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Non-discrimination

Hungary

2023

including summary

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European Commission
B-1049 Brussels

EUROPEAN COMMISSION

Country report
Non-discrimination

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

Hungary

András Kádár

Reporting period 1 January 2022 – 1 January 2023

2023 Directorate-General for Justice and Consumers

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Luxembourg: Publications Office of the European Union, 2024

PDF ISBN 978-92-68-01447-9 ISSN 2599-9176 doi: 10.2838/173259 DS-BB-23-013-EN-N

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EXECUTIVE SUMMARY

1. Introduction

Hungary is a country of around 10 million people. Fifteen years after its political transition into democratic pluralism, Hungary became a member of the EU. The creation of democratic laws and institutions has been accompanied by increasing awareness of the principle of equal treatment, but the issue of discrimination was brought to light by the debates generated by the process leading to the adoption of a comprehensive anti-discrimination law in late 2003 – Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA).[1] The law established the Equal Treatment Authority (hereinafter: Authority) – a body responsible for combating discrimination in all sectors and with regard to all grounds. Until it was merged into the Office of the Commissioner for Fundamental Rights (hereafter: Ombudsman) at the end of 2020 (see below), the Authority's activities and strategic litigation by NGOs further raised awareness of equal treatment and the situation of the groups most exposed to discrimination.

The group most vulnerable to discrimination is the Roma population. The only 'visible' ethnic minority in Hungary constitutes 6–9% of the country's population.[2] Despite positive legislative changes and significant amounts spent on integration programmes, Roma still face deeply rooted discrimination in education, employment, healthcare, housing and access to goods and services. They are greatly over-represented in the poorest layers of society. The most heated debate concerns the segregation of Roma pupils in education. The systemic nature of the problem is illustrated by a court decision in which a foundation sued the ministry responsible for educational affairs for failing to take effective action against the segregation of Roma pupils in 28 schools for over a decade. The courts concluded[3] that the ministry's failure to take action against the widespread segregation it had been aware of had indeed amounted to discrimination.

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

An important issue in relation to the political and social context is the active anti-LGBTIQ campaign carried out by high-ranking Government officials and the ruling party. After an initial surge in the spring of 2019, the campaign restarted in late 2020, when amidst the public debate around *Wonderland is for Everyone*, a children's book with fairy tales featuring various vulnerable groups (LGBTIQ, Roma, persons with disabilities) that prompted a large number of homophobic and transphobic political attacks, the Prime Minister stigmatised the LGBTIQ community by linking LGBTIQ orientations and identities with paedophilia and making a distinction between 'Hungarians' and 'homosexuals' in a radio interview on 4 October 2020.

The rhetoric was followed by actual measures and legislation, including the passing of Act

[1] Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

[2] See among others: Pásztor, I. Z. and Pénzes, J. (2018) 'The Number and Situation of the Roma Population in Light of a Survey From North-Eastern Hungary', *Földrajzi Közlemények* (Geographical Bulletin), 142.2., pp. 154-169, available at: https://www.foldrajzitarsasag.hu/downloads/foldrajzi_kozlemenyek_2018_142_evf_2_pp_154.pdf.

[3] Metropolitan Appeal Court, Decision No. 2.Pf.21.145/2018/6/I, 14 February 2019, available in the database of judicial decisions (https://birosag.hu/birosagi-hatarozatok-gyujtemenye) through the search function.

LXXIX of 2021[4] in June 2021, which banned any advertisement or media content that 'promotes or portrays deviation from [gender] identity aligning with birth at sex, gender reassignment, or homosexuality' from being made available to persons under the age of 18. The Act also amended Act CXC of 2011 on National Public Education (National Public Education Act)[5] to prescribe that sessions delivered in educational institutions on sexual culture, sexual life, sexual orientation or sexual development shall not be aimed at promoting deviation from the child's gender identity aligning with sex at birth, gender reassignment or homosexuality. Furthermore, only persons or organisations registered by a designated state body shall be allowed, in the framework of the regular curriculum or as extracurricular activities, to hold a session on, among other subjects, sexual culture, sexual life, sexual orientation or sexual development. The law's explanatory memorandum makes it clear that this provision is aimed at preventing LGBTIQ NGOs and other persons who may wish to sensitise students in relation to the issue of non-discrimination based on sexual orientation from having access to educational institutions.[6]

On 15 July 2021, the Commission launched infringement proceedings against Hungary in relation to the new legislation.[7] On 2 December 2021, the Commission sent a reasoned opinion to Hungary with regard to these national provisions.[8] This development was used by the Government to tie Hungary's debates with the European Union to the accusation that under the pretext of sensitisation, the organisations offering such educational sessions are in fact trying to provide LGBTIQ activists with access to educational institutions so that they could spread 'gender propaganda' to children, and they are assisted in this effort by EU institutions.[9] Further intensifying the anti-LGBTIQ propaganda, a referendum on questions reflecting the Government's ideas regarding 'gender propaganda' was held on the same day as the Hungarian general election (3 April 2022), but it was invalid.[10] Notwithstanding this result, the Government continued the campaign, claiming that the EU institutions' ulterior motive in withholding funds in the context of the conditionality mechanism and the recovery and resilience facility is to punish Hungary for its resolution to protect Hungarian children from the 'gender-propaganda' and the country from immigration.[11]

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4 Act LXXIX of 2021 on Harsher Action Against Paedophile Criminal Perpetrators and the Amendment of Certain Laws with a View to Protecting Children (*2021. évi LXXIX. törvény a pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról*), https://net.jogtar.hu/jogszabaly?docid=A2100079.TV&timeshift=20220201&txtreferer=00000003.txt, 23 June 2021.

5 Act CXC of 2011 on National Public Education (*2011. évi CXC. törvény a nemzeti köznevelésről*), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100190.TV.

6 'The proposal envisages the introduction of rules for school sessions/activities – including sex education sessions – held by organisations […] whose objective in many cases is to represent specific sexual orientations. Representatives of certain organizations in these sessions seek to influence the sexual development of children through activities called sensitising programmes provided in the framework of anti-discrimination awareness-raising activities, which can cause serious damage to children's physical, intellectual and moral development.'

7 European Commission (2021), 'EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people', 15 July 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.

8 European Commission (2021), 'December infringements package: key decisions', 2 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

9 See: https://444.hu/2021/07/21/orban-gyermekvedelmi-nepszavazast-kezdemenyez.

10 As several voters intentionally cast invalid votes to protest against the anti-LGBTIQ campaign, the proportion of valid referendum votes did not reach the required threshold (50 % of all those with the right to vote). For more information see: *Hungary Today* (2022) 'Referendum on "child protection" invalid', 4 April 2022, https://hungarytoday.hu/child-protection-referendum-invalid-result-outcome-hungary/.

11 In December 2022, the Prime Minister said that 'Hungary has fulfilled all the conditions that it has agreed on with the European Commission. The Brussel bureaucrats are coming up with new conditions, they want to impose their will on us with regard to immigration, sanctions [against Russia] and gender. Hungary is complying with its obligations, but with regard to the questions of immigration, gender and the sanctions, we are representing the interests of the Hungarian people and not those of Brussels.' See: *Hirado* (2022) 'Viktor Orbán: We represent the interests of the Hungarian people when it comes to immigration, gender and sanctions', 10 December 2022, https://hirado.hu/belfold/cikk/2022/12/10/orban-viktor-a-bevandorlas-a-gender-es-a-szankciok-kerdeseben-a-magyar-emberek-erdekeit-kepviseljuk. After the cut-off date of the report, several Member States joined the infringement proceedings to support the action brought by the

2. Main legislation

Hungary has ratified almost all the major international instruments combating discrimination, with some exceptions, namely: Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and the collective complaints protocol of the Revised European Social Charter.

The cornerstone of the legislation is the general anti-discrimination clause of the Fundamental Law of Hungary[12] adopted in 2011. This general ban is detailed by the ETA. Sectoral laws (e.g. civil law, labour law) refer to the provisions of the ETA in discrimination-related instances, which creates consistency within the system. The ETA covers all five grounds included in the EU directives and in some respects goes beyond the requirements of the directives.

The protection provided by the ETA is amplified by the Civil Code,[13] which lists the right to non-discrimination as an 'inherent personality right' (i.e. a right that is inalienably attached to the human personality) and prescribes specific sanctions for the infringement of such a right, and by a number of other laws (e.g. the law on consumer protection). The institutional framework established by the ETA is augmented by statutes governing the operation of institutions with functions aimed at combating discrimination.

3. Main principles and definitions

The ETA specifies definitions for both direct and indirect discrimination. The definitions are largely but not fully based on the concepts used by the directives. Harassment, instruction to discriminate and victimisation are defined and outlawed in the Hungarian system. The ETA distinguishes between three types of cases where differentiation is acceptable: (i) a general objective justification; (ii) special exceptions; and (iii) positive action.

The general objective justification clause makes a distinction on the basis of the right affected by the differentiation. If this right is a fundamental one, the differentiation may only be exempt if its aim is the enforcement of another fundamental right, provided that the differentiation is absolutely necessary, suitable for achieving the aim and proportionate. When the differentiation concerns a right that is not deemed to be fundamental, it is allowed by the law if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation. There are also special exempting rules related to different sectors, such as employment or education. Legislation exempting organisations based on a religious ethos (such as denominational schools) may go beyond what can be regarded as an appropriate transposition of Directive 2000/78. The third exception from the requirement of equal treatment is positive action.

Discrimination on all the grounds listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU) is expressly prohibited but Hungarian national law covers other grounds as well. The ETA contains a list of the protected grounds. It has 19 items, including sex, national or ethnic origin, disability, state of health, religious or other similar philosophical conviction, sexual orientation, gender identity, motherhood, age and financial status. The list is not exhaustive, so grounds not explicitly identified are also covered. Harassment, instruction to discriminate and victimisation are clearly outlawed. Neither

Commission. See for example at: https://www.reuters.com/world/europe/germany-france-join-eu-proceedings-against-hungary-over-anti-lgbt-law-2023-04-06/.

[12] The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV.

[13] Act V of 2013 on the Civil Code (*2013. évi V. törvény a Polgári Törvénykönyvről*), 26 February 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300177.TV.

instruction to discriminate, nor discrimination by association is expressly defined, but the concepts are applied in case law.

The concept of multiple discrimination is not known in Hungarian legislation. However, there are some cases in which the concept is applied.[14]

The ETA does not establish a sui generis duty to provide reasonable accommodation for persons with disabilities, but the labour law recognises the obligation. In terms of the relevant jurisprudence, the failure to comply with statutory requirements aimed at evening out existing disadvantages of persons or groups with protected grounds amounts to discrimination.

Both the equality body and the courts regularly apply the concepts of direct discrimination, indirect discrimination, harassment and segregation. The application of these concepts has become more or less unproblematic since the ETA came into force more than 15 years ago.

4. Material scope

The ETA approaches the issue of scope from the personal rather than the material aspect. It prohibits any discrimination in all spheres of the public sector, so in this respect its scope is in fact broader than that of the equality directives. In the private sector, only four groups of actors fall under the scope of the ETA: (i) those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender; (ii) those who provide services or sell goods at premises open to customers; (iii) entities receiving state funding in respect of their legal relations established in relation to the usage of the funding; and (iv) employers with respect to employment (interpreted broadly).

Although it is not easy to identify a field listed in the directives where a private actor who falls under the personal scope of the directives does not fall under the personal scope of the Hungarian legislation, and although the European Commission closed infringement procedures against Hungary concerning Directives 2000/43/EC and 2000/78/EC, such discrepancies may arise (e.g. harassment by colleagues). However, there is no relevant case law in this area.

5. Enforcing the law

When there is a case of discrimination, victims may choose to seek remedy from among a number of options, depending partly on the field where the discrimination has occurred. They can turn to (i) the civil court; (ii) the labour court; (iii) the Ombudsman; (iv) the administrative bodies authorised to sanction discrimination (e.g. the consumer protection inspectorate); (v) the regional Government office (to initiate a petty offence procedure in education). The key principle is that the victim must decide which authority to turn to.

It is possible for a victim of discrimination to initiate a procedure before the Ombudsman, or any other administrative body before bringing a lawsuit based on the Civil Code or the Labour Code.[15] If, however, a complainant initiates a case before a court, administrative bodies, including the Ombudsman will have to suspend their proceedings and base their decision on facts as established by the court. The sanctions that may be imposed by the Ombudsman do not provide the victim with compensation, so if a complainant wishes to be granted damages as well, they still need to go to court.

As they exist in the legal system, the sanctions can potentially be applied in a proportionate, effective and dissuasive manner. Compliance with the requirements of the EU *acquis* therefore primarily depends on how the sanctions are used by the courts and

[14] Case No. EBH/130/2017 of the Equal Treatment Authority, 7 August 2017.
[15] Act I of 2012 on the Labour Code (*2012. évi I. törvény a munka törvénykönyvéről*), 6 January 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV.

authorities. In this regard, there has been some improvement in recent years, as courts have started to move from obliging respondents in general terms to stop discriminatory practices towards prescribing specific measures to be taken.

The ETA guarantees the right of associations to engage, either on behalf of or in support of victims of discrimination: any non-governmental and interest representation organisation with a legitimate interest may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Non-governmental and interest representation organisations are also entitled to the rights of the concerned party in such administrative proceedings.

Associations can also launch *actio popularis* claims. If the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by any non-governmental and interest representation organisation (as well as the Public Prosecutor and the Ombudsman), if the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be accurately determined. This instrument has been resorted to in a number of cases, primarily in relation to segregation of Roma pupils in education.[16]

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

Different fields (education, access to goods and services) still operate with different sanctions against discrimination that may be applied by the specific administrative bodies in the given field. Some degree of consistency is provided by the equality body, which may impose a fine in cases of discrimination regardless of the sector in which it occurs, and by the civil courts, which have a general competence to oblige discriminators to pay non-pecuniary and pecuniary damages to the victims.

The ETA also introduced statutory acknowledgment of situation testing. The relevant provision expressly authorises the equality body to conduct testing in the course of its investigations and to take its result into consideration as evidence when making a decision.

The ETA allows for positive action (on the basis of acts of Parliament, decrees of Government and collective agreements), and positive measures have indeed been implemented (e.g. preferential treatment of Roma and persons with disabilities in education, quotas for persons with disabilities in employment).

Dialogue with NGOs and social partners on discrimination-related matters was primarily conducted by the Equal Treatment Authority. A series of training sessions, workshops and conferences was held within the framework of a four-year programme supported by the European Commission and the Hungarian state. However, the intensity of the dialogue could not be sustained after the extra funding ended in 2014. As the current equality body, the Ombudsman is much less accessible to civil society organisations than his predecessor was.

6. Equality bodies

The specialised body for the promotion of equal treatment irrespective of racial or ethnic origin (Equal Treatment Authority) was established by the ETA and began operation on 1 February 2005. It was an autonomous public administrative body with overall responsibility for ensuring compliance with the principle of equal treatment. The Authority was abolished as of 1 January 2021, and its tasks and competences were transferred to

[16] See for instance the case described in Point 1 of the executive summary.

the Ombudsman. Several bodies, including domestic NGOs representing protected groups[17] and ILGA Europe[18] criticised the plan, fearing that it would mean an organisational 'downgrading' of the issue of non-discrimination, given that this had been the single focus of and mandate for the Authority, whereas within the large multi-mandate organisation of the Ombudsman's Office non-discrimination was much less likely to be paid sufficient attention. However, the law was passed without any meaningful consultation.

The developments so far seem to justify the concerns: there has been a radical decrease in the number of complaints submitted to the Ombudsman, and reduced visibility of the equality body. The European Commission for Democracy through Law (Venice Commission) of the Council of Europe examined the merger and also expressed concerns over a number of issues, including the understaffing of the unit responsible for the equality mandate, and the Ombudsman's failure to appoint either a Director General for Equal Treatment or a Deputy Director General in the nine months that passed between the merger and the Venice Commission's visit.[19] Two years later, at the time of writing this report, there is still no Director or Deputy Director.

The equality body is entrusted with all the powers required by the Racial Equality Directive. It may/shall among other things: (i) conduct complaint-based or *ex officio* investigations to establish whether the principle of equal treatment has been violated, and, if necessary, apply sanctions; (ii) initiate lawsuits with a view to protecting the rights of persons and groups whose rights have been violated; (iii) make proposals concerning governmental decisions and legislation pertaining to equal treatment; (iv) regularly inform the public about the situation concerning the enforcement of equal treatment; (vi) provide information to those concerned and offer assistance in acting against the violation of the principle of equal treatment.

7. Key issues

In the author's view, the domestic legal framework is not fully in line with the directives in some areas. The most important problems may be summarised as follows:

- The requirement of equal treatment applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the directives, Hungarian law may be in breach of the *acquis* as it does not impose on all private actors the obligation of non-discrimination (e.g. fellow employees may not be called to account for harassment under the ETA).
- The ETA allows for objective justification in certain cases of direct discrimination.
- The special exempting clauses contain certain inconsistencies, unjustified distinctions between certain grounds and wider possibilities for exemption than allowed by the directives.

[17] MEOSZ (National Federation of Organisations of People with a Physical Disability) (2020) 'MEOSZ says effective enforcement could be jeopardised by the abolition of the Equal Treatment Authority', press release, 16 November 2020, http://www.meosz.hu/blog/a-meosz-szerint-veszelybe-kerulhet-a-hatekony-jogervenyesites-az-ebh-megszuntetesevel/; Civilisation Coalition (2020) 'The merger of the Equal Treatment Authority into the Office of the Commissioner for Fundamental Rights is a very bad step', press release, 19 November 2020, https://civilizacio.net/hu/hirek-jegyzetek/nagyon-rossz-lps-az-egyenl-bnsmd-hatsg-beolvasztsa-az-alapvet-jogok-biztosnak-hivatalba; and Telex (2020) 'Several disability organisations are protesting against the merger of the Equal Treatment Authority', news article, 24 November 2020, https://telex.hu/belfold/2020/11/24/ebh-aosz-mvgyosz-meosz-tiltakozas-targyalas.

[18] ILGA Europe (2020) 'ILGA-Europe is alarmed by Hungarian Parliament's moves to abolish the national Equal Treatment Authority', press release, 10 November 2020, https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-alarmed-hungarian-parliaments-moves-abolish-national-equal.

[19] Venice Commission (2021), *Hungary - Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-e.

- Depending on judicial interpretation, some provisions of the law governing churches and religion[20] and the National Public Education Act[21] may give rise to a contradiction between domestic and EU law in relation to organisations with a religious ethos, as they provide such organisations with unqualified and unconditional rights to make differentiations in recruitment.
- The exclusion of workers of pension age from a severance payment and the capping by the Labour Code of damages that may be granted in cases where an employee is dismissed in a discriminatory manner may be in violation of the relevant Court of Justice of the European Union (CJEU) jurisprudence.
- The obligation of reasonable accommodation has not been unambiguously transposed into Hungarian law. The problem is especially acute with regard to employing persons with disabilities, as the requirement of reasonable accommodation seems to be guaranteed only in relation to the recruitment procedure, but does not expressly prescribe reasonable efforts to adapt the workplace to the specific needs of persons with disabilities to promote their actual employment.
- The 2021 amendment excluding the possibility of demanding financial compensation for the violation of inherent personality rights (including segregation and other forms of discrimination) committed by educational institutions, is disadvantageous to the victims, since it reduces their freedom of choice regarding the types of sanctions they can request the courts to apply, and deprives them of the possibility of claiming a particularly effective type of sanction that is available to all other persons in a similar situation. It disproportionately concerns Roma pupils, as the majority of known cases of inherent personality rights violations committed by educational institutions are segregation cases. The amendment has reduced the dissuasiveness of the system of sanctions, raising a possible breach of the requirements provided by Articles 6 and 15 of the Racial Equality Directive and, in relation to vocational training, Articles 8 and 17 of Directive 2000/78.
- In the author's view, the abolition of the Equal Treatment Authority and the transfer of its mandate and powers to the Ombudsman organisationally 'downgrade' the issue of non-discrimination by vesting a multi-focus body with the task of combating discrimination instead of the Authority, for which it was the single focus and mandate. This has thus decreased the level of protection against discrimination in Hungary. In the author's view, this means a potential violation of the non-regression clause of Directive 2000/43.

Further issues of concerns are the following:

- Accessibility to public premises and services is incomplete, although the obligation to guarantee persons with disabilities an accessible environment has been in place for over a decade.
- The degree of segregation of Roma pupils/students in education has been rising steadily. Legislative amendments regarding when and how separate education for majority and minority children is allowed and what role denominational schools may play in such arrangements do not seem conducive to reversing these trends.
- High-ranking Government officials and representatives of the ruling party have been using increasingly hostile rhetoric towards vulnerable minority groups, including the Roma minority group and LGBTIQ persons. The communication has been followed by hostile legislation curbing the rights of these groups.

[20] Act CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities (*2011. évi CCVI. törvény a lelkiismereti és vallásszabadság jogáról, valamint az egyházak, vallásfelekezetek és vallási közösségek jogállásáról*), 31 December 2011, https://net.jogtar.hu/jogszabaly?docid=A1100206.TV.

[21] Act CXC of 2011 on National Public Education (*2011. évi CXC. törvény a nemzeti köznevelésről*), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100190.TV.

Good practices:

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

INTRODUCTION

The national legal system

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

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

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

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

While international human rights treaties are integrated into the domestic legal system through their promulgation in the form of acts of Parliament, courts, as a rule, refuse to apply them directly. They are applied as points of reference at times if concurring interpretation of domestic law is possible.

List of main legislation transposing and implementing the directives

Official title of the law: Fundamental Law of Hungary[22] **(Article XV)** Name used in this report (*if different from above*): Fundamental Law Abbreviation: N/A Date of adoption: 25 April 2011 Latest relevant amendment: N/A Entry into force: 1 January 2012 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV Grounds covered: race, colour, gender, disability, language, religion, political or other opinion, national or social origin, financial, birth or any other status Constitutional law Material scope: All fields Principal content: General constitutional prohibition of discrimination
Official title of the law: Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities[23] Name used in this report (*if different from above*): Equal Treatment Act or ETA Abbreviation: N/A Date of adoption: 28 December 2003 Latest relevant amendment: 1 January 2023 Entry into force: 27 January 2004 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV&celpara=#xcelparam

[22] The Fundamental Law of Hungary (*Magyarország Alaptörvénye*), 25 April 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100425.ATV.

[23] Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (*2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról*), 28 December 2003, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300125.TV.

Grounds covered: a) sex, b) racial affiliation, c) colour of skin, d) nationality (not in the sense of citizenship), e) belonging to a national minority, f) mother tongue, g) disability, h) health condition, i) religion or belief, j) political or other opinion, k) family status, l) maternity (pregnancy) or paternity, m) sexual orientation, n) gender identity, o) age, p) social origin, q) financial status, r) part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, s) belonging to an interest representation, t) any other situation, attribute or condition of a person or group. Civil and administrative law Material scope: All, with a special focus on employment (public and private), social protection and healthcare, housing, education, access to goods and services Principal content: Prohibition of direct and indirect discrimination, victimisation, instruction to discriminate, harassment, etc.; creation of a specialised body; shift of the burden of proof; legal standing of associations; sanctions on discrimination
Official title of the law: Act V of 2013 on the Civil Code[24] Name used in this report (*if different from above*): Civil Code Abbreviaton: N/A Date of adoption: 26 February 2013 Latest relevant amendment: N/A Entry into force: 15 March 2014 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300005.TV&celpara=#xcelparam Grounds covered: All Civil law Material scope: All Principal content: Prohibition of discrimination; sanctions on discrimination
Official title of the law: Act I of 2012 on the Labour Code[25] Name used in this report (*if different from above*): Labour Code Abbreviation: N/A Date of adoption: 6 January 2012 Latest relevant amendment: 1 January 2018 Entry into force: 1 July 2012 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV&celpara=#xcelparam Grounds covered: All Labour law Material scope: All Principal content: Employment
Official title of the law: Act XXVI of 1998 on the Rights of Persons with Disabilities and the Guaranteeing of their Equal Opportunities[26] Name used in this report (*if different from above*): RPD Act Abbreviation: N/A Date of adoption: 1 April 1998 Latest relevant amendment: 1 January 2023 Entry into force: 1 January 1999

[24] Act V of 2013 on the Civil Code (*2013. évi V. törvény a Polgári Törvénykönyvről*), 26 February 2013, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1300177.TV. The Civil Code refers back to the requirement of equal treatment, thus invoking the Equal Treatment Act, which has an open-ended list of grounds in Article 8.

[25] Act I of 2012 on the Labour Code (*2012. évi I. törvény a munka törvénykönyvéről*), 6 January 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200001.TV. The Labour Code refers back to the requirement of equal treatment, thus invoking the Equal Treatment Act, which has an open-ended list of grounds in Article 8.

[26] Act XXVI of 1998 on the rights of persons with disabilities and the guaranteeing of their equal opportunities (*1998. évi XXVI. törvény a fogyatékos személyek jogairól és esélyegyenlőségük biztosításáról*), 1 April 1998, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV.

Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800026.TV&celpara=#xcelparam Grounds covered: Disability Civil and administrative law Material scope: Numerous fields including education, employment, cultural activities, accessibility of public services, transportation Principal content: Setting out the most important principles in relation to the inherent rights of persons with disabilities; reasonable accommodation provisions (limited in scope)
Official title of the law: Act CXI of 2011 on the Commissioner for Fundamental Rights[27] Name used in this report (*if different from above*): Ombudsman Act Abbreviation: N/A Date of adoption: 26 July 2011 Latest relevant amendment: 1 January 2023 Entry into force: 1 January 2017 Web link: http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV&celpara=#xcelparam Grounds covered: All Constitutional law, administrative law Material scope: Acts of public entities and public service providers in all fields Principal content: Creation of an organ with a role in combating discrimination; Hungary's designated equality body; independent mechanism under the UN CRPD

[27] Act CXI of 2011 on the on the Commissioner for Fundamental Rights (*2011. évi CXI. törvény az alapvető jogok biztosáról*), 26 July 2011, https://net.jogtar.hu/jogszabaly?docid=a1100111.tv. The Ombudsman has the power and obligation to examine any complaint regarding any constitutional violation (Article XV of Hungary's constitution, the Fundamental Law contains a non-discrimination clause with an open-ended list).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The constitution of Hungary includes the following articles dealing with non-discrimination.

Article XV of the Fundamental Law reads as follows:

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

Thus, Article XV is a general clause, containing an open-ended list of protected grounds. Not all the grounds listed in the directives are explicitly included (age and sexual orientation are missing from the list), but when Constitutional Court jurisprudence is taken into account it can be concluded that all the grounds covered by the directives are included at least implicitly.

In its jurisdiction on the non-discrimination clause in the Old Constitution (which was also open-ended), the Constitutional Court consistently regarded sexual orientation as being one of the 'other grounds'.[28] In its Decision No. 13/2013. (VI. 17.) AB,[29] the Constitutional Court concluded that the old jurisprudence of the Constitutional Court shall apply to the Fundamental Law if the provisions of the Old Constitution and the Fundamental Law are identical or similar from a substantive point of view, and there is nothing in the constitutional context or the particularities of the individual case that would exclude the possibility of such an application. Reading this in conjunction with the old jurisprudence, it seems unambiguous – and, so far, it has not been challenged – that Article XV of the Fundamental Law does include sexual orientation (and the same is true for age).[30]

This provision applies to all areas covered by the directives. Its material scope is broader than those of the directives in the sense that it is not specified. The provision states that Hungary shall ensure fundamental rights to every person without any discrimination. This shall be the case in all the areas affected by the directives, and beyond. However, the provision only stipulates the requirement of non-discrimination in relation to the guaranteeing of rights that are regarded as fundamental.

For a long time, the provisions were regarded as not directly applicable. However, there have been some judicial decisions, including one on the state administration's responsibility for the widespread systemic segregation of Roma children (see section 3.2.7 below), in

[28] In its Decision No. 20/1999 (VI. 25.) on abolishing a discriminatory provision of the Criminal Code (rendering certain forms of sexual contact between same-sex siblings punishable, while not rendering them punishable if the siblings are of different sex), the Constitutional Court claimed the following: 'The sole basis of distinction in the case examined is sexual orientation homosexual siblings are punishable under the law, whereas heterosexual siblings are not. In terms of Article 70/A of the Constitution, this is discrimination based on "other ground"'. Decision available at: http://public.mkab.hu/dev/dontesek.nsf/0/1264902F1E6415B7C1257ADA00527C70?OpenDocument.

[29] https://net.jogtar.hu/jogszabaly?docid=A13H0013.AB&txtreferer=A1100162.TV.

[30] For a decision that examined – in the context of pension schemes – whether differentiation based on age constituted discrimination (which presupposes that age is accepted as one of the protected grounds), see: Constitutional Court Decision No. 871/B/2000. AB, 18 January 2005.

which the courts have applied constitutional provisions directly to decide conflicts between competing rights.

It is debated whether these provisions can be enforced against private actors (or only against the state).[31]

[31] See for instance: Vincze, A. (2004), 'Az Alkotmány rendelkezéseinek érvényre juttatása a polgári jogviszonyokban' (The enforcement of constitutional provisions in civil law relationships), *Polgári Jogi Kodifikáció*, vol. VI, no. 3, HVG-ORAC, Budapest, pp. 3–13, available at: https://ptk2013.hu/wp-content/uploads/2012/11/2004-3kodi.pdf.

