s ethnic affiliation.

The Minorities Act claims that "it is the individual's inalienable right to *choose* and publicly claim affiliation with a national or ethnic minority". If it is the individual's right to choose affiliation, the establishment of one's minority identity by any other person is the violation of that particular individual's right of choice. This however should not, in theory, prevent courts from making an assessment about assumed ethnic affiliation, so in the author's view a court ought to be able to claim that the alleged discriminator is likely to have assumed that the complainant was of, for instance Roma origin.

To overcome this difficulty, the CFCF commissioned an expert to carry out a survey.[11] The survey was based on the total number of pupils in each of the three “Roma schools”. Since before the bringing of the lawsuit, the plaintiff foundation did not wish (and would not have been authorized) to request a list of pupils from the concerned educational institutions, the researchers took the time and energy to visit every house of every street belonging to the given school’s area of registration and tried to establish contacts with the children and the parents of the children going to that particular school.

Contacts were established with (the families of) more than 50 percent of the children attending the Roma schools (see the table below).

[11] Tibor Derdák: Szakértői vélemény az Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány felkérésére (Expert opinion prepared upon the request of the Chance for Children Foundation).

Name of the school	No. of pupils in the 2004/05 schoolyear	Pupils found by researchers	Percentage
Fazola Henrik	303	166	54,78%
József Attila	172	99	57,55%
Kuti István	115	42	36,52%
Total	590	307	52,03%

Once a pupil's family was thus found by the researchers, certain questions concerning their ethnic origin and social status were posed to them. Since Roma interviewers were employed, the interviewees were in all the cases willing to answer. Some of the answers are summarized in the table below.

Name of the school	Number of parents contacted	Parents of Roma origin		Parents with higher than elementary education		Parents with a job	
		Person	%	Person	%	Person	%
Fazola Henrik	213	187	87,8	16	7,51	32	15,02
József Attila	109	99	90,83	8	7,33	14	12,84
Kuti István	47	42	89,37	5	10,63	9	19,14
Total	369	328	88,8	29	7,85	55	14,9

The expert's research results were submitted to the court as evidence. Although the CFCF's claim was rejected in the first instance, the fact that there is a high degree of ethnic segregation in the schools of Miskolc was not questioned in the lawsuit by either the court or the defendant, so in this regard the use of research and statistics proved to be successful. (The second instance court established that discrimination had taken place. For details see Section 0.3.)

In another actio popularis case also initiated by 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. 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.

Therefore, in the given case, it was not the rejection of statistical evidence that led to the rejection of the segregation claim, but the Court's interpretation of segregation (which in the Court's view contains an element of intention). This restrictive interpretation of the legal framework is highly questionable (especially in the light of the Appeals Court's former decision in the Miskolc case, where segregation by failure to act was established), but – if accepted by other courts – it obviously may have implications with regard to the applicability of statistical evidence in general. CFCF requested the review of the Appeals Court's decision by the Supreme Court.

- *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is 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 2 of Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest (Data Protection Act), "personal data" shall mean any data relating to a specific (identified or identifiable) natural person ("data subject") as well as any conclusion with respect to the data subject which can be inferred from such data. 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. An identifiable person is in particular one who can be identified, directly or indirectly, by reference to his name, identification code or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

"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; (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 3 (2) 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 prescribed by an international agreement or it is set forth by an Act, either in order to enforce a fundamental right provided for in the Constitution or in the interest of national security, crime prevention or criminal investigation; or
(c) the processing is prescribed by an Act in the case of data not falling into group (i).

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 is not possible.

The practical result of these strict data protection rules is that public authorities have fully stopped collecting data concerning the sensitive grounds. This is obviously very detrimental from the point of view of monitoring discrimination in different fields of life. For instance, the last official data concerning the numbers of Roma children in education are from 1993. Since that time, sociological researches have been the only source of information with regard to this crucial issue.[12]

The Data Protection Act does not exclude the processing of personal data for scientific and statistical purposes. Under Article 32, 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. Article 32/A prescribes that personal data collected, received or processed for statistical purposes may not be used for any other purpose, and may not be made publicly accessible.

[12] E.g. the recent 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 (for an example, see the survey described above, where researchers had to find data subjects and collect the data on a street by street, house by house basis). 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 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.[13]

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 2001. Data on age, ethnic or racial origin, religion or belief and disability were collected. 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 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. 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.[14] 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.

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

[13]See for instance: http://www.romaweb.hu/doc/palyazatok/2008/TELEP/Palyazati%20felhivas%202008.doc
[14]See: Kertesi, Kézdi: A cigány népesség Magyarországon /The Gypsy Population in Hungary/, Socio-typo, Budapest, 1998.

Ethnic origin in education: There is a complex system of minority education in Hungary.[15] In terms of Article 43 (2) of the Minorities Act, based on the decision of their parents children belonging to an ethnic or national minority shall or may receive education in the mother tongue, education in Hungarian or education in both Hungarian and the mother tongue (bilingual education). Under Paragraph (3) of the same Article, depending on local possibilities, mother tongue education and bilingual education may take place in a minority kindergarten or school, or in a minority class or minority study group established within the framework of a majority school. Under Paragraph (4), the local council shall be obliged organize minority education if the parents of at least eight minority pupils request so, and a kindergarten group or a school class may be established in accordance with the provisions of the Public Education Act. Since minority education is supported by the state of a per capita quota basis, this naturally requires that those pupils who participate in minority education be registered by the school. In the 2004/05 school year for example altogether 31,503 children participated in elementary level Roma minority education, the number of pupils in German, Romanian, Croatian and Slovakian minority education was 46,722, 1,110, 2,304 and 4,498 respectively.[16] In the 2005/2006 school year, the number of pupils in Roma minority education was 38,304, whereas the number of pupils in German, Romanian, Croatian and Slovakian minority education was 47,403, 1,159, 2,265 and 4,528 respectively.[17] In the 2006/07 academic year, the number of pupils in Roma minority education was 40,944, whereas the number of pupils in German, Romanian, Croatian and Slovakian minority education was 46,880, 1073, 2,179 and 4,443 respectively.[18]

Ethnic origin for the purposes of minority elections: The 13 minorities recognized by the Minorities Act (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 substantial state 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).

One has the right to vote and run as a candidate if he/she is registered in the Minority Election Register kept by the Local Election Office headed by the Notary of the respective Local

[15]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).

[16]See: http://www.om.hu/doc/upload/200506/oe050531.pdf

[17] See: http://www.okm.gov.hu/letolt/statisztika/okt_evkonyv_2005_2006_060927.pdf

[18]See: http://www.okm.gov.hu/letolt/statisztika/okt_evkonyv_2006_2007_070824.pdf

Council.[19] 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 recognized by the Minorities Act.[20] 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.[21]

The Minority 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 Minority Election Register shall immediately be eliminated. On the other hand, the number of voters registered in the Minority Election Register is to be regarded as public information, which is published by the National Election Office.[22]

At the 2006 minority elections the following numbers were registered.[23]

Minority	**Number of registered voters**
Bulgarian	2 110
Roma	106 333
Greek	2 451
Croatian	11 090
Polish	3 061
German	45 983
Armenian	2 361
Romanian	4 404
Ruthenian	2 729
Serbian	2 143
Slovakian	15 049
Slovenian	991
Ukrainian	1 084
Total	**199 789**

Disability for the purposes of benefits in employment: In terms of Article 41/A of the Act on the Promotion of Employment, employers shall be obliged to pay a so called "rehabilitation contribution" to the central Labour Market Fund if the number of their employees exceeds 20 and the proportion of persons with disabilities 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.

[19] Article 2, Minority Elections Act
[20] Article 115/E, Elections Act
[21] Article 115/F, Elections Act
[22] Article 115/G, Elections Act
[23] See: http://www.valasztas.hu/main_hu.html

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 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 data necessary for the preparation of the equal opportunities plan shall be proceeded in accordance with the Data Protection Act, based on the voluntary permission of the concerned employee and only until the last day of the period concerned by the equal opportunities plan."

This means that not even for the purpose of preparing the equal opportunities plan may the employer keep record of special data of employees without their explicit written permission.

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.

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 "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."

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.

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 prohibit instructions to discriminate?

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 order 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. 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 38 of the Civil Servants Act).

The professional members of armed organs have the right to warn their superiors of unlawful orders but ultimately, 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, the border guards, 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.

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'. e.g. ➔ 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?*

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. We can conclude that 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.

Under Article 15 of the RPD Act, persons living 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.

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

To summarise the situation, the following can be said. If we interpret the text of the law strictly, there is an obligation to provide an accessible environment at the recruitment stage (e.g. for the interview), but not an obligation to provide an accessible environment to enable an applicant with a disability to do the job. Therefore, a person could be qualified – in that they could perform the job if an accommodation was made – but the employer can reject them because they need the accommodation without which they cannot perform the job, and the employer does not wish to provide the accommodation. The law definitely does not regulate whether there is a limit beyond which the employer could refer to a disproportionate burden to reject employment on this basis, which seems to imply that the legislators envisaged the narrow interpretation (because otherwise we would have a situation in which the employers could be required to make any accommodation irrespective of the burden it poses on them).

The Ministry of Social Affairs and Labour has a different interpretation of the law and claims that Article 15 of the RPD Act imposes the reasonable accommodation duty on the employer in relation to all aspects of access to employment.

Even if this is not the interpretation a court would take in an actual 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 such a rejection. 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 living 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 reasonable accommodation.

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

b) Does failure to meet the duty 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 law[24] in relation to the obligation to make public buildings accessible, which is a reasonable accommodation type of obligation outside the field of employment. In its case law on the issue, the Authority relies on Guideline No. 10.007/3/2006. TT. of the Equal Treatment Advisory Board (the six-member advisory board established to assist the work of the Equal Treatment Authority, see Section 7),[25] which established that "the failure to guarantee accessibility 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. The failure to guarantee accessibility shall also be regarded as direct discrimination, because it constitutes a breach of an express statutory obligation."

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.

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

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[24]See cases 13/2006, 596/2006 at:

[25]See: http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_200610.htm

There are certain provisions in national law that may be regarded as specific forms of reasonable accommodation. Channelling Roma children into special schools established for pupils with light intellectual disabilities is a form of educational segregation in Hungary. Specialised expert panels are vested with the task of deciding about placement in special schools.