2 THE DEFINITION OF DISCRIMINATION

2.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

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

'Race' (*faj*) and 'colour' (*szín*) are mentioned by the Fundamental Law, whereas the ETA uses 'colour of skin' (*bőrszín*), 'racial affiliation' (*faji hovatartozás*), 'belonging to a national minority' (*nemzetiséghez való tartozás*)[32] and 'nationality' (*nemzetiség*) (not in the sense of citizenship).

There is a statutory definition of only one of these terms: nationality (*nemzetiség,* not in the sense of citizenship), which is set out in Article 1 of Act CLXXIX of 2011 on the Rights of Nationalities[33] (Act on Nationalities): 'Under this law, a nationality is any ethnic group with a history of at least one century of living in the territory of Hungary, which represents a numerical minority among the citizens of the state, and is distinguished from the rest of the population by their own language, culture and traditions, and at the same time demonstrates a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history.'[34] The other relevant terms have no legal definitions.

This uncertainty in relation to terms is also reflected in case law. In 2012, for instance, in two identical cases (launched because Roma guests were not allowed to enter the respective bars), the Equal Treatment Authority established the occurrence of discrimination on two different bases: in one on the basis of the colour of skin,[35] in the other on the basis of belonging to the Roma national minority.[36] From 2013 on, the Equal Treatment Authority and its successor, the Ombudsman, have consistently used the term 'belonging to a national minority' in Roma discrimination cases.

The main reason for the lack of definitions is that, due to the open-ended nature of the list of protected grounds, there is no pressing need to provide definitions or interpret the differences in these terms.

Article 8 of the ETA lists the following protected grounds: a) sex, b) racial affiliation, c) colour of skin, d) nationality (not in the sense of citizenship), e) belonging to a national minority, f) mother tongue, g) disability, h) health condition, i) religion or belief, j) political or other opinion, k) family status, l) maternity (pregnancy) or paternity, m) sexual orientation, n) gender identity, o) age, p) social origin, q) financial status, r) part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, s) belonging to an interest representation organisation, t) any other situation, attribute or condition of a person or group

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

[33] Act CLXXIX of 2011 on the Rights of Nationalities (*2011. évi CLXXIX. törvény a nemzetiségek jogairól*), 19 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?dbnum=1&docid=A1100179.TV.

[34] Under Annex 1, the Act on Nationalities itself recognises 13 nationalities: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian, Ukrainian.

[35] Equal Treatment Authority, EBH/50/2012, 5 January 2012.

[36] Equal Treatment Authority EBH/117/2012, 22 May 2012.

Thus, the fact that the term national minority is statutorily defined does not mean that persons affiliated with the 13 recognised national minorities are in a more advantageous position than others from the point of view of the application of the ETA: if a person not belonging to any of the acknowledged nationalities is discriminated against, the protection will be based on Article 8(b) (racial affiliation) or (c) (colour of skin), or maybe even (t) (other characteristic) of the ETA. This blurs the boundaries between the different concepts and no effort is made to come up with clear distinctions on behalf of either the bodies applying non-discrimination legislation, or the parties involved in such legal disputes.

b) Religion or belief

Neither of the two terms is defined in national discrimination legislation.

Religion is not defined by Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities[37] (Act on Churches), but religious activities are (under Article 7/A). In terms of this definition, religious activities are activities linked to a worldview which is directed towards the transcendental; has a system of faith-based principles, the teachings of which are directed towards existence as a whole; and embraces the entire human personality by requiring a specific code of conduct.

It needs to be added that this definition is provided in the context of church recognition, but not in the context of the exercise of the freedom of religion. However, this does not mean that the definition of religion or belief is expected to be different or broader in the anti-discrimination legal framework. In this context, it must be emphasised again that, as a result of the open-ended list of protected grounds in the ETA, anything that may not be regarded as coming under the term religion, can still be dealt with as 'other characteristic'. Definitions are therefore not as important an issue in Hungary as they are in legal systems with a closed list of protected grounds. The issue of what is to be regarded as religion under the ETA has not come up in the jurisprudence.

Article 1 of the Act on Churches provides protection regarding both the *forum internum* and the *forum externum*, when it prescribes that no one shall be subjected to any disadvantage because of having, accepting, manifesting, confessing, changing or practising his or her religious belief or conviction.

Belief is not defined in either legislation or jurisprudence.

c) Disability

This term is not defined in national discrimination legislation, but definitions of the term can be found elsewhere under national law. For instance, one definition of disability is to be found in Article 4 of Act XXVI of 1998 on the rights of persons with disabilities and the guaranteeing of their equal opportunities (RPD Act), which was amended in 2013 to comply with the UN Convention on the Rights of Persons with Disabilities (CRPD): 'persons with disabilities are those who have irreversible or long-term sensory, communication-related, physical, intellectual, or psychosocial impairments or the accumulation thereof, which in interaction with significant environmental, societal or other barriers restrict or hinder their full and effective participation in society on an equal basis with others.' Laws on certain social benefits contain differing definitions of what constitutes disability for their purposes. Due to the fact that the list of protected grounds in the ETA is open-ended (covering 'any other situation, attribute or condition') no problems of definition have so far arisen in Hungarian jurisprudence, as any feature not expressly falling under the grounds protected

[37] Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities (*2011. évi CCVI. törvény a lelkiismereti és vallásszabadság jogáról, valamint az egyházak, vallásfelekezetek és vallási közösségek jogállásáról*), 31 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100206.TV.

by the directives or the ETA can qualify as falling under the prohibition of discrimination based on the 'any other characteristic' clause.

A problem may arise in relation to reasonable accommodation, which is governed by the RPD Act and the Labour Code, but in the absence of domestic jurisprudence it is difficult to assess whether this might be a case. Persons not falling under the RPD Act's definition may therefore be left without protection against failure to provide reasonable accommodation, although the RPD Act's definition seems to be in line with the CJEU's definition of 'disability' developed in *HK Danmark*[38] (in fact, it is broader than the CJEU's definition, in that it is not confined to hindrances to professional life, but embraces all aspects of a person's participation in society).

d) Age

This term is not defined in national discrimination legislation or in any other legal norm. There are norms which define certain age-based categories (e.g. under Article 294 of the Labour Code, a 'young employee' is an employee who is below 18 years of age), but belonging to these categories is not a precondition for protection against discrimination. Therefore, both older and younger persons are protected against age-based discrimination without any further need for categorisation. The only question to be examined in any given case is whether a person would be in a disadvantageous situation based on their age compared to another person who belongs to an age cohort that can be distinctively differentiated from the one to which the complainant belongs.

e) Sexual orientation

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

2.2 Multiple and intersectional discrimination

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

In Hungary, intersectional discrimination is not *expressis verbis* prohibited by law, but it is possible to sanction intersectional discrimination.

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

In a case of three female complainants of Roma origin (claiming that the mayor of the neighbouring municipality who had employed them as public workers had regularly harassed them), the Equal Treatment Authority concluded that the harassment they had suffered was connected to their gender, Roma origin and vulnerable social status and that the combination of these characteristic features had formed the basis of the mayor's behaviour towards them. According to the decision, when determining the sum of the fine imposed (HUF 300 000, or EUR 830), the Authority took into account – among other factors – that the violation was committed in a manner taking advantage of the multiply disadvantageous situation of the complainants.[39]

[38] Court of Justice of the European Union, Judgment in 11 April 2013, *Ring and Skouboe Werge,* joined cases C-335/11 and C-337/11, ECLI:EU:C:2013:222.

[39] Equal Treatment Authority, EBH/467/2016, 30 December 2016. Description of the case based on Equal Treatment Authority (2018), *EBH Booklet 5 – Multiple discrimination in the Equal Treatment Authority's case law*, Budapest, Equal Treatment Authority, pp. 39-40.

In another case,[40] the Equal Treatment Authority dealt with intersectional discrimination in connection with an employer's '13th-month payment' policy that applied to workers on the sole basis of their actual presence in the workplace. The case concerned discrimination based on gender and family status ('motherhood') and although these characteristics fall outside the scope of this report, the case is worth mentioning from the perspective of intersectional discrimination. The Equal Treatment Authority concluded in its decision (which expressly referred to the intersectional nature of the discrimination) that women with children were deprived of the extra month's salary disproportionately more often than any other employee in a comparable situation (women without children, men with children, men without children), i.e. persons to which both characteristics (having children and being a woman) applied, had been discriminated against.[41]

2.3 Assumed and associated discrimination

a) Discrimination by assumption

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

Article 8 of the ETA expressly prohibits discrimination based on 'real or assumed' characteristics. It stipulates that 'direct discrimination shall be constituted by any action [including any conduct, omission, requirement, order or practice] as a result of which a person or group based on its *real or assumed* sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, other situation, attribute or condition (hereinafter collectively referred to as characteristics) is treated less favourably than another person or group is, has been or would be treated in a comparable situation.' (emphasis added)

This prohibition is reinforced by Article 19(1)(b) of the ETA, which provides for the reversal of the burden of proof on the basis of both the victim's real protected characteristic or that 'assumed by the perpetrator'.

The equality body and the courts apply the standard methods of gathering and assessing evidence when determining the perpetrators' assumptions. An example is provided by a case decided by the Equal Treatment Authority, in which the employer harassed the complainant and a colleague of his due to their assumed homosexual orientation. In the case, the complainant proved the existence of the assumption with witnesses who could testify to the employer's statements at different meetings, and a recording of one staff meeting where he asked the employer why the employer thought that they were gay and whether this was the reason for the increasingly hostile working environment.[42]

b) Discrimination by association

In Hungary, discrimination based on association with persons with particular characteristics is not expressly prohibited under national law.

[40] Equal Treatment Authority, EBH/130/2017, 7 August 2017.

[41] Equal Treatment Authority (2018), *A többszörös diszkrimináció megjelenése az Egyenlő Bánásmód Hatóság joggyakorlatában* (Multiple discrimination in the practice of the Equal Treatment Authority), p. 12. Most of the materials that were available on the Equal Treatment Authority's website are not available any more due to the transfer of the Authority's mandate to the Ombudsman, and the Ombudsman's decision to make the Authority's website unavailable. Where there is no internet link next to a decision or publication of the Authority, it means that those materials have been made unavailable.

[42] Equal Treatment Authority, EBH/985/2010, no date available.

However, the national law as applied by the courts and authorities is in line with the judgment in *Coleman v. Attridge Law and Steve Law,* Case C-303/06, and *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, handed down by the European Court of Justice.

For some time, Article 8(t) (other situation, attribute or condition) was applied to provide protection for those discriminated against on the basis of association with members of a particular group. Later on, the Equal Treatment Advisory Board formulated Guideline No. 288/2/2010 (IV.9.) TT, which recommends that in such cases the ground for discrimination should not be 'other characteristic', but the ground with which the victim is associated, and the Authority should expressly refer to the concept of discrimination by association.

The Authority took this recommendation into account. For instance, in Case No. EBH/23/2011,[43] the Authority relied on the notion of discrimination by association when the complainant's labour contract was terminated because she had to take a leave of absence due to her two-year-old child's illness. The Ombudsman as equality body follows this interpretation. In its decision no. EBF-AJBH-28/2022, it concluded that not only the wife of Roma origin, but also the non-Roma husband was discriminated on the basis of ethnic origin when the landlord had terminated the lease once he had found out that the wife was of Roma ethnicity (see section 12.2 below). The Ombudsman claimed that 'the requirement of equal treatment can primarily be violated in relation to the complainant's protected characteristic, but it can be qualified as discrimination by association if someone suffers a disadvantage not because of their own protected characteristic but due to the protected characteristic of a person who is in a direct (family or friendly) relationship with them, therefore, the husband could request protection on the basis of his wife's protected characteristics.'[44]

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

2.4 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

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

As mentioned above, the definition of direct discrimination is set out in Article 8 of the ETA: 'direct discrimination shall be constituted by any action [including any conduct, omission, requirement, order or practice] as a result of which a person or group based on its real or assumed sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority, mother tongue, state of disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, other situation, attribute or condition (hereinafter collectively referred to as characteristics) is treated less favourably than another person or group is, has been or would be treated in a comparable situation.'

Both the equality body and the courts regularly apply the concept of direct discrimination, and the application of this concept has become more or less unproblematic since the ETA came into force over 15 years ago.

[43] Equal Treatment Authority, EBH/23/2011.
[44] Ombudsman, EBF-AJBH-28/2022, December 2022.

An example is the case mentioned above,[45] where the Ombudsman concluded that a landlord, who had verbally agreed to rent out his apartment to a non-Roma man and his wife and allowed them to move in but then refused to conclude a rental contract and called on them to leave the apartment after he had found out that the wife was Roma, had committed direct discrimination against both members of the couple on account of their ethnic origin.[46]

b) Justification for direct discrimination

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

> '(2) Unless this law stipulates otherwise, an action, conduct, omission, requirement, order or practice (hereinafter: action) shall not be deemed to violate the requirement of equal treatment if
> a) it restricts the aggrieved party's fundamental right for the sake of the enforcement of another fundamental right, provided that the restriction is absolutely necessary, suitable for achieving the aim and proportionate with the aim, or
> b) in cases not falling under the scope of a), it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation
> (3) Paragraph (2) shall not be applied concerning differentiation based on b)-e) of Article 8 [racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national minority].'

The explanation for the differentiation set out in Paragraph (3) is that when the Hungarian legislature realised that Directive 2000/43 did not allow for a general objective justification in the case of direct discrimination based on racial or ethnic origin, it removed the relevant grounds from the scope of Article 7(2) of the ETA.

However, the same has not been done with regard to the grounds listed in Directive 2000/78. By not doing so, the legislature maintained the situation whereby a general and objective justification exists in relation to direct discrimination based on age, disability, religion and sexual orientation.

The specific exempting clauses related to employment coincide to a great extent with the genuine and determining occupational requirement (GOR) and religious ethos provisions. Therefore, it may be argued that in practice the general objective justification clause may not be applied in relation to employment due to the *lex specialis derogat legi generali* principle, which prevents the general exempting clause from being applied in employment-related cases, and thus the requirement set by the Directive is in fact met. However, it would have seemed to be a safer and more desirable solution to remove these grounds completely from the scope of Article 7(2) of the ETA.

The differentiation between a) and b) in Paragraph (2) reflects the practice of the Hungarian Constitutional Court. After extending the constitutional ban on discrimination to the whole legal system (and not only fundamental rights) in its Decision No. 61/1992 (XI. 20),[47] it became necessary for the court to establish different tests for discrimination concerning fundamental human rights on the one hand and other rights on the other. In the first case, the court applies the test of necessity and proportionality, while in the latter

[45] Ombudsman, EBF-AJBH-28/2022, December 2022.
[46] Equal Treatment Authority, Decision No. EBH/70/2018, 9 January 2018.
[47] Constitutional Court, 61/1992 (XI. 20.) AB határozat, 20 November 1992, http://public.mkab.hu/dev/dontesek.nsf/0/7F28814984A06851C1257ADA00526FCE?OpenDocument.

a test defined in Constitutional Court Decision No. 35/1994[48] is applied: 'the unconstitutionality of a measure unfavourably discriminating between persons and not concerning fundamental rights may be established if the infringement is related to one of the fundamental rights […] and the discrimination or restriction does not have an objectively reasonable ground, i.e. it is arbitrary.'

This is why the Hungarian legislature made a distinction on the basis of whether a certain differentiation concerns a fundamental right (such as the right to education) or a right that may not be regarded as such (e.g. access to services). In the former case, the test is stricter (there has to be a legitimate aim, notably the enforcement of another fundamental right, and the test of necessity, suitability and proportionality is applied), while in the latter, the criterion is objective reasonability.

The relationship between this general justification and the Hungarian versions of the special exceptions stipulated by the directives is based on the *lex specialis derogat legi generali* principle, i.e. the specific justification rules are to be regarded as specific legal provisions, which, in the respective fields, prevail over the general (and more lenient) exemption set out in Article 7(2).

The ministerial comments attached to Act CIV of 2006 on the Amendment of the ETA[49] expressly state this: 'The law (…) states that a behaviour shall not be regarded as discriminatory if it meets the necessity/proportionality test in relation to fundamental rights and the rationality test in all other areas. (…) As [the ETA] sets forth special exempting rules in relation to employment, public education and access to goods and services, Paragraph (2) of Article 7 may only be applied if the ETA does not prescribe (stricter or less strict) exempting rules.'

2.5 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

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

Article 9 of the ETA states: 'A provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment is deemed as indirect discrimination if it puts individual persons or groups with characteristics specified in Article 8 in a situation that is significantly disproportionately disadvantageous compared to the situation in which a person or group in a comparable position is, has been or would be.'

Both the equality body and the courts regularly apply the concept of indirect discrimination. In the absence of relevant 2022 jurisprudence, one example that can be quoted is an *actio popularis* case won by the European Roma Rights Centre (ERRC) regarding Miskolc town hospital's policy of charging for mandatory maternity clothing for friends and family members of pregnant mothers (to wear when present during the birth). In its judgment of 24 January 2019, the Debrecen Appeals Court upheld the first instance decision and concluded that the apparently neutral measure had impacted the Roma women disproportionately since their financial situation was on average much worse than that of the non-Roma women giving birth in the hospital, and therefore they were

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

[49] Act CIV of 2006 on the Amendment of the ETA (*2006. évi CIV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény módosításáról*), 5 December 2006, https://mkogy.jogtar.hu/?page=show&docid=a0600104.TV.

disproportionately represented among those who could not afford to have their companions present during the birth.[50] The Curia also confirmed this interpretation.[51]

b) Justification test for indirect discrimination

The ETA makes no distinction between the justification of direct and indirect discrimination. Therefore, the same general and specific exempting clauses pertain to both types.

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

As explained above, this means that if a constitutional right of the complainant is restricted through a distinction based on a protected ground, it can only be justified if it is done for the sake of the enforcement of another fundamental right, whereas if the distinction concerns a right that is not deemed to be fundamental, the justification of objective reasonability may be applied. Objective justification may not be applied if the basis for the distinction is racial or ethnic origin.

With regard to the type of exemption covered by a), it can be said that it is compatible with the directives, as the legitimate aim requirement (the enforcement of another fundamental right) as well as the criteria of 'appropriateness' and 'necessity' are in place.

With regard to the types of exemption covered by b), it can be said that the 'objective reasonability' of the ground for differential treatment is obviously a test that is less strict than the one used by the directives. This terminology may be interpreted as corresponding to the requirement of a 'legitimate aim' (an aim that is found by objective consideration to have a reasonable ground can definitely be regarded as legitimate). However, the criteria of 'appropriateness' and 'necessity' are missing from the Hungarian legislation.

2.5.1 Statistical evidence

Section 2.5.1 has not been updated for 2022. Regarding the legal framework and practice, please see *Country report Non-discrimination Hungary 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78*, reporting period 1 January 2021 – 1 January 2022.[52]

2.6 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Hungary, harassment is prohibited under national law. It is defined.

Under Article 10(1) of the ETA, 'harassment is a sexually charged or other conduct violating human dignity related to the concerned person's characteristic defined in Article 8, with

[50] Debrecen Appeals Court, Judgment No. Pf.I.20.749/2018/8, 24 January 2019, available at: http://www.errc.org/uploads/upload_en/file/5106_file1_anonymised-version-of-the-judgment-in-hungarian-2018.pdf.

[51] Curia, Judgment No. Pfv.IV.20.677/2019/8, 20 May 2020, available at: http://www.errc.org/press-releases/romani-mothers-win-hospital-discrimination-case-in-hungarian-supreme-court.

[52] See: https://www.equalitylaw.eu/downloads/5732-hungary-country-report-non-discrimination-2022-1-63-mb.

the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment'.

In the absence of relevant 2022 jurisprudence, one example that can be quoted is Decision No. EBH/362/2018, in which the Equal Treatment Authority concluded that the action of security guards of a bar who went up to a gay couple and told them to stop kissing, eventually causing them to leave, was harassment based on the complainants' sexual orientation and was attributable to the bar.[53]

In Hungary, harassment explicitly constitutes a form of discrimination.

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

Since the definition of harassment in the ETA refers to 'the concerned person', and no reference is made to a group of persons, it was uncertain for some time whether harassment can be committed against a group within the meaning of the ETA. The issue was settled by the Curia based on a reading of both Article IX(5) of the Fundamental Law and Article 1 of the ETA. In a case concerning anti-Roma statements made publicly by a town mayor, the Curia concluded that the ETA shall be understood as prohibiting harassment committed not only against individuals but also against groups and that any other interpretation would fly in the face of the principles set out in the ETA and the Fundamental Law. It also concluded that if such inciting statements could not be sanctioned, it would contradict the objectives defined by these laws.[54]

Harassment is also prohibited and sanctionable under the Civil Code (as behaviour violating a person's dignity), although it is not expressly defined therein. According to Article 2:42(2) of the Civil Code, everyone shall respect human dignity and the inherent personal rights[55] stemming therefrom.

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

b) Scope of liability for harassment

In Hungary, in cases where harassment is perpetrated by an employee, the employer and the employee are liable under certain conditions.

Co-workers do not fall under the personal scope of the ETA, so their liability will not be established under the ETA's provision on harassment. Liability on the basis of the ETA falls on the employer if the employer fails to react to a complaint of harassment by an employee.

[53] Equal Treatment Authority, Decision No. EBH/362/2018, 5 November 2018.
[54] Curia, Kfv.III.37.848/2014/6, 29 October 2014, available at: http://www.helsinki.hu/wp-content/uploads/kiskunlachaza_ciganyozo-polgarrmester_kuria.pdf.
[55] 'Inherent' personal rights are rights that are inalienably attached to the human personality.

However, employees can also be held liable under Article 2:42 of the Civil Code, which contains a general ban on the violation of inherent civil rights.

This liability is restricted to the non-pecuniary sanctions provided for by the Civil Code (e.g. an apology), since, under Article 6:540 of the Civil Code, employers and not workers can be held liable for damage caused by employees. Damages are to be sought from the employer, even if the employer played no role in the violation. This is preferential to the victim, who does not need to consider whether or not the employee acted upon an instruction or his or her own initiative.

While, in theory, the employer may reclaim part of the damages paid to the complainant from the employee, this rarely happens in practice. However, employees who harass others may face other legal consequences within the framework of labour law: according to the Labour Code, they can be held liable at their workplace in disciplinary proceedings, provided that the collective agreement or the labour contract stipulates this possibility (Article 56) or can be dismissed (Article 78).

2.7 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Hungary, instructions to discriminate are prohibited under national law. Instructions are not defined.

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

In Hungary, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Hungary, the instructor and the discriminator are liable.

Given that the instruction to discriminate is defined as a form of discrimination, sanctions available against other, more common forms of discrimination can be sought here too. If the person giving the instruction is known, then civil law sanctions for the violation of civil rights and sanctions that the equality body has the power to impose are at hand (these latter sanctions only apply if the instructions come from someone who falls under the ETA's scope).

In terms of the Civil Code (Article 6:540), if an employee causes damage to a third party in connection with his/her employment, liability in relation to the injured person lies with the employer, but if the damage was caused intentionally, the liability of the employee and the employer shall be joint and several.

In terms of Article 6:542, if an agent causes damage to a third party in connection with his/her assignment (e.g. if a third-party client issues an instruction to discriminate), liability in relation to the injured person lies with the principal and the agent jointly and severally. The principal shall be relieved of liability if he/she is able to prove that he/she has not acted wrongfully in terms of choosing, instructing and supervising the agent.

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

a) Implementation of the duty to provide reasonable accommodation for persons with disabilities in the area of employment

In Hungary, the duty to provide reasonable accommodation is included in the law, and is defined, but the provision is not unproblematic.

The term 'reasonable accommodation' expressly appears in the Labour Code. However, in the author's opinion, the duty of reasonable accommodation is still missing from the Hungarian system with regard to very important aspects of access to employment, while the obligation is more or less in place in relation to other aspects of employment. A short summary below outlines the relevant provisions that substantiate this opinion.[56]

Under Article 15 of the RPD Act, persons with disabilities shall, if possible, be employed in integrated (ordinary) employment, or, in lieu of this, in protected employment. (Integrated employment occurs when a person with a disability is employed at a workplace where the decisive majority of their co-workers are not persons with disabilities.)

Under Paragraph (2), the employer employing a person with a disability is obliged to provide accommodation at the workplace to the extent necessary for the performance of the work, i.e. in particular to ensure the appropriate refurbishment of tools and machines. Support from the central budget can be requested to cover the expenses incurred by refurbishment. (Based on the text of the law, the employers of any employees with disability would be entitled to request such support. However, the relevant bylaws envisage such support only with regard to employees who have officially been recognised as persons with an altered ability to work.) The provision does not contain any reference to the issue of disproportionate burden.

The law refers to the adaptation of the 'workplace environment' (*munkahelyi környezet*). If this term is interpreted from a strictly semantic point of view, it does not contain accommodations such as alternative procedures, reallocation of tasks or a transfer to another position, as would be required under Directive 2000/78 as interpreted by the CJEU in the *HR Rail SA* case.[57]

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

Furthermore, if the text is interpreted literally, the conclusion is that if an employer does employ someone with a disability, the employer is obliged to take measures aimed at reasonable accommodation but only after the person with a disability gets the job, i.e. if the person becomes disabled whilst in employment, or if the employer decides to employ someone with a disability despite the fact that at the time of making this decision the workplace is not accommodated to that person's particular needs.

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

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

[57] CJEU, judgment of 10 February 2022, *HR Rail SA*, C-485/20, ECLI:EU:C:2022:85.

Unfortunately, judgment No. 105.K.704.617/2021/18 of the Metropolitan Regional Court[58] (delivered in the very first case where this issue was raised) failed to settle the question when it concluded that since the recruitment process had already been conducted without accommodating the visually impaired job applicant's specific needs, it could not be established whether the complainant possessed all the required skills for filling the advertised position. Hence, the question whether with reasonable accommodation of his specific needs the applicant could actually be suitable for the job, could not be assessed and therefore, no judicial decision could be reached on this issue (for a detailed description of the case, see section 12.2 below). Thus, while the judgment was favourable for the complainant in the sense that it concluded that there had been discrimination due to the lack of reasonable accommodation in the recruitment process, it left the larger question, of whether there is an obligation on the employer to facilitate employment by reasonably adapting to the needs of a job applicant with a disability, unanswered.

With regard to access to employment, the RPD Act stated for a long time only that persons with disabilities shall be employed in integrated workplaces *if possible*. Act CXXI of 2007 on the amendment of certain social laws[59] amended Article 15 of the RPD Act as of 1 January 2008, adding two paragraphs. Under Paragraph (3), the employer shall be obliged to provide an accessible environment *in the course of the recruitment procedure* in order to enhance the access to employment of persons with disabilities.

Paragraph (4) states that this obligation shall be imposed on the employer if (a) the employer publicly advertised the vacancy; (b) when applying for the job, the person with a disability states their specific needs relating to the job interview; and (c) the accommodation of those needs does not impose a disproportionate burden on the employer. The burden shall be regarded as disproportionate if compliance with the obligation would make it impossible for the employer to continue operating.

In judgment No. 105.K.704.617/2021/18 mentioned above, the Metropolitan Regional Court concluded that for the employer's obligation regarding reasonable accommodation to apply, it is sufficient if the applicant informs the employer at the beginning of the recruitment process of his/her impairment. Since it is the employer and not the applicant who is aware of the methodology to be followed in the application process (meaning that there is an information asymmetry between the parties), the applicant cannot be required to provide very specific information as to how his/her disability ought to be accommodated. Therefore, if an applicant informs the employer about their disability at the outset, they sufficiently fulfil their statutory obligations in this regard.

In summary, if the text of the law is interpreted strictly (and in the absence of any contradicting case law), there is an obligation to provide an accessible environment at the recruitment stage (e.g. for the interview), but not an obligation to provide an accessible environment to enable an applicant with a disability to do the job.

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

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[58] Metropolitan Regional Court, judgment No. 105.K.704.617/2021/18, 3 May 2022, https://eakta.birosag.hu/anonimizalt-hatarozatok.

[59] Act CXXI of 2007 on the amendment of certain social laws (*2007. évi CXXI. törvény egyes szociális tárgyú törvények módosításáról*), 7 November 2007, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0700121.TV.

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

In any case, based on the indirect effect of the anti-discrimination directives, it would most likely be possible for a person with a disability to act against a rejection that is based by the employer on the difficulties the employer would face in making a reasonable accommodation. However, it may be advisable in all cases to formulate the law in a way that makes the reasonable accommodation obligation more explicit in relation to access to employment, e.g. by appropriately adapting Article 5 of Directive 2000/78/EC.

Under Article 19(4) of Act XCIII of 1993 on work safety[60] (Work Safety Act), in relation to the creation of workplaces where employees with physical disabilities are employed, the physical environment (accommodation) must suit the changes in the character of the human body. The Work Safety Act does not impose an express duty on employers not yet employing workers with disabilities to create an accessible workplace.

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

Neither the RPD Act, nor the Labour Code mention the availability of financial assistance from the state as a factor to be taken into account in assessing whether there is a disproportionate burden on the employer. In fact, the concept of disproportionate burden is altogether missing from the legal framework of reasonable accommodation (with the exception of in the context of the recruitment process), although it may be considered under the general exempting clause of the ETA as a ground that is to be regarded as 'reasonable by objective consideration'.

b) Case law

Judgment No. 105.K.704.617/2021/18 mentioned above of the Metropolitan Regional Court is the only publicly available decision regarding reasonable accommodation. *For a* detailed description of the case, see section 12.2 below.

c) Definition of disability and non-discrimination protection

Under Article 4 of the RPD Act, persons with disabilities are those who have irreversible or long-term sensory, communication-related, physical, intellectual, psychosocial impairments or the accumulation thereof, which, in interaction with significant environmental, societal or other barriers, restrict or hinder their full and effective participation in society on an equal basis with others. Since the provisions that are the most relevant from the point of view of reasonable accommodation are set out in the RPD Act, this seems to be the most likely definition of disability for the purposes of claiming reasonable accommodation.

However, people with lesser degrees of impairment may still need an accommodation, which is an additional argument for adopting a new and clear set of norms in this regard. Furthermore, persons with certain illnesses might not fall under the RPD Act's definition, so it might not be possible for them to claim reasonable accommodation. However, in the

[60] Act XCIII of 1993 on work safety (*1993. évi XCIII. törvény a munkavédelemről*), 3 November 1993, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300093.TV.

absence of accessible jurisprudence, it is difficult to assess what the approach of the courts would be.

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In Hungary, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination in practice.

The detailed rules concerning reasonable accommodation in employment for persons with disabilities and the limitations of the legislation are described in detail above (section 2.8.a).

While the failure to meet the duty of reasonable accommodation is not expressly regulated as a form of discrimination, it is sometimes regarded as such in practice (see 2.8.e) below for some examples which are from another field, but demonstrate the logic applied). The logic behind the jurisprudence is outlined in Guideline No. 309/1/2011. (II.11) TT issued by the Equal Treatment Advisory Board, which established that 'the failure to guarantee accessibility to buildings and equal access to public services amounts to a breach of the requirement of equal treatment, so the scope of the ETA covers this omission. The (...) failure to guarantee accessibility shall be regarded as direct discrimination under Article 8 of the ETA, because as a result of this failure, persons with disabilities are treated less favourably than people without disabilities in their movement and their access to services.'[61]

So, where there is a statutory obligation to provide reasonable accommodation, failure to meet this obligation counts as discrimination. If, however, no such obligation is in place (e.g. to adapt the working environment in order to make the employer capable of offering employment to a person with a disability), the failure to meet the obligation cannot be sanctioned by the anti-discrimination legislation.

In cases where the failure to provide reasonable accommodation amounts to discrimination, the same sanctions can be applied as for other instances of discrimination (e.g. a fine by the equality body, damages awarded by the labour or civil court). For a description of possible sanctions, see sections 6.1 and 6.5, below.

The same is true for the shifting of the burden of proof. In areas where a statutory obligation to provide reasonable accommodation exists, it ought to be sufficient for the claimant to substantiate the existence of the protected ground and the disadvantage (the lack of reasonable accommodation). This would then place the burden on the respondent to provide a justification for the failure (e.g. the disproportionate nature of the burden). However, in the absence of an express legal provision and consolidated case law, it must be noted that the above is mainly the author's interpretation of the legal framework on the basis of an analogy with the situation in the area of accessibility.

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

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

Examples of reasonable accommodation duties can be found in the area of education. Under Article 24(3) of Government Decree 423/2012 on the admission procedure of

[61] See: https://www.ajbh.hu/documents/10180/3908613/TTaf_20110211-1.pdf/9c6b5cac-fe61-be99-941b-bf3d2ec3d347.

universities,[62] higher education institutions are obliged to provide the conditions for participation in the admission procedure to applicants with disabilities. Paragraph (5) of the same Article stipulates that if the institution of higher education determines health-related conditions or conditions for professional suitability as admission criteria, applicants with disabilities can request exemptions in accordance with the statutes of the particular educational institution. Paragraph (6) states that such exemptions shall be tailored to the features of the particular disability, but may not mean a full exemption from fulfilling the fundamental educational requirements of the institution.

A special type of accommodation in education is the accommodation to be provided to 'children with special educational needs', i.e. children who, under Article 4 of the National Public Education Act, 'are diagnosed by the specialised expert panel to have a locomotor, sensory, mental or speech disability, multiple disabilities, autism spectrum disorder or any other psychological development disorder (severe disorder of learning, attention or behaviour), and therefore require special attention'.

Under Article 47 of the Public Education Act, if, on the basis of the opinion of the educational expert panel, the child with special educational needs is placed in an integrated kindergarten or school, the educational institution shall provide the specialist (specialist teacher, speech therapist, conductive educator, etc.) with the special curriculum and educational materials required by the child's specific needs. The maintainers (i.e. the entities responsible for maintaining the school: the state or the private foundation) may not be exempted from this duty by referring to the absence of the required financial resources, especially as, under Paragraph 10 of the Article, the required specialist may be provided through the network of travelling specialist and conductive teachers. This network, as specified by Article 15/A, is operated by the regional state centre responsible for maintaining schools.

The equality body has dealt with several cases in which educational institutions refused to provide such accommodation, or only agreed to provide it partially, referring to the difficulties this obligation would impose on them. In one case, for example, the school failed to provide to a pupil with speech disability the three hours of speech therapy and one hour of motion development therapy that had been prescribed by the expert panel. The Ombudsman as equality body did not accept the school's reference to technical difficulties and the absence of therapists and concluded that the school had committed direct discrimination against the complainant by not providing the services aimed at accommodating the pupil's specific needs.[63]

In other areas, while there are no explicit legal norms prescribing reasonable accommodation, case law suggests that courts and the equality body classify the unjustified refusal to provide reasonable accommodation as a form of discrimination. An example of healthcare-related case law is provided by Case No. EBH/10/2013 decided by the Equal Treatment Authority. It was an *actio popularis* claim against a healthcare institution that refused to provide stomatology treatment to HIV-positive patients and patients with hepatitis and instead sent them to another hospital for treatment. The institution tried to defend its practice by referring to the fact that the extra protective measures it would need to take in order to treat such patients alongside other patients (and in this sense accommodate the specific needs stemming from their health status) would impose a disproportionate financial burden on the institution. The Authority did not accept the defence – as the institution failed to provide any evidence to substantiate it – and concluded that the patients had suffered direct discrimination.[64]

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62 Government Decree 423/2012 on the admission procedure of universities (*423/2012. (XII. 29.) Korm. rendelet a felsőoktatási felvételi eljárásról*), 29 December 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200423.KOR.

63 Ombudsman, EBF-AJBH-32/2021, February 2021.

64 Equal Treatment Authority, EBH/10/2013, March 2013.

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

Section 2.8.f has not been updated for 2022. Please see *Country report Non-discrimination Hungary 2022 Transposition and implementation at national level of Council Directives 2000/43 and 2000/78*, reporting period 1 January 2021 – 1 January 2022.[65]

[65] See: https://www.equalitylaw.eu/downloads/5732-hungary-country-report-non-discrimination-2022-1-63-mb.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Hungary, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. Article 1 of the ETA proclaims that 'based on the requirement of equal treatment, natural persons and groups of natural persons as well as legal persons and organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and equal account shall be taken of individual features'. Thus, all natural persons fall under the ETA's protection irrespective of nationality/citizenship.

This includes irregular migrants, which does not however mean that the fact that someone is an irregular migrant cannot result in the justification of differentiation, e.g. because this fact makes the irregular migrant's situation not comparable to that of another person, or because the irregularity of his or her stay may be regarded as a reasonable ground for the differentiation. However, as a general rule, irregular migrants, as natural persons who are under Hungarian jurisdiction, are also protected by the ETA.

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

a) Protection against discrimination

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

As mentioned above, Article 1 of the ETA proclaims that 'based on the requirement of equal treatment, natural persons and groups of natural persons as well as legal persons and organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and equal account shall be taken of individual features'.

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

Protection against discrimination can also be sought under Articles 2:42, 2:43 and 2:51 of the Civil Code. Under Article 3:1 of the Civil Code, provisions relating to protection against the violation of inherent personal rights (which include the right to non-discrimination) apply to legal persons unless, due to the nature of the protection, it is limited to natural persons. For the purposes of protection, therefore, legal persons are generally included.

b) Liability for discrimination

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

For historical reasons, the ETA primarily lists (mostly public) legal entities in relation to liability. Under Article 4, these include: the Hungarian state, local and nationality self-governments, public authorities, the army, the police, prison services, border guards, public foundations and associations, organisations representing employees' and employers' interests, bodies providing public services, public education institutions, institutions providing vocational training and higher education institutions, persons and institutions

providing social and child protection services, museums, libraries, private pension schemes, voluntary mutual insurance schemes, health service providers, political parties and other organs funded from the central budget.

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

Those private actors who do not fall into these four categories are liable for discrimination under the general norms of the Civil Code pertaining to the protection of inherent personal rights.

The following are expressly excluded from the ETA's scope (Article 6): (i) family relations; (ii) legal relations between relatives; (iii) issues relating to the faith of churches (to use the exact – and not entirely clear – wording of the Hungarian legislation: 'a denominational legal person's legal relationship directly related to the denomination's religious activity'); (iv) the internal operations of NGOs and legal entities, except for those operations establishing and terminating membership. Political parties are also an exception to this rule: in their case, only differentiation based on political views falls outside the scope of the ETA.

The ETA's solution concerning personal scope may easily be in breach of the directives, as it exempts most private and certain public actors from the ETA's application in sectors covered by the directives.

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

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

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

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

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

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

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

a) Protection against discrimination

In Hungary, the personal scope of national law covers the private and public sector, including public bodies, for the purpose of ensuring protection against discrimination.

As outlined above, Article 1 of the ETA proclaims that 'based on the requirement of equal treatment, natural persons and groups of natural persons as well as legal persons and organisations that do not have legal personality shall be treated in line with the provisions of this law, with equal respect and consideration, and equal account shall be taken of individual features'. The provision does not differentiate between protected persons or groups that belong to the public sector and those that belong to the private sector.

b) Liability for discrimination

In Hungary, the personal scope of anti-discrimination law covers the public sector, including public bodies, and certain segments/actors in the private sector for the purpose of liability for discrimination.

For historical reasons (as outlined above), the ETA lists primarily public legal entities under Article 4 in relation to liability, while only four groups of private actors are enumerated in Article 5.

If, however, the Civil Code's provisions pertaining to the protection of inherent personal rights are interpreted widely enough to cover discriminatory acts by those private actors who do not fall under the ETA's scope, then liability for discrimination can be considered to extend to the whole private sector with the limitation that certain provisions (such as the provision governing the shifting of the burden of proof) apply only in procedures concerning the four groups covered by the ETA.

3.2 Material scope

3.2.1 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Hungary, national legislation prohibits discrimination in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds and in both the private and public sector, as described in the directives. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while gender expression and sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

Article 3 of the ETA defines 'labour relations' (*foglalkoztatási jogviszony*) and 'other relationships relating to employment' (*munkavégzésre irányuló egyéb jogviszony*) in such a way and so widely that they cover all forms of employment, including self-employment; public employment; the special employment relationship pertaining to healthcare professionals; the administrative service relationship in law enforcement bodies; the legal relationship of independent contractors; members of specialised agricultural or producers' groups; and all the elements of an activity outlined in company or civil law that are related to the performance of work.

Article 5 of the ETA extends the obligation to comply with the principle of equal treatment to 'employers' in the wide sense of the term.

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

- access to employment, including public job announcements and selection criteria;
- actions leading up to employment in the wider sense;
- actions relating to the commencement and termination of employment.

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

In Hungary, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while gender expression and sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

As mentioned above, Article 3 of the ETA defines labour relations in such a way that they cover a very wide range of legal relationships within the framework of which work is done. Article 5 lists employers and persons with the right to give instructions in other legal relationships relating to employment (including the legal relationship entered into by principals and the legal relationship of independent contractors) among those private actors who fall under the personal scope of the ETA.

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

- actions relating to the commencement and termination of employment (dismissals);
- remuneration;

- working conditions;
- promotion and training;
- liability for damages and disciplinary actions;
- different forms of parental and other types of leave.[66]

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

In Hungary, national legislation prohibits discrimination in vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses. This protection extends to all five grounds. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while gender expression and sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

As mentioned above, Article 3 of the ETA defines labour relations in such a way that they cover a very wide range of legal relationships within the framework of which work is done. Article 5 lists employers and persons with the right to give instructions in other legal relationships relating to employment among those private actors who fall under the personal scope of the ETA.

In addition, Article 21 of the ETA provides that the principle of equal treatment shall be respected in relation to any training conducted before or during employment (in the widest sense), so all types and levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, can be deemed to be covered.

Furthermore, Article 27 of the ETA (defining forms of education falling under the scope of the law) is so wide that all forms of vocational training will definitely fall under the law's definition of education. Under Article 27, 'the principle of equal treatment extends to any form of care, education or training, which a) is carried out in accordance with requirements approved or prescribed by the state, or b) is supported by the state ba) by direct normative budgetary subsidy, or bb) indirectly, especially through tax benefits (hereinafter collectively: education)'.

Even if non-accredited adult lifelong learning courses provided by private actors do not fall under the term 'education' within the meaning of the ETA, they will still be covered as a type of service accessible to the public (Article 5: private actors falling under the law's personal scope).

Since the ETA applies to all forms of education, vocational training outside the employment relationship (by technical schools, universities or any other educational institution) also falls under the scope of the Hungarian national anti-discrimination legislation.

3.2.4 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Hungary, national legislation prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly

[66] Irrespective of sexual orientation, gender, gender identity, or any other characteristics.

listed in Article 8 of the ETA, while gender expression and sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

Article 21 of the ETA expressly lists membership of and participation in workers' organisations as an area in which the requirement of equal treatment shall be complied with.

Organisations representing the interests of workers or employers are expressly listed under Article 4 of the ETA, which defines the personal scope of the law. Such organisations are therefore obliged to abide by the requirement of equal treatment in all their actions, practices, policies and measures, which of course also include the benefits that they provide. The amended provision also makes it clear that not only the external relations of interest groups of employers and employees, but also the exercise of members' rights and participatory rights in such organisations fall under the scope of the law.

'Public associations' (such as bar associations and various professional chambers) fall under the personal scope of the ETA (see above).

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

In Hungary, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive for all five grounds listed in the directives. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while gender expression and sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

With regard to social protection, Article 24 of the ETA stipulates that the requirement of equal treatment shall be enforced in relation to social security, specifically when any form of financial or in-kind assistance is requested and provided that is financed from social security schemes, and in the case of social or child protection allowances.

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

Article 25(2) allows for preferential treatment – based specifically on the state of health or disability – to be accorded in an act of Parliament or a Government decree based on an act of Parliament in both the fields of social security and healthcare.

Article 7(1) of Act CLIV of 1997 on healthcare[67] (Healthcare Act) reinforces the prohibition of discrimination in the field of healthcare, when it claims that all patients shall be entitled, within the framework prescribed by law, to receive health services that meet the requirement of equal treatment. (Since the law invokes the ETA by referring to the 'requirement of equal treatment', this provision covers all the 20 grounds listed in Article 8 of the ETA.)

An example of jurisprudence in this area is the case of the mandatory maternity clothing for friends and family members of pregnant mothers, which disproportionately affected Roma women (described above in section 2.3), or the case where a hospital refused to provide complex rheumatic treatment to a person with Down syndrome without assessing whether his disability would in fact prevent him from being able to participate in the

[67] Act CLIV of 1997 on healthcare (*1997. évi CLIV. törvény az egészségügyről*), 23 December 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700154.TV.

treatment and comply with instructions, which according to the Ombudsman amounted to direct discrimination.[68]

a) Article 3(3) exception (Directive 2000/78)

In relation to religion or belief, age, disability and sexual orientation, national law does not seek to rely on the exception in Article 3(3), Directive 2000/78.

3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)

In Hungary, national legislation does not expressly prohibit discrimination in social advantages as formulated in the Racial Equality Directive. However, discrimination based on any of the five grounds listed in the directives in this area can easily be argued to be unlawful under Hungarian non-discrimination legislation, especially if the discriminator falls under the personal scope of the ETA (i.e. it is listed in Article 4 of the ETA), since all kinds of disadvantageous differentiations made by such actors are regarded as discrimination under Article 8, irrespective of the area in which they take place.

An example is provided by case No. 68/2008 decided by the Equal Treatment Authority, in which the Authority established discrimination based on political opinion when the mayor of a village instructed the conductor on the 'village bus' (a bus line operated by the local council to guarantee appropriate transportation for residents for social purposes) not to allow the complainant to get on the bus. The reason for the instruction was that the complainant's political views were different from those of the mayor, and several conflicts had arisen between the two of them as a result.

This protection extends to all five grounds. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

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

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

In Hungary, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive. This protection extends to all five grounds. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

The ETA devotes a chapter to education, which means that that is where the bulk of anti-discrimination provisions are to be found.

Article 4 of the ETA lists public education institutions, institutions providing vocational training and higher education institutions among those entities that are obliged to comply with the requirement of equal treatment.

Under Article 7(1) of the ETA, segregation shall be regarded as a breach of the requirement of equal treatment. Article 10(2) of the ETA states that 'segregation is a behaviour aimed at separating individuals or a group of persons from other individuals or another group of persons in a comparable situation, based on a characteristic defined in Article 8, without an express authorisation set out in an Act of Parliament.' The provision on segregation is included in the ETA to clearly deem 'separate but equal' types of behaviour unlawful. If separation also entails some disadvantage (e.g. lower standard education for the separate

[68] Ombudsman, Decision No. EBF-AJBH-174/2021, April 2021.

Roma class within a primary school), it can be qualified as direct discrimination. If, however, it is difficult to prove in a given case that the separate group (the Roma class) suffers disadvantages other than those stemming from the nature of such separation, the provision on segregation may be relied upon. This rule exempts the victims of such practices from the obligation to prove that segregation is in itself a disadvantage, therefore it may be regarded as a further easing of the rules regarding the provision of evidence compared to the reversed burden of proof (see section 6.3).

In a chapter entitled 'Education and training', the ETA provides for the following, under Article 27:

> '(1), the principle of equal treatment extends to any care, education or training
> a) carried out in accordance with requirements approved or ordered by the state, or
> b) whose organisation is supported by the state
> ba) by direct normative budgetary subsidy, or
> bb) indirectly, especially by releasing or clearing taxes or by tax credit (hereinafter collectively: education).
>
> (2), the principle of equal treatment shall be enforced in relation to education as defined in Paragraph (1), particularly in:
> a) determining the conditions of accessing education and assessing applications;
> b) defining and setting the requirements for education;
> c) evaluating performance;
> d) providing and using services related to education;
> e) accessing benefits related to education;
> f) providing accommodation and subsistence in dormitories;
> g) issuing academic certificates and diplomas;
> h) accessing vocational guidance; and
> i) terminating the relationship related to participation in education.'

Article 27(3) not only prohibits segregation in an educational institution, or in a division, class or group within such an educational institution, but also perceives as a form of discrimination education limited to a care or educational system, or a care or educational system or institution created or maintained according to standards that do not meet accepted professional requirements or do not comply with professional rules, and thus do not ensure that pupils or students can expect to have a reasonable opportunity to prepare for state exams.

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

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

The ETA's provisions on education were augmented in response to an infringement procedure initiated by the European Commission against Hungary with a formal letter of notice on 26 May 2016, requesting that Hungary ensures the segregation-free education of Roma children. In addition to expressing concerns about the fact that Roma children are disproportionately over-represented in special schools for children with intellectual disabilities, the Commission urged Hungary to bring its national law on equal treatment and education and the implementation of its education policies in line with the Racial Equality Directive.[69]

Subsequently, references to national or ethnic minority education were removed from Article 28(2) (which now only contains provisions pertaining to religious education), and new provisions were inserted into Article 28.[70] The amendments entered into force on 1 July 2017 and read as follows:

> '(2a) The organisation of education based on religious or other ideological conviction as set forth in Paragraph (2) shall not result in segregation based on characteristics listed in Article 8 b) to e) [racial affiliation, colour of skin, nationality (not in the sense of citizenship) or belonging to a national minority].
> (2b) If the education is organised on the basis of belonging to a national minority, the principle of equal treatment is not violated only if, in addition to meeting the requirements set forth in Paragraph (2), the following criteria are also met:
> (a) acquiring the knowledge required by the core curriculum is guaranteed at the same level as in the majority education, and
> (b) education based on belonging to a national minority complies with the requirements set forth in the Act on the Rights of Nationalities.'

The codification of the exceptions allowed by Paragraphs (2) to (2b) was necessary to make separate religious and minority education possible (the Nationalities Act, for example, allows minority parents to initiate the formulation of separate minority classes for their children, where they can learn the minority language and minority culture). To maintain the legality of such classes, an exempting rule had to be inserted.

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

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

While the law looks unproblematic on paper and it seems to guarantee that education organised on the basis of religion or belonging to a national minority would not result in

[69] See: http://europa.eu/rapid/press-release_MEMO-16-1823_en.htm.
[70] Act XCVI of 2017 on the Amendment of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities and Act CXC of 2011 on National Public Education (*2017. évi XCVI törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény és a nemzeti köznevelésről szóló 2011. évi CXC. törvény módosításáról*), 27 June 2017, https://net.jogtar.hu/jogszabaly?docid=A1700096.TV&timeshift=fffffff4&txtreferer=00000001.TXT.

segregation and that the quality of such education would meet national standards, the practice leaves much to be desired, as will be outlined below. In addition, educational experts have doubts about the ulterior rationale of inserting Article 34/A into the National Public Education Act (see the explanation below).

Under Paragraph (3) of Article 28 of the ETA, a legal act may divert from the requirement of equal treatment concerning admission criteria in respect of educational institutions serving the protection of linguistic or cultural identity, or denominational or national minority schools.

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

The grounds cited most often in relation to discrimination in education are disability and Roma origin.

Under Article 13(1) of the RPD Act, persons with disabilities have the right to participate in early development and care, kindergarten education, school education, developmental preparation, vocational training, adult training and tertiary education in accordance with their state and age and in line with the provisions of the relevant laws. Under Article 13(2), if, based on the opinion of the specialised expert panel, it is advantageous for the development of their skills, persons with disabilities shall participate in integrated kindergarten and school education.

However, in practice, the situation is far from unproblematic. The 2017 shadow report prepared for the UN CRPD by the Child Rights NGO Coalition lists several problems regarding the education of children with disabilities, including the high number of children with disabilities who are educated in a non-integrated manner; the shortage of well-qualified specialists who could support the development of children with special educational needs in the mainstream schools; the absence of adequate knowledge on disabilities on the part of teachers and other persons working in education; and the lack of accessibility to adequate education due to the authorities' failure to provide the required special conditions close to their homes.[71]

In its alternative reports submitted to the CRPD in advance of its 23rd session, the National Federation of Organisation of Persons with Physical Disabilities also referred to problems in relation to the education of pupils with disabilities:

> 'Due to the lack of accessible structure, the participation at all levels of education as well as the possibility of life-long learning are not ensured for persons with physical disabilities. Despite the fact that the requirement of equal access to public services – including education – is laid down in the legislation, our experience is that as a result of [inaccessible] buildings, facilities, roads as well as different means of public transport, persons with physical disabilities are being excluded from mainstream education.
>
> […] Due to lack of accessible environment and disability professionals, parents often decide to enrol their disabled children in special schools because they view segregated education as a protected environment that may prevent abuse, school bullying, maltreatment and violence against students with disabilities. The traveling network of special education teachers suffers from a serious shortage of

[71] Child Rights NGO Coalition (2017), *Hungary - List of issues submissions prepared by the Child Rights NGO Coalition*, pp. 12-15, available at: https://unicef.hu/wp-content/uploads/2015/10/List-of-issues-submissions-prepared-by-the-Child-Rights-NGO-Coalition-1.pdf.

professionals, so children with disabilities in mainstream schools do not receive the necessary development.'[72]

The 2021 annual report of the Commissioner for Educational Rights, published in 2022, shows that these conclusions are still valid. According to this report, the Commissioner receives many complaints concerning the education of children with disabilities. The report emphasises that children with disabilities and their parents are often vulnerable since they are not able to exercise their rights, partly because of a lack of awareness of the relevant laws.[73]

The Ombudsman has also dealt with several cases in which parents complain that educational institutions fail to provide their children with the special services that would enable them to participate effectively in integrated education. In 2022, out of the 32 noteworthy cases published on the Ombudsman's website, four concerned the education of children with disabilities.[74]

Cases concerning sexual orientation have also been dealt with under the ETA. In one case, for instance, the application of a 13-year-old boy to enrol in a school was rejected because he was raised by a lesbian couple. The parents sued the school for damages. In its decision of 24 June 2016, the Metropolitan Court of Budapest found in favour of the claimants, and established a violation of the mother's inherent personal right to non-discrimination.[75] The court concluded that the child's admittance to the school had been rejected due to his mother's sexual orientation. In response to the school's argument that the rejection was in line with the interest of the child, the court stated that '[a]ny educational institution and their teachers are expected [...] to use the necessary pedagogical tools to prevent the bullying of students who differ from their classmates in whatever aspect. Students with such characteristics […] cannot suffer a disadvantage because an educational institution or a class teacher is not willing or able to take into consideration their specific needs and facilitate their integration into the community of students.'

a) Trends and patterns regarding Roma pupils

In Hungary, the education of Roma pupils is characterised by specific trends and patterns, such as segregation.

As stated above, the legal framework was amended in response to the infringement procedure initiated by the European Commission, with a view to strengthening compliance with the requirements of the Racial Equality Directive. However, despite the detailed legislative framework, segregation of Roma pupils in different forms is still widespread in Hungary, and the situation seems to be deteriorating due to a number of factors, including the centralisation of the educational system after 2010, in parallel with a court-established failure of the state authorities to make meaningful efforts to end segregation, as well as the steep increase in the number and proportion of denominational schools within the

[72] National Federation of Organisations of Persons with Physical Disabilities (MEOSZ) (2019), *Alternative Report for the Periodic Review on the implementation of UN Convention on the Rights of Persons with Disabilities (CRPD) in Hungary,* available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fCSS%2fHUN%2f41334&Lang=en.

[73] Commissioner for Educational Rights (2022), *Az oktatási jogok biztosának beszámolója 2021. évi tevékenységéről* (Report of the Commissioner for Educational Rights about his activities in 2021), https://www.oktbiztos.hu/ugyek/jelentes2021/ojb_2021_beszamolo.pdf, p. 53.

[74] Ombudsman, cases EBF-AJBH-65/2022, EBF-AJBH-150/2022, EBF-AJBH-363/2022, EBF-AJBH-69/2022.

[75] Metropolitan Court of Budapest, 31.P.25.499/2015/16/1, 24 June 2016.

Hungarian educational system, which has only 'facilitated the flight of local elites from state-owned schools'[76] and boosted the extent of segregation.[77]

While the changes in the definition of 'disadvantaged' (*hátrányos helyzetű*) and 'multiply disadvantaged' (*halmozottan hátrányos helyzetű*) children have made it more difficult to conduct comparable impact studies,[78] statistical data suggest that the degree of segregation is on the rise. According to a 2021 study published in February 2022, the segregation index (the degree to which 'disadvantaged' and 'multiply disadvantaged' children are separated from non-disadvantaged peers in the course of their education) increased nationally from 27.7 to 40.7 and from 29.2 to 37.5, respectively, between 2010 and 2020.[79] As Roma children are overrepresented among disadvantaged and multiply disadvantaged children, this segregation index is also indicative of the (increasing) degree of segregation between Roma and non-Roma children.

The Hungarian educational system's ability to even out socioeconomic inequalities is among the worst in Europe, most probably as a result of the increasing degree of segregation between disadvantaged and advantaged children. The summary report of the Organisation for Economic Co-operation and Development's 2018 PISA[80] survey concludes that while:

> 'In almost all countries that participated in PISA 2018, students who were disadvantaged compared with their peers in their country were less likely to attain the minimum level of proficiency in reading. However, the strength of the relationship between a student's socio-economic status and his or her performance varied greatly across countries and economies.'

Hungary is listed in the report as one of the 'systems where the relationship between the two was particularly strong'.[81]

The percentage of 'disadvantaged' and 'multiply disadvantaged' students among those applying to higher education is also decreasing: in 2011, just over 10 % of applicants belonged to one of the two categories, whereas by 2021, this percentage had dropped to about 3 % (although this is a slight increase compared to 2017, when 1.5 % of the applicants came from this group).[82] The percentage of early school leavers has also been on the rise, partly as a result of reducing the compulsory school-leaving age from 18 to 16. In 2006, the figure was 12.5 %; by 2010, it had decreased to 10.5 %, but since 2010 it has returned to the 2006 level, and in 2020, it was 12.1 %. There are significant geographical differences in this regard, with the Roma-concentrated counties being among the areas with the worst results. For instance, in Borsod-Abaúj-Zemplén and Baranya

[76] See Fejes, J. B. and Szűcs, N. (eds.) (2018), *Én vétkem. helyzetkép az oktatási szegregációról* (Mea Culpa. State of affairs in educational segregation), Szeged, Motiváció Oktatási Egyesület, available at: https://motivaciomuhely.hu/wp-content/uploads/2018/05/%C3%89n-v%C3%A9tkem_online.pdf, p. 15.

[77] For more information, see *Country report Non-discrimination, Hungary, 2022*, European network of legal experts in gender equality and non-discrimination, available at: https://www.equalitylaw.eu/downloads/5481-hungary-country-report-non-discrimination-2021-1-88-mb.