As a reaction to the indications concerning the disproportionate number of Roma children in special schools, Decree 14/1994 of the Ministry of Education on Educational Obligations and Pedagogical Services (hereinafter MKM Decree 14/1994) was amended in 1998 and in and in 2001 with the aim of strengthening the role of the parents in the process. One of the provisions inserted with this aim is Article 5 Paragraph (5), according to which "upon the voluntary request of the parent, in the course of their examination the educational advice centre and the expert panel shall take into consideration the special linguistic and socio-cultural characteristics of children belonging to minority groups. The parent shall be informed about this opportunity in writing." This provision may be regarded as a form of (reasonable) accommodation, because it requires the expert panels to adapt the assessment procedure itself to the special linguistic and socio-cultural characteristics of Roma children, and bring their decisions in a manner that is accommodated to the specificities of these children.

d) 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 can access only about 20 percent of Hungary's public buildings. 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 include among others a surgery, a pharmacy, a town hall, an employment agency and a court.[26]

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

The new law inserted in the RPD Act, the new concept of "public services" and sets 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

[26] See: www.meosz.hu /index01.htm

In terms of Point (h) of the same Article, "equal access" means that a public service is accessible, foreseeable, comprehensible, and perceivable – with the help necessitated by his/her status – for everyone, with special regard to people whose locomotive, visual, audio, mental or communicational functions are restricted; furthermore, the building where the public service is provided shall be accessible to everyone, everyone shall be able to use all the parts of the building that are open to the public, and shall be able to leave it in a case of emergency. In addition, everyone shall be able to use and utilize the services provided and the objects and equipment placed in the building.

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 sets out a schedule for making public services 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.

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 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 (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 the above mentioned 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.

e) 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 national and ethnic minorities) 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 criticized 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:[27]
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 living with disabilities shall be given particular attention and it must be taken into account that persons living 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 living with disabilities it must be taken into account that persons living 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 living 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 living 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 development of the capabilities of the person living with disability – in keeping with the opinion of the expert and rehabilitation committee set up for this purpose – the person living 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, claiming that persons living with disabilities shall if possible be employed in integrated employment, or, in lieu of this, in protected employment. If employment of the person living with disability cannot be ensured within the framework of integrated employment, the right to work must as far as possible be ensured for him/her through the operation of sheltered workplaces.)

[27] 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/

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

Chapter IV deals with the issue of rehabilitation. Article 19 claims that persons living 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 outlines 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 the severely disabled. 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 living 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 living with disabilities; makes proposals for decisions, programs and legal regulations affecting persons living with disabilities; regularly informs the Government on trends in the situation of persons living with disabilities; drafts the National Disability Program and monitors its implementation. Different number of members are delegated to the Council among others by the national organisations representing the interests of the physically disabled, the deaf, the blind and the mentally handicapped; the organisations of sheltered workplaces; and by non-profit organisations operating in the interest of persons living 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 living with disabilities; the objectives related to rehabilitation; the tasks aimed at bringing about a favourable change in social attitudes affecting persons living with disabilities; plans promoting the active participation in social life of persons living 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 living 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 28 defines the deadlines by which compliance with the provisions of the Act shall be achieved. For example, with regard to transportation systems, this deadline is 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 living with disabilities shall if possible be employed in integrated employment, or, in lieu of this, in sheltered employment. Under Article 16, if the person living 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 recognized 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 recognized 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; (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; (vi) in the 6 months preceding the submission of the request for recognition the average percentage of workers with disabilities within the workforce reaches 50% in he unit with regard to which the recognition is requested

These employers may receive significant support from the sate 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.

a) Would such activities be considered to constitute employment under national 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.

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 400) 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.[28] (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 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 of individual features..

[28]See: http://www.egyenlobanasmod.hu/zanza/278-2007.pdf

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 – it primarily lists (mostly public) legal entities. Under Article 4 these include: the Hungarian state, local and minority 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 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. This, however, has not been subject to litigation so far.

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, 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

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).

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?

National legislation covers all sectors of public and private employment and occupation, including contract work, self-employment and military service. The ETA, however, does not apply to certain elected officers, such as the President of the Republic of Hungary, MPs, judges of the Constitutional Court and the Parliamentary Commissioners for human rights, ethnic and national minorities and data protection respectively.

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 home work, 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.

When specifying the requirement of equal treatment in the field of employment, Article 21 of the ETA distinguishes between labour relations and other relations aimed at employment. Actions leading up to employment in the wider sense, as well as actions relating to the commencement and termination, as well as remuneration are specifically spelt out as being covered in both relations. With regard to other areas specified in Article 21, such as promotion, training, working conditions, selections criteria, public job announcements and liability for damages and disciplinary actions other relations aimed at employment are not mentioned. This might lead to a narrow interpretation of other relevant domestic provisions pursuant to Article 2 of the ETA, which claims that provisions pertaining to the principle of equal treatment, set out in separate legal acts, shall be applied in harmony with the provisions of ETA.

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.

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.

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?

What is said above, also applies here. No distinction is made between the private and public sector in the ETA in this respect.

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

a) *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.*

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.

b) *In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?*

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.”[29]

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 life long learning course?

[29] 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 an negligent omission than a conscious decision of the legislator “allowing” discrimination on grounds not included in this seemingly closed list. 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.

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 the Act 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.

As membership or involvement under Article 21 of the ETA is regulated only in relation to workers' organisations, other relations aimed at employment are not included in this provision. However, if such organisations fall under the personal scope of the ETA (Articles 4 and 5), they are obliged to abide by the requirement of equal treatment in all their actions, practices, polices, measures, which of course includes the benefits they provide too. 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?

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.

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 granted to people because of their employment or residence status, for example, e.g. 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.

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. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

The Minorities Ombudsman has persistently reported that race discrimination and segregation in education is widespread.[30] In 2002 the Liberal Minister of Education pledged to end segregation. To this end institutions, such as the National Network for Integration in Education have been established (see below in more detail). A Ministerial Commissioner for the Integration of Roma and Impoverished Children was also appointed, however as of August 2006 the new Socialist Minister terminated this post, and allegedly delegated the Commissioner's tasks to two different departments. Further efforts included the series of amendments to Article 4 Paragraph (7) of the Public Education Act prohibiting discrimination. 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 authorization 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.

[30] For the text of the Minorities Ombudsman's reports see: http://www.obh.hu/nekh/hu/beszam/beszamol.htm

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 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 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 Minorities 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, ethnic or other 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 after 27 January 2004 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.

Besides the above outlined legislative changes, we also need to note that very serious efforts have been taken by the Government to combat segregation of Roma pupils in the Hungarian educational system. The starting point of these efforts was the recognition that integration measures are more efficient if they are based on social status instead of ethnicity. Due to the high degree of social marginalization of the Roma in Hungary, measures aimed at the integration of socially disadvantaged pupils and students were thought to strongly promote the integration of Roma students without raising the difficulties stemming from problems of definition and identification, and without intensifying potential ethnic tensions. Shortcomings of this approach are surfacing in strategic litigation by CFCF (for a description of the Miskolc case, see Section 0.3): given that in impoverished regions a great number of non-Roma also fall into the category of socially disadvantaged children, schools can implement an integration training in a way that does not at the same time ensure racial integration, i.e. the mixing of Roma and non-Roma children.

The most important steps taken with the purpose of reducing the extent of racial discrimination in education have been the following.

Amendment of the regulation concerning school catchment areas: Under Article 66 Paragraph (2) of the Public Education Act, if a settlement has more than one primary school, its local council shall define the catchment areas in a way that the difference between the proportions of "multiply disadvantaged" pupils in the different catchment areas shall not exceed 25%. (Under Article 121 of the Public Education Act, "disadvantaged pupils" are children who are taken into protection by the notary pursuant to their family conditions or social status and/or children whom the notary declares eligible for regular child protection benefits.[31] Within this group those children qualify as multiply disadvantaged whose parents' education level does not exceed eight grades and also those whoo have been taken to long-term state care.) Schools shall not refuse the enrolment of children living in their catchment areas.

[31]These are special benefits and forms of protection for socially disadvantaged children.

If after admitting all the children who are entitled to enrolment on the basis of residence in the catchment area, the school has still places, it is obliged to give priority to children who live in the settlement where the school is seated, and within this group, priority shall be given to multiply disadvantaged pupils and also to pupils with disabilities. The purpose of these rules is to mitigate the segregating effects of segregation in housing. It however needs to be noted that it is unclear what happens if local governments and schools do not comply with these regulations, as there is no effective and formalised oversight mechanism and clear-cut sanctions are also lacking from the system (although the restructuring of the state support system for schools implementing desegregation programs has a certain control effect – see right below).

Support from the central budget: Decree 57/2002 of the Ministry of Education inserted Article 39/D into Decree 11/1994 of the Ministry of Education on the Operation of Educational Institutions (hereinafter: MKM Decree 11/1994). Paragraph (1) of this Article claims that with the aim to counterbalance the student's social or developmental disadvantages, educational institutions may organize a "competence development program", in the framework of which the student is assisted in developing his/her talents and catching up with the others. In terms of Paragraph (5), multiply disadvantaged pupils may participate in this program. Originally, the institutions providing such a program automatically received an additional per capita budgetary support from the central state budget after each child participating in the training. In order to prevent misuses of the system, an application system was introduced by Decree 12/2007. (III. 14.) OKM on the Mechanism of Applying for, Deciding on and Providing Support Promoting Equal Opportunities and Catching Up.[32]

Under the Decree, local councils shall apply for state support to competence development programs. In order to be eligible for support, the applicants shall verify that the catchment areas of the schools they maintain are defined in compliance with Article 66 Paragraph (2) of the Public Education Act. Applications are decided on by a 5-member panel consisting of representatives of the relevant ministries and the National Network of Educational Integration, which started its operation in early 2003 with the aim of providing professional assistance and consultancy to those schools which run integration training programs. From August 2005 onward only those schools may run competence development and integration programs (and thus apply for the additional budgetary support) which cooperate with the Network based on a contract.

A decision on the support is made by the Minister of Education and Culture, the maximum amount of support is HUF 20,500 (EUR 82) per child (in the previous system, this amount was fixed, now a differentiation can be made on the basis of the quality of the application).

In order to make schools interested in integration instead of segregation, Decree 57/2002 introduced yet another new educational form. Article 39/E of MKM Decree 11/1994 sets forth the rules of the so-called "integration program".

[32]For the 2008/2009 academic year a new Decree (Decree 9/2008. (III. 29.) OKM) was adopted, which however will only come into force after the report's cut off date. The mechanism prescribed by the Decree is similar to the one described here, with the main difference that the highest available amount is HUF 61,500 for both competence development and integration programs and that the representation of the National Network of Educational Integration has been enforced on the panels deciding about the support.