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

[79] Hajdu, T., Hermann, Z., Horn, D., Hőnich, H. and Varga, J. (2022), *A közoktatás indikátorrendszere 2021* (The indicator system of public education 2021), available at: https://kti.krtk.hu/wp-content/uploads/2022/02/A_kozoktatas_indikatorrendszere_2021.pdf, p. 196. The index is 100 when disadvantaged or multiply disadvantaged children are fully separated from their non-disadvantaged peers.

[80] PISA is the OECD's programme for international student assessment.

[81] Schleicher, A. (2019), *PISA 2018, Insights and Interpretations*, p. 17.

[82] Hajdu, T., Hermann, Z., Horn, D., Hőnich, H. and Varga, J. (2022), *A közoktatás indikátorrendszere 2021* (The indicator system of public education 2021), available at: https://kti.krtk.hu/wp-content/uploads/2022/02/A_kozoktatas_indikatorrendszere_2021.pdf, p. 208.

counties, the percentage of early school leavers was 20 or higher, whereas in Nógrád County, it was above 30 in 2020.[83]

The problems regarding the education of Roma pupils are reflected in the annual reports of the Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (hereafter: Minorities Deputy). In her report on the year 2021, she summarised her experiences as follows:

> 'One group of the complaints was related to […] the disadvantaged and constantly marginalised situation of Roma children within the school system. The cases have in common that the children concerned did not have access to the same quality of education [as their non-Roma peers] and, in many instances, they studied and were educated in an environment where their human dignity was violated and they suffered inadequate treatment due to their ethnic origin.
>
> In 2021, there were also several submissions in which Roma parents complained about the behaviour and attitude of principals, teachers or kindergarten teachers, or the biased or discriminatory actions of some educational institutions. In most cases, the parents felt that their child had been treated worse by the teacher or kindergarten teacher because of their ethnic origin. They complained about abusive verbal statements, making Roma children sit in the back bench, more frequent punishments, and being placed in a separate class. In the context of education and training, equal treatment
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> […]
>
> The lack of social mobility, which is closely linked to high school drop-out rates, remains a serious problem regarding the situation of Roma children in schools. According to the available information, more than half of Roma pupils study in segregated institutions, and segregation in most cases goes hand in hand with lower quality.
>
> […]
>
> The Minorities Deputy found it necessary to provide a comprehensive analysis of the situation, because […] while the number of segregated education institutions has increased in Hungary in the past years, the measures and incentives of educational policy that could generate systemic changes, are still missing.'[84]

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

In Hungary, national legislation prohibits discrimination in the access to and the supply of goods and services as formulated in the Racial Equality Directive. This protection extends to all five grounds. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while sex

[83] Hajdu, T., Hermann, Z., Horn, D., Hőnich, H. and Varga, J. (2022), *A közoktatás indikátorrendszere 2021* (The indicator system of public education 2021), available at: https://kti.krtk.hu/wp-content/uploads/2022/02/A_kozoktatas_indikatorrendszere_2021.pdf, pp. 312-313.

[84] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, pp. 137-138. The Ombudsman's report for 2022 was not available at the time of writing this report.

characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

Article 5 of the ETA extends the scope of the law to all actors who offer a public contract, make a public offer, provide public services or sell goods to the public.

In addition, discrimination with regard to access to goods and services is regulated by Article 30 of the ETA:

> (1) It is considered a particular violation of the principle of equal treatment if, at premises open to customers, particularly in catering, commercial, cultural and entertainment establishments, and based on a characteristic defined in Article 8,
> a) the provision of services or sale of goods is denied or neglected;
> b) the services provided and goods sold are not of the same quality as those normally available at the particular premises;
> c) a notice or sign is placed implying that a certain individual or individuals are excluded from the provision of services or sale of goods at the premises.

Paragraph (2) and Article 30/A contain specific exemption clauses for access to goods and services:

> 'Article 30(2) Entry into premises established for a group defined by characteristics listed in Article 8 for the purposes of preserving traditions or maintaining cultural and self-identity and open to the immediate public may be limited or subject to membership or specific conditions.
> Article 30/A(1) In relation to insurance services and services based on the insurance principle – with the exception of group life, casualty and health insurances and unless the pertaining laws stipulate otherwise – differentiation based on gender infringes the principle of equal treatment if the service provider's measure results in gender-based direct or indirect differentiation in relation to the fees to be paid by or the services provided to the concerned individuals.'

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

Failure to adapt goods or a service to meet the needs of a person with a disability is regarded as a form of discrimination. To substantiate this, a case can be quoted in which the complainant launched a proceeding before the Ombudsman because she could not get on the local bus company's bus, as it stopped too far from the pavement, the ramp did not work, and the driver refused to provide the complainant with assistance. The parties reached a friendly settlement.[85]

b) Distinction between goods and services available publicly or privately

In Hungary, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants and banks) and those only available privately (e.g. those restricted to members of a private association).

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

[85] Ombudsman, EBF-AJBH-106/2022, March 2022.

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

In Hungary, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. This protection extends to all five grounds. Gender identity/expression and sex characteristics are also covered in national legislation: gender identity is expressly listed in Article 8 of the ETA, while sex characteristics can ultimately be brought under the protection offered by the category of 'other characteristics'.

Under Article 4, public actors who have a role in housing (including municipalities) fall under the law's scope. Article 5 of the ETA extends the law's personal scope to all persons making a public offer, including an offer to rent out a private apartment.

Discrimination in housing is forbidden by Article 26 of the ETA, which reads as follows:

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

Thus, housing discrimination is dealt with in relation to state or municipal housing. However, housing provided by private actors (e.g. the renting out of apartments) will also fall under the scope of the ETA, provided that the given private actor advertises the available housing publicly.

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

In a case taken by the Equal Treatment Authority, a Roma man filed a complaint because when he was looking for an apartment to rent, the real estate agency provided him with a list of apartments meeting his demands concerning size and location, but some of the apartments in the list had a 'No Roma' comment attached to them. The Authority concluded that discrimination had taken place.[86]

a) Trends and patterns regarding housing segregation for Roma

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

The intensity of segregation in housing is acknowledged in Hungary's national Roma inclusion strategy, which states that while the Roma community constitutes about 6-7 % of Hungary's total population, this proportion exceeds 14 % in three counties and 25 % in seven districts, and the Roma population is a majority in 279 villages. Residents of these segregated areas live in substandard conditions; the disadvantages facing children growing

[86] Equal Treatment Authority, Decision No. EBH/70/2018, 9 January 2018.

up here are not offset by the educational system but instead are perpetuated by it.[87] There are also segregated neighbourhoods within larger settlements (towns, cities); their number is estimated to be 1 384 within 709 settlements.[88]

The proportion of social housing (8 %) is far below the EU average (33 %). The proportion of housing owned by local councils (providing a basis for social housing) decreased from 4.6 % in 2001 to 2.6 % in 2019.[89] According to other sources, it is even lower: according to the *Fifth Opinion on Hungary* of the Advisory Committee on the Framework Convention for the Protection of National Minorities (the ACFC report) published in October 2020, 'the proportion of social housing is very low (1.5 % of the total housing portfolio), particularly in rural areas (0.7 %)'.[90] The lack of social housing has a very negative impact on the housing conditions of the marginalised Roma groups, significantly reducing their chances of finding a way out from the segregated Roma neighbourhoods and settlements.

The quality of housing for many Roma families is also significantly worse than that of the average population. The Second European Union Minorities and Discrimination Survey claims that, while there have been improvements since 2011, the housing conditions of Roma people are still far below those experienced by the non-Roma population. By way of example, in 2016, 33 % of Roma people lived in households without tap water inside the dwelling. In contrast, practically everyone in the non-Roma population had access to tap water in their home. While only 4 % of the general population lived in dwellings without a toilet and shower or bathroom inside the dwelling in 2016, this proportion was 38 % within the Roma population. A total of 44 % of the Roma population lived in dwellings with a leaking roof or damp walls or other structural problems compared with 26.9 % of the general population.[91]

Based on the accounts of housing situation researchers, the ACFC report lists further issues regarding the housing of the Roma in Hungary:

> '[T]he disadvantaged areas, whose management has been relegated to the local level, are excluded from major development projects by municipalities, with no incentives for the latter to take these areas and persons into account. […] Cases of discrimination and evictions were also reported in the course of the monitoring period […]. In some cases, rental agreements were terminated by the municipality, with limited compensation, on condition that the tenant purchase a property located outside the municipality. Harassment of families and fear-inducing tactics were reported in this connection. The number of evictions from municipal housing tripled between 2001 and 2015. In the second quarter of 2018 alone, 1 355 evictions officially took place.
>
> The reduction of housing benefits is also listed as a cause of housing difficulties for Roma. Municipalities' discretionary power in this regard, and the absence of a statutory minimum benefit renders the aid recipients more vulnerable to local policies. In parallel, a majority of Roma are not targeted by housing support programmes, as they do not meet the criteria for the Family Housing Allowance, and do not benefit from the VAT refund related to home construction.'[92]

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87 Hungarian Government (2021), *Magyar Nemzeti Társadalmi Felzárkózási Stratégia 2030*, (Hungarian National Strategy for Social Inclusion 2030), p. 108. https://ec.europa.eu/info/sites/default/files/mntfs2030.pdf.

88 Hungarian National Strategy for Social Inclusion 2030, p. 114.

89 See: https://www.ksh.hu/thm/2/indi2_7_7.html.

90 Advisory Committee on the Framework Convention for the Protection of National Minorities (2020), *Fifth Opinion on Hungary*, p. 26, available at: https://rm.coe.int/5th-op-hungary-en/16809eb484.

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

92 Advisory Committee on the Framework Convention for the Protection of National Minorities (2020), *Fifth Opinion on Hungary*, p. 26.

In her 2022 annual report,[93] the Ombudsman's Minorities Deputy also made reference to the frequency of housing-related complaints from Roma persons, particularly in relation to housing provided by municipalities. She emphasised that the Roma complainants mainly raised issues regarding the difficulties of paying the rental fees and the public utility bills; the ordering and executing of evictions; the physical conditions of municipal social housing; refusal to conclude rental contracts with Roma people; the rejections of applications for social housing; and limited access to water and electricity. She also pointed out that the excessively high rate of inflation had a disproportionately negative impact on indigent Roma families, as had the increase in energy prices and the abolition of the state support for energy consumption, as

> 'the tenants and owners of poorly insulated apartments in a bad state of technical repair have become especially vulnerable due to the high utility expenses. The increase of utility fees has led to further arrears among those living in social housing, which entails the threat of eviction. The rise in the number of evictions ordered because of rental and utility fee debts and the consequent increase in the vulnerability of people living in housing poverty arose as severe problems when in the summer of 2022, the eviction moratorium introduced at the start of the state of danger [declared due to the epidemic] was terminated. Based on the complaints related to housing it has been confirmed too that there are not enough municipality-owned apartments, with special regard to those that would be for suitable to satisfy social housing needs […].'

The ACFC emphasised that while 'all the stakeholders recognise affordability as one of the major problems to be addressed', paradoxically, 'no mention is made of a national policy or programme aimed at significantly increasing the social housing stock, and nor is there a clear plan to develop subsidised housing.'[94] While noting that most of these questions fall under the jurisdiction of the municipalities, the ACFC is of the view that 'it is the national authorities' responsibility to create the necessary incentives, including by establishing clear legal obligations, in order to impose minimum standards on municipalities with regard to their housing-related prerogatives, so they are obliged to protect the most vulnerable Roma.' The ACFC further noted that a significant proportion of Roma still live in segregated areas, despite the legislation aimed at prohibiting housing segregation.[95]

The ACFC made a number of recommendations regarding the housing situation of the Roma, including urging the authorities

- to design and implement a comprehensive national policy framework on housing, with a system of incentives for municipalities to become involved in the design and implementation of the policies aimed at improving the housing situation of Roma;
- to significantly develop social and subsidised housing and to ensure that the existing legislation against housing segregation is effectively implemented.[96]

[93] Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, pp. 154-155.

[94] Advisory Committee on the Framework Convention for the Protection of National Minorities (2020), *Fifth Opinion on Hungary*, p. 26.

[95] Advisory Committee on the Framework Convention for the Protection of National Minorities (2020), *Fifth Opinion on Hungary*, p. 26.

[96] Advisory Committee on the Framework Convention for the Protection of National Minorities (2020), *Fifth Opinion on Hungary*, p. 27.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4 Directive 2000/43, Article 4(1) Directive 2000/78)

In Hungary, national legislation provides for an exception for genuine and determining occupational requirements.

Article 22(1) of the ETA provides an exception for genuine and determining occupational requirements (GORs). It reads as follows:

> 'The following shall not be regarded as a violation of the requirement of equal treatment:
> a) differentiation regarding access to employment, if by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, it is based on a genuine and determining occupational requirement, provided that its objective is legitimate and it is proportionate to that objective;
> b) differentiation that arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.'

Article 22(2) states that in the course of applying Article 21(f) (i.e. the equal pay for equal work principle), the exempting clauses set forth in Article 22(1) (i.e. the GOR and religious ethos exemption) shall not be applicable when the ground concerned is gender or racial or ethnic origin. This can be interpreted to imply (*argumentum a contrario*) that unequal pay may be permissible in respect of religion, disability and sexual orientation if it can be substantiated by a genuine occupational requirement or the religious ethos of the relevant organisation (employer). There is no case law regarding this provision, and in all probability, it is a result of hasty legislation aimed at transposing the EU *acquis* (Directives 2000/43/EC and 2002/73/EC), which was done inconsistently without due attention to the fact that Directive 2000/78/EC also excludes differentiation in pay on these grounds.

Article 22(1)(a) is the equivalent of the genuine and determining occupational requirement rule, while (b) is the Hungarian version of the religious ethos exception (with an additional element that allows special institutions of national and ethnic minorities to employ people coming from that particular national and ethnic group).

Article 22(1)(a) was amended as of 1 January 2018 in a way that creates doubts regarding its full compliance with the *acquis*. Previously, the text was formulated in a way that could be interpreted to extend to all aspects of employment, whereas the new text seems to suggest that the exempting clause is only applicable at the time of recruitment ('differentiation regarding access to employment'). While this formulation seems to follow the solution applied in Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (where a differentiation can be allowed only in relation to access to employment, but not in relation to any other aspect of employment), the problem in the Hungarian context is that there are general exempting clauses (see section 2.4 above), and therefore, a possible interpretation may be made according to which Article 22(1)(a) is a *lex specialis* only in relation to the recruitment process, whereas (in the absence of a *lex specialis*) the general exempting clause (Article 7(2) of the ETA) will become applicable with regard to all other aspects of employment. This would mean a simple reasonability test, providing the employer with a much more lenient possibility for exemption than the genuine occupational requirement test set forth by the directives.

It can of course be argued that even if this interpretation is valid, based on the principles first declared in the *Mangold* judgment,[97] Hungarian courts would be required to put aside Article 22 of the ETA, and use Article 4 of Directives 2000/43/EC and 2000/78/EC, to adjudicate any complaint concerning differentiation based on the grounds protected by these directives and related to other aspects of employment (e.g. dismissal, promotion).

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

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

In Hungary, national law provides for an exception for employers with an ethos based on religion or belief.

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

Furthermore, Article 20(3) of the Churches Act states that 'denominational legal personalities or religious associations conduct their public interest activities [educational, healthcare, charity, social, cultural, sports, youth-related, child protection activities] directly or through their institutions in accordance with their religious convictions, and therefore, specific requirements may be determined concerning recruitment and the establishment, maintenance and termination of the legal relationship of employment, provided that these requirements can be regarded as justified by the nature or substance of the given religious ethos, they are necessary for preserving and realising the ethos, and they are proportionate'.

It is doubtful whether these provisions are fully in line with Directive 2000/78, as Article 22 of the ETA does not seem to incorporate the Directive's notion of 'legitimacy'. Although it is likely that, in the course of applying the law, courts and authorities would see this as an implied requirement of any distinction based on religious ethos, there is no case law on this issue yet.

Furthermore, according to the Directive, a differentiation based on the religious ethos of an organisation may only be based on the religion of the person subjected to the differentiation, and not on any other characteristics (e.g. sexual orientation), whereas the Hungarian provisions do not impose this restriction on the application of these exempting clauses.

In the case of denominational schools, additional legal provisions cause further problems. Article 32(1) of the National Public Education Act states that if the educational institution is maintained by a denomination, (i) it may in the course of recruiting teachers and other employees attach weight to considerations related to religion or belief, and define them as criteria of recruitment; (ii) it may restrict or ban teachers' general right to carry out their educational work in accordance with their beliefs and values (without imposing these on the child or pupil); and (iii) it may – in its rules of operation and house rules and in line with the teachings of the maintaining denomination – prescribe regulations concerning appearance and behaviour, rights and obligations and religious activities. Disciplinary

[97] Judgment of 22 November 2005, *Werner Mangold v. Rüdiger Helm*, C-144/04, ECLI:EU:C:2005:709.

proceedings may be launched against the child, pupil or teacher for breaching these latter obligations.

In the author's view, these provisions – especially in light of recent CJEU case law, such as the *Egenberger* judgment[98] – do not comply with Article 4 of Directive 2000/78 for a number of reasons. First, according to the Directive, Member States may maintain national legislation in force at the date of adoption of the Directive or provide for future legislation incorporating national practices existing at the date of adoption of the Directive. At the time of Hungary's accession to the Union, Act LXIX of 1993 on Public Education[99] (the previous act on public education, parts of which were still in force on 1 September 2013) contained no provisions authorising denominational educational institutions to set considerations related to religion or belief as recruitment criteria or prescribe regulations concerning appearance, behaviour or religious activities.

Secondly, the provisions outlined above do not contain any reference to the genuineness, legitimacy and justified nature of the differentiation – they are absolute, unqualified and unconditional. Therefore, they are not in line with the Directive's requirement that a difference of treatment shall not constitute discrimination only if 'by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement'.

It remains to be seen how the relation between Article 32(1) of the National Public Education Act and Article 22(1)(b) of the ETA will be interpreted, as the interpretation will have a decisive impact on its conformity with Article 4(2) of the Directive. Article 32(1) of the National Public Education Act does not specify what types of special conditions may be set, and how the selection criteria shall be formulated. It can therefore be interpreted in line with Article 22(1)(b) of the ETA and regarded as a declarative rule simply reinforcing those existing special rights of organisations based on a religious ethos that were put in place by the ETA. The same interpretation would follow from the principle of indirect effect of the EU *acquis*, i.e. domestic authorities' obligation to interpret domestic laws in a way that is compatible with the *acquis*.

However, another interpretation is also possible. One can argue that there would have been no point in re-declaring an existing right, and therefore the legislature's intention behind the adoption of Article 32(1) must have been to make it possible for church institutions to set conditions going beyond those that were already permitted under the ETA. In this case, there would be a conflict between the ETA and the new provision. Based on the principle of *lex posterior derogat legi priori*, this conflict could be resolved in favour of Article 32(1), since this is the norm that was adopted later. This interpretation opens the door for employment-related differentiation that goes far beyond what is allowed by the Directive.

Looking at the legislative reasons attached to Article 32 of the National Public Education Act, it seems that the legislature's intention was to create an exception to the GOR provision of the ETA, which takes precedence over Article 22 of the ETA. The legislative reasons read as follows. 'The ethos of educational institutions maintained by a denomination is necessarily determined by the religious principles of the maintaining denomination, therefore further special and exceptional provisions pertain to public educational institutions maintained by churches. Some of these provide extra rights to the maintainer and at the same time restrict the autonomy of the staff, and concern the rights and obligations of the parents and children. Since the law declares the [parents' and children's] right to freely choose the educational institution to attend, these restrictions are not detrimental to children and parents. The provisions influencing the rights of the

[98] Court of Justice of the European Union, Judgment of 17 April 2018, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2018:257.

[99] Act LXIX of 1993 on Public Education (*1993. évi LXXIX. törvény a közoktatásról*), 3 August 1993, https://mkogy.jogtar.hu/jogszabaly?docid=99300079.TV.

staff are necessary in order to guarantee the ethos based on religion or belief, at the same time the law wishes to guarantee professional freedom and autonomy of teachers.'

A case taken by the Hungarian Helsinki Committee demonstrates that some schools themselves share this interpretation. In this case, a denominational school dismissed a boarding school teacher who had been working for the institution for 10 years (and whose performance was rated excellent by auditors commissioned by the maintaining church) as soon as the above provisions of the National Public Education Act entered into force on the basis that his world view was not in line with the school's religious values. If the school management had thought that this was possible under Article 22 of the ETA, it could have dismissed him before that. However, in all probability, the school was of the view that under the ETA it would have been difficult for it to substantiate that religiosity was a genuine and determining occupational requirement, as the teacher always saw to it that the students abided by the religious requirements and attended the school's religious events. In the labour lawsuit, no judicial decision was reached, because the school finally acknowledged the violation and the parties concluded a settlement.

– Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Hungary, there are specific provisions and/or case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment.

Article 6 of the ETA stipulates that a denominational legal person's legal relationships directly related to the denomination's religious activity are excluded from the scope of the law. Therefore, churches enjoy complete freedom with regard to the employment of priests and pastors and other persons with directly religious tasks.

Case law also shows that religious freedom can be an exempting factor in cases not expressly removed from the ETA's scope. The *Károli* case concerned the conflict between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. After dismissing a theology student who had confessed his homosexuality to one of his professors, the faculty council of the Károli Gáspár Calvinist University's Faculty of Theology published a general declaration 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'.

In this case (brought as an actio popularis claim by an LMBTIQ NGO), the Supreme Court took the view[100] that the denominational university was exempted from the obligation to abide by the requirement of equal treatment by virtue of the general exempting rule of the ETA [Article 7(2)], according to which an action based on a protected characteristic 'shall not be taken to violate the requirement of equal treatment if it is found by objective consideration to have a reasonable ground directly related to the relevant legal relation'. In the Supreme Court's view, in the case of a denominational university, it may objectively be considered to be reasonable to exclude homosexuals from theological education, taking into consideration the fact that later on they may become pastors.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

In Hungary, national legislation does not provide for a general exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78). The statutes regulating the status of armed forces contain provisions on age limits and physical suitability.

[100] Supreme Court, Pfv.IV.20.678/2005/5, 8 June 2005, http://epa.oszk.hu/02300/02334/00020/pdf/EPA02334_Fundamentum_2005_03_100-104.pdf.

Article 5 of the Act XLII of 2015 on the service relationship of professional members of law enforcement organisations[101] (the Law Enforcement Organisations Act), which refers to regulating organisations, such as the police, prison services, customs and excise guards, reads as follows:

> (1) With regard to the service relationship, the requirement of equal treatment shall be met.
> (2) The law enforcement organisation guarantees without discrimination the advancement of its professional member, based exclusively on his or her professional qualities, training, experience, performance and service time.

Article 6 of Act CCV of 2012 on the status of military personnel[102] (the Armed Forces Act) claims that the state and the employer shall comply with the requirement of equal treatment. Furthermore, remedying the violation of the requirement of equal treatment shall not result in the violation or limitation of a third person's rights.

However, this does not exclude the possibility of differential treatment based on age and disability (or rather: physical features) in the context of armed forces and other armed organisations. The limitations are set out by the relevant statutes. Under Article 33 of the Law Enforcement Organisations Act, individuals who are older than 18 and at least 10 years younger than the upper age limit pertaining to the organisation and are suitable for service from a medical, psychological and physical point of view may enter service. Under Article 31 of the Armed Forces Act (regulating the army), individuals who are older than 18 and are suitable for service from a medical, psychological and physical point of view may enter service.

The detailed regulations are set out by Joint Decree 57/2009 of the Ministry of Justice and Law Enforcement, the Ministry of Municipalities and the Minister without Portfolio Overseeing Civil Secret Services.[103] The Decree contains a very detailed description of what suitability from a medical, psychological and physical point of view means.

The Equal Treatment Authority had a related case. A woman filed a complaint because she was refused admission to the Police College due to her height. The college used the exemption that it was obliged by the Decree (i.e. a statutory norm) to reject her application, since, under its terms, a woman who is less than 162 centimetres tall may not become a police officer (for men, the minimum height is 168 centimetres). Consequently, the Authority had to reject the complaint, but indicated to the Ministry of Justice and Law Enforcement that a revision of the Decree is necessary. (If a law, such as an act of Parliament or a ministerial decree is discriminatory, only the Constitutional Court is entitled to declare it null and void. The Authority only has the right to initiate the amendment with the responsible entity.)

[101] Act XLII of 2015 on the service relationship of professional members of law enforcement organisations (*2015. évi XLII. törvény a rendvédelmi feladatokat ellátó szervek hivatásos állományának szolgálati jogviszonyáról*), 24 April 2015, http://mkogy.jogtar.hu/?page=show&docid=a1500042.TV.

[102] Act CCV of 2012 on the status of military personnel (*2012. évi CCV. törvény a honvédek jogállásáról*), 18 December 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200205.TV.

[103] Joint Decree 57/2009 of the Ministry of Justice and Law Enforcement, the Ministry of Municipalities and the Minister without Portfolio Overseeing Civil Secret Services (*57/2009. (X. 30.) IRM-ÖM-PTNM együttes rendelet egyes rendvédelmi szervek hivatásos állományú tagjai egészségi, pszichikai és fizikai alkalmasságáról, közalkalmazottai és köztisztviselői munkaköri egészségi alkalmasságáról, a szolgálat-, illetve keresőképtelenség megállapításáról, valamint az egészségügyi alapellátásról*), 30 October 2009, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=a0900057.irm.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Hungary, national law does not include exceptions relating to difference of treatment based on nationality.

In Hungary, nationality (as in citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law.

Although the English text of Article 8(d) of the ETA mentions nationality (*nemzetiség*) among protected grounds, this expression does not refer to citizenship but is used to refer to affiliation with a national minority. However, differentiation based on nationality (as citizenship) is not excluded from the scope of the ETA: in fact, it is one of the 'other characteristics' to be protected by the ETA, as supported by the Equal Treatment Authority's case law.

In the absence of recent jurisprudence, a case before the Equal Treatment Authority can be quoted, in which a Polish citizen who had lived and worked in Hungary for years and spoke excellent Hungarian requested a credit card from his bank, but his request was rejected. The bank argued that the reason for the policy was that it was not able to check the foreign credit history of non-Hungarian citizens, and also the recovery of potential unpaid debts was much more cumbersome abroad. Ultimately, the parties reached a friendly settlement, and the bank undertook to amend its credit card policy to allow foreigners to have credit cards. The Authority approved of the settlement.[104]

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

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

4.5 Health and safety at work (Article 7(2) Directive 2000/78)

In Hungary, there are exceptions in relation to disability and health and safety at work (Article 7(2), Directive 2000/78). However, these are not expressly stated in anti-discrimination law.

Decree 33/1998 of the Ministry of Welfare on the medical examination and assessment of labour, professional and personal hygienic suitability[105] (the Labour Suitability Decree) covers job- and profession-related suitability tests (Article 1(a) and (b)). Article 1(a) serves to test whether the applicant can cope with the risks and effects resulting from the activity they need to perform as part of the job. Article 1(b) seems to be of an even more strictly medical nature, testing suitability prior to (re)training.

Some relevant provisions can be found in the Labour Code. Article 51(3) prescribes that employees may only be employed for work that may not entail disadvantageous effects for them, taking into consideration their physical features or maturity or health status. Taking into account the changes in the health status of the employee, the employer shall adjust the working conditions and the working hours of the employee concerned. Under Paragraph (4) of the same Article, the employer shall provide free labour suitability examinations before employment commences and at regular intervals subsequently.

[104] Equal Treatment Authority, Decision No. EBH/74/2017, 27 March 2017.

[105] Decree 33/1998 of the Ministry of Welfare on the medical examination and assessment of labour, professional and personal hygienic suitability (*33/1998. (VI. 24.) NM rendelet a munkaköri, szakmai, illetve személyi higiénés alkalmasság orvosi vizsgálatáról és véleményezéséről*), 24 June 1998, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800033.NM.

The Labour Code here refers to examinations conducted under Article 10(1) of the Labour Suitability Decree: 'In the course of examining and assessing labour suitability it shall be taken into consideration that women (with special regard to women of child-bearing age, pregnant women (…), women who have recently given birth, women who are breastfeeding and women giving milk) are not or only conditionally suitable for work entailing health risks or dangerous encumbrances as enumerated under Annex 8.'

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

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

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

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

b) Justification of direct discrimination on the ground of age

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

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

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

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

Compatibility with Article 6 is very difficult to assess currently due to a number of undecided issues. As described above, there is an amended version of Article 22(1)(a) (the Hungarian GOR clause). At the moment, it is not possible to say with certainty whether this new version will be interpreted as relating only to access to employment or to all aspects of employment.

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

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

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

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

c) Permitted differences of treatment based on age

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

Under Article 294 of the Labour Code, a 'young employee' is an employee who is below 18 years of age. The Labour Code contains numerous provisions aimed at protecting young employees. These are mostly related to employment and working conditions. For instance, young employees may not be employed for night shifts (Article 114), they are entitled to five extra days off per year (Article 119), and so on.

Apart from these provisions, age-related differences are mostly in place with regard to dismissals and the promotion of access to employment. For these, see the relevant parts of chapter 4.

d) Fixing of ages for admission to occupational pension schemes

In Hungary, national law does not allow occupational pension schemes to fix ages for admission to the scheme, availing of the possibility provided for by Article 6(2).

Article 5(2) of Act LXXXII of 1997 on private pensions and private pension funds[106] (Private Pensions Act) expressly prescribes that private pension funds (including ones established by the employer) must not discriminate between their members on the basis of religion, racial or ethnic origin, political conviction, sex or age.