Under Paragraph (1), such a program may be organized for those students who are entitled to participate in the competence development program, with the difference that in the framework of integration programs they attend the same class (or group) as "ordinary" students.

The maximum central budgetary support available for this form of program is three times as high: HUF 61,500 (EUR 246) after each child participating in such a program. Similar to the support available for competence development programs, the support for integration programs used to be available with a fixed amount on an automatic per capita basis, but under Decree 12/2007. (III. 14.) OKM it is now distributed on the basis of applications with flexibility as to the amount provided.

As it was mentioned above, the efficiency of the quota-system is envisaged to be enhanced by the National Network of Educational Integration, which is represented in the panel deciding on the provision of state support for competence development and integration programs.

From the Last Desk Program: Channelling Roma students into special schools originally established for children with slight mental disabilities is a form of segregation common to the countries of the CEE region. Hungary is no exception. Where doubts emerge about the ability of students to cope with normal school, a so-called ‘expert panel’ examines them for possible attendance at a ‘special school’, intended for children with physical or mental disabilities with lower requirements for pupils. Children remain at these schools until their abilities are considered to be sufficient for elementary education, and may continue through the auxiliary system throughout primary level, with practically no chance of continuing to secondary schools afterwards. Roma are disproportionately represented at both the testing and selection stages.

In order to overcome this problem, the Ministry of Education initiated the „From the Last Desk” program that aimed to decrease the incidence of misplacement of disadvantaged and especially Roma children in special schools. In the first phase the Decree regulating the process of placement was revised and amended to contain more safeguards. As a result, 11 per cent of slightly mentally disabled children examined in the course of the regular revisions were placed back into normal schools in the 2003/2004 academic year.[33] Although there were plans for the continuation of this program,[34] these were finally not realised.[35]

Furthermore, a new form of per capita support from the central state budget was introduced (first in the 2004/2005 academic year). The support is paid per child placed back into normal schools from special educational institutions (in the first two academic years following the replacement).[36] This measure applies to children with disabilities in general and is not formulated in ethnic terms.[37]

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[33] Information from the Ministerial Commissioner for Integration of Roma and Disadvantaged Children

[34] See for instance: http://www.okm.gov.hu/main.php?folderID=1741&articleID=227599&ctag=articlelist&iid=1

[35] Information from the Ministry of Education and Culture

[36] For its amount in the year 2008 see Act CLXIX of 2007 on the Year 2008 Budget of the Republic of Hungary.

[37] One must not forget that the Roma children mentioned above are not overtly directed into special schools because of their Roma origin, but because in the expert panel's view they have slight intellectual disabilities preventing them from coping with “normal” school requirements. Obviously, as they are overrepresented among children sent to special schools, they may be over represented among children placed back to “normal” institutions, so they could benefit from this measure “disproportionately”. However, the per capita support is also available for non-Roma children with disabilities provided that they return to “normal” schools.

The Anti-Discrimination Alarm System: The aim of the program is to enhance the capacity of stakeholders to recognize instances of educational discrimination and find the most effective legal ways to combat such phenomena. It consists of three elements: a) a training program is devised for stakeholders; b) the trainings are also used as a means to develop a network of activists; c) cooperation is promoted among local activists, advocates, the school evaluation authority and the Equal Treatment Authority to prevent and remedy cases of discrimination in education (among other things, with the development of an intranet they can use to share problems and ideas).

Experts warn that the Action Plan for the Decade of Roma Inclusion prepared by the Government in 2005 with the aim of promoting the integration of the Roma in different fields of life, counts on NGOs and activists joining the anti-discrimination alarm system in putting an end to discrimination,[38] but "without funds opening up for such activities, NGOs and activists will not be able to contribute to the fight against segregation as envisaged. It remains unclear whether the existing enforcement mechanism can be made effective, and whether there will be Government funding for such efforts."[39]

In the lack of publicly available studies or analyses, it is not possible to give a proper assessment on the efficiency and impact of this program.

Affirmative types of action: An example is Article 22 of Government Decree 237/2006 on the Rules of Admission Procedures of Universities, under which 25 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 400, and admission is based on the number of points. Further 25 points shall be added to the results of a disadvantaged student if his/her parents attended only elementary school.

As to the results of these efforts, it needs to be pointed out that educational experts are of the opinion that in spite of the various positive measures, segregation is still on the rise. "Measures were enacted in 2002 that should support better enrollment of Roma children in pre-school, but the impact of these reforms does not yet appear to be significant. [...R]esearch indicates that the separation of Roma children into segregated schools and classes has been on the rise over the past 15 years. [...] The Government has implemented a funding scheme intended to integrate schools, offering a subsidy and other support through the National Network of Educational Integration (OOIH). While the number of schools using these subsidies has been steadily increasing, research suggests that true integration remains a slow and uneven process."[40]

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[38]"From September 2007 catchment areas will have to be redrawn so as to prevent segregation among children who suffer from cumulative social disadvantage. We will further develop the anti-discrimination alarm system and count on NGOs in putting an end to discrimination in education." (New Hungary: Freedom and Solidarity, Government Programme, pp. 25–26.)

[39]See: Farkas, p. 225.

[40]See: EUMAP Monitoring Report: Equal Access to Quality Education for Roma – Hungary (by Lilla Farkas), available at:
http://www.eumap.org/topics/minority/reports/roma_education/national/hungary/romeduc_hungary.pdf
(hereafter: Farkas)

It also needs to be noted that due to strategic litigation efforts by NGOs, it is exactly the field of education where the most substantial case law related to the ETA has started to evolve. See the separate "farewell ceremony" case under section 0.3, the Miskolc and Hajdúhadház cases under sections 2.3.1. and 6.3., and the Károli case under section 4.2.

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

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.

There are some further provisions in some sectoral laws reinforcing this ban on discrimination. For instance, under Article 6 Paragraph (1) (f) of Act CLV of 1997 on Consumer Protection (hereinafter: Consumer Protection Act) "the legal consequences prescribed in this Act shall be applied to economic organizations in the event that such organizations unlawfully withhold goods from placement on the market or unlawfully deny the provision of services."

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 of the Roma and other minorities or groups.

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%).[41] The lack of social housing has a very negative impact on the housing conditions of the marginalized 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.[42]

As to patterns and cases in housing segregation, the following can be said. In spite of the relatively high number of housing cases appearing in the statistics of the Roma Antidiscrimination Network Service of the Ministry of Justice and Law Enforcement, no cases related to housing appear in the jurisprudence of the Equal Treatment Authority. Neither does one find numerous housing cases in the latest annual reports of NEKI, the largest NGO providing legal assistance to victims of racially motivated discrimination. In his 2007 annual report, the Minorities Ombudsman sets forth the following: "Like in previous years, in 2007, only people of Roma origin filed complaints in relation to [...] housing. [...] The complainants turned to the Minorities Ombudsman, because they presumed that the injurious decisions and omissions of the concerned organs are in some way related to their biases against the Roma, so they were treated less favourably, they did not get the necessary help and support because of their Roma origin. Our experiences in several cases supported this presumption: prejudices could be traced in the way the authorities and public service providers treated the Roma clients. But [...] the violation of the requirement of equal treatment, i.e. that the complainant was discriminated due to his/her minority origin, could not be justified. In some cases the authority's measures or omissions did violate fundamental rights, but this was not in direct relation with the complainant's ethnicity, or this could not be proved – generally because the lack of comparable data."[43]

[41] http://www.jogvedok.hu/hirek_01/kisebsegi_ombudsmann.doc
[42] http://www.romnet.hu/hirek/hir07021202.html
[43] http://www.3ddigitalispublikacio.hu/media/ombudsman/beszamolo_2007.pdf

Thus, discrimination in housing seems to be more difficult to prove and related claims more difficult to assert than discrimination suffered in other fields of life, although the legislative framework is in place.

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) 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." Given that at present interpretation is not yet available for Article 22 of the ETA, reference shall be made to Decision no. 97 of the Labour Law Board (*Munkaügyi Kollégium*) of the Supreme Court, which dealt with former Article 5 Paragraph (5). It 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."

Doubtless, Hungarian judges will follow the above guidelines after ETA as well. 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. 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 Article 22 (b) is fully in line with the Framework Directive, as it does not seem to incorporate the directive 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.

Questions raising the issue of the conflicts of the non-discrimination principle and the interests of religious organizations may also entail the application of the general exempting clause [Article 7 Paragraph (2)] quoted and explained in detail under Sections 2.2. b) and 2.3. c). This is illustrated by the case outlined below.

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?

A final and binding decision has been delivered by the Supreme Court in the Károli case, which 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 organization "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.

(It needs to be stressed that the Háttér organization's claim was not related to the dismissal of the individual student: it aimed at the withdrawal of the declaration entailing the future danger of discrimination against homosexual students who wish to be admitted to the university's faculty of theology.)

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 organization submitted a request for extraordinary review to the Supreme Court, claiming that the courts misinterpreted the ETA's provision concerning the reversed burden of proof, under which if the claimant proves that it belongs to one of the protected groups (homosexuals in this case) and that it suffered a disadvantage, it is up to the defendant to prove that it observed the requirement of equal treatment or that it was by law exempted from having to do so. In the organization's view even such an abstract disadvantage as the future possibility of exclusion is sufficient, therefore the defendant university should have proven that it met the requirement of equal treatment, or was not required to do so under one of the exempting provisions of the ETA, which the university failed to do in both the first and the second instance procedure. As the ETA does not acknowledge the freedom of expression as a ground for exemption from the obligation to observe the requirement of equal treatment, the courts' argument is not legally founded. Furthermore, the organization pointed out that since the declaration is practically a guideline to be taken into account when deciding about the admission of individuals who wish to become students of theology, it may not be regarded as a simple "opinion".

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.

In addition to what has been said above, it needs to be pointed out that the declaration's part regarding the recruitment and employment of homosexual pastors was not touched upon in the case. The reason for this is that – unlike the admission of students – the employment of pastors is not the competence of the university. Therefore, the declaration was in the particular case relevant only insofar as it concerns the university's admission practices, so the case was a case of discrimination in education and not in employment.

However, based on the fact that the Court based its decision on the general exempting clause of the ETA, and ignored the specific exempting clause for education – Article 28 of the ETA –, and also taking into consideration Article 6 of the ETA, which exempts issues related to a denomination's religious life from the Act's scope (see under 3.1.2), it is likely that a claim based on the discriminative nature of the statement's part relating to homosexual pastors, would have also been rejected. This case raises some concerns about the compatibility of Hungarian law with Section 4(2) of the Framework Directive, since this provision only makes distinction based on religion (and not on sexual orientation) acceptable on the basis of the religious ethos of an organization.