Before January 2011, membership of a private pension fund was either compulsory (for young people starting out in a career and establishing an employment relationship for the first time, provided they were younger than 35 years of age) or voluntary (in January 2011, even those individuals for whom membership had been compulsory were allowed to leave private pension funds, and from this date there has been no compulsory membership). In either case, the pension fund itself may not fix an age for admission.

4.6.2 Special conditions for younger or older workers

In Hungary, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

Article 2 of Act IV of 1991 on the promotion of employment and the allowances of unemployed persons (Act on the Promotion of Employment)[107] 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.

Accordingly, companies employing young workers can apply for different forms of state support. For instance, until December 2022, employers could apply to Government Offices for support if they employed a registered job seeker under the age of 25. The support was provided for 6 months and amounted to 50 % of gross salary costs (but not more than EUR 416 or HUF 150 000).[108]

Protection against dismissal exists for older workers. Under Article 66(4) and (5) of the Labour Code, employers shall be allowed to terminate an employee's employment

[106] Act LXXXII of 1997 on private pensions and private pension funds (*1997. évi LXXXII. törvény a magánnyugdíjról és a magánnyugdíjpénztárakról*), 25 July 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700082.TV.

[107] Act IV of 1991 on the promotion of employment and the allowances of unemployed persons (*1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról*), 23 February 1991, https://net.jogtar.hu/jogszabaly?docid=99100004.tv.

[108] See: https://nfsz.munka.hu/cikk/1268/Vallalkozasok_munkaero_tamogatasa.

relationship within a five-year period preceding the employee's eligibility for the old-age pension by regular dismissal only in particularly justified cases. Under Article 77(4), the amount of severance pay shall be increased by up to three months' average earnings if the employee's employment relationship is terminated within a five-year period before their eligibility for the old-age pension.

4.6.3 Minimum and maximum age requirements

In Hungary, various exceptions permit minimum and/or maximum age requirements in relation to access to employment and training.

According to Article 34 of the Labour Code, all persons entering into an employment relationship as employees shall be at least 16 years of age. During the school holidays, full-time pupils and students attending primary school, vocational school or secondary school may also enter into an employment relationship, provided that they are at least 15 years old. Under the same Article, persons younger than 16 may be employed for the purposes of performance in artistic, sports, modelling or advertising activities subject to prior authorisation by the competent guardianship authority.

In addition to these general rules, minimum age requirements apply only to a very limited number of positions (e.g. members of the Constitutional Courts shall be at least 45 years old, judges shall be at least 30 years old).

The Constitutional Court has dealt with a number of cases that raise the question of whether it is legitimate to define a minimum or maximum age with regard to certain positions and occupations. In its Decision No. 857/B/1994,[109] the court stated the following: 'the legislator is entitled to subject the exercise of certain professions and the filling of certain positions to age-related conditions, i.e. to set a lower and an upper age limit.' The Constitutional Court established that 'age-related restrictions concerning the filling of certain positions shall not be regarded as discriminatory unless they are arbitrary'.

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

4.6.4 Retirement

a) State pension age

In Hungary, there is a difference between the private and the public sphere in relation to the legal consequences of reaching pension age.

In Hungary, in the private sphere, there is no state pension age at which individuals must begin to collect their state pensions. An individual can collect a pension and still work, which means that there is no need to defer a pension if an individual wishes to work for longer.

In Hungary, in the public sphere, there is a state pension age at which individuals must begin to collect their state pensions. An individual cannot collect a pension and still work in a public position, but if he or she wishes to work for longer, the pension can be deferred under certain circumstances.

[109] Constitutional Court, 857/B/1994 AB határozat, 20 February 1995, http://public.mkab.hu/dev/dontesek.nsf/0/C4B0DFED73219E48C1257ADA005294B9?OpenDocument.

Under Article 18 of Act LXXXI of 1997 on State Pensions[110] (State Pensions Act), the pension age in Hungary is currently 65 years for both men and women. Notably, only workers with 20 years' service are eligible for a full old-age pension, others can receive a partial pension. There is one significant exception: women with 40 years' service (including maternity leave and other similar periods) can retire irrespective of their actual age.

Employees are not obliged to begin to collect their state pensions and they can continue working after pension age. However, when they reach pension age, they are considered to be pensioners from the point of view of the Labour Code (Article 66), provided that they have the necessary number of service years. This means that their protection against dismissal and redundancy ceases, as explained below.

Penalties are not imposed on employees who work beyond pension age. In the private sphere, there is no cap on the number of working hours and the salary of persons collecting their pensions.

In the public sphere, however, a person who has reached pension age has to choose between collecting their pension or continuing to work (provided that, according to the rules pertaining to the individual, he or she has the choice to continue working – see below). Under Article 83/C of the State Pensions Act, payment of the pension has to be suspended if the pensioner starts working (or continues to work) as a: (i) public servant (e.g. a teacher teaching in a public school, a doctor working in a public hospital); (ii) civil servant (working in the public administration); (iii) Government servant; (iv) high-ranking state official; (v) judge; (vi) justice employee (e.g. a court clerk); (vii) prosecutor; (viii) person serving in a law enforcement agency or the army. This list is not exhaustive.

An intricate system regulates the amount of work that incapacitated pensioners can perform and the salary they can receive without being disqualified from their pension: the lower the level of incapacity, the higher the number of limitations.

The differentiation between the public and private sphere was challenged before the European Court of Human Rights in the case *Fábián v. Hungary* (Application No. 78117/13). In its judgment handed down on 15 December 2015,[111] the ECtHR concluded unanimously that there had been a violation of the applicant's rights under Article 14 in conjunction with his right to property. However, in its judgment of 5 September 2017,[112] the Grand Chamber overturned the first instance judgment. With a vote of 11 to 6, it held that, since the applicant had not demonstrated that as a member of the civil service whose employment, remuneration and social benefits were dependent on the state, he was in a relevantly similar situation to those pensioners who were employed in the private sector and the differentiation did not amount to discrimination.

The ECtHR came to this conclusion on the following basis:[113]

> 'Three of the elements to be taken into account had been widely reflected in a long-standing line of the Court's case law recognising a distinction between civil servants and private employees.
>
> - Firstly, Contracting Parties, by necessity, enjoyed wide latitude in organising State functions and public services […].

[110] Act LXXXI of 1997 on State Pensions (*1997. évi LXXXI. törvény a társadalombiztosítási nyugellátásról*), 25 July 2007, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700081.TV.
[111] European Court of Human Rights, *Fábián v. Hungary* Application. No. 78117/13, 15 December 2015, http://hudoc.echr.coe.int/eng?i=001-159210.
[112] European Court of Human Rights, *Fábián v. Hungary* [GC], Application No. 78117/13, 5 September 2017, https://hudoc.echr.coe.int/eng#{"itemid":["002-11655"]}.
[113] European Court of Human Rights, *Fábián v. Hungary* [GC], Application No. 78117/13, 5 September 2017.

- Secondly, for institutional and functional reasons, employment in the public sector and in the private sector was typically subjected to substantial legal and factual differences […].
- Thirdly, it could not be assumed that the terms and conditions of employment, including the financial ones, or the eligibility for social benefits linked to employment, would be similar in the civil service and in the private sector, nor could it therefore be presumed that those categories of employees would be in relevantly similar situations in that regard. The applicant's case revealed a need to take a fourth factor into account, namely the role of the State when acting in its capacity as employer. In particular, as employers, the State and its organs were not in a comparable position to private-sector entities either from the perspective of the institutional framework under which they operated or in terms of the financial and economic fundamentals of their activities; the funding bases were radically different, as were the options available for taking measures to counter financial difficulties and crises.

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

b) Occupational pension schemes

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

Under the provisions of Article 7 of the Private Pensions Act, employers and professional chambers (such as the bar association) may establish private pension funds for their employees or members. Employers may also undertake to supplement the payments made by employees into private pension funds. Private pension funds established by employers and other private pension funds operate in the same way. Employees may request that such private pension funds start to pay their pensions when they reach pension age, as defined in the law relating to state pensions, or later, depending upon their choice.

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

c) State-imposed mandatory retirement ages

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

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

- Under Article 60(1)(j) of Act CXCIX of 2011 on Civil Servants,[114] the service relationship of civil servants ceases when they reach the general pension age (provided that they have 20 years of service). If they do not have 20 years of service, or if they receive special permission from their superior, they may continue to work, but not after reaching the age of 70.
- Under Article 90(ha) of Act CLXII of 2011 on the status and remuneration of judges[115] (Judicial Status Act), judges have to retire when they reach the actual pension age. Although this was 62 at the relevant time, the Hungarian Government allowed judges who were older than 62 a transitional period in an attempt to comply with the decision of the CJEU (see below). The mandatory retirement age for judges has therefore been decreased gradually to 65. At the moment, the mandatory retirement age for judges coincides with the general pension age (see Articles 232/C and 232/J of the Act).
- The same applies to prosecutors under Article 34(d) and Articles 165/C and 165/J of Act CLXIV of 2011 on the status of the chief public prosecutor, prosecutors and other prosecutorial employees and the prosecutorial career.[116]
- Similar rules apply to notaries public under Article 22(1)(d) and Article 178 of Act XLI of 1991 on Public Notaries.[117]
- Under Article 80(1)(a) of the Law Enforcement Organisations Act, the service relationship of the professional member ceases once they reach the upper age limit of professional service. Under Article 81, the upper age limit coincides with the general pension age.

These provisions were not subject to debate during the transposition of the directives. However, they were subject to serious domestic and international criticism when the mandatory retirement age for judges and prosecutors (which was 70 before the entry into force of the Fundamental Law in April 2011) was abruptly reduced to the actual general pension age with an insufficient transition period.

The Commission brought an action against Hungary for failure to fulfil obligations on the basis that the contested Hungarian regulation is contrary to Directive 2000/78 in that it gives rise to unjustified discrimination and is neither appropriate nor necessary to achieve the allegedly legitimate objectives. In its decision of 6 November 2012,[118] the CJEU established that the national scheme requiring the compulsory retirement of legal professionals when they reach the age of 62 was not in line with Articles 2 and 6(1) of Directive 2000/78/EC. The radical lowering of the retirement age by eight years (with a very short transition period) and the simultaneous raising of the general pension age did not take sufficient account of the interests of those affected and could not therefore be seen as necessary to achieve the objective of standardising the retirement age for public

[114] Act CXCIX of 2011 on Civil Servants (*2011. évi CXCIX. törvény a közszolgálati tisztviselőkről*), 30 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100199.TV.

[115] Act CLXII of 2011 on the status and remuneration of judges (*2011. évi CLXII. Törvény a bírák jogállásáról és javadalmazásáról*), 2 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100162.TV.

[116] Act CLXIV of 2011 on the status of the chief public prosecutor, prosecutors and other prosecutorial employees and the prosecutorial career (*2011. évi CLXIV. törvény a legfőbb ügyész, az ügyészek és más ügyészségi alkalmazottak jogállásáról és az ügyészi életpályáról*), 28 November 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100164.TV.

[117] Act XLI of 1991 on Public Notaries (*1991. évi XLI. törvény a közjegyzőkről*), 7 October 1991, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99100041.TV.

[118] Judgment of 6 November 2012, *European Commission* v. *Hungary*, C-286/12, ECLI:EU:C:2012:687, http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=20661.

sector professions. The contested legislation was not appropriate to achieve the pursued objective of establishing a more balanced 'age structure', since, after the first wave of replacing the dismissed persons with young professionals, the system does not allow for further corrections to the age structure. Following up on the judgment, the Hungarian legislation adopted Act XX of 2013,[119] remedying most of the failures.

d) Retirement ages imposed by employers

In Hungary, national law does not permit employers to set retirement ages (or ages at which an employment contract can be terminated) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

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

Under Article 66(9) of the Labour Code, the employer is not obliged to provide reasons for the dismissal if the employee has passed pension age. In all other cases, reasons shall be provided, and if a dispute arises, the employer shall be obliged to prove that the reasons are real and relevant. On the other hand, only an exceptionally reasonable justification may be acceptable if the dismissal takes place within five years before the employee reaches pension age.

Another restriction is that employers are exempted from severance payment if they dismiss an employee after the employee has reached pension age (Article 77(5) of the Labour Code). On the other hand, if the dismissal takes place within five years before the employee reaches pension age, an additional three months' salary shall be paid in addition to the severance payment prescribed by law.

f) Compliance of national law with CJEU case law

In Hungary, national legislation on mandatory retirement is in line with CJEU case law on age.

From what is set forth above, it can be concluded that Hungarian national legislation is for the most part in line with most principles arising in CJEU case law.

The domestic law clearly does not seem to be in line with the jurisprudence of the CJEU when it comes to the exclusion of employees beyond pension age from severance payment (cf. the CJEU's *Andersen* judgment[120] in which the Court concluded that by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, nonetheless wish to waive their right to such a pension temporarily in order to continue with their career, the pertaining national law unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued).

[119] Act XX of 2013 on amendments related to upper age limits to be applied in certain relationships in the justice sphere (*2013. évi XX. törvény az egyes igazságügyi jogviszonyokban alkalmazandó felső korhatárral kapcsolatos törvénymódosításokról*), 25 March 2013, http://mkogy.jogtar.hu/?page=show&docid=a1300020.TV.

[120] Judgment of 12 October 2010, *Ingeniørforeningen i Danmark v Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Hungary, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. However, as was pointed out above, it is possible to dismiss someone who has passed retirement age without having to provide reasons.

b) Age taken into account for redundancy compensation

In Hungary, national law provides compensation for redundancy. This is affected by the age of the worker.

If a person is dismissed after they have reached pension age (and has the necessary service time), they are not entitled to compensation. Otherwise, if a person is dismissed due to redundancy, they are entitled to compensation, and the amount of the compensation is dependent on the number of years they have worked for the company, so age may play a role in the amount. Furthermore, if an employee is dismissed within the five-year period preceding their retirement age, they shall be entitled to additional compensation amounting to up to three times their monthly salary (Article 77 of the Labour Code).

4.7 Further exceptions necessary in a democratic society: public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Hungary, national law does not include exceptions that seek to rely on any of the factors listed in Article 2(5) of the Employment Equality Directive (public security, the maintenance of public order and the prevention of criminal offences, the protection of health and of the rights and freedoms of others). However, these grounds could be referred to when claiming that a certain action falls under Article 7(2) of the ETA, i.e. it serves the enforcement of a fundamental right and is necessary, suitable and proportionate, or it is found by objective consideration to have a reasonable ground.

For instance, the Equal Treatment Authority heard a case in which the complainant launched a procedure because a public bath banned him from using the swimming pool because of the stoma seal he was wearing. The public bath argued that the complainant had been prevented from using the swimming pool because of the health risk it would have posed for the other guests. The Authority looked into the argument and concluded that, since the stoma seal had provided sufficient protection against leakage, the complainant's GP had confirmed that the complainant was a responsible user of the stoma seal and since other guests who do not have similar visible signs of their health conditions (e.g. persons with an STD or simply the flu) might also carry health risks when using the services of a bath, reliance on the protection of health as a ground for the differentiation was not acceptable.[121] The decision was upheld by the Metropolitan Court.

Another case, where a company collecting blood-plasma prevented a gay man from donating plasma, can also be quoted as an example when the respondent referred to the protection of health of others. The equality body accepted this to be a legitimate ground, but found that since in the given case other, less restrictive measures could have guaranteed the safety of the recipients, the differentiation based on sexual orientation was not justified.[122]

[121] Equal Treatment Authority, Decision No. EBH/95/2018, no date available.
[122] Ombudsman, Decision No. EBF-AJBH-139/2021, May 2021.

4.8 Any other exceptions

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

With regard to education – Article 28

> (1) If the education is organised only for students of one sex, it does not violate the principle of equal treatment, provided that participation in such education is voluntary, and will not result in any disadvantages for the participants.
> (2) The principle of equal treatment is not violated if,
> a) in institutions of public or vocational 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 is organised in a way that the goal or the curriculum of the education justifies the creation of separate classes or groups and provided that this does not result in any disadvantage for those participating in such education, and that the education complies with the requirements approved, laid down and subsidised by the state.
> (2a) The organisation of education based on religious or other ideological conviction as set forth in Paragraph (2) shall not result in segregation based on characteristics listed in Article 8 b) to e) [racial affiliation, colour of skin, nationality (not in the sense of citizenship) or belonging to a national minority].
> (2b) If the education is organised on the basis of belonging to a national minority, the principle of equal treatment is not violated only if it meets the requirements set forth in Paragraph (2) and
> a) acquiring the knowledge required by the core curriculum is guaranteed at the same level as in the majority education, and
> b) education based on belonging to a national minority complies with the requirements set forth in the Act on the Rights of Nationalities.

With regard to access to goods and services – Article 30

> […]
> (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 provided for in Paragraph (2) must be obvious from the name of the establishment and the circumstances of the use of the service; this shall not be done in a manner that may be humiliating and defamatory to individuals who do not belong to the particular group, and furthermore it must not provide an opportunity for an abuse of this right.

Article 30/A

> (1) In relation to insurance services and services based on the insurance principle – with the exception of group life, casualty and health insurances and unless the pertaining laws stipulate otherwise – differentiation based on gender infringes the principle of equal treatment if the service provider's measure results in gender-based direct or indirect differentiation in relation to the fees to be paid by or the services provided to the concerned individuals.
> (2) In relation to services referred to in Paragraph (1), costs related to pregnancy and maternity shall not lead to differences in relation to the fees to be paid by or the services provided to the concerned individuals.

These may be problematic with regard to racial or ethnic origin, as the Racial Equality Directive does not envisage specific exemptions allowing direct discrimination in connection with these fields. This may be a breach of the transposition obligation, which, however, could be remedied by applying the principles of the direct and indirect effect and the primacy of EU law.

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

a) Scope for positive action measures

In Hungary, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is permitted under national law.

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

Paragraph (2) provides that 'a measure aimed at evening out a disadvantage shall not violate any basic rights, shall not provide unconditional advantage, and shall not exclude the consideration of individual circumstances'.

Certain provisions of domestic law *expressis verbis* allow for positive action: (i) RDP Act, Article 3: Given their situation, persons with disabilities have less access to their rights than others, therefore, it is reasonable to accord preferences to them in all possible ways; (ii) ETA, Article 23: An act, a Government decree based on an act or collective contract may impose an obligation to provide preferential treatment to a specified group of employees in respect of the labour relationship or other relationship relating to employment; (iii) ETA, Article 25(2): Pursuant to or authorised by the law and based on health, disability or a characteristic defined in Article 8, a Government decree may grant additional benefits to specified social groups within the framework of the social and healthcare system, in accordance with the provisions herein; (iv) ETA, Article 29: A Government decree created pursuant to the law or the authorisation thereof may impose an obligation to provide preferential treatment to a specified group of participants in education within or outside the school system in respect of education or training.

One example of positive action related to age is the state support that was available until December 2022 for companies employing young workers; this included coverage of 50 % of the gross salary for six months (see section 4.6.2).

b) Quotas in employment for persons with disabilities

In Hungary, national law provides for a quota for the employment of persons with disabilities.

A quota-type measure relating to the employment of people with an altered ability to work (including persons with disabilities) is constituted by Act CXCI of 2011 on the benefits of persons with an altered ability to work and the amendment of certain laws.[123]

In terms of Article 2 of Act CXCI of 2011, a person with an altered ability to work is any person over the age of 15 whose 'health status' is assessed by the rehabilitation authority to be 60 % or less. This category includes but is not limited to those who are regarded as being persons with disabilities in terms of Directive 2000/78, as persons with chronic health problems also fall under this definition. Since this is the category that is used in both the legislation and statistics, it is not possible to narrow down the data to persons with

[123] Act CXCI of 2011 on the benefits of persons with an altered ability to work and the amendment of certain laws (*2011. évi CXCI. törvény a megváltozott munkaképességű személyek ellátásairól és egyes törvények módosításáról*), 29 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100191.TV.

disabilities, but it can be assumed that any increase in the employment rate of people with an altered ability to work also means a certain increase in the numbers of persons with disabilities in employment.

Under the quota-type measure regulated by Article 23 of Act CXCI of 2011, employers[124] are obliged to pay a 'rehabilitation contribution'[125] if they have more than 25 employees and the proportion of persons with an altered ability to work within the workforce is below 5 %. According to analyses, this quota system, which has been in place since 1998, albeit with changing conditions and figures, has achieved some improvement in the employment of persons with an altered ability to work: their employment rate increased from 11 % to 35 % between 2001 and 2019,[126] while the proportion of employers employing persons with an altered ability to work was 17 % in 2008,[127] in 2019, 80 % of the companies employing over 250 persons employed persons with an altered ability to work.[128] According to a statement by the Secretary of State at the Ministry of Human Capacities, who is responsible for social affairs and social catching up, 155 000 persons with an altered ability to work were employed in 2020; this equates to an employment rate of 44 %.[129] In 2021[130] and 2022[131] this proportion remained approximately the same.

[124] The duty applies (under identical conditions) to both the private and the public sector, with some exemptions, including law enforcement bodies, companies established for the specific purpose of employing inmates and the army.

[125] The amount per unfilled position per year is nine times the minimum wage, in 2020 it was approximately EUR 4 025.

[126] See: https://www.vg.hu/gazdasag/gazdasagi-hirek/megduplazodott-a-megvaltozott-munkakepesseguek-foglalkoztatasi-aranya-1632821/.

[127] Tardos, K. (2013), 'Jó gyakorlatok a megváltozott munkaképességűek foglalkoztatására' (Good practices in employing persons with altered labour suitability), *Kultúra és Közösség*, 2013/I, available at: http://www.hrportal.hu/download/megvaltozottmunkakepesseg.pdf.

[128] See: https://www.vg.hu/gazdasag/gazdasagi-hirek/megduplazodott-a-megvaltozott-munkakepesseguek-foglalkoztatasi-aranya-1632821/.

[129] See: https://ado.hu/munkaugyek/no-a-megvaltozott-munkakepessegu-emberek-foglalkoztatasi-tamogatasa/.

[130] See: https://ado.hu/munkaugyek/prohuman-pozitiv-hatasokkal-jar-a-megvaltozott-munkakepesseguek-foglalkoztatasa/.

[131] See: https://ado.hu/munkaugyek/egyre-nagyobb-szerepet-kaphatnak-a-megvaltozott-munkakepesseguek-a-munkaeropiacon/

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

In Hungary, the following procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation).

Judicial procedures

Civil courts

Victims of discrimination may sue in civil courts based on Articles 2:42 and 2:43 of the Civil Code, claiming that inherent rights are protected by the Civil Code, and that the right to non-discrimination is an inherent right. The possible remedies applicable by the court are listed under Articles 2:51-2:53 of the Civil Code. Article 2:51 reads as follows:

> (1) A person whose inherent rights have been violated may – within the statute of limitation – demand the following on the basis of the violation and depending on the circumstances of the case:
> a) a court declaration of the occurrence of the infringement;
> b) to have the infringement discontinued and the perpetrator banned from further infringement;
> c) that the perpetrator provides adequate redress and publicises this fact at his or her own expense;
> d) the termination of the injurious situation and the restoration of the previous state, and the elimination of the object that came into existence as a result of the violation, or to have such an object deprived of its injurious nature;
> e) that the perpetrator or its successor hand over the financial asset acquired through the violation.

Article 2:52 of the Civil Code stipulates that:

> (1) A person whose inherent rights have been violated may claim moral compensation for the non-pecuniary damage caused to him or her.
> (2) The provisions pertaining to damages shall be applied to moral compensation – with special regard to the determination of the liable person and exculpation – with the difference that for moral compensation to be payable the claimant shall not be required to prove any further damage beyond the occurrence of the violation of the inherent right.
> (3) The sum of the moral compensation shall be determined by the court in accordance with the circumstances of the case, with special regard to the severity and regularity of the violation, the degree of liability, and the violation's impact on the claimant and his or her environment.

Article 2:53 stipulates that a person who suffers pecuniary damages as a result of the violation of his or her inherent rights, may claim damages from the violator in accordance with the general provisions governing damages.

These provisions provide victims of discrimination with a flexible instrument, as they apply to all types of discrimination regardless of the field or ground.

Following successful litigation by 60 segregated Roma pupils in Gyöngyöspata, Article 59 of the National Public Education Act was amended with a view to excluding the possibility of demanding moral damages for the violation of inherent personal rights committed by

educational institutions. Under the new legislation, if an educational institution violates the inherent personal rights of the child or pupil in relation to education, the Civil Code's provisions regarding moral damages shall be applied with the difference that the moral damages shall be granted by the court in the form of educational or training services. The educational or training services granted by the court can be either provided or purchased by the violator.

This amendment has created an unjustified differentiation between the potential consequences of inherent rights violation based on whether they have been committed in education or in any other area and has severely lowered the level of protection against discrimination when it is perpetrated by an educational institution.

These concerns were confirmed by the position paper[132] issued by the Ombudsman's Minorities Deputy on the educational situation of Roma children in Gyöngyöspata (Position Paper No. 5/2021). The position paper is highly critical of the amendment. The main criticisms can be summarised as follows:

- Financial compensation is the type of sanction that is the easiest to enforce (in the case of non-compliance): the aggrieved party does not have to rely on the violator's cooperation to get remedy, and it guarantees the victim's right to self-determination in the sense that he/she can decide how to use the damages granted as compensation for the disadvantages suffered. Thus, as a result of the amendment, the victims of violations by educational institutions, who are likely to belong to marginalised groups such as the Roma minority, may seek remedy for the non-pecuniary damages they suffer under less favourable conditions than those experienced by others.
- It is not usual in the Hungarian legal system that the perpetrator of a violation can determine or control the type and method of compensation for the violation.
- If segregated children are compensated through educational services, these services will in all probability be provided in a segregated manner, and will thus aggravate the violation stemming from segregation.[133]

In conclusion, the Minorities Deputy emphasises that while the provision of educational services can be useful for offsetting the disadvantages suffered as a result of discrimination, this can only be an auxiliary measure applied in addition to the financial compensation.[134]

Labour courts

In Hungary, regional courts apply the Labour Code. The most important remedies in labour law are the following.

The court may declare an agreement null and void under Article 27.

If the discrimination is manifested in the unlawful termination of employment, Article 82 stipulates that the employer shall compensate the employee for the damage suffered. Full compensation is limited by Paragraph (2) of the provision, according to which a maximum of 12 months' salary may be claimed by the employee under the heading of lost income. Under Article 83, if the termination of employment constitutes a violation of the requirement of equal treatment, the employee may request the court to order their reinstatement (in other cases of unlawful termination of employment, this option is only

[132] Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (2021), *5/2021. számú elvi állásfoglalás a gyöngyöspatai roma gyermekek nevelési-oktatási helyzetével kapcsolatban feltárt egyedi és általános problémákról* (Position Paper No. 5/2021 on the Individual and General Problems Revealed Regarding the Education Situation of Roma Children in Gyöngyöspata, hereafter: Position Paper 5/2021), 5 November 2021, https://www.ajbh.hu/documents/2657648/adba0e8d-7646-7c6d-d13d-2eb39fa4e847.

[133] Position Paper No. 5/2021, p. 41.

[134] Position Paper No. 5/2021, p. 41.

available in exceptional cases, such as when the dismissed employee is a trade union representative).

In other cases of discrimination (i.e. when it is not a dismissal that serves as the subject matter of the case), the employer is liable to pay full damages to the employee, as set out in Article 167 of the Labour Code.

Administrative procedures

Until 31 December 2020, the Equal Treatment Authority had the authority to take action against any discriminatory act, irrespective of the ground of discrimination (e.g. sex, race, age) or the field concerned (e.g. employment, education, access to goods). In addition to the authorisations required by the Racial Equality Directive, this body was vested with the right to impose severe sanctions on persons and entities violating the ban on discrimination (section 6.5, below, deals with the sanctions that the Authority was entitled to impose, and the organisational structure of the Authority is described in detail in chapter 7). As of 1 January 2021, the Authority's mandate and powers were transferred to the Ombudsman. This change and what it means regarding the protection of equal treatment is described in chapter 7, below.

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

Access to goods and services

Under Article 45/A(2) of Act CLV of 1997 on Consumer Protection[135] (hereinafter referred to as the Consumer Protection Act), the consumer protection authority monitors provisions related to the requirement of equal treatment to ensure that they are respected in the course of access to goods and services. In the event that a breach is found, the authority conducts proceedings. Under Article 47, if the authority establishes a breach of the provisions guaranteeing consumers' rights (including the requirement of non-discrimination), it may apply a number of sanctions, including a fine, the maximum amount of which is determined by the annual revenue of the service provider concerned.

Education

Under Article 79 of the National Public Education Act, the lawful operation of educational institutions is supervised by Government offices located in each county and the capital. If an office finds a violation, it may impose an 'administrative fine'. In terms of Article 10 of Act CXXV of 2017 on the sanctions of administrative violations,[136] the upper limit of administrative fines is EUR 2 780 (HUF 1 million) for natural persons and EUR 27 800 (HUF 10 million) for legal persons and organisations without legal personality.

With regard to discrimination, a special sanction is also available. Under Article 79(6) of the National Public Education Act, if the Government office establishes that the educational institution has violated the requirement of equal treatment in the course of the admission or the transfer of a pupil, upon the request of the concerned parent, it can declare that the given pupil is admitted or transferred to that particular educational institution (provided that fewer than 150 days have passed since the parent made the request), and can launch

[135] Act CLV of 1997 on Consumer Protection (*1997. évi CLV. törvény a fogyasztóvédelemről*), 23 December 1997, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99700155.TV.