Another issue raised by the Károli case is the relation between the general exempting clause [Article 7 Paragraph (2)] and the sectoral exempting clauses [Articles 22, 28, 30 and 30/A]. (For a description of these clauses please see Section 2.2.b). This relation is not determined by the law. The Supreme Court based its decision on the general exempting clause in a sector (education) with regard to which specific exempting clauses exist. This may give rise to the conclusion that instead of the *lex specialis derogat legi generali* approach, the judicial practice will tend to interpret the general and sectoral exempting clauses as complementing each other.

However, there is another possible explanation of the Supreme Court's choice. Article 28 of the ETA says the following with regard to exemptions in education:

(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.

According to one interpretation, the reason why the Supreme Court could lawfully decide the Károli case on the basis of the general exempting clause is that the above specific exempting clauses only concern differentiation (or rather separation) based on sex, ethnicity and religion. Therefore, in cases, when the differentiation concerns these grounds, the specific clause prevails over the general one [Article 7 Paragraph (2)] and exclude its application. Since the Károli case concerned education but in relation with another ground (sexual orientation), with regard to which no specific exempting clause exists, the Supreme Court could found its decision on the general clause (as there is no *lex specialis* related to this ground).

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 law does not provide for a particular exception for the armed forces in relation to age or disability discrimination and there are no specific provisions or exceptions relating to employment in the police, prison or emergency services.

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 in the context of armed forces and other armed organisations. Arguments for such treatment may be based on the above quoted Article 6 Paragraph (2) of the Armed Organisations Act ("professional qualities" may be claimed to be negatively influenced by old age or disability) or the general exemption clause of the ETA. As was pointed out above, under Article 7 Paragraph (2), an action based on a characteristic listed in Article 8 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.

Differential treatment may be based on the argument that exclusion of the elderly or the disabled from the armed organisations is found by objective consideration to have a reasonable ground, taking into account the special requirements set by the military or police service.

There is no case law on this issue, so we do not know whether courts would be willing to accept such an argument.

c) Are there cases where religious institutions can 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 (example: the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done ? Is this possibility provided for by national law only, or international agreements with the Holly 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. E.g. – as it was outlined above – under Article 27 Paragraph (1) of the ETA, 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). 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), religious institutions 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.).

4.4 Nationality discrimination (Art. 3(2)

Both the Race Directive and the Framework Employment 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 (ie where nationality discrimination may constitute ethnic discrimination as well) ?

Although the English text of Article 8 (d) 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 grounds" 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 ground" 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. A rise in the number of more non-European migrants will undoubtedly result in litigation relying on ETA and responses from domestic legislation.

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 employee and their partner. Certain employers limit these benefits to the married partners 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) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide 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)

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

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 special health and safety considerations are restricted to (young and old) age and motherhood.

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)?

There are no such exceptions.

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 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 under it 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 is 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 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 (which is a new development) older workers as well. Article 2 of the Act on the Promotion of Employment expressly claims that while the requirement of equal treatment shall be respected in connection with the promotion of employment and the support of job seekers, this shall not exclude the possibility of offering additional rights to those who are in a disadvantaged position on the labour market.

The Act on the Promotion of Employment enumerates the forms of state support available for the promotion of employment. The funding of 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 year 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 at least 12 months;
b) has not dismissed with reference to circumstances concerning its own operation any employee performing the same or a similar task within 6 months preceding the submission of the request for support; and
c) undertakes not to dismiss the disadvantaged worker 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;

(The same Article defines the term of workers with disabilities for the purposes of this type of support. For this definition, see Section 2.1.1.)

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 71 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, modeling or advertising activities upon prior authorization 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).

Examples of a maximum age requirement also exist: for instance, with regard to the service relationship of the members of armed organisations (police, border guards, etc.) and armed forces (35 and 47 years of age respectively). 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 discriminative unless they are arbitrary. [I]f the age-related conditions concern each person in the given category and are not arbitrary, they do not violate Article 70/A Par (1) of the Constitution."

Thus, continues the decision of 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 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).

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 for longer, or can an individual collect a pension and still work?

Under Article 18 of Act LXXXI of 1997 on State Pensions, the pensionable age in Hungary is 62 for both men and women. Notably, only workers with twenty years in service are eligible for a full old age pension. Others can receive a partial pension. Disabled workers' pension is dependent on the degree of their disability. Members of the armed organisations become eligible for a full old age pension five years prior to men's pensionable age. 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 will be completely unified.

Prior to 1 January 2009 men became eligible for full old age pension at 60 and women at 57, given that they had spent 38 years in service. Failing to comply with these requirements retirement is still possible but the amount of pension is reduced.

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. Lower the level of incapacity, higher the number of limitations.

b) Is there a normal age when individuals 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 for longer, or can an individual collect a pension and still work?

In Hungary private pension schemes may complement or replace the state pension scheme, based on the decision of the individual (a switch from one to the other is also possible).

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 do 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, 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) (f) of the Civil Servants Act, the service relationship of civil servants ceases at the age of 70.
- Under Article 57 Paragraph (1) (h) of Act LXVII of 1997 on the Status of Judges, if prior to turning 70 but after the coming of pensionable age the judge requests his/her retirement, or if he/she reaches 70, his/her employment ceases. Under Article 127, the lay judge's appointment ceases at the age of 70.
- Under Article 22 of Act XLI of 1991 on Public Notaries, the retirement age is fixed at 70.
- Under Article 59 Paragraph (1) (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 is five years less than the age limit set for men's old age pension.

The general upper age limit for public service is 70 years. Under Article 17 Paragraph (1) (d), of the Civil Servants Act, civil service can be terminated – in the form of a discharge – if the civil servant is a pensioner. In terms of Article 19/A Paragraph (1) not only old age pensioners, but also service pensioners, disability pensioners etc. come under the definition of pensioners.

These provisions were not subject to debate during the transposition of the directives. Notably, however, even at first glance the categories of professions subject to a compulsory retirement age seem to lend themselves to future debate or even legal action.

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?*

In terms of Government Decree 181/1996 on Early Retirement, the employer may agree with the employee about an early retirement. This makes it possible for the employee to retire at most five years before he/she would be entitled under the general rules pertaining to state pensions. However, in such a case the employer shall cover the difference between old age and early retirement pensions.

Such a scheme is possible only if the employee agrees, i.e. no unilateral decision of the employer is allowed by the Hungarian law.

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.

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 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.

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

As it was mentioned above, the pensionable age for men and women will be the same as of January 2009. Until that time, the ages will be different for men and women, meaning that the lack of the employer's obligation to provide reasons for dismissal will set in at an earlier age with respect to female employees, so in this regard the protection for men will last longer. After January 2009, this inequality will come to an end.

4.7.5 Redundancy

a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*
b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

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. It is also true though that employees are accorded special protection against dismissal in the five year period preceding their retirement age.

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 Framework Employment 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 ECJ 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 of 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 5 grounds, 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 again 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) a) with the aim of generating less tension within society and b) because problems faced by indigent non-Roma people are often very similar. 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.[44]

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 25 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 400, and admission is based on the number of points. Further 25 points shall be added to the results of a disadvantaged student if his/her parents attended only elementary school.

The per capita integration support described under Section 3.2.8, there are further positive action type initiatives in education (primarily aimed at the integration of Roma through the integration of socially disadvantaged pupils and students).

An example for more widely interpreted affirmative measures in education is the so-called „Road Pack" Grant Program initiated by the Government in order to support disadvantaged youth during their studies. It contains different program elements: the Way to Secondary School Program for instance makes it possible for disadvantaged elementary school students to choose a tutor helping him/her to prepare for admission to a secondary school. Both the students and the tutor receives a grant during 10 month of the school year.

As to the output, the following can be said. In 2007, 2,249 tutors and 5,565 pupils were supported in 590 education institutions in a total amount of HUF 41,737,500 (approximately EUR 167,000).[45] No thorough analysis on the actual impact is available, however.

There is also an on-going program aimed at the elimination of segregated residential areas. The first phase of the program (run by the Ministry of Social Affairs and Labour) was based on a tender to which the Ministry invited 40 small settlements (with a population of less than 4,000 each), where segregation is extensive. Out of the 37 applicants, 9 submitted receive support for the realization of their desegregation plans (including measures aimed at the social rehabilitation of segregated areas, and also assistance for residents of segregated areas to move into non-segregated neighborhoods). The program has continued, a new tender was issued for February 2008.[46]

[44] "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)

[45] See: http://www.okmt.hu/main.php?folderID=754&articleID=1613&ctag=articlelist&iid=1

[46] See: http://www.romaweb.hu/romaweb/index.jsp?p=sajat&id=telpro2008febr

There are numerous programs financed by the Ministry in the field of employment as well with the aim of enhancing the entry and re-entry of disadvantaged (Roma) employees into the labour market. Types of these programs include:

- vocational training and re-training
- support for starting an enterprise,
- inclusion of Roma employees in public labour schemes
- wage and social security contribution support to employers employing Roma employees
- mobility and travel support
- complex labour market programs (combination of training and financial support)
- central support to the employment-related micro-projects of Roma NGO's[47]

Experts however point out that the number of people reached by these programs is still very low compared to the unemployment rates among the Roma population,[48] and doubts are also voiced with regard to the efficiency of educational policy measures aimed at the promotion of integration.[49] The Institute for Development and Methodology of the National Audit Office also voiced criticism of the inefficiency of 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.[50]

A type of quota measures in relation to the employment of disabled persons is constituted by Article 41/A of the Act on the Promotion of Employment, in terms of which employers shall be obliged to pay a so called "rehabilitation contribution" to the central Labour Market Fund if the number of their employees exceeds 20 and the proportion of persons with disabilities within the workforce is below 5 percent.

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 fro instance Section 4.7.2).

[47]See: János Zolnay: A romapolitika sarokpontjai és finanszírozása (The key points and financing of Roma policies), pp. 27-34; http://www.eokik.hu/publikaciok/MHT08_Zolnay_romafin.pdf;
[48]Ibid.
[49]See: EUMAP Monitoring Report: Equal Access to Quality Education for Roma – Hungary (by Lilla Farkas), available at: http://www.eumap.org/topics/minority/reports/roma_education/national/hungary/romeduc_hungary.pdf
[50]See: http://www.asz.hu/ASZ/Tanulm.nsf/0/2036D01DEFE98909C125744200469FC9/$File/t206.pdf

6. REMEDIES AND ENFORCEMENT

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

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

b) Are these binding or non-binding?
In relation to each, 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)?