[136] Act CXXV of 2017 on the sanctions of administrative violations (*2017. évi CXXV. törvény a közigazgatási szabálysegések szankcióiról*), 25 October 2017, https://net.jogtar.hu/jogszabaly?docid=a1700125.tv.

petty offence proceedings against the head of the educational institution. Following such a decision, the Government office monitors whether the educational institution is respecting the requirement of equal treatment. This monitoring is performed as needed but at least once every academic year.

Distribution of powers

If a service provider discriminates against a customer, both the Ombudsman (as the equality body) and the consumer protection authority have competence to examine the case and impose sanctions on the discriminator. It was therefore necessary to devise a system for distributing the cases. The key principle is that it is up to the victim to decide which authority to contact. Under Article 15 of the ETA, a violation of the principle of equal treatment within the scope of the ETA shall be investigated by a) the Ombudsman or b) another public administrative body that has been granted authority in a separate act to assess violations of the principle of equal treatment, as chosen by the offended party.

In order to avoid double procedures, Article 15 stipulates that the Ombudsman shall inform other organs, and other organs shall inform the Ombudsman about the initiation and the outcome of a procedure relating to a case of discrimination, or about the outcome of the subsequent judicial review, if there is one. Furthermore, if a procedure relating to a case of discrimination has been initiated before any public administrative body, the other public administrative bodies a) may not proceed with the same case with regard to the same persons, and b) shall suspend their procedure initiated in relation to the same case with regard to any other person until a binding decision is made in the matter. If the case has been decided by any public administrative body, then other public administrative bodies a) may not proceed in the same case with regard to the same persons, and b) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the former public administrative body.

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

The Ombudsman and a court (civil or labour) may not proceed simultaneously with a case. Under Article 15/B of the ETA, if the victim of discrimination also files a lawsuit with the court, the Ombudsman shall suspend his/her 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 Ombudsman can then proceed but he/she 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 Ombudsman, the Ombudsman a) may not proceed in the same case with regard to the same persons, and b) will proceed with regard to other persons on the basis of the facts as established in the binding decision of the court.

Petty offence proceedings

Petty offence proceedings in the Hungarian legal system are quasi criminal proceedings devised for small-scale violations. Their procedural rules are set out in Act II of 2012 on

petty offences, the petty offence procedure and the petty offence database[137] (Petty Offences Act). Petty offences are decided upon by the general petty offence authority (i.e. the police). The decision is subject to a judicial review either on the basis of the case file or a hearing (depending on the request of the sanctioned person). The judicial decision may not be further appealed.

Discrimination in education qualifies as a petty offence. Under Article 248(5) of the Petty Offences Act, any person who discriminates against a child, pupil, person participating in the education or student is punishable with a fine of up to approximately EUR 420 (HUF 150 000). It should be noted that, under Article 19(3) of the ETA, the shifted burden of proof does not apply to these proceedings. The aggrieved party is not liable for any costs in such proceedings.

Conciliation procedures

General mediation procedure

According to Article 1 of Act LV of 2002 on Mediation[138] (hereinafter referred to as the Mediation Act), the aim of the general mediation procedure is to facilitate the settling of civil and administrative law disputes arising in connection with the personal and property rights of private and other persons in cases where the parties' right of determination is not limited by law. As no such limitation exists in relation to the ban on discrimination in the Civil Code or the ETA, victims of discriminatory acts are entitled to resort to the mediation procedure.

Under Article 36, the agreement reached in a mediation procedure does not prevent the parties from asserting their claim in a court procedure. However, in these cases, claimants are liable to pay all costs.

Mediation by the Equal Treatment Authority

Under Article 75 of Act CL of 2016 on the General Administrative Procedure[139] (GAP), public administrative authorities are obliged to try to resolve the conflict by forging an agreement between the parties, if the case is decided in a hearing. Pursuant to Article 83 of the GAP, if the parties reach an agreement at the hearing or otherwise, and the agreement complies with the laws and the Fundamental Law and contains adequate provisions concerning the deadline for compliance and the bearing of procedural costs, then the proceeding authority approves it and includes it in a formal decision.

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

Education

Decree 40/1999 of the Minister of Education established the Commissioner for Educational Rights.[140] Under Article 1 of the Decree, the Office of the Commissioner for Educational Rights is an independent, internal organisational unit of the ministry responsible for

[137] Act II of 2012 on petty offences, the petty offence procedure and the petty offence database (*2012. évi II. törvény a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről*), 6 January 2012, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200002.TV.

[138] Act LV of 2002 on Mediation (*2002. évi LV. törvény a közvetítői tevékenységről*), 17 December 2002, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0200055.TV.

[139] Act CL of 2016 on the General Administrative Procedure (*2016. évi CL. Törvény az általános közigazgatási rendtartásról*), 14 December 2016, https://net.jogtar.hu/jogszabaly?docid=A1600150.TV.

[140] Decree 40/1999 of the Minister of Education on the Commissioner for Educational Rights (*40/1999. (X. 8.) OM rendelet az Oktatási Jogok Miniszteri Biztosa Hivatalának feladatairól és működésének szabályairól*), 8 October 1999, http://net.jogtar.hu/jr/gen/getdoc2.cgi?dbnum=1&docid=99900040.OM.

education that promotes citizens' rights concerning education. The Decree establishes a special conciliation procedure.

Parents, students, teachers, etc. have the right to complain, provided that all available administrative remedies have been exhausted and less than a year has elapsed since the measures complained of were handed down or carried out (Article 5).

Complaints not dismissed by the Commissioner are subject to the conciliation procedure. The Commissioner sends the petition to the institution about which a complaint has been made and requests a declaration. The Commissioner attempts to establish a consensus between the institution and the petitioner. In the event of an agreement, the Commissioner prepares a report and sends it to the parties concerned. If no consensus is reached, the Commissioner prepares a report on the results of the conciliation and calls on the institution to terminate the infringement. In the case of non-compliance, the Commissioner sends a recommendation to both the institution and its supervisory organ. The latter must respond within 30 days. The Commissioner reports to the minister responsible for education (Article 7).

Other forums to be approached in cases of discrimination

The 'Ombudsman'

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

Under Article 30 of the Fundamental Law, the Ombudsman (who is appointed by a two-thirds parliamentary majority vote for six years) investigates violations of fundamental rights and initiates general or individual measures to remedy such violations.

The status and proceedings of the Ombudsman are governed by Act CXI of 2011 on the Commissioner for Fundamental Rights (Ombudsman Act).[141] Any victim of acts or omissions of public authorities or public service providers can complain to the Ombudsman's Office, provided that all administrative remedies have been exhausted or none exist. The Ombudsman can also proceed *ex officio*.

The Ombudsman can investigate any authority, including the armed forces, national security services and law enforcement organisations. He or she may request information, look into files, visit premises and can hear any employee of the examined authority. On finding a violation, the Ombudsman issues recommendations to which the supervisory body of the authority found to be in breach of fundamental rights shall respond within 30 days. The Ombudsman may also (i) petition the Constitutional Court; (ii) initiate criminal or disciplinary proceedings; and (iii) propose that a legal provision be amended, repealed or issued. The Ombudsman's main publicity weapon is the annual report submitted to Parliament. He or she can also request parliamentary investigations and debates.

As of 1 January 2023, the Ombudsman also fulfils the role of the independent mechanism established under the UN Convention on the Rights of Persons with Disabilities (CRPD) to promote, protect and monitor implementation of the CRPD. In terms of Articles 39/N-39/Q of the Ombudsman Act, in this capacity, the Ombudsman has some rights and obligations additional to his general mandate. For instance, he may proceed *ex officio* regarding individual rights violations if the person with disability is unable to assert their rights or if the submission of a complaint would impose a disproportionate burden on them. In the course of his investigation, the Ombudsman may inspect court files and expert opinions regarding the concerned person with disability even without the authorisation of the person concerned. The annual budget of the Ombudsman's Office was increased between 2022

[141] Act CXI of 2011 on the Commissioner of Fundamental Rights (*2011. évi CXI. törvény az alapvető jogok biztosáról*), 26 July 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100111.TV.

and 2023 (from EUR 7.6 million/HUF 2.73 billion to EUR 8.2 million/HUF 2.96 billion), however, since this increase of 8.4 % is much less than the rate of inflation between the two years (the January 2023 inflation rate was over 20 %),[142] it can be concluded that the additional mandate has not been accompanied by sufficient additional resources.

As mentioned above, as of 1 January 2021, the Equal Treatment Authority's mandate and powers have been transferred to the Ombudsman. This does not mean that the proceedings of the two bodies have been merged. The legislature has chosen a solution whereby it is up to the complainant to decide whether they request the Ombudsman to act in his or her capacity as the Commissioner for Fundamental Rights or as the successor of the Equal Treatment Authority. Based on this choice, there will be a difference in the Ombudsman's procedure, the complainant's rights and obligations and the outcome of the proceeding. This issue is described in detail in chapter 7, below.

b) Barriers and other deterrents faced by litigants seeking redress

Under Article 72 of Act CXXX of 2016 on the Code of Civil Procedure,[143] legal representation is mandatory in courts as a general rule. Labour lawsuits are an exception, but civil lawsuits launched on the basis of the right to non-discrimination as an inherent personality right and the judicial review of decisions by the Ombudsman now require mandatory legal representation.

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

Under Article 5 of Act LXXX of 2003 on Legal Aid (Legal Aid Act),[144] the state pays a party's legal fees if the party's monthly net income (wage, pension or other regularly paid cash allowance) does not exceed the actual amount of the 'social projection-basis', and the party has no assets. The social projection-basis (previously: 'minimum pension') has been EUR 80 (HUF 28 500) for over a decade now. If a person lives alone, the state pays for legal aid if his or her available income does not exceed 150 % of the social projection-basis (EUR 120 or HUF 42 750).

Under Article 6, the state does not pay, but advances the legal fees if the monthly net income available to the party does not exceed 43 % of the national average of the gross monthly wage published by the Central Statistical Office for the second year prior (for 2023: EUR 530 or HUF 188 680), and the party has no assets.

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

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

[142] See: https://www.ksh.hu/docs/hun/xftp/gyor/far/far2301.html
[143] Act CXXX of 2016 on the Code of Civil Procedure (*2016. évi CXXX. törvény - a polgári perrendtartásról*), 1 January 2018, https://net.jogtar.hu/jogszabaly?docid=a1600130.tv.
[144] Act LXXX of 2003 on Legal Aid (*2003. évi LXXX. törvény a jogi segítségnyújtásról*), 6 November 2003, https://net.jogtar.hu/jogszabaly?docid=A0300080.TV.

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

With regard to labour court proceedings, it must be pointed out that in certain cases (such as dismissals), the deadline for initiating a lawsuit is relatively short: 30 days (Article 287). In this regard, there is a difference between the private and the public sector, as in some segments of the latter (e.g. the judiciary), the deadline for suing is even shorter (15 days). Courts adjudicating labour cases are located in county seats, which means that if the claimant does not live at or around the seat, money and time has to be spent on travel whenever a hearing is held (unless a legal representative is involved, in which case the claimant is only obliged to appear in court if the court wishes to hear him or her in person).

With regard to barriers and deterrents in administrative procedures, the following can be said. The administrative organs are obliged by Article 3 of the GAP to fully establish the facts of a given case. The role of legal assistance is therefore not as crucial as in court cases, although the involvement of a lawyer is obviously an asset. Furthermore, administrative proceedings are significantly shorter than court cases. On the other hand, administrative bodies may not grant compensation to the victim and may not oblige the discriminator to apologise or provide moral remedy in any other way.

c) Number of discrimination cases brought to justice

In Hungary, some statistics on the number of cases related to discrimination brought to justice are available. Such statistics are not available regarding court cases, but data related to the activities of the Equal Treatment Authority existed while the Authority was the equality body. No data are available for 2020 because, in 2021 (when the Ombudsman took over the Authority's mandate), the Ombudsman chose not to produce a report on its predecessor's activities in 2020. More substantive explanation of the trends in the caseload is presented in section 7.1, below.

Caseload of the equality body, 2007-2021[145]

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

[145] Source: Annual reports of the Equal Treatment Authority, which used to be available on the former website of the Authority. As explained above, the Ombudsman made these unavailable six months after taking over the Authority's mandate. The source of the data for 2021: Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 97. The source of the data for 2022: Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 106.

2018	786	315	36	30
2019	868	308	44	22
2021	462	169	26	8
2022	463	180	23	7

d) Registration of national court decisions on discrimination cases

In Hungary, court decisions on discrimination are not registered as such by national courts.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

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

Under Article 18(1) of the ETA, 'non-governmental and interest representation organisations' and the Equal Treatment Authority may act on behalf of the victim in proceedings launched due to the violation of the requirement of equal treatment (for instance in civil lawsuits initiated due to a violation of inherent personal rights or labour lawsuits).

Under Article 3 of the ETA, a 'non-governmental and interest representation organisation' means:

- Any non-governmental organisation established under the Act on the right to assembly, public benefit status and the operation and funding of non-governmental organisations,[146] whose objectives set out in its articles of association or statutes include the promotion of equal social opportunities or the catching up by disadvantaged groups defined by an exact enumeration of the relevant protected ground(s) or the protection of human rights defined by an exact enumeration of the relevant protected ground(s). The exact enumeration of the relevant protected ground(s) means that, for instance, an LGBTIQ organisation will not be authorised to launch *actio popularis* procedures against discrimination concerning persons with disabilities, unless its statutes contain a reference to disability. Based on the text of the law, the amendment should not prevent organisations aimed at protecting the rights of a particular group from taking action against intersectional discrimination if the protected ground that is relevant for them is among those that are concerned in the given case, but, in the absence of case law, it remains to be seen whether a flexible or restrictive interpretation will be adopted.
- A minority (nationality) self-government in respect of a particular national and ethnic minority.
- A trade union in respect of matters related to employees' material, social and cultural situation and living and working conditions.

As outlined above, only those non-governmental organisations and foundations whose objectives set out in their articles of association or statutes include the promotion of equal social opportunities for disadvantaged groups or the protection of human rights are authorised to act on behalf or in support of the victims, and they may only act to promote the rights of those protected groups that are expressly mentioned in their articles of association. There are no further conditions for legal standing in relation to associations.

[146] Act CLXXV of 2011 on the right to assembly, public benefit status and the operation and funding of non-governmental organisation (*2011. évi CLXXV. törvény az egyesülési jogról, a közhasznú jogállásról, valamint a civil szervezetek működéséről és támogatásáról*), 14 December 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100175.TV.

To prove its legal standing, the non-governmental and interest representation organisation shall submit its statutes (so that it can be established whether it is entitled to act in relation to the given complaint) and the authorisation signed by the individual victim.

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

One of the problematic areas is that there are no special provisions on victim consent in cases where obtaining formal authorisation can be difficult, e.g. from minors or persons under guardianship. In practice, this has caused problems when people under guardianship wished to take action against the guardianship office, but the guardians employed by the office refused to sign the powers of attorney.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

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

Under Article 18(2) of the ETA, non-governmental and interest representation organisations are entitled to exercise the rights of the concerned party (e.g. making motions, submitting legal briefs, attending procedural acts) in administrative proceedings (but not before courts) that are initiated due to the infringement of the requirement of equal treatment.

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

c) *Actio popularis*

In Hungary, national law allows associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

Under Article 20 of the ETA, if the principle of equal treatment is violated or there is a direct danger thereof, a lawsuit against the infringement of inherent rights, a labour lawsuit or a lawsuit related to a civil service relationship may be brought by a) the Public Prosecutor; b) the Ombudsman; or c) any non-governmental and interest representation organisation, provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of a human being, and the violation affects a larger group of persons that cannot be determined accurately.

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

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

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

The first case to arise under the ETA was the *actio popularis* claim brought by Háttér Association, an LGBTIQ rights organisation, against a denominational university (described in more detail in section 4.2, above).[147] The Chance for Children Foundation (CFCF) launched several *actio popularis* claims with respect to the segregation of Roma pupils.

The right to bring *actio popularis* claims has been restricted by a decision of the Constitutional Court. Following the handing down of the final decision in an *actio popularis* lawsuit brought by the CFCF against a local school where Roma pupils were educated in a segregated manner, the Foundation filed a complaint with the Constitutional Court, claiming that the Curia's decision (according to which courts in general are not authorised to order an end to the segregation) had violated the pupils' constitutional rights. However, in its decision, the Constitutional Court declared the complaint inadmissible on the basis that only natural and legal persons affected by the actual individual case may file a constitutional complaint against a court decision. Since it is not the NGO that is actually affected by the segregation (in other words, the Curia's decision affects the constitutional rights of persons other than the NGO, i.e. the pupils), it has no standing before the Constitutional Court.[148] This interpretation was shared by the European Court of Human Rights, which rejected the CFCF's application claiming a violation of its rights under Article 6 of the European Convention of Human Rights on the basis of the lack of *locus standi*.[149]

d) Class action

In Hungary, national law does not allow associations/organisations/trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

It must be added, however, that, while there is no separate set of rules for such cases, associations are not prevented from obtaining authorisation from more than one victim and initiating one single case on their behalf if the claims stem from similar factual and legal bases and the court has a jurisdiction over all the respondents (Article 37 of the Code of Civil Procedure). Since the Hungarian legal system does not recognise the classic form of class action, the claims of each victim will be examined individually in such cases. Furthermore, the court may refuse to examine the cases together.

As far as the author is aware, the question of giving wider effect to Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) was not raised as an issue during the codification process of the new Code of Civil Procedure in 2016. Nor is the author aware of any publicly announced plans to look further into the matter.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Hungary, national law requires a shift of the burden of proof from the complainant to the respondent.

Article 19 of the ETA provides for the shift of the burden of proof. It is applicable to all grounds of discrimination, in all fields and all types of procedures, except for criminal and

[147] Supreme Court, Pfv.IV.20.678/2005/5, 8 June 2005, http://epa.oszk.hu/02300/02334/00020/pdf/EPA02334_Fundamentum_2005_03_100-104.pdf.

[148] Constitutional Court, IV/3311-9 /2012, 17 June 2013, http://cfcf.hu/sites/default/files/Gal%C3%A9ria/Gy%C5%91r_Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1g_2013.06.17.pdf.

[149] European Court of Human Rights, *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány v.* Application No. 786/14, 25 March 2014.

petty offence proceedings. It shall be noted that Article 19 of the ETA addresses data protection concerns when taking into consideration both real and assumed ethnic origin.

The test for the shift of the burden of proof only requires that the allegedly injured party substantiates, rather than proves, his or her claims. Substantiation involves a lower level of certainty: if the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or the other party must have assumed so), then the burden of proof is shifted. The provision reads as follows:

> '(1) In procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to assert an *actio popularis* claim shall substantiate that
>
> a) the injured person or group has suffered a disadvantage, or – in a case of *actio popularis* claims – there is a direct danger thereof; and
> b) the injured party or group possesses – or is assumed to possess by the violator– characteristics defined in Article 8.
>
> (2) If the case described in Paragraph (1) has been substantiated, the other party shall prove
>
> a) that the circumstances substantiated by the injured party of the entity entitled to assert an *actio popularis* claim do not prevail; or
> b) that it has observed or, in respect of the relevant relationship, was not obliged to observe, the requirement of equal treatment.'

The Hungarian solution requires claimants or complainants to substantiate the disadvantage and protected characteristic – real or supposed by the perpetrator. This is more generous than the solution offered by the directives: in the Hungarian system, the causal link between the protected ground and the disadvantage does not need to be substantiated in any way, whereas the directives require that facts substantiating discrimination, i.e. a disadvantage caused because of the existence of a protected ground, also be established. In the Hungarian system, it is the task of the other party to prove that there is no such link.

While this is the strictly literal interpretation, and the Equal Treatment Advisory Board (see chapter 7) issued guidelines on the shift of the burden of proof in 2006 (revised in 2008) stating that it is not the complainant's obligation to prove that there is a causal link between the protected ground and the disadvantage,[150] the judicial practice took a different direction and for a while followed an interpretation according to which complainants are obliged to provide evidence that makes it at least likely that they have suffered a disadvantage because they belong to a certain group.[151]

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

[150] See: https://www.ajbh.hu/documents/10180/3908613/bizonyitasi_kotelezettseg.pdf/fa1047b6-a7c4-f115-7a74-714bc9b25d0e.

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

on the basis of the law's literal interpretation and the Equal Treatment Advisory Board's guidelines. The Curia concluded the following:

> 'It is to be inferred from the above-quoted provisions [Article 19 of the ETA] that the claimant was obliged to only substantiate that she had suffered a disadvantage and that she had one of the protected characteristics listed in Article 8 of the ETA. The law does not put the burden of proving the causal link between the disadvantage and the protected ground on the claimant (the employee). Based on the specific rules of exculpation to be applied in discrimination cases, it fell on the employer to prove that there was no causality between the disadvantage and the protected ground, and therefore, it complied with the requirements of the ETA and Article 5 of the Labour Code. This [i.e. the Curia's] interpretation is aligned with the stance put forth in Guideline No 384/2008. (III. 28) TT. of the Equal Treatment Advisory Board in this regard. The interpretation of the second instance court is therefore […] erroneous.'[152]

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

Finally, in its Summary Opinion on the Labour Courts' Jurisprudence Regarding the Violation of the Requirement of Equal Treatment (adopted in February 2017),[153] the Curia's jurisprudence analysis group seems to have concluded that this latter interpretation (i.e. that the claimant shall not be obliged to substantiate the causal link) is to be followed.[154] However, the group called attention to the need for further consultation on this matter between the administrative and the labour law branches of the Curia (as the two opposing judgments came from two different branches).[155]

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Hungary, there are legal measures of protection against victimisation.

Victimisation is prohibited by Article 10(3) of the ETA, which claims that 'victimisation is a conduct that causes infringement, is aimed at causing infringement, or threatens with infringement, against a person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts'.

In a case of victimisation, the same sanctions may be applied against the perpetrator as against discriminators. As can be seen, the above definition extends the protection to persons providing any form of assistance to the victim.

In a case before the Equal Treatment Authority, the complainant was a 62-year-old forklift driver who worked as a temporary employee for over a year in a warehouse. During this time, the warehouse recruited a total of 10 permanent employees, but the complainant's applications were repeatedly rejected despite meeting the requirements. He also filed two complaints with the employer because he was of the view that he earned less than the permanent workers. A few weeks after he submitted the complaints, he was dismissed by the employer without justification. The Equal Treatment Authority concluded that the warehouse had committed direct discrimination based on age when it did not employ the complainant as a permanent worker and was liable for victimisation when it dismissed him after he had filed complaints concerning his wages. The Authority also pointed out that the

[152] Curia, Judgment No. Mfv. I. 10.517/2014, 2015 (no exact date available).
[153] Available at: https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf.
[154] Summary Opinion, Suggestions and Recommendations, Point 3.
[155] Summary Opinion, Suggestions and Recommendations, Point 10.

underlying discrimination complaint did not necessarily have to be well-founded for victimisation to be established.[156]

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

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

General sanctions (applicable irrespective of sector)

In addition to the sanctions listed in Articles 2:51-2:53 of the Civil Code that can be applied by regular civil courts in lawsuits aimed at redressing the violation of the right to equal treatment as an inherent personality right (which include the possibility of awarding moral compensation to the victim), the sanctions imposed by the Ombudsman (as the equality body) can be used to redress discrimination in any sector and based on any ground.

Under Article 17/A(1) of the ETA, if the Ombudsman has established that the provisions ensuring the principle of equal treatment have been violated, he or she 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 his or her decision establishing the violation of law be published; d) impose a fine; e) apply a legal consequence determined in a special act. These sanctions can be applied jointly.

Article 17/A(3) stipulates that the legal consequences set out in Article 17/A(1) shall be determined on the basis of all the circumstances of the case, with particular regard to those who have been affected by the violation of law, the consequences of the violation of law, the duration of the situation constituting a violation of law, the repeated demonstration of conduct constituting a violation of law and the financial standing of the person or entity committing such a violation.

Under Article 17/A(5), the sum of the fine imposed by the Ombudsman can range from approximately EUR 140 (HUF 50 000) to approximately EUR 16 665 (HUF 6 million).

Under Articles 114 and 116 of the GAP, the Ombudsman's decision may not be appealed within a public administrative procedure, but it may be subjected to judicial review. In terms of Article 13(2) of the ETA, the Metropolitan Court has exclusive competence to adjudicate such cases. Representation by a legal counsel is mandatory in these proceedings.

Education

Under Article 59(3) of the National Public Education Act, the kindergarten, school, dormitory and the organiser of occupational training are objectively and fully liable, regardless of their culpability, for damage caused to children and students in relation to their placement in kindergartens, studies in schools, membership of a dormitory and in relation to occupational training. The relevant provisions of the Civil Code shall be applied in relation to damages, taking into account that the above organs may only be exempted from liability for damages if they prove that the damage occurred outside of their sphere

[156] Equal Treatment Authority, Decision No. EBH/114/2017, 2017 (no exact date available).

of operation and were caused by an unavoidable reason. No damages shall be paid if they occurred as a result of the unavoidable conduct of the person injured.

In terms of damage caused by discrimination, this provision puts more responsibility on educational institutions than would normally be the case under the Civil Code. Under the normal rules, a party can be exempted from liability for damages if they can prove that they acted as can be generally expected in the given situation, whereas educational liability is close to being objective.

However, as explained above, after the judgment handed down in the Gyöngyöspata case (see section 6.1), Article 59 of the National Public Education Act was amended as of 22 July 2020, with a view to excluding the possibility of demanding moral damages for the violation of inherent personal rights committed by educational institutions. Article 59(4) reads as follows:

> 'If the educational institution violates the inherent personal rights of the child or pupil in relation to education, the Civil Code's provisions regarding moral damages shall be applied with the difference that the moral damages shall be granted by the court in the form of educational or training services. The educational or training services granted by the court can be either provided or purchased by the violator.'

In the author's view, this differentiation and depriving victims of educational rights violations (including discrimination) from the right to claim financial compensation, is in breach of Directives 2000/43 and 2000/78.

b) Compensation – maximum and average amounts

Compensation (damages and moral compensation granted by the civil court) is not capped: there is no upper limit. With regard to fines that can be imposed by administrative and petty offence authorities, the laws define the highest possible amounts (these are indicated in the respective sections above).

As to the amounts awarded in civil court cases, according to Hungarian law (Articles 2:52 and 2:53 of the Civil Code), compensation for violating the requirement of equal treatment can be pecuniary (damages) and moral. Moral compensation is more usual in discrimination cases. Since moral compensation cannot be quantified, it is up to the court to decide on the compensation amount. While there is no upper statutory limit, Hungarian courts had a long-standing tendency to be rather cautious in establishing the amounts. In a number of cases concerning discrimination in access to services (most frequently cases in which Roma guests were denied entry to discos and bars), the compensation amount was fairly constant at around EUR 280 (HUF 100 000). Recently, however, the average amounts have started to rise. For example, in the Gyöngyöspata case, the court of second instance granted EUR 1 400 (HUF 500 000) as damages for each school year when a complainant was segregated and received inferior education, and EUR 833 (HUF 300 000) for each year when a complainant was educated in a segregated class but the substandard quality of education was not proven.

The situation is somewhat more complex in labour cases. As outlined above, under Article 82 of the Labour Code, if the discrimination is manifested in the unlawful termination of employment, the employer shall compensate the employee for the damage suffered. Under Article 82(2), if the claimant demands lost income as an element of the damages, a maximum of 12 months' salary may be claimed by the employee under this heading. The reason for this provision (which means a significant change to the previous situation in which no such cap existed), was that protracted lawsuits put employers in very difficult situations if, for instance, after three or four years they had to pay the full amount of the unlawfully dismissed employee's unpaid salary if the employee had not found a new job in the meantime. The change has a very detrimental effect on employees, as there is now a

maximum 'penalty' that employers have to pay for unlawful dismissal. This may dissuade them from trying to reach a friendly settlement and may encourage them to extend the case for as long as possible by appealing the subsequent judicial decisions (since the delaying tactics will not have an impact on how much they have to pay in the end).

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

With regard to the Equal Treatment Authority's sanctioning practice, it can be said that it applied fines of between approximately EUR 280 and EUR 14 000 (HUF 100 000 and HUF 5 000 000, respectively). In two cases of racially motivated discrimination in access to services, the Authority imposed fines of EUR 1 112 (HUF 400 000) and EUR 1 400 (HUF 500 000) respectively. A fine of approximately EUR 12 500 (HUF 4.5 million) was imposed on an employer who committed indirect discrimination (against people taking sick leave either because of their own illness or to care for their sick children) by reducing the salary of those who spent less than 85 % of their working time in the workplace.[157] The highest amount ever was imposed on a bar found to be discriminating, for the second time, on the basis of ethnicity in relation to entry to the bar. In this case, the Equal Treatment Authority imposed a fine of approximately EUR 13 889 (HUF 5 million) on the bar.[158] The highest fine applied by the Ombudsman as the equality body was EUR 1 400 (HUF 500 000), which was imposed on a public service provider whose premises were not accessible for wheelchair users.[159]

Mention also must be made of public interest fines. Article 84 of the old Civil Code stipulated that 'if the amount of damages that can be imposed [in a lawsuit launched due to a violation of inherent personality rights] is insufficient to mitigate the gravity of the actionable conduct, the court shall also be entitled to penalise the person having committed a violation by ordering him/her to pay a fine to be used for public purposes.' This fine is not a type of punitive damage, as it is payable to the state and not the victim.