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 income does not exceed the minimum old age pension (HUF 28,500 or EUR 114), 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 73,616 or EUR 295).[51]

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, labour courts apply the Labour Code and are relatively independent within the judiciary. 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 Race Equality Directive, the new body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination. (Section 6.5 will deal with the sanctions that the Authority is entitled to impose, and the Authority’s organisation will be described in detail in Chapter 7.)

The establishment of the Authority did not mean that 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.

[51] Articles 5 and 6 of Act LXXX of 2003 on Legal Aid

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. It is therefore advisable from a strategic point of view to first launch an administrative proceeding, within which the acting body gathers the evidence and establishes the facts of the case in a relatively short time. Using this evidence, it will become possible for the victim to turn to a court for compensation.

Employment

Under Article 3 Paragraph (1) (d) of Act LXXV of 1996 on Labour Supervision (hereafter: Labour Supervision Act) labour inspectorates examine compliance with non-discrimination provisions. They may resort to a number of sanctions: (i) call on employers to abide by the rules of labour law; (ii) oblige employers to terminate the violation; (iii) propose the impositions of the so-called “labour law fine”; and (iv) conduct a petty offence procedure (Article 6). The fine can range between HUF 30,000 (EUR 120) and HUF 8,000,000 (EUR 32,000) depending on the number of violations and the number of employees concerned. In the case of repeated violation within 3 years, the upper limit of the fine goes up to HUF 20,000,000 (EUR 80,000) (Article 7). Labour inspectors may conduct petty offence procedures parallel to proposing the imposition of a labour law fine. However, if a fine is imposed, inspectors may not conduct petty offence procedures (Article 7).

Although as a general rule labour inspectors proceed ex officio, under Paragraph (2) of Article 3 of the labour Supervision Act investigations into cases of discrimination may only be conducted upon the request of the victim. Experts charge that the biggest problem is exactly this. This practically paralyses the use of the above sanction, because most victims are too vulnerable to be aware of the possible legal remedies.

Access to goods and services

Under Article 47 of the Act CLV of 1997 on Consumer Protection (hereafter: Consumer Protection Act), the consumer protection authority may, upon finding a violation, such as the unlawful denial of services under Article 6 (f) order the termination of the infringement; (ii) prohibit continuation of the illegal conduct; (iii) order the closure of a business establishment. Under Article 48 Paragraph (1) a fine can be imposed, which is not capped.

Under Article 46 of the Act, the provisions of the GPSA apply in consumer protection procedures. Article 3 of the GPSA allows for *ex officio* procedures, thus there is no need for personal complaints from victims. Under Article 15 Paragraph (1) of the GPSA private and legal persons whose rights are concerned are regarded as clients.

Under Article 19 Paragraph (1) of Government Decree 133/2007 on the Rules of Operating Shops, “in the course of performing their tasks, the security guards and employees of the shop shall refrain from violating the inherent rights of clients.

Under Article 21 Paragraph (3), if the trader fails to comply with legal regulations, the notary may provisionally close the shop until the noted shortcomings are remedied, or for a maximum period of up to 90 days. Under Paragraph (4), the notary may revoke the business license if the trader fails to comply with the provisions of Paragraph (3) within the period of the closure.

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 discriminative 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 discriminative 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) if the decision is made by the educational institution, b) the head of the regional office of public administration, if the discriminative measure is taken by a local council, or c) the court (if neither of the above is possible). Further judicial review of the maintainer's decision on such a request is also possible. The complainant may only turn directly to a court after a preliminary mediation procedure is accomplished. 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.

Health care
Act CXVI of 2006 on the Administrative Supervision of Health Care established the Health Care Authority. The Authority is vested with a number of administrative tasks related to health care provision. Under Article 9 Paragraph (2) for instance, the Authority monitors the accessibility of health services, with special regard to compliance with the requirement of equal treatment within health care institutions. If upon a complaint, the Authority establishes a breach of this obligation, it may

a) order that the violation be terminated;
b) order that the health care provider refrain from future violation;
c) impose a fine.

Under Article 11, the maximum amount of the fine is HUF 10,000,000 (EUR 40,000). The amount shall be determined with a view to the severity of the violation, the effect it has on patients, the duration of the violation, the intentions behind the violation, the frequency of the violations, etc. The decision of the Authority is subject to judicial review.

Complainants can file their complaints with the Authority free of charge.

Distribution of powers
If an employer discriminates against an employee, both the Authority and the Labour Inspectorate has authority to examine the case and impose sanctions on the discriminator. It was therefore necessary to devise a system for distributing the cases. The key principle is that it is up to the victim to decide which authority he/she wishes to turn to: under Article 15 Paragraph (1) of the ETA, a violation of the principle of equal treatment within the scope of this Act 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 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.[52] 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 judgement is made in the matter.[53] If the case has been judged by any public administrative body, then other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the former public administrative body.

This means the following. If for example a group of Roma people are denied access to a pub, the members of the group can decide whether they turn to the Authority or the Consumer protection. If one of them turns to the Authority, it shall notify the Consumer Protection, as the case falls into the Consumer protection's authority as well. If then another member of the group files a complaint with the Consumer protection, this organ may not proceed with regard to the first complainant, and shall suspend its procedure with regard to the second one. Once the Authority has made a decision on the case, the Consumer Protection may continue its procedure, but it has to base its decision on the facts established by the Authority.

The Authority has some degree of dominance though, as under Article 15 Paragraph (7), the Authority may participate as an interpleader in the judicial review of a public administrative decision brought by another public administrative body concerning the principle of equal treatment.

No parallel proceeding of the Authority and a court (civil or labour) is possible. In terms of Article 15/A of the ETA, if the victim of discrimination also files a lawsuit with the court, the Authority shall suspend its procedure until the case is adjudicated, and notifies the court about the suspending decision. When the court case is closed, the court notifies the Authority about its decision. The Authority then can proceed but is shall do so on the basis of the facts of the case as established by the court. If the case has been judged by the court before the victim turns to the Authority, the Authority a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the court.

Petty offence proceedings

Petty offence proceedings in the Hungarian legal system are quasi criminal proceedings devised for small scale violations. Their procedural rules are set out in Act 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.

[52]Article 15 Paragraph (2), ETA
[53]Article 15 Paragraph (3), ETA

Petty offences are decided upon by the general petty offence authority (the local notary) or a specialised authority. The decision is subject to two level of judicial review. At first, the court reviews the decision on the basis of the case files, 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 (EUR 400).

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 240).

As it can be seen, the texts of the the two provisions are not consistent: for instance, Article 96 expressly mentions disability as one of the protected grounds, whereas Article 93 does not. This however does not mean that any of the grounds listed in the Directives remains unprotected, as the list is open ended, "any other ground that is not relevant from the point of view of the occupation" covers all the remaining Article 13 grounds.

These proceedings may be conducted by both the labour inspectorates (as specialised petty offence authorities) and local notaries.

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 400). The proceeding shall be conducted by the Office of Education established by Government Decree 307/2006.

Health care
Under Article 101 Paragraph (1) (a) 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 200). 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
The ETA does not explicitly authorize the Authority to mediate between the parties, but under Article 64 of the GPSA, the Authority, as a public administrative organ, is authorized 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 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 – imposes a sanction or rejects the complaint.

Access to goods and services
Chapter VI of the Consumer Protection Act regulates the operation of the so-called arbitration boards. In terms of Article 18 of the Act, "arbitration boards are established for the purpose of attempting to reach an agreement between an economic organization and a consumer to settle a dispute or, should the prior process fail to produce results, to decide on the matter in order to quickly, efficiently and simply enforce consumer rights." Arbitration boards are independent organs operating in affiliation with regional chambers of commerce. Board members are appointed in equal proportions by the chamber and by social organizations representing consumer interests (Article 21).

The consumer must attempt to settle the case directly with the economic organization involved. The latter has the duty to cooperate. In case of disagreement, it shall inform the consumer in a written statement (Article 27). The consumer (or an NGO representing consumer interests) can then petition the arbitration board and attach a fee of HUF 1,000 (EUR 4).

Under Article 30 of the Act, the chairman of the council shall attempt to negotiate an agreement between the parties. The council shall approve the agreement by resolution, if it is in conformity with legal regulations, otherwise, or if there is no agreement, it shall continue the proceeding. If necessary, the chairman shall inform the consumer of his rights and obligations.

The council decides by simple majority vote within thirty days from the commencement of the proceeding. The deadline may be extended by maximum thirty days. The council delivers a *recommendation*, if the economic organization involved in the case has stated upon the commencement of the proceedings that it does not accept the decision of the council as obligatory. Otherwise it is without dispute an *obligatory resolution* (Article 31-32).

The organization shall comply with the resolution within fifteen days from its delivery. If the resolution is obligatory, but the organization fails to comply, the consumer may request execution by court (Articles 33 and 36). Otherwise, (a) the chamber operating the arbitration board or the competent consumer protection inspectorate can publish, (withholding the consumer's name) the complaint and the outcome of the proceedings, or (b) the consumer can try to enforce his/her claim in a court procedure (Articles 34 and 36).

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 organizational 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 Constitution, 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).

<u>Other forums to be approached in cases of discrimination</u>

The "Ombudsman"

Under Article 32/B of the Constitution the Ombudsmen (Parliamentary Commissioners) investigate violations of constitutional rights and initiate general or individual measures to remedy such violations. There are currently four ombudspersons in Hungary: the Ombudsman for Civil Rights (General Ombudsman), the Deputy Ombudsman for Civil Rights, the Ombudsman for the Rights of National and Ethnic Minorities (Minorities Ombudsman) and the Ombudsman of Data Protection.

Under Act LIX of 1993 Ombudsmen are appointed by two-thirds parliamentary majority vote. Financial independence (Article 9) and immunity are provided for. Any victim of acts or omissions of public authorities or public service providers can complain to the Ombudsmen's office, provided that all administrative remedies are exhausted or none exist. The Ombudsmen can proceed *ex officio*.

Ombudsmen can investigate into any authority, including the armed forces, national security services, and policing organisations. They may request information, a hearing, written explanation, declaration or opinion from the competent official or demand that an inquiry be conducted by a superior. When finding a violation, the Ombudsmen issue recommendations, to which perpetrators must respond within 30 days. Further, Ombudsmen may (i) petition the Constitutional Court; (ii) initiate that the prosecutor issue a protest; and (iii) propose that a legal provision be amended, repealed or issued (Article 25). Ombudsmen may initiate disciplinary or criminal proceedings (Article 24).

The Ombudsmen's main publicity weapon is their annual report submitted to Parliament. Further, they can request parliamentary investigations and debates.

The ETA fails to settle potential clashes of authority between the Authority and the Ombudsmen who are also entitled 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 Ombudsmen from the Authority's investigation.[54]

In practice however, a good working relationship was established between the Minorities Ombudsman and the Authority. For example in a case where the Board of Representatives of the Local Council, despite the recommendation of the local minority self-government and the unequivocal will of the local Roma population expressed through a petition, did not elect the only Roma representative of the board neither a member nor the president of the Permanent Sub-board of Ethnic Issues, the Minorities Ombudsman forwarded the case to the Authority after his recommendations were neglected by the local council. (The Authority established discrimination, since in its view, the representation of the interests of the Roma population was not secured in the local council, and it could be established that while the presidents of all other permanent sub-boards had been elected on the basis of specialization and experience, it had not been considered evident by the local council that the only Roma representative should be a member of the Board of Ethnic Issues. However, the Metropolitan Court annulled the decision of the Authority since after the initiation of the administrative proceedings, the Board of Representatives requested the local minority government to delegate a member to the Sub-board, they, however, due to the escalation of the situation, insisted on the election of the Roma representative as president and did not fulfil the request. In the repeated procedure the Authority again established the violation, which was approved by the Metropolitan Court)[55]

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[54]Article 15, Paragraph (6), ETA.

[55]Report on the activities of the Equal Treatment Authority and the experiences of the implementation of Act Nr. 125 of 2003 on equal treatment and the promotion of equal opportunities (July 2006). See: http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes06_EN.htm

Issues of accessibility

In general, we can say that there are rules setting forth the requirement of accessibility, but their implementation leaves much to be desired.

Article 5 Paragraph (2) of the RPD Act claims that persons with disabilities shall be entitled to an accessible, perceivable and safe environment. Article 6 Paragraph (1) prescribes that access to information of public interest as well as to information on the rights of the disabled shall be guaranteed for disabled persons and their family members and helpers.

As was pointed out above, under section 2.6, in terms of Article 29 of the RPD Act, public buildings existing at the time of the law's coming into force ought to have been made accessible for disabled persons by 1 January 2005 (and new ones shall be built in a way as to guarantee accessibility). The failure to keep this deadline was also described in detail.

There are some positive developments with regard to disability though. The GPSA is the first procedural code that expressly prescribes the right to sign language interpretation, and sets forth (under Article 11) that the costs of such interpretation shall be borne by the proceeding administrative authority.

On the other hand, information in Braille would be practically impossible to find in public institutions.

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. 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 (such as disputes concerning the termination of an employment relationship) the Labour Code (Article 202) limits the period open for initiating a lawsuit to 30 days after the injurious measure.

Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.

The statistics of the **Equal Treatment Authority** and the **Roma Anti-discrimination Network Service of the Ministry of Justice and Law Enforcement** concerning discrimination against the Roma are presented under Section 0.3.

The statistics of the **Equal Treatment Authority** are summarised in Section 7.

In 2007, the **Labour Inspectorate** took measures in three discrimination cases affecting altogether 25 employees. All the cases were related to racial discrimination[56]

[56]Information provided by staff upon targeted request.

In 2007 the **Office of Education** received 11 complaints and notifications regarding the infringement of the requirement of equal treatment. The Office established the violation in all 11 cases. Out of the 11 complaints one was an individual complaint, the others arrived from the Equal Treatment Authority, the Minorities Ombudsman, and from the Ministry of Education and Culture – all of them concerned racial discrimination. The Office imposed a fine in seven cases (a total of HUF 410,000 – EUR 1,640) ranging from HUF 20,000 (EUR 80) to HUF 100,000 (EUR 400). In four cases the Office issued a warning to the educational institution.[57]

The **Health Care Authority** handled altogether four discrimination complaints in 2007, out of which two concerned racial discrimination. Out of the four complaints, two were rejected due to the lack of competence, one applicant's case was investigated but rejected as unfounded (the applicant was Roma), and in one case the Authority imposed fine.[58]

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) in support of a complainant
b) on behalf of one or more complaints (please indicate if class actions are possible)

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.

Presently, the Authority "shall continuously provide information to those concerned and provide assistance with regard to acting against the violation of equal treatment"[59]

Furthermore, the ETA introduced the term "social and interest representation organisation", which, under Article 3 (f), 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 disadvantageous groups or the protection of human rights; and, in respect of a particular national and ethnic minority, the minority self-government; furthermore the trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions.

This is an important notion, as under Article 18 of the ETA, unless stipulated otherwise by the law, any social and interest representation organisation, as well as the Authority may – based on an authorization by the victim – 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.

[57]Information provided by staff upon targeted request.
[58] Information provided by staff upon targeted request.
[59]Article 14, Paragpah (1) (g), ETA.

Another important novelty introduced by the ETA is the possibility of bringing an *actio popularis* claim. In terms of 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.

The first case ever emerging under the ETA was the *actio popularis* claim brought by a gay organisation against a denominational university (and described in detail under section 3.2.8).

At the time of the lawsuit the text referring to a direct danger of the violation was not included in the ETA. As it was pointed out in Section 3.2.8, the plaintiff organisation sought remedy against a general declaration of the university excluding homosexual students from theological education. A part of the university's defence was that an actio popularis claim may only be brought if the violation of the principle of equal treatment has already taken place. Since at the time of the lawsuit no one had been rejected by the university on the basis of the declaration,[60] – in the view of the defendant – the plaintiff had no legal standing on the basis of the actio popularis provision. Furthermore, the defendant claimed that homosexuality is not an essential feature of the individual.

Although the court decided against the plaintiff, it came to the conclusion that homosexuality is an inherent feature of one's personality and that the future possibility of an infringement of rights is sufficient ground for bringing an actio popularis claim. Consequently, the court acknowledged the gay association's legal standing in the case (and rejected the claim on the merits).

The courts argument was taken into consideration when the ETA was amended and the direct danger of a violation was inserted into the law to make it absoluetly sure that no actio popularis claims can be rejected on the basis of the lack of a concrete violation taking place.

This case was followed by the Miskolc educational segregation case described under Section 2.3.1. and the same organization (Chance for Children Foundation) launched a number of actio popularis claims with respect of the segregation of Roma pupils, one example being the Hajdúhadház case also described under Section 2.3.1.

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).

[60] A homosexual student had been expelled from the university, but the declaration was issued afterwards.

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. Article 19 is one of the provisions that were amended as of 1 January 2007. With the amendments, the Hungarian legislation has come clearly in line with the Directives, in fact, it may be described as even more advantageous for the victims.

The new 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 Substantiation means 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. Before the amendment the disadvantage and the protected ground had to be proved – i.e. establish in full – by the injured party, however, as it was outlined above, this is not the case any more.

The Miskolc case described under Section 2.3.1. highlighted how difficult it is for Hungarian judges to handle the concept of the shifted burden of proof. The court of first instance accepted the fact that Roma children are overrepresented in some of the schools integrated from an economic and administrative point of view and also that the level of education is lower in these schools than the ones they have been integrated into, however, it rejected the claim that by not integrating the catchment areas of the schools and thus maintaining the segregation of Roma pupils, the local council of Miskolc acted in a discriminatory manner.

Despite the clear provisions of the ETA, the court expressed its opinion that the reversed burden of proof does not exempt the claimant from proving that there is a causal link between the protected ground (Roma origin) and the disadvantage the group with that particular protected characteristic suffers. As was outlined above, under Article 19, after the complainant proves that (i) he/she possesses a protected characteristic, and (ii) he/she has suffered a disadvantage, it is up to the alleged discriminator to prove that the requirement of equal treatment was duly observed. One possibility to prove this is to demonstrate that there was no causal link between the protected ground and the disadvantage (i.e. the disadvantage has another, legitimate reason). If the causal link also has to be proved by the victim, the burden of proof is not reversed (or shifted) at all.

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 the city of Miskolc to publicise its finding through the Hungarian Press Agency. In its decision the second instance court laid down very important principles concerning the shift of the burden of proof. The court observed that the legal provision regulating the reversal of the burden of proof in fact created a legal presumption to the effect that once the protected ground (Roma ethnicity) and the disadvantage suffered (separate education of lower quality) had been established, the burden of disproving the discrimination automatically fell to the defendant.

There are other positive examples as well. In a labour lawsuit (also taking place in Miskolc), the first instance court established that the Hungarian Railways had infringed the inherent right to equal treatment of two Roma employees. The Hungarian Railways handed over some tasks related to the maintenance of the railroad to a private company. As part of the agreement, out of the 30 employees who before the handing over fulfilled these tasks, the Railways also transferred 11 employees to the private company. Out of the 11, 9 were of Roma origin, whereas none of the remaining 19 were Roma. In its decision the court claimed that the protected ground of and the disadvantage suffered by the plaintiffs were appropriately proved, however, since the defendant was not able to prove that there was no causal link between the two, direct discrimination based on racial origin could be established. The defendant was obliged to pay EUR 2000 to each plaintiffs as compensation for non-pecuniary damages.

It shall be noted that 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.[61]

[61]See: http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf_200804.htm

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 persons other than the complainant? (e.g. witnesses, ➔ or person that help the victim of discrimination to present a complaint)

Before the ETA came into force, no general definition of victimization 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.*
b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*
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 is required by the Directives?*

The system of sanctions has not become much more consistent with the coming into force of the ETA. Even since that time, some new remedial forums have been established (e.g. the Health Care Authority – see under Section 6.1.).

Under Section 6.1 we already outlined most of the sanctions that may be applied in discrimination cases. We touched upon sanctions applied by the Civil Courts, the Labour Inspectorates, the Consumer Protection. 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, the sanctions imposed by the Equal Treatment Authority can be used to redress discrimination in any sector and based on any ground.

Under Article 16 Paragraph (1) of the ETA, if the Authority has established that the provisions ensuring the principle of equal treatment have been violated, it may a) order that the situation constituting a violation of law be terminated; b) prohibit the future continuation of the conduct constituting a violation of law, c) order that its decision establishing the violation of law be published, d) impose a fine, e) apply a legal consequence determined in a special act.

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 legal consequences set out in Paragraph (1) can be applied jointly.

Under Paragraph (4), the sum of the fine imposed by the Authority can range from HUF 50,000 (EUR 200) to HUF 6,000,000 (EUR 24,000).

Article 17 reads as follows:

"(1) The decision of the Authority may not be appealed within a public administrative procedure.

(2) The decision of the Authority concerning the violation of the principle of equal treatment may not be altered or annulled by supervisory powers.