In a number of *actio popularis* lawsuits, where damages could not be imposed on discriminators (since the NGOs initiating the lawsuits did not themselves suffer damages – either pecuniary or moral), the courts did resort to public interest fines. This obviously added to the dissuasiveness and effectiveness of the sanctions, and also provided a possibility to express the severity of the violation in pecuniary terms, so it also contributed to the proportionality of the sanction applied by the courts. However, the possibility of applying a public interest fine was left out of the new Civil Code (according to its explanatory memorandum: due to the fact that 'courts very rarely apply it' and 'it is alien to the concept of civil law because of its public law nature'). This means that once the cases that the courts must try under the old Civil Code (because the violation took place while it was still in force) run out, public interest fines will disappear from the Hungarian legal system, which could – in the context of non-discrimination cases – be regarded as a regression in terms of the effectiveness of the system of sanctions.

[157] The source for the cases and amounts described here is the former website of the Equal Treatment Authority that was made unavailable by the Ombudsman six months after taking over the Authority's mandate.

[158] See: http://www.neki.hu/index.php?option=com_content&view=article&id=416:oetmillio-forint-birsagot-kell-fizetnie-a-rio-cafenak&catid=1:friss-hk&Itemid=64.

[159] Ombudsman, Decision No. EBF-AJBH-251/2021, August 2021.

c) Assessment of the sanctions

Sanctions are regulated in such a way that they could meet the requirements set forth by the directives. However, in practice, the situation varies. While the number of cases in which a fine was imposed was trending downwards for a number of years (e.g. in 2012, the Authority imposed a fine in only two cases compared to 11 cases in 2011 and 20 in 2010), the trend changed around 2015, and in 2019, out of the 44 cases where the Authority concluded that a violation had taken place, a fine was imposed in 25 of them.[160] With the transfer of the Authority's mandate to the Ombudsman, the trend seems to have reversed again. In 2021, the Ombudsman as equality body imposed a sanction in only 5 out of the 26 cases in which he concluded a violation of the right to equal treatment.[161] In 2022, the number of fines was even lower: four in total.[162]

The average fine amount was increasing in the last stage of the Equal Treatment Authority's operation. In 2016, the total fine amount came to EUR 11 944 (HUF 4.3 million) in 13 cases (an average of EUR 919 or HUF 330 800 per fine), whereas in 2019, the Authority imposed fines totalling EUR 30 417 (HUF 10.95 million), resulting in an average of EUR 1 217 (HUF 438 000) per fine.[163] Thus, while the Authority remained somewhat cautious in using its most effective sanctioning tool, it moved towards a practice that had more potential to be effective and dissuasive around the end of its operations.

As the Authority's successor, the Ombudsman seems to be rather cautious regarding fines. In 2021, he imposed a fine on the discriminators in only 5 out of the 26 cases in which he concluded that discrimination had taken place. The highest amount was EUR 1 400 (HUF 500 000), imposed on a public service provider whose premises were not accessible for wheelchair users.[164] For 2022, the Ombudsman's website lists three cases in which a fine was applied. The amount is specified in only one case, where the Ombudsman imposed an EUR 560 (HUF 200 000) fine on an employer for terminating a pregnant employee's labour relationship during her probationary period.[165]

A positive development in the jurisprudence must be mentioned in relation to the decisions made by the civil courts in school segregation cases. The Chance for Children Foundation won numerous *actio popularis* cases against segregated schools and the municipalities maintaining them. However, for a long time, courts simply declared that a violation had taken place and called on the discriminators in very general terms to put an end to the discrimination. They were not willing to prescribe actual steps for the schools and/or the municipalities (after the recentralisation of the school system: the state body managing the schools) to take to achieve desegregation.

A change came about with the *Kaposvár* case,[166] where, in spite of a previous high court judgment concluding that the Municipal Council of Kaposvár had failed to act against the spontaneously developed segregation in one of its schools, the municipal council did not

[160] Source for the numbers: former website of the Equal Treatment Authority that was made unavailable by the Ombudsman six months after taking over the Authority's mandate.

[161] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 97.

[162] Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 106.

[163] Source for the numbers: former website of the Equal Treatment Authority that was made unavailable by the Ombudsman six months after taking over the Authority's mandate.

[164] Ombudsman, Decision No. EBF-AJBH-251/2021, August 2021.

[165] Ombudsman, decision no. EBF-AJBH-40/2022, March 2022.

[166] Pécs Appeals Court, Pf.III.20.004/2016/4., 13 October 2016, available at: http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf.

take any measures to comply with the court obligation and put an end to the segregation. Consequently, the CFCF decided to start another lawsuit in late 2013, which ended in October 2016, with the second instance court ordering that the segregated school must be closed in a sequential system from the 2017/2018 academic year onwards, and obliged the municipality to adopt a detailed desegregation plan on the admission and placement of those first-grade pupils who were in the school's catchment area. The judgment was upheld by the Curia, which held that courts can do more than simply declare that a violation has taken place and order in general terms – without specifying the 'how' – that the defendant should put an end to the violation: they may also order specific measures to be taken in order to enforce the requirement of equal treatment.[167]

Similarly, in the so-called 'Numbered Streets' case in Miskolc, the Metropolitan Administrative and Labour Court[168] confirmed that the Equal Treatment Authority had the right to oblige the discriminating municipality to take specifically prescribed action to end a discriminatory situation regarding housing.

These new cases have moved the jurisprudence in a direction where courts are willing to take more responsibility not only for concluding that systemic discrimination has taken place, but also to prescribe steps to address systemic discrimination.

[167] Curia, Pfv.IV.20.085/2017/9., 4 October 2017, available at: http://cfcf.hu/sites/default/files/Kaposvar2_Kuria.pdf.

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

7 BODY FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

7.1 Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

Until 31 December 2020, the specialised body for the promotion of equal treatment irrespective of racial or ethnic origin was the Equal Treatment Authority (the Authority) established by the ETA. It began operation on 1 February 2005. The most important rules governing the Authority, its structure, statutes and operations were stipulated in Article 8 and Articles 14-17/D of the ETA.

Hungary's Ombudsman, the Commissioner for Fundamental Rights (through his Minorities Deputy) also performs some of the functions required by Article 13 of Directive 2000/43: he conducts independent surveys concerning discrimination, publishes independent reports and makes recommendations on any issues relating to such discrimination. The Ombudsman has a very limited ability to assist victims in pursuing their complaints, and the scope of the Ombudsman's investigation is restricted to state authorities and public service providers. As mentioned above, the status and proceedings of the Ombudsman are governed by the Ombudsman Act.

On 10 November 2020, the Parliamentary Committee of Justice Affairs headed by an MP of the ruling Fidesz Party, submitted a bill proposing the abolition of Hungary's equality body, the Authority, and transferring its tasks and competences to the Ombudsman as of 1 January 2021. The introduction of the bill was not preceded by any consultation: neither the general public, the institutions concerned nor other stakeholders (such as organisations representing the interests of people with the protected characteristics) were consulted on the planned reorganisation. Several bodies, including domestic NGOs representing protected groups[169] and ILGA Europe[170] criticised the plan and the lack of consultation. However, on 1 December 2020, less than a month after the submission of the bill, the Parliament passed the law, which was published on 3 December, and came into force on 1 January 2021.

Besides the lack of consultation with stakeholders, the change raised numerous problems in the author's view. The most important ones are:

- The Authority was one of the best functioning rights protection bodies in Hungary, and did not shy away from delivering decisions in sensitive, complex cases to protect vulnerable minority groups. The explanatory memorandum of the new law does not provide any convincing argument as to why a well-functioning body that has gained the respect of a wide range of stakeholders, including civil society organisations representing the interests of the protected groups, needed to be dismantled.
- The Ombudsman is Hungary's national human rights institution (NHRI). In June 2021, the Sub-Committee on Accreditation (SCA) of the Global Alliance of National Human Rights Institutions (GANHRI), recommended the downgrading of the Ombudsman from an 'A status' to a 'B status' national human rights institution, reflecting a

[169] MEOSZ (National Federation of Organisations of People with a Physical Disability) (2020) 'MEOSZ says effective enforcement could be jeopardised by the abolition of the Equal Treatment Authority', press release, 16 November 2020, http://www.meosz.hu/blog/a-meosz-szerint-veszelybe-kerulhet-a-hatekony-jogervenyesites-az-ebh-megszuntetesevel/, Civilisation Coalition (2020) 'The merger of the Equal Treatment Authority into the Office of the Commissioner for Fundamental Rights is a very bad step', press release, 19 November 2020, https://civilizacio.net/hu/hirek-jegyzetek/nagyon-rossz-lps-az-egyenl-bnsmd-hatsg-beolvasztsa-az-alapvet-jogok-biztosnak-hivatalba; and Telex (2020) 'Several disability organisations are protesting against the merger of the Equal Treatment Authority', news article, 24 November 2020, https://telex.hu/belfold/2020/11/24/ebh-aosz-mvgyosz-meosz-tiltakozas-targyalas.

[170] ILGA Europe (2020) 'ILGA-Europe is alarmed by Hungarian Parliament's moves to abolish the national Equal Treatment Authority', press release, 10 November 2020, https://www.ilga-europe.org/resources/news/latest-news/ilga-europe-alarmed-hungarian-parliaments-moves-abolish-national-equal.

deterioration in its degree of independence. The SCA expressed the view that 'the CFR [the Ombudsman] has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence. The SCA is of the view that the CFR has not spoken out in a manner that promotes protection of all human rights. The failure to do so demonstrates a lack of sufficient independence. Therefore, the SCA is of the view that the CFR is operating in a way that has seriously compromised its compliance with the Paris Principles.'[171] In the first round of assessment, the SCA only forms a recommendation, providing the concerned NHRI with the possibility to take measures to address the identified shortcomings and present to GAHNRI evidence of these measures. However, the Hungarian Ombudsman did not avail himself of this opportunity. According to the report on the SCA's March 2022 session, the Hungarian Ombudsman was scheduled for interview by the SCA on 21 March 2022. 'However, on 19 March it requested for the postponement of its review. […T]he SCA tried to accommodate this request and provided the CFR with three new dates for its interview during its March 2022 session. However, the CFR declined the alternate opportunities to take the interview', thus the SCA had to conclude the process on the basis of the available documentation.[172] Finally, in the absence of anything refuting the previously voiced concerns of the SCA, the downgrading became final, and at present, Hungary's national human rights institution holds a B status, showing a lack of sufficient independence. This makes it even more problematic that the widely respected Authority's mandate has been transferred to the Ombudsman.

- From the point of view of the sociology of organisations, the change is definitely a 'downgrading' of the issue of non-discrimination, in the sense that this has been the single focus and mandate for the Authority, whereas the Ombudsman's Office is a large organisation with a wide mandate ranging from environmental protection through children's rights to the monitoring of prisons. Consequently, it is highly likely that much less attention can be paid and far fewer resources will be available for the issue of non-discrimination within the Ombudsman's Office than was the case in the Authority.
- The quasi-judicial nature of the Authority is completely alien to the Ombudsman who relies on recommendations and publicity, which could create a permanent tension. The problem is the following: since non-discrimination is a fundamental right enshrined in the Fundamental Law (Hungary's constitution), the Ombudsman is already authorised to examine discrimination complaints in his current capacity. If the examination based on the procedural rules of the Ombudsman Act concludes that there was a violation, the Ombudsman may – as described above – issue non-binding recommendations. Under the new law, after the transition, the complainant has a choice as to whether he/she wants the Ombudsman to act in his original capacity or in his capacity as successor to the Authority. In the latter case, the Ombudsman must proceed on the basis of the code of administrative procedure, which prescribes much stricter rules regarding a number of issues (such as deadlines, discovery, the warning of witnesses before hearings, etc.) than the Ombudsman Act. Therefore, the same institution will have to address complaints regarding the same right (the right to non-discrimination) on the basis of two different sets of rules with different outcomes (non-binding recommendations versus binding decisions, including sanctions) depending on the complainant's choice. Furthermore, the law stipulates that it would also be possible for the Ombudsman to investigate a complaint in his capacity as Ombudsman first, and then, after that examination is completed (e.g. with a

[171] Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions (2021), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA)*, 14-24 June 2021.

[172] Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions (2022), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation (SCA)*, 14-25 March 2022.

recommendation) also as the successor to the Authority if the complainant requests so or the Ombudsman decides so *ex officio* on the basis of the results of the first investigation. However, the quasi-judicial role that the Ombudsman plays in the second type of procedure requires qualities (such as impartiality) that are impossible to guarantee if he has already investigated the case and concluded that there has been discrimination. Procedural requirements regarding quasi-judicial procedures would also be compromised. By way of example, under the Ombudsman Act, the Ombudsman may hear any employee of the authority that he is investigating. However, the Act does not prescribe the types of warnings that the code of administrative procedure requires when an administrative authority hears a witness. This can cause significant problems if the Ombudsman hears in the quasi-judicial follow-up procedure a witness who was already heard in the first examination and was not duly warned (even if the earlier hearing could not formally be taken into account during the hearing in the follow-up procedure).

These concerns were mostly shared by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, which examined the transfer of the Authority's tasks and powers based on a request from the Parliamentary Assembly of the Council of Europe. In its opinion,[173] the Venice Commission raised the following issues. It noted with regret 'that no Director General for Equality Treatment has been appointed to-date, nine months after the merger'. The Commission also noted that no Deputy Director General for Equality Treatment had been appointed and that the Ombudsman 'could not confirm either the date for filling these vacancies or elaborate on the criteria and rules of selection. According to the additional information received by the Venice Commission, due to various reasons the ETD [the Equal Treatment Directorate] is currently understaffed, which affects the overall quality of its performance.' The Commission reminded the Hungarian authorities that 'without DGET [a Director General for Equality Treatment], it is hard to imagine the promotion and visibility of equality mandate as required by ECRI General Policy Recommendation No. 2.' For that reason, the Commission encouraged 'the Hungarian authorities to ensure a timely appointment of DGET and his/her Deputy in accordance with clear and transparent criteria defined by law'. However, in the six months that have passed since the publication of the Commission's opinion, neither a Director General for Equality Treatment, nor a Deputy has been appointed, which means that the Directorate has been running without a head for over a year now.

In the absence of accurate information provided by the Ombudsman and the Hungarian authorities, the Venice Commission could only remain 'hopeful that ETD is under no risk of under financing and that work on equality issues, as a result of the merger, is taken to a higher level'.

The Venice Commission also elaborated on the procedural concerns stemming from the dual nature of the Ombudsman's procedure, depending on the capacity in which he acts in a case of discrimination, and held that 'the new system of protection against discrimination is overall more complicated and thus has the potential to be less effective than the previous one' and that 'collision of the competences already enjoyed by the Commissioner under Act CXI [of 2011] and those acquired in his/her capacity as successor of the Equal Treatment Authority, is a clear demonstration of a risk that may undermine the effectiveness of the work in the field of promoting equality and combating discrimination'.

The Háttér Society, which is an NGO, carried out a survey,[174] anonymously interviewing former staff members of the Equal Treatment Authority, some of whom also continued to

[173] Venice Commission (2021), *Hungary – Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-eu.

[174] Háttér Society (2021), *Information on the Abolishment of the Equal Treatment Authority in Hungary. A Briefing Written for the Experts of the Venice Commission on September 15, 2021*, https://en.hatter.hu/sites/default/files/dokumentum/kiadvany/hatter-venicecommission-eta.pdf.

work at the Ombudsman's Office after the merger. According to information provided by them, there has been a significant drop in the number of complaints. This substantiates the belief that the merger and the subsequent organisational difficulties and omissions have had a negative impact on the activities of the Hungarian equality body. According to Háttér, 'in 2019 […], ETA received 868 cases throughout the year. In the first 6 months of 2021, ETD received only 156 complaints, proportionate to the time only one third of the 2019 number of complaints. […] Interviewees listed the following reasons for such a drastic drop in the number of complaints: the termination of the equal treatment [referees]' network; lack of active communication; unclear information on the webpage […]. Interviewees also mentioned the COVID situation, but emphasized that the number of cases decreased even compared to last year, where the COVID situation was already bad.'

The published numbers substantiate the concerns. In 2019, the last year in which an annual report of the Authority's work was published, the Authority received 868 complaints, handed down 44 decisions concluding that discrimination had taken place and approved of 22 friendly settlements, however, the same numbers for the Ombudsman in 2021 were 462, 26 and 8, and in 2022 463, 23 and 7, respectively.[175]

In the author's opinion, it is also concerning that the Ombudsman does not seem to be making a significant effort to change these trends. Six months after taking over the Authority's mandate, the Ombudsman shut off the Authority's website, making the easy to digest materials produced by the Authority (such as: the general information leaflets on the Authority's procedure and on issues such as discrimination against women, persons with disability, the Roma, discrimination in education, the workplace and the provision of services; training material on the ETA; and the Authority's annual reports dating back to 2005) unavailable to the public. The information available on the Ombudsman's website regarding the equality mandate is much less detailed and user friendly.

The Ombudsman also does not seem to seek publicity to promote awareness regarding the equality mandate. It does not provide targeted information to the press regarding its equality work, and whereas the last published annual report of the Authority was 54 pages long, the Ombudsman's annual report for 2022 contains a total of 13 pages regarding the work of the Equal Treatment Directorate (the unit performing the equality body's task within the Ombudsman's Office).

As far as the legislation is concerned, the Ombudsman (as the equality body) has very wide responsibilities: he is vested with the right and duty to act against any discriminatory act irrespective of the ground of discrimination (sex, racial affiliation, colour of skin, nationality (not in the sense of citizenship), belonging to a national or ethnic minority, mother tongue, disability, health condition, religion or belief, political or other opinion, family status, maternity (pregnancy) or paternity, sexual orientation, gender identity, age, social origin, financial status, part-time nature of employment legal relationship or other legal relationship relating to employment, or fixed period thereof, belonging to an interest representation organisation, any other situation, attribute or condition of a person or group) or the field concerned (e.g. employment, education, access to goods). In addition to the responsibilities required by the Racial Equality Directive, the Ombudsman is vested

[175] Source: Equal Treatment Authority (2020) *Annual Report 2019*, which used to be available on the former website of the Authority. The source of the data for 2021: Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 97. The source of the data for 2022: Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 106.

with the right to impose severe sanctions on persons and entities that violate the ban on discrimination.

As far as accessibility and barriers are concerned, the following can be said. In terms of Article 16 of the ETA, the complainant does not have to advance the costs of the proceeding of the equality body, and is also exempted from having to pay them in case the complaint is rejected for any reason, unless he/she acted in bad faith. The respondent must bear their own costs.

Under Articles 16(5) and 16(6) of the ETA, if the equality body holds a hearing, it shall be organised in the offices of the municipality where the complainant lives. If this municipality does not have offices that are suitable for this purpose, the hearing shall be held in the premises of the closest municipality with suitable offices. If the equality body summons a person, it shall summon that person to the offices of the municipality where the summoned person lives. These provisions are aimed at mitigating any geographical and financial barriers that would hinder access to the equality body's procedure. However, under Article 16(10) of the ETA, if the application of Articles 16(5) and 16(6) would create a disproportionate burden or would lead to the unnecessary protraction of the proceeding, the equality body may summon the persons to be heard to its own offices. In this case, the body shall reimburse the concerned person's travel costs.

The abolishment of the Equal Treatment Authority has weakened the accessibility of the equality body's procedure in one very important aspect: legal assistance to those who cannot afford to retain a lawyer. In terms of the Legal Aid Act, legal assistance is available for indigent persons for drafting legal briefs, however, the application for legal aid is a complicated process with a lot of documents to be obtained and submitted.

That is why the setting up in September 2009 of an equal treatment referee system was an important step. In each county, one referee (a practising lawyer) was chosen and contracted to be available (for approximately 16 hours per month) for consultations on potential discrimination complaints irrespective of the concerned person's financial situation. The referees forwarded complaints of discrimination to the Equal Treatment Authority, provided assistance to the complainants in formulating their petitions and operated as a kind of filtering system. In 2017, the referee system served 1 618 clients and forwarded 73 complaints to the Authority. In 2018, these numbers were 1 576 and 64, respectively.[176] The referee network was dissolved after the Ombudsman took over the Authority's mandate, which, in the author's view (which seems to be substantiated by the significant decrease in the number of complaints received by the Ombudsman mentioned above), has negatively impacted the Hungarian equality body's ability to provide independent assistance to victims of discrimination in pursuing their complaints under Article 13 of the Racial Equality Directive, thus raising, in the author's view, another potential violation of the Directive's non-regression clause.

It must be mentioned that in 2022, the Ombudsman opened six regional offices to increase its geographical accessibility,[177] however, this does not make up for the loss of the referee network that was present in all of the 20 counties of Hungary.

In terms of Article 16(2) of the ETA, the minutes of hearings and the final decision in the case must be prepared in Braille, if a client with visual impairment requests so.

[176] Source of the information: the Equal Treatment Authority's website that was made unavailable by the Ombudsman half a year after he took over the Authority's mandate.
[177] See: https://www.ajbh.hu/teruleti-irodak.

7.2 Political, economic and social context of the designated body

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

In February 2018, at a meeting for municipal leaders, Prime Minister Viktor Orbán expressly rejected diversity:

> 'Diversity is not a value, it is a given. We must declare it: we do not want to become diverse in a way that we get mixed, our colour, our traditions, our national culture get mixed with others. We don't want that. […] We want to stay like we have been for 1 100 years here in the Carpathian Basin.'[178]

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

Since 2015, the Hungarian Government has been conducting an intensive nationwide campaign against migration and migrants of Muslim origin. In October 2015, Prime Minister Viktor Orbán told the German news journal *Focus* that, while it is not inevitable that Muslims could not be integrated into European societies, experience shows that 'so far, it has not been possible to do so'. He said that 'Islam has never been a part of Europe, it just came here' and it does not belong to Europe in a spiritual/intellectual sense.[179] A year later, in September 2016, at the opening session of the Hungarian Parliament, the Prime Minister said: 'Terror and violence have become parts of everyday life in Europe.' He also contended that what happened in Belgium, Germany and France could happen anywhere and that if European politics continued as it was, 'the numbers of Muslims will keep growing, and we will hardly recognise Europe'.[180]

The level of xenophobia has been increasing steadily in Hungary, most probably as a result of the campaign. According to research conducted in 2018, Hungarians express the most hostility to migrants in Europe, with 48 % of the population categorised as xenophobes, whereas in Estonia, the second country in the list, this proportion was only 29 %.[181]

Statements capable of inciting negative feelings towards Roma people are also made by high-ranking Government officials and prominent supporters of the ruling party. The Government's communication concerning the Gyöngyöspata judgment (mentioned in section 6.1 above) stirred up anti-Roma sentiment. On 9 January 2020, Prime Minister Viktor Orbán said at a press conference that the judgment violated the Hungarian people's sense of justice. 'I'm not from Gyöngyöspata, but if I were to live there, I would ask how it is possible that members of an ethnic group who live with me in the same community […], receive a significant amount of money without performing any work while I would have to work for the same amount for I don't know how many hours, days or years.'[182] A week later, he said the following: 'Hungarians accept it if […] we spend the taxpayers' money on kindergartens which provide catching-up programmes, free meals […].

[178] See: https://budapestbeacon.com/orban-uses-conference-mayors-vow-protect-hungarys-ethnic-group/ and https://www.youtube.com/watch?v=-xyutFLn_8E.
[179] See: https://hvg.hu/itthon/20151016_Orban_Az_iszlam_soha_nem_volt_Europa_resz.
[180] See: http://index.hu/belfold/2016/09/12/orban_viktor_beinditja_a_politikai_oszt/.
[181] See: https://qubit.hu/2018/03/02/a-magyarok-gyulolnek-a-legjobban-mindenki-mast-europaban.
[182] Index (2020), 'According to Orbán, segregation compensation for Gypsy students in Gyöngyöspata is money received without any work', news article, 9 January 2020, https://index.hu/belfold/2020/01/09/orbaninfo_gyongyospata_gyori_gyerekgyilkos_birosagi_iteletek_biralat/.

Hungarians are not racists, they do not automatically reject the Roma', but 'there is a line that Hungarians feel should never be crossed: to give money for nothing'. It is possible that there was segregation or 'a failed catch-up attempt', but 'we cannot remedy the trouble by giving money'. It is better 'to provide services, instead of giving money into their hands, which Hungarians will never accept.'[183]

Anti-LGBTIQ statements are also made by high-ranking public figures. In May 2019, the Speaker of the Hungarian Parliament, László Kövér, said that standing up for 'marriage and adoption by homosexuals' was equivalent to paedophilia: 'Morally there is no difference between the behaviour of a paedophile and the behaviour of someone who demands such things [as adoption by same-sex couples]. In both cases, the children are treated as objects, luxury goods, mere tools for gratification, for self-realisation. I don't want to have children for various reasons, but I claim the right to raise someone else's child.' He also said that 'a normal homosexual is aware of the order of things in the world, and knows that he was born this way, he became like this. He tries to fit into this world while he doesn't necessarily think he is equal.'[184]

The difference between LGBTIQ persons and paedophiles was also blurred by the Prime Minister, who also made a distinction between 'Hungarians' and 'homosexuals' in a radio interview on 4 October 2020:

> 'in essence I'd like to confirm that in Hungary there are laws relating to homosexuality. They are based on an extremely tolerant and patient approach. Hungarians are very tolerant in relation to this phenomenon. In fact Hungarians are so patient that we even accept provocations of this kind with patience – although not without comment. So, we can safely say that as regards homosexuality Hungary is a patient, tolerant country. But there is a red line that must not be crossed, and this is how I would sum up my opinion: "Leave our children alone".'[185]

The interview was apropos the publication of *Wonderland is for Everyone*, a children's book with fairy tales featuring various vulnerable groups (LGBTIQ, Roma, persons with disabilities) that prompted a large number of homophobic and transphobic political statements and attacks.

As was the case in the anti-migrant campaign, the rhetoric was followed by hostile legislation. In a law adopted on 19 May 2020,[186] the Parliament prohibited legal gender recognition. The new law prescribes that an individual's 'sex at birth' (defined as 'biological sex based on primary sex characteristics and chromosomes') must be recorded in the national registry of births, marriages and deaths, and cannot be changed later.[187]

On 10 November 2020, the Government submitted a proposal for the 9th Amendment to the Fundamental Law. The 9th Amendment was adopted on 15 December 2020, and its

[183] Index (2020) 'Orbán: "I have already been killed eight times by the Soros network"', news article, 17 January 2020, https://index.hu/belfold/2020/01/17/orban_engem_mar_nyolcszor_olt_meg_soros_halozata/.

[184] Index (2020) 'Speaker of Hungarian Parliament: Fighting for LGBT adoption is morally equivalent to paedophilia' news article, 17 May 2019, https://index.hu/english/2019/05/17/speaker_of_hungarian_parliament_a_normal_homosexual_does_not_regard_himself_as_equal/ and http://www.parlament.hu/naplo40/221/n221_0014.htm.

[185] For the full interview in English, see: http://www.miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-sunday-news/.

[186] Act XXX of 2020 on the amendment of certain laws related to public administration and on donating property (*2020. évi XXX. törvény egyes közigazgatási tárgyú törvények módosításáról, valamint ingyenes vagyonjuttatásról*), 28 May 2020, http://www.kozlonyok.hu/nkonline/index.php?menuindex=200&pageindex=kozltart&ev=2020&szam=125.

[187] For more details, see: Háttér Society (2020) 'Despite human rights concerns, Hungarian President signs the law that bans legal gender recognition', press release, 28 May 2020, available at: https://en.hatter.hu/news/president-signs; EELN (2020), *Flash report – Amendment of the provisions on legal recognition of gender*, 30 June 2020, https://www.equalitylaw.eu/downloads/5168-hungary-amendment-of-the-provisions-on-legal-recognition-of-gender-137-kb.

provisions entered into force on 23 December 2020. Article 1 of the 9th Amendment added the following to Article L) of the Fundamental Law, which already excluded the marriage of same-sex couples and restricted the notion of family: 'The mother is female, the father is male'.[188] In itself, this new declaration would have little legal consequence. However, another bill, also introduced on 10 November and adopted on 15 December 2020,[189] prescribes that, as a main rule, only married couples will be allowed to adopt children. Any exceptions can only be granted on a case-by-case basis by the minister responsible for family policies.[190] Thus, same-sex couples, single persons and non-married opposite-sex couples are excluded from adoption as of March 2021 unless a political appointee specifically exempts them from the general restriction of the law.

On 10 June 2021, the Parliament's Legislative Committee (where the ruling party has a majority) submitted to a bill on harsher sentencing for paedophile criminal offences a series of proposed amendments[191] envisaging severe restrictions on the display of LGBTIQ-themed media content and the provision of information on LGBTIQ-related topics in educational institutions. The amended bill was passed on 15 June 2021 and came into force on 8 July 2021.[192]

Act LXXIX of 2021 amended several different laws,[193] and banned any advertisement or media content that 'promotes or portrays deviation from [gender] identity aligning with birth at sex, gender reassignment, or homosexuality' from being made available to persons under the age of 18. The Act also amended the National Public Education Act to prescribe that sessions delivered in educational institutions on sexual culture, sexual life, sexual orientation or sexual development shall not be aimed at promoting deviation from the child's gender identity aligning with sex at birth, gender reassignment or homosexuality. Furthermore, only persons or organisations registered by a designated state body shall be allowed, in the framework of the regular curriculum or as extracurricular activities, to hold a session on, among other subjects, sexual culture, sexual life, sexual orientation or sexual development. The law's explanatory memorandum makes it clear that this provision is aimed at preventing LGBTIQ NGOs and other persons who may wish to sensitise students in relation to the issue of non-discrimination based on sexual orientation from having access to educational institutions.[194]

The rhetoric and legislative attacks were critiqued by several international bodies, including the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights

[188] Before the amendment, the text of Article L) (1) read: 'Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children.'