(3) According to 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.

(4) The Metropolitan Court shall proceed through a panel comprised of three professional judges.

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 organizer 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, discriminative 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 discriminative 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.

Health care:

Besides Article 101 of the Petty Offences Decree and the proceeding of the Health Care Authority, Article 27 of the RPD Act is also applicable: If an unlawful detriment is imposed on someone because of his/her disability, he or she may be entitled to exercise all the rights applicable in the case of the violation of the inherent rights of the individual. This refers to the remedies enumerated under Article 84 of Act IV of 1959 on the Civil Code, so in this sense this provision does not add too much to the system of sanctions.

Employment:

Besides the sanctions applicable by labour courts and the labour inspectorate, as well as the petty offences related to employment, it is worth mentioning that under Article 15 Paragraph 9 of Act XXXVIII of 1992 on Public Finances, no support may be provided for an employer from the central budget or separate financial funds if within two years preceding the submission of the application it was fined by the conclusive decision of an administrative authority (e.g. the Equal Treatment Authority or the Labour Inspectorate).

Access to goods and services:

The sanctions applicable by both the notary and the consumer protection inspectorate are outlined under Section 6.1.

Overview

To give an overview of the situation, we can still say that the Hungarian enforcement model is fundamentally individualistic. Remedies for discriminatory acts can be sought under the Civil Code, the Labour Code and various administrative proceedings, including the procedure of the Authority, but the system of sanctions is still not cohesive. Extreme forms of racial discrimination are penalized.

Before the coming into force of the ETA the core provisions of this patchy system were Articles 76 (discrimination is a violation of inherent civil rights) and 84 (the types of remedies to be sought) of the Civil Code. Theoretically any act of discrimination could be brought under the tenet of Article 76. More importantly, however, it was the legal provision that operationalized and ensured the vertical effect of the constitutional anti-discrimination clause.

Administrative authorities, such as the Labour Inspection, the Consumer Protection Inspection and notaries have had for long the power to investigate and sanction (mainly fine) employers and service providers who discriminate on the basis of race. Nevertheless, they have been found to persistently fail to investigate complaints and adequately sanction perpetrators. According to the Minorities Ombudsman for example, in the field of employment, where an elaborate set of sanctions has been in place for quite some time, their application to discrimination in recruitment has been staggeringly ineffective.

Therefore, although administrative procedures offered a much quicker route, most of the successful efforts to enforce the right to non-discrimination before the Authority was set up were attached to civil lawsuits brought under Articles 76 and 84 of the Civil Code. Civil procedures however tend to be rather long, and sanctions, if applied at the end of three-five years of court proceedings, are not dissuasive enough.

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 EUR 400. This is double of the 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 2000, 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.

With regard to the sanctioning practice of the Authority, it can be said that it applies fines between EUR 1,200 and 18,200.[62] In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1600 and EUR 2000 respectively. An EUR 1800 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. The highest 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.[63]

It has to be noted that the sanctions imposed by the Authority have shown a tendency of increase in the past years.

[62]See: http://www.egyenlobanasmod.hu/kozadat.htm#ie1
[63] See: http://www.egyenlobanasmod.hu/zanza/700-2007.pdf

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), 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?

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin (the Equal Treatment Authority) established by Article 13 of the ETA 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.

The Authority 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 Race Equality Directive, the new body is vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination.

The three-year caseload of the Authority is summarised in the table below

	2005	**2006**	**2007**
Complaints of discrimination	491	592	756
Decision on the merits of the case	144	212	186
Decisions establishing discrimination	9	27	29
Friendly settlement	6	13	3

756 complaints were filed with the Authority in 2007. A decision on the merits was delivered in 186 cases (96 cases were forwarded to the competent authority, in 348 cases the complainant was informed about possible forms of legal remedy, the rest of the cases were in progress at the end of the year).

Out of the 186 cases, discrimination was established in 29, out of which 14 violations were sanctioned with a fine. The highest amount imposed was HUF 4,500,000 (EUR 18,000). In 15 cases the Authority ordered that its decision shall be made public. [64] A detailed breakdown for the year 2007 is presented below.

[64] Ibid.

Breakdown based on ground

Ground of discrimination	**Number of decisions**
Nationality, ethnic or racial origin	8
Age	4
Maternity	2
Disability	3
Affiliation with trade union	2
Gender	1
Financial status	1
Lack of an equal opportunities plan	1
Health status	1
Political or other opinion	1
Other ground	5
Sexual orientation	0
Total	**29**

Breakdown based on sector

Sector	**Number of decisions**
Employment	17
Access to goods and services	9
Activities of local councils	2
Education (segregation)	1
Total	**29**

Based on the Authority's report on the year 2005, most complaints come from

- women who wish to have children
- women over the age of 50,
- persons living with disabilities,
- Roma people.

In its report on the year 2006, the Authority concluded that most problematic sector is employment, while discrimination concerning access to goods and services almost exclusively concerns Roma people. Accessibility of public buildings remains to be a problem.[65] Based on the numbers, it can be said that similar trends characterised the year 2007 as well.

[65] http://www.egyenlobanasmod.hu/index.php?g=EBH-jelentes06_EN.htm

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.*

Article 13 of the ETA defines the Authority as a public administrative body with the overall responsibility to ensure compliance with the principle of equal treatment. In terms of Article 1 of the ETAD, the Authority is supervised by the Minister of Social and Labour Affairs. In order to guarantee independence, Paragraph (3) of the Article 13 of the ETA declares that "the Authority shall not be instructed in relation to the exercise of its duties defined in this law." This means that in theory, despite the Ministerial supervision, the Authority shall enjoy full independence in performing its statutory tasks. A further provision envisioned to protect independence is Article 17 Paragraph (2), which sets forth that the Minister may not change or abolish the Authority's decisions in his/her supervisory role. (In the Hungarian public administrative law, supervisory organs are normally entitled to change or abolish the administrative decisions delivered by the supervised entities.)

The Authority's independence is however still not fully guaranteed.

With regard to budgetary independence, the December 2006 amendment of the ETAD seems to have solved most of the problems.

The original Article 13 Paragraph (4) of the ETA, declared that the Authority is a budgetary organ vested with so-called "chapter-type authorizations". According to Act XXXVIII of 1993 on the State Budget, chapters are the largest units of the state budget, and the head of the organ supervising a given chapter is responsible for the planning and implementation of the budget of all the organs belonging to the chapter and is also entitled to amend the budget of these organizations. The fact that the Authority was vested with "chapter-type authorizations", therefore meant that its budget was the sole responsibility of its President, and that it was not subordinated to any other organs or persons.

However, in May 2005 the Parliament amended the ETA, and deprived the Authority of its chapter-type authorizations thus (from a financial point of view) practically reducing the body to the level of a department within the Ministry supervising it (at the time it was the Ministry Youth, Social and Family Affairs and Equal Treatment, now it is the Ministry of Social Affairs and Labour). The amended Article 13 Paragraph (4) simply claims that the Authority's budget forms a separate unit within the budgetary chapter of the supervising Ministry. This means that although the annual budget of the Authority is determined by the Parliament in the law on the annual budget, the Minister (as the person responsible for the Ministry's budget and entitled to regroup amounts between the different units belonging to it) has the right to modify (reduce or increase) the Authority's budget during the year. This – without any restrictions as to the Minister's budgetary rights – meant a significant threat to the Authority's independence.

This situation was remedied by the December 2006 amendment of the ETAD, Article 1 Paragraph (2) of which now declares that the Authority is a budgetary organ in charge of its own finances, which has an unrestricted competence to dispose over its own budgetary appropriations.

This however is only a remedy on the level of the legal framework. As to the actual financial resources, we can say that despite a clearly growing work load, the Authority's budget was substantially decreased from HUF 220,000,000 (EUR 880,000) in 2006 to HUF 160,000,000 (EUR 640,000) in 2007. It has to be added that under Article 14/A of the ETAD, the Authority may spend 50% of the imposed fines on 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.

The other problem – namely the status of the Authority's President – has not been solved yet. Pursuant to Article 2 Paragraph (1) of the ETAD the Authority is lead by a President – in the rank of a deputy state secretary –, appointed by the Prime Minister on common proposal by the Minister of Justice and the Minister of Equal Opportunities. In terms of Paragraph (2), both the president and Vice-president shall be Hungarian citizens, without a criminal record. They shall be lawyers with (i) outstanding expertise in the field of human rights or the prohibition of discrimination, (ii) a bar exam and (iii) at least five years of practice in the legal field or in public administration. Pursuant to Article 2 Paragraph (4) the Minister of Labour and Social Affairs exercises the employer's rights over the President (with the exception of the right of appointment and dismissal, which is exercised by the Prime Minister).

The Vice-president and the staff are appointed by the President, who also exercises the employer's rights over them.

With regard to the Authority's actual independence the status of its President is of crucial importance. Under Article 2 Paragraph (1) of the ETAD, the President is appointed for an indefinite period of time in accordance with the provisions of the Civil Servants Act. As the reference is to the special rules of the Civil Servants Act concerning "appointment to a leading position" (Article 31), the President's appointment may be withdrawn at any time without any justification.

Pursuant to Article 17/B Paragraph (3) of the ETA, the Authority shall perform most of its duties in co-operation with an advisory board (the Equal Treatment Advisory Board, hereinafter: Advisory Board) whose members have extensive experience in the protection of human rights and in enforcing the principle of equal treatment, and have been invited by the Prime Minister to join the Committee. With regard to decisions on individual complaints, and the bringing of actio popularis claims, the Advisory Board's role is restricted to legal interpretations assisting the Authority's work.

Under Article 17/C of the ETA, the Advisory Board consists of six members. It has co-decision powers on the adoption of proposals for government decision and legal drafts relating to equal treatment and on reporting in general.

Pursuant to Article 17/C Paragraph (1) of the ETA, "following consultation with public bodies and NGOs participating in the implementation of equal treatment, three members are proposed by the Minister of Justice and another three by the Minister responsible for the promotion of equal opportunities respectively." The candidates are invited to join the Board by the Prime Minister. In terms of Paragraph (2), members must have a clean criminal record. Under Paragraph (3), persons who for the last two years have been MPs, members of government or political state secretaries, employees or representatives or political parties, cannot be selected. Pursuant to Paragraph (5), their office terminates with resignation, the laps of six years, death or dismissal. In case of dismissal the Prime Minister is under the duty to appoint a new member. Resigned members shall be replaced within thirty days.

In terms of Article 17/D of the ETA, the Board elects its own President, who convenes and manages the meetings. All members are remunerated. Under Paragraph (3) of the same Article, the Board decides on a majority vote, with the President deciding in case of an impass.

Until 1 January 2007, members of the Board were entitled to remuneration for their work. In terms of the amendments, members are no longer remunerated for their work.

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 14 of the ETA. It reads as follows: The Authority shall

(c) , based on a complaint or – in cases defined in the ETA – ex officio, 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;
(d) may initiate an actio popularis claim with a view to protecting the rights of persons and groups whose rights have been violated;
(e) review and comment on drafts of legal acts and reports concerning equal treatment;
(f) make proposals concerning governmental decisions and legislation pertaining to equal treatment;
(g) regularly inform the public and the Government about the situation concerning the enforcement of equal treatment;
(h) in the course of performing its duties, co-operate with the social and representation organisations and the relevant state bodies;
(i) continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment;
(j) provide assistance in the preparation of governmental reports to international organizations, especially to the Council of Europe concerning the principle of equal treatment;

(k) provide assistance in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment;
(l) 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 assistance to victims, conduct surveys and publish 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), we have to conclude that at present the circumstances prevent the Authority from fulfilling this task.

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").

In fact, the key element of the Authority's activity is none of the three tasks envisioned by the Racial Equality Directive, but investigating into and deciding on individual instances of discrimination. In terms of Article 14 Paragraph (1) Point (a) of the ETA, 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) 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 authorization 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.

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.

f) Is the work undertaken independently?

As to the issue of independence, see what has been set forth in connection with the legal framework above, under point b). With regard to the practice, we can say that the Authority's impartiality and actual independence has not been questioned during the two years of its operation.

g) 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 above).

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 discriminative 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.

There are further Governmental efforts to disseminate information on equal opportunities and protection against discrimination. Within the Republican Program for Equal Opportunities, a so-called National Network for Equal Opportunities has been set up. The Network consists of twenty Houses of Opportunities (one in each county and one in Budapest) each with a staff of three headed by someone with a law degree and a diploma in either sociology or psychology. The Houses of Opportunities have several tasks including the organization of researches, conferences, preparation and dissemination of information materials. Information on the tasks and contact data of the Houses of Opportunities can be found on the website of the Ministry of Social Affairs and Labour (http://www.szmm.gov.hu/).

The website also has sections dealing with issues related to protection against discrimination, including the equal opportunities of certain protected groups (the Roma, disabled people, sexual orientation, gender equality).

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)*

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. For instance, in September 2007 the Authority's president gave a presentation at the anti-discrimination training organised by the Hungarian Helsinki Committee for representatives of NGOs and trade unions in the framework of the of the European Community Action Programme to combat discrimination 2001-2006 (Antidiscrimination and Diversity Training VT/2006/009). In the framework of the same program, two staff members of the Authority participated in the follow up training organised in January 2008.

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)

The institutional framework for such dialogue is in place: the National Labour Council includes the representatives of the Government and all the national organizations representing employers and workers. According to Article 16 of the Labour Code, the Government discusses employment-related issues of national significance with the national organs representing the interests of employers and employees in the National Labour Council.

Despite this, dialogue concerning the promotion of equal treatment has not become much more intensive in the past years. Based on interviews with trade union representatives within the framework of the above mentioned Antidiscrimination and Diversity Training Program VT/2006/009, it can be said that anti-discrimination is not in the forefront of the attention of trade unions. The unions are more engaged in "classic" issues, such as group dismissals and wage negotiations.

d) to specifically address Roma and Travellers

Besides the above listed efforts (e.g. the Houses of Opportunities), a website is operated specifically for Roma issues. The site www.romaweb.hu has a separate chapter on governmental information and news regarding the Roma, and one on available grants and tenders targeted at the Roma minority.

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).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

There are no laws that blatantly violate the principle of equality. There are some statutes with regard to which such infringement 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 Article 1 (b) of Act XXXII of 1989 on the Constitutional Court the latter is entitled to subsequently examine the constitutionality of any legal provision. Any law that is contrary to the constitutional non-discrimination clause is also automatically unconstitutional. Under Article 21 Paragraph (2) any person has the right to petition the Constitutional Court for such examination. Under Article 40 of the Act if the Constitutional Court finds that a legal provision is unconstitutional, it shall – fully or partly – abolish that provision. 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.

9. OVERVIEW

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 (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Structure of the Hungarian anti-discrimination law

The previously inconsistent and scattered system of anti-discrimination underwent an extremely thorough reform inspired by the necessity to implement the EC anti-discrimination acquis. Presently, the system is set up as follows.

- The corner stone of the regulation is the general anti-discrimination clause (Article 70/A) of Act XX of 1949 on the Constitution of the Republic 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 protection provided by the ETA is amplified by Articles 76 and 84 of Act IV of 1959 on the Civil Code (Civil Code), which list the right to non-discrimination among the so-called “inherent rights” and prescribe specific sanctions for the infringement of such rights.
- 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. Examples of such statutes are: Act LIX of 1993 on the Parliamentary Commissioner of Human Rights; Act LXXV of 1996 on Labour Inspection; and Act CLV of 1997 on Consumer Protection.

Protected grounds

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.

Scope of protection

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 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

Before the coming into force of the ETA, no definition of direct discrimination existed in the Hungarian legal system, and indirect discrimination was only defined in labour law. This was changed by the new anti-discrimination code, which introduced the following new concepts: 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 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. Positive action is possible on the basis of a law, a government decree or a collective agreement “with the aim of eliminating the objectively assessable inequality of opportunities of an expressly identified social group”.

Institutional framework

The ETA creates the framework of setting up an equality body (the Equal Treatment Authority) with a very wide scope of authority. The Authority is an administrative organ functioning under the supervision of the Government with an 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 Race Equality Directive, the new 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 new authority, organs that have played a role in combating discrimination, will continue to act in the field. Court procedures will continue to be available for victims (in fact, the Authority is authorized to assist the victim in asserting his/her rights before the court), 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 either of the two inspectorates. The Parliamentary Commissioners (of Civil Rights and of Minority Rights) also remain authorised to investigate cases of discrimination.

The focus of anti-discrimination proceedings has mainly shifted to the Authority, however, court procedures have remained to be very important, as this is the only forum where victims themselves can receive a monetary compensation (the fines imposed by the Authority are paid to the central budget).

New legal institutions

An important development is that the ETA has extended the reversal of the burden of proof to all procedures related to discrimination (with the exception of penal law and petty offence procedures). Before the statute's coming into effect the reversed burden of proof existed only in labour law.

Another important novelty is that the introduction of the institution of actio popularis has enabled associations and other entities with a legitimate interest in ensuring compliance with anti-discrimination law to engage in judicial procedures on behalf of or in support of the complainants.

Overall trends

Although the legislative framework is still not in complete harmony with the Directives (although significant improvement was achieved through the December 2006 amendment of the ETA) and the lack of guarantees for the Authority's independence may give rise to worries, it can be said that the coming into force of the ETA and the first three years of 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 has proved to be very open towards NGO's and other civilian actors, cooperation is much closer than what is usually characteristic for Hungarian public administrative bodies.

10. 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?

The Ministry of Justice and Law Enforcement, the Ministry of Social Affairs and Labour and the Equal Treatment Authority are primarily responsible for dealing with or coordinating issues regarding antidiscrimination on the grounds covered by this report.

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 Date

Title of Legislation (including amending legislation)	In force from:	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.	Please give month / year			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, harassement, instruction to discriminate or creation of a specialised body
Act XX of 1949 on the Constitution of the Republic of Hungary (Article 70/A)	10/1989	All	Constitutional law	All	prohibition of discrimination
Act CXXV of 2003 on Equal Treatment and the Promotion of the Equality of Opportunities	01/2004 (certain provisions: 01/2005 and 01/2007)	All	Civil and administrative	All, with special focus on: employment (public and private), social protection and healthcare, housing, education, access to goods and services	prohibition of direct and indirect discrimination, victimisation, instruction to discriminate, harassment etc.; creation of a specialised body; shift of the burden of proof; legal standing of associations; sanctions of

					discrimination, etc.
Government Decree 361/2004 on the Equal Treatment Authority and the Detailed Provisions of its Proceedings	01/2005 (certain provisions: 01/2007)	All	Administrative	All	creation of a specialised body
Act IV of 1957 on the Civil Code (Art's 75, 76 and 84)	05/1960 with modifications	All	Civil	All (with certain exceptions, where sectoral provisions are in place)	prohibition of discrimination, sanctions of discrimination
Act LXXV of 1996 on Labour Inspection	09/1996 with modifications	All	Administrative	Employment	creation of an organ with a role in combating discrimination, sanctioning of discrimination
Act CLV of 1997 on Consumer Protection	03/1998 with modifications	All	Administrative	Access to goods and services	creation of an organ with a role in combating discrimination, sanctioning of discrimination
Act CXVI of 2006 on the Administrative Supervision of Health Care	01/2007 with modifications	All	Administrative	Health care	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)	03/2000; 06/2001; 03/2000 and 05/2002 respectively	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	07/1992 with modifications	All	Labour law	Employment	prohibition of discrimination, sanctions of discrimination
Act LXXIX of 1993 on Public Education	09/1993 with modifications	All	Administrative law	Education	prohibition of discrimination, sanctions of discrimination
Act LIX of 1993 on the Parliamentary Commissioner of Human Rights	06/1993	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	01/1999 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

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country Date

Instrument	Signed (yes/no)	Ratified (yes/no)	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)	yes	yes	--	yes	Theoretically yes, practically with some difficulties
Protocol 12, ECHR	yes	no	--	--	--
Revised European Social Charter	yes	no	--	Collective complaints protocol signed but not ratified	--
International Covenant on Civil and Political Rights	yes	yes	--	yes	Theoretically yes, practically with some difficulties
Framework Convention for the Protection of National Minorities	yes	yes	--	--	Theoretically yes, practically with some difficulties
International Convention on Economic, Social and Cultural Rights	yes	yes	--	--	Theoretically yes, practically with some difficulties
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes	--	yes	Theoretically yes, practically with some difficulties

Convention on the Elimination of Discrimination Against Women	yes	yes	--	yes	Theoretically yes, practically with some difficulties
ILO Convention No. 111 on Discrimination	yes	yes	--	--	Theoretically yes, practically with some difficulties
Convention on the Rights of the Child	yes	yes	--	--	Theoretically yes, practically with some difficulties
Convention on the Rights of Persons with Disabilities	yes	yes	--	yes	Theoretically yes, practically with some difficulties