[189] Act CLXV of 2020 on the amendment of certain laws concerning matters of the justice system (*2020. évi CLXV. törvény az egyes igazságügyi tárgyú törvények módosításáról*), 22 December 2020, http://www.kozlonyok.hu/nkonline/index.php?menuindex=200&pageindex=kozltart&ev=2020&szam=285.

[190] Articles 99–103 of Bill T/13648.

[191] https://www.parlament.hu/irom41/16365/16365-0015.pdf.

[192] The bill came into force as Act LXXIX of 2021 on harsher action against paedophile criminal perpetrators and the amendment of certain laws with a view to protecting children (*2021. évi LXXIX. törvény a pedofil bűnelkövetőkkel szembeni szigorúbb fellépésről, valamint a gyermekek védelme érdekében egyes törvények módosításáról*), https://net.jogtar.hu/jogszabaly?docid=A2100079.TV&timeshift=20220201&txtreferer=00000003.txt, 23 June 2021.

[193] Including: Act XXXI of 1997 on child protection and guardianship administration; Act CCXI of 2011 on the protection of families; Act XLVIII of 2008 on the basic conditions and certain restrictions of commercial advertising activities; Act CLXXXV of 2010 on media services and mass communication; and Act CXC of 2011 on National Public Education.

[194] 'The proposal envisages the introduction of rules for school sessions/activities – including sex education sessions – held by organisations […] whose objective in many cases is to represent specific sexual orientations. Representatives of certain organisations in these sessions seek to influence the sexual development of children through activities called sensitising programmes provided in the framework of anti-discrimination awareness-raising activities, which can cause serious damage to children's physical, intellectual and moral development.'

of the Council of Europe,[195] and the Venice Commission,[196] while on 15 July 2021, the Commission launched infringement proceedings against Hungary in relation to the new legislation. This was on the basis that, in addition to breaching the Audiovisual Media Services Directive, the e-Commerce Directive, the freedom to provide services and the free movement of goods, and some data protection provisions, it also violates human dignity, freedom of expression and information, the right to respect of private life and the right to non-discrimination as enshrined in the EU Charter of Fundamental Rights as well as the values laid down in Article 2 TEU.[197] This development was used by the Government to tie Hungary's debates with the European Union to the accusation that under the pretext of sensitisation, the persons and organisations offering such educational sessions are in fact trying to 'influence the sexual development of children' (i.e. to actually 'recruit'). The Prime Minister said that 'Brussels has clearly attacked Hungary […] because of the child protection act. The Hungarian laws do not allow sexual propaganda in the kindergartens, schools, television and advertisements. Brussels is now demanding the amendment of the law on education and child protection regulations. Their grievance is that in our country it is not allowed what has become a steady practice in Western Europe. There, LGBTIQ activists have access to kindergartens and schools, they are the ones who provide sex education [to the children]. They want the same thing here [in Hungary], and for this reason the Brussels bureaucrats are using threats, start infringement proceedings, that is, they abuse their powers. Our children's future is at stake, so we cannot back down regarding this issue.'[198]

Further intensifying the anti-LGBTIQ propaganda, on 21 July 2021, the Government initiated a referendum asking Hungarian voters five questions, including whether they supported that gender reassignment surgeries could be promoted for minors, and sessions portraying different sexual orientations be held for minors in educational institutions without the approval of the parents.[199] The referendum was held on the same day (3 April 2022) as the Hungarian general election, but it was invalid, as several voters intentionally cast invalid votes to protest against the anti-LGBTIQ campaign, and therefore the proportion of valid referendum votes did not reach the required threshold (50 % of all those with the right to vote).[200] Notwithstanding this result, the Government continued the campaign, claiming that the EU institutions' ulterior motive for withholding the funds in the context of the conditionality mechanism and the recovery and resilience facility is Hungary's resolution to protect Hungarian children from the 'gender-propaganda' and the country from immigration. By way of example, in December 2022, the Prime Minister said that 'Hungary has fulfilled all the conditions that it has agreed on with the European Commission. The Brussel bureaucrats are coming up with new conditions, they want to impose their will on us with regard to immigration, sanctions [against Russia] and gender. Hungary is complying with its obligations, but with regard to the questions of immigration, gender and the sanctions, we are representing the interests of the Hungarian people and not those of Brussels.'[201]

In the country report for 2019, the author wrote that the 'political and social context is thus not conducive to the work of the Authority, however, the Authority has not been attacked despite the fact that it has found in favour of complainants belonging to or representing societal minorities in a number of sensitive cases'. Examples quoted include the case of the Numbered Streets, where the leaders of the municipal council were

[195] See: https://pace.coe.int/en/files/29712/html; and https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe?redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2Flgbti.
[196] See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)050-e.
[197] European Commission (2021), EU founding values: 'Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people', 15 July 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668.
[198] See: https://444.hu/2021/07/21/orban-gyermekvedelmi-nepszavazast-kezdemenyez.
[199] See: https://444.hu/2021/07/21/orban-gyermekvedelmi-nepszavazast-kezdemenyez.
[200] See: https://hungarytoday.hu/child-protection-referendum-invalid-result-outcome-hungary/.
[201] See: https://hirado.hu/belfold/cikk/2022/12/10/orban-viktor-a-bevandorlas-a-gender-es-a-szankciok-kerdeseben-a-magyar-emberek-erdekeit-kepviseljuk

representatives of the ruling party, and a case in which the Authority found that the Ministry of Human Capacities (EMMI) had engaged in discrimination. The ministry's website listed certain benefits related to family status and provided information about who was eligible for these benefits. However, in relation to one such benefit (a tax deduction), the ministry's website only mentioned married couples as being eligible, but did not state that this benefit was also available for registered (same-sex) partners.[202] The author also reported that there was no political pressure or hostility perceivable from the trends concerning the Authority's budget.

However, the sudden abolition of the Authority and the transfer of its mandate to the Ombudsman, who – as opposed to the Authority – has been practically silent on all these issues, especially after a new Ombudsman took office in autumn 2019, suggests in the author's view, that the Authority's activities in these politically sensitive areas might have played a role in the decision on the organisational reshuffling that was not preceded by any consultation with stakeholders, and was in fact carried out despite explicit objections from many of them.

7.3 Institutional architecture

In Hungary, the designated body forms part of a body with multiple mandates. As described above, the single-mandate Equal Treatment Authority was abolished, and its mandate was transferred to the Ombudsman as of 1 January 2021.

The Ombudsman has the right and obligation to look into any fundamental rights violation. Under Article 1 of the Ombudsman Act, the Ombudsman must pay special attention to the protection of (i) children's rights; (ii) the rights of national minorities living in Hungary; (iii) the rights of the most vulnerable social groups; (iv) environmental rights.

The Ombudsman has two deputies: the Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (Minorities Deputy) and the Deputy Ombudsman Responsible for the Protection of the Interests of Future Generations (i.e. environmental rights).

When the Equal Treatment Authority's mandate was transferred to the Ombudsman's Office, an Equal Treatment Directorate was set up to carry out the tasks of the Authority. However, as mentioned above, and as noted with concern by the Venice Commission, neither a Director General nor a Deputy Director General for Equal Treatment has been appointed to date, over two years after the merger. Former staff members of the Equal Treatment Authority, some of whom have continued to work at the Ombudsman's Office, told the Háttér Society[203] that the idea of a directorate was only put in place to create the impression that there would be more autonomy for the equality mandate, but in reality 'it is a department like any other'.

Under Article 39/M of the Ombudsman Act, the Equal Treatment Directorate shall cooperate with the Minorities Deputy in cases where the ground for discrimination is affiliation with a national minority. As mentioned above, the complainant has a choice as to whether he/she wants the Ombudsman to act in his original capacity or in his capacity as successor to the Authority. If the complainant does not make a choice or requests the launching of both types of procedure, the Ombudsman must act on the basis of the Equal Treatment Act. If however, the complaint concerns discrimination based on affiliation with a national minority, the Minorities Deputy can decide which procedure the Ombudsman should follow in the investigation of the complaint.

[202] http://hatter.hu/hirek/sajtokozlemeny-ebh-nem-rejtegetheti-tovabb-az-emmi-a-szivarvanycsaladokat.
[203] Háttér Society (2021), *Information on the Abolishment of the Equal Treatment Authority in Hungary. A Briefing Written for the Experts of the Venice Commission on 15 September 15, 2021*, https://en.hatter.hu/sites/default/files/dokumentum/kiadvany/hatter-venicecommission-eta.pdf.

7.4 Status of the designated body – general independence and resources

a) Status of the body

(i) Status: the Ombudsman and the Deputies are constitutional positions established by Article 30 of the Fundamental Law.

(ii) Selection of governing body: the Ombudsman and the Deputies are elected by the Parliament with a two-thirds majority. Under Article 5 of the Ombudsman Act, the Ombudsman is nominated by the President of the Republic and the Deputies are nominated by the Ombudsman. The candidate for the position of Ombudsman shall (i) have a law degree; (ii) be eligible to vote; (iii) be at least 35 years of age; and (iv) possess outstanding theoretical knowledge or at least 10 years of experience in the area of fundamental rights. The term of office for both the Ombudsman and the Deputies is six years and they can be re-elected once.

(iii) Sources of funding: the equality body is financed from the central state budget. Under Article 41 of the Ombudsman Act, the Ombudsman's Office – providing the institutional framework for the Ombudsman's activities – is a so-called 'special status organisation', the budget of which constitutes an independent chapter within the central state budget. The Ombudsman has full autonomy in how the budget earmarked for the chapter is spent.

(iv) Powers to recruit and manage staff: the Ombudsman has the right to recruit and manage his/her staff, and exercises the employer's rights with regard to all staff members, including the Deputies (with the exception of the election and dismissal of the Deputies).

(v) Accountability: the Ombudsman is only accountable to the Parliament, to which he or she shall submit a report on an annual basis. Under Articles 16 and 17 of the Ombudsman Act, the Ombudsman can be removed only by the Parliament and only if (i) they fail to terminate a conflict of interest; (ii) they cannot perform their tasks for more than 90 days due to circumstances for which they are not at fault (e.g. illness); or (iii) they do not perform their tasks for more than 90 days due to circumstances for which they are at fault, or fail to make a declaration of assets, or provide false information in their declaration of assets.

The Ombudsman and the Deputies enjoy the same type of immunity as members of Parliament.

b) Independence of the body

While on paper, the guarantees of independence (in terms of election, removal, institutional framework, budgetary independence) are in place, concerns may be raised with regard to the functional independence of the Ombudsman. As mentioned above, in its June 2021 report, the Sub-Committee on Accreditation of GANHRI expressed the view[204] that the Ombudsman 'has not effectively engaged on and publicly addressed all human rights issues, including in relation to vulnerable groups such as ethnic minorities, LGBTI, refugees and migrants as well as constitutional court cases deemed political and institutional, media pluralism, civic space and judicial independence. The SCA is of the view that the CFR [i.e. the Ombudsman] has not spoken out in a manner that promotes protection of all human rights. The failure to do so demonstrates a lack of sufficient independence. Therefore, the SCA is of the view that the CFR is operating in a way that has seriously compromised its compliance with the Paris Principles'. The Paris Principles set out the internationally agreed minimum standards that national human rights institutions (NHRIs) must meet to be considered credible. They require NHRIs to be

[204] Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions (2021), *Report and Recommendations of the Virtual Session of the Sub-Committee on Accreditation* (SCA), 14-24 June 2021.

independent in law, membership, operations, policy and control of resources. NHRIs that comply with the Paris Principles are accredited with 'A status', while those that partially comply are accredited with 'B status'.

For these reasons, among others, the SCA recommended that the Hungarian Ombudsman be downgraded from 'A status' to 'B status'. The decision on the downgrading eventually became final in 2022, since the Ombudsman failed to make time for a meeting with the SCA and refute the SCA's concerns.[205]

c) Resources

(i) The annual budget of the body: under Chapter IV of Act XC of 2021 on Hungary's Budget for the Year 2022,[206] the budget of the Ombudsman is around EUR 7.65 million (HUF 2.73 billion).

(ii) The share of the annual budget dedicated to the equality body mandate: as far as the equality budget is concerned, it is worth pointing out that during its meeting with the Ombudsman, the Venice Commission was not provided with accurate information on the Equal Treatment Directorate's budget: 'the Venice Commission was informed that 462 000 000 HUF [about EUR 1.27 million], a budget of ETA [the Equal Treatment Authority] for 2020, was added to the overall budget of CFR [the Ombudsman's Office] for 2021 for tasks related to equal treatment, internal distribution of which is a competence of the CFR [the Ombudsman]. The Venice Commission has not been provided with additional information concerning the internal distribution of the budget, in particular the budget distributed to the ETD [Equal Treatment Directorate].' In the absence of accurate information, the Venice Commission could only remain 'hopeful that ETD is under no risk of under financing'.[207]

In Hungary's annual budget for the year 2022, only the total budget of the Ombudsman's Office is earmarked, therefore, there is no publicly available information on how much of the total amount is spent on the equality mandate.

(iii) Total number of staff: according to the Ombudsman's website, the actual number of staff was 176 on 1 January 2022, and 31 positions were vacant.[208]

(iv) Number of staff dedicated to the equality mandate: there is no publicly available information on the number of staff dedicated to the equality mandate. According to the Ombudsman's response No. AJB-812-2/2023 provided on 10 February 2023 to the Háttér Society's freedom of information request, there are six case officers at the Equal Treatment Directorate who investigate the discrimination complaints submitted to the Ombudsman, and three positions are unfilled: those of the Director and the Deputy Director, and one case officer is on a long-term leave. Based on this information it seems that the understaffing that the Venice Commission found concerning (see under section 7.1) continues to persist.

[205] Global Alliance of National Human Rights Institutions (2022), *Accreditation status as of 27 April 2022*, https://ganhri.org/wp-content/uploads/2022/04/StatusAccreditationChartNHRIs_27April2022.pdf.

[206] Act XC of 2021 on Hungary's Budget for the Year 2022 (*2021. évi XC. törvény - Magyarország 2022. évi központi költségvetéséről*), 25 June 2021, https://net.jogtar.hu/jogszabaly?docid=a2100090.tv.

[207] Venice Commission (2021), *Hungary - Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-e.

[208] See: https://www.ajbh.hu/documents/10180/806018/Elemi+k%C3%B6lts%C3%A9gvet%C3%A9s+2022.+%C3%A9v.pdf/a164f486-4b4c-6179-1ceb-85d9478729d0?t=1647424896561.

7.5 Grounds covered by the designated body

The Ombudsman has a mandate to deal with all the grounds contained in the open-ended list of Article 8 of the ETA: (a) sex, b) racial affiliation, c) colour of skin, d) nationality (not in the sense of citizenship), e) belonging to a national minority, f) mother tongue, g) disability, h) health condition, i) religion or belief, j) political or other opinion, k) family status, l) maternity (pregnancy) or paternity, m) sexual orientation, n) gender identity, o) age, p) social origin, q) financial status, r) part-time nature of employment legal relation or other legal relation aimed at labour, or determined period thereof, s) belonging to an interest representation, t) any other situation, attribute or condition of a person or group). The Ombudsman's mandate therefore extends to all possible grounds on the basis of which unlawful differentiation may be made.

As a result of the Ombudsman's quasi-judicial character, the level of attention given to the grounds depends mainly on the number of complaints concerning the different grounds.

7.6 Competences of the designated body – and their independent exercise

a) Independent assistance to victims

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

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

In practice, since the Ombudsman's primary function in his equality mandate is the quasi-judicial adjudication of discrimination complaints, he is rather restricted in the assistance he provides to victims (in forms other than investigating and deciding their grievances).

The Ombudsman's website provides general information on the procedure (what the protected grounds are, who can initiate the procedure, what the petition should contain, what sanctions the Authority may impose, etc).

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

As described below, the Ombudsman has standing to bring discrimination complaints to court on behalf of identified victims and intervene in legal cases involving discrimination. However, most probably due to its different focus (quasi-judicial role), it has not exercised these rights in the first two years of its operation as Hungary's equality body.

The 'assistance to victims' competence is not exercised by third parties.

b) Independent surveys and reports

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

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

organisations, especially to the Council of Europe, concerning the principle of equal treatment'. According to (i) in the same Paragraph, the Ombudsman 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 Ombudsman possesses information about the nationwide situation concerning discrimination. Therefore, in the author's view, the Ombudsman's right to carry out such surveys is not to be questioned.

The mandate to publish independent reports concerning discrimination is set out in Article 14(1)(e) of the ETA (the Ombudsman shall 'regularly inform the public and the Parliament about the situation concerning the enforcement of equal treatment'), and finally Article 14(2) of the ETA ('in order to continuously inform the public, the Ombudsman shall regularly publish its reports, proposals and detailed information concerning its activities on its website').

It is also the obligation of the Ombudsman to submit an annual report to the Parliament, in accordance with Article 30 of the Fundamental Law. This report contains a chapter on the Ombudsman's work under the equality mandate (in 2021, out of the 192-page long annual report, only 16 pages were dedicated to the equality mandate, with 14 of these containing case summaries; in 2022, 13 pages were dedicated to the work under the equality mandate, with 10 pages containing case descriptions).

Mention may be made of some reports produced by the Ombudsman's Office, including the Position Paper No. 5/2021 issued by the Ombudsman's Minorities Deputy on the problems arising with regard to the education of Roma children in Gyöngyöspata,[209] and a joint report by the Ombudsman and the Minorities Deputy regarding the practice of identity checks by the police and how they impact the Roma minority.[210] It must be pointed out, however, that it is not the Equal Treatment Directorate that issues these reports, but the Ombudsman and the Deputy in their original capacity.

There is no publicly available document or other information regarding any strategic planning done by the Equal Treatment Directorate. Due to its quasi-judicial function (paired with its staffing shortages), the Directorate seems to follow a primarily complaints-based approach, although at the end of 2021, the Equal Treatment Directorate launched a comprehensive *ex officio* investigation into the accessibility for persons with disabilities of the offices of general practitioners in 10 larger ('county level') towns,[211] which suggests that there are attempts to focus on some systemic issues.

c) Recommendations

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

The mandate to make recommendations concerning discrimination is set out in Article 14(1)(c) of the ETA (the Ombudsman shall 'review and comment on drafts of legal acts and reports concerning equal treatment'); Article 14(1)(d) of the ETA (the Ombudsman shall 'make proposals concerning governmental decisions and legislation

[209] Position Paper No. 5/2021.

[210] Ombudsman and Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (2021), *Jelentés az AJB-729/2021. és az AJB-730/2021. számú ügyekben, egy roma nemzetiségű személlyel szemben fokozott ellenőrzés keretében foganatosított rendőri intézkedések vizsgálatát érintően* (Joint Report in Cases AJB-729/2021 and AJB-730/2021 Regarding Police Measures Taken vis-à-vis a Person of Roma Nationality Under the Scope of Enhanced Supervision).

[211] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/9886 4dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 98.

pertaining to equal treatment'); and finally Article 14(2) of the ETA ('in order to continuously inform the public, the equality body shall regularly publish its reports, proposals and detailed information concerning its activities on its website').

In practice, recommendations made by the Ombudsman as the equality body are very rare (most probably due to lack of staff and the focus on the body's quasi judicial function) and are primarily of legislative and not of policy nature. According to the Ombudsman's response no. AJB-812-2/2023 provided on 10 February 2023 to Háttér Society's freedom of information request, in 2021-22, the Equal Treatment Directorate was approached for contributions by the Ombudsman's Department for Public Law (which is primarily responsible for formulating the Ombudsman's recommendations) in a total of four cases, out of which the Directorate contributed to the recommendations formulated by the Ombudsman regarding two issues: the proposal for the Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (which was sent out by the Government to the relevant state bodies for comment) and a draft regarding the amendment of Government decrees pertaining to higher education (where the Directorate formulated an opinion on how the university admissibility points shall be calculated with regard to students with disabilities). In two other cases (one concerning the amendment of certain employment-related laws, and the other the conditions of using sign-interpretation services), the Directorate had no comments to make.

These recommendations and comments are not public, therefore, it is not possible to provide a substantive assessment of their quality and degree of independence.

As far as the effectiveness of the process and the implementation of the recommendations are concerned, according to the 2021 annual report, the Ombudsman pointed out that the number of draft laws sent to him for commenting was much lower than in previous years (which he attributed to the epidemic and the special legal order introduced because of it), and that the deadlines for commenting were very often extremely short. Out of the 33 draft laws sent for comment, the Ombudsman provided comments and recommendations on 25 of them.[212]

There is no information on the rate of compliance with the recommendations. The 2021 report mentions two cases in which the Ombudsman's recommendations were taken on board: one case concerned students with disabilities taking their high school graduation exams. In this case, the Ombudsman's recommendation that such students should be allowed to be accompanied by the persons providing them with physical assistance or the sign interpreter was accepted.[213]

The Ombudsman and his deputies also have the competence to set out recommendations on the basis of their original mandate outlined in Article 2 of the Ombudsman Act, according to which the Ombudsman has the right to comment not only on draft laws, but also on longer term development plans and concepts, including plans concerning the natural and constructed environment. Furthermore, the Ombudsman can launch *ex officio* investigations into systemic problems, and not only into individual complaints, and the reports concluding such investigations very frequently contain recommendations concerning larger policy issues. For example, Position Paper No. 5/2021 of the Minorities

[212] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 127.

[213] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 128.

Deputy contains not only a recommendation to the Deputy State Secretary for Social Inclusion that an adequately resourced and incentivised inclusive pilot integration programme should be developed to facilitate the integrated education of Roma and non-Roma pupils in the Gyöngyöspata school, but also a recommendation for the development of a national system of targeted financial and methodological support for schools where the ratio or disadvantaged or multiply disadvantaged children exceeds 15 %.[214]

d) Prevention, promotion and awareness-raising

The designated body has competence to engage in the prevention of discrimination and in the promotion of equal treatment, and to adopt a strategy defining how it will engage in public dialogue, communicate with individuals and groups at risk of discrimination, provide training and guidance, and promote equality duties, equality mainstreaming and positive action among public and private entities.

Article 14 of the ETA listing the powers of the equality body is formulated very broadly, and several items of the list can be interpreted to include these competencies. Article 14(1)(g) of the ETA prescribes that the equality body shall 'continually provide information to those concerned and provide them with assistance in acting against the violation of equal treatment'. Article 14(e) stipulates that the equality body shall regularly inform the public about the situation regarding the implementation of the requirement of equal treatment. Article 14(f) states that in the course of performing its tasks, the body shall cooperate with civil society organisations and state bodies.

Article 2(5) of the Ombudsman Act prescribes that the Ombudsman shall promote compliance with human rights and their protection through social awareness raising activities and cooperation with those organisations and national institutions that aim to promote the protection of fundamental rights.

Thus, although the power is in place, in practice, these activities are completely absent from the work of the Equal Treatment Directorate (see also what is said about this issue under section 7.1).

In the period of 2009-2014, a grant was provided to the Equal Treatment Authority with the aim of enhancing its effectiveness and accessibility within the context of the Social Renewal Operative Programme 5.5.5 (the TÁMOP project). The TÁMOP project was financed by the European Social Fund and the Hungarian state with a budget of approximately EUR 3 million.[215] The project's module aimed at the raising of the general public's awareness included the following activities:

- forwarding the Authority's newsletter to over 2 500 addresses;
- organising 10 workshops for 100 participants each (6 in universities) participating in over 350 events (conferences, workshops) aimed at transferring knowledge about the issue of non-discrimination;
- arranging close to 1 000 appearances on radio and over 1 700 on television;
- publishing 3 000 copies of a short film about non-discrimination and 3 000 copies of a multimedia DVD on the issue;
- organising different competitions (for short films dealing with non-discrimination; for artwork by young people that was later turned into a travelling exhibition; and a design competition);
- placing over 23 000 posters and 200 giant posters and circulating over 80 000 leaflets.

[214] Position Paper No. 5/2021, p. 78.

[215] Unless indicated otherwise, the results of the programme are presented on the basis of its closing study, which is not available online any more due to the fact that the Equal Treatment Authority's website was shut down and made unavailable after the Ombudsman took over the equality mandate.

An additional element consisted of a series of training events held by the Authority for teachers, social workers and the media, combined with workshops with NGOs and public administration staff members. A 30-hour training module (a combination of awareness raising and legal knowledge transfer) was developed, and a total of 80 training events were held. The series of training events ended in March 2014; in total over 1 500 people completed the training.

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

While the Authority could not continue to disseminate information and engage in dialogue with NGOs and social partners with the same intensity when the extra funding came to an end, it continued to place emphasis on awareness raising until the end of its operations, and included accounts of such activities in its annual reports.

As opposed to this, the sections written in the Ombudsman's 2021 and 2022 annual reports about the activities of the Equal Treatment Directorate contain no mention whatsoever about any preventive, promotional or awareness-raising activities or events, reflecting the absence of such efforts.

In the author's view this is the direct consequence of replacing the single-mandate Authority with the Ombudsman's Office, which is a large organisation with a wide range of issues covered. The Equal Treatment Directorate does not have a Director or a Deputy Director, nor does it have its own communications unit. The Directorate is therefore in a disadvantaged situation in the inevitable competition within the organisation for resources and attention. In the author's opinion, this – paired with the fact that its primary focus is the adjudication of the complaints and not awareness raising – logically leads to the radical reduction in awareness raising and promotional activities.

It must be added that the Minorities Deputy has been proactively seeking cooperation with NGOs involved in the protection of minorities. An example is the December 2022 conference on hate crimes, which the Deputy organised together with an association of judges, and which was attended by legal professionals and NGOs active in the field.[216]

e) Other competences

The equality body's powers and responsibilities are provided in Article 14 of the ETA. In addition to its quasi-judicial powers, its right to launch *actio popularis* legal proceedings, and the responsibilities discussed above, the list includes:

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

[216] Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 145.

- performing the tasks of the enforcement body responsible for enforcing Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

As mentioned above, the key element of the equality body's activities is investigating and deciding on individual instances of discrimination. As a result, no significant emphasis has been placed on the additional functions.

7.7 Legal standing of the designated body

In Hungary, the designated body has legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example, as an *amicus curiae*.

Under Article 14(1)(g) of the ETA, the Ombudsman 'shall continuously provide information to those concerned and provide assistance with regard to acting against the violation of equal treatment'.

Under Article 18 of the ETA, unless stipulated otherwise by the law, the Ombudsman may engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment, provided he or she has been authorised by the victim to do so.

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

Under Article 20 of the ETA, if the principle of equal treatment is violated, a lawsuit for the infringement of inherent rights, a labour lawsuit or a lawsuit related to a civil service relationship may be brought by – among others – the Ombudsman, provided that the violation of the principle of equal treatment was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately.

Due to inadequate staffing, these types of activities were rather rare during the 2005-2020 period. The Equal Treatment Authority launched one *actio popularis* lawsuit and intervened in only one case during its entire history.[217]

The intervention concerned a school segregation case. The lawsuit was launched by the regional Office of Public Administration against the municipal council with the aim of ending the segregation of Roma pupils in a town, and the Authority intervened in favour of the Office. Although, in another lawsuit (launched by an NGO), the Supreme Court eventually declared that the municipal council was liable for the segregation, the Office of Public Administration's petition was rejected by the court in that particular procedure, so the Authority's intervention was unsuccessful. The intervention took place in 2005 and the Authority never intervened in any legal proceedings after that.[218]

The *actio popularis* case was launched on the basis of a food company's sexually charged advertisement. The company advertised its products by depicting virtually naked women covered in different types of food. However, the courts of first and second instance concluded that no harassment had taken place. The Metropolitan Appeals Court was of the

[217] Information from Authority staff.
[218] Equal Treatment Authority (2007) *Annual Report 2006*, p. 58.

view that the advertisements 'did not depict the women in a humiliating, demeaning situation. Presenting the female body together with food is not inevitably humiliating or demeaning; the advertisements […] do not create a connection or identify the meat or other food to be eaten with the female body, they do not present the human body as a product.'[219]

The Ombudsman did not launch any *actio popularis* lawsuits in 2021 and 2022 either, nor did he intervene in any court case.[220]

7.8 Dispute resolution

a) Quasi-judicial functions

In Hungary, the body is a quasi-judicial institution. It can issue binding enforceable decisions. It does not issue non-binding opinions.

(i) Power to impose sanctions: under Article 14(1)(a) of the ETA, the Ombudsman shall, based on a complaint or *ex officio*, conduct an investigation to establish whether the principle of equal treatment has been violated, and hand down a decision on the basis of the investigation.

Proceedings usually start with a complaint. (*Ex officio* investigations were rare in the 2005-2020 period: between one and four were conducted each year.[221] In 2021, the trend did not change with the merging of the Authority and the Ombudsman, but in 2022, the Ombudsman as equality body launched *ex officio* investigations into the accessibility of the offices of general practitioners in 10 larger towns.[222]) The equality body communicates the complaint to the other party. The other party responds to the complaint in writing. The complainant has the opportunity to comment on the other party's response, and at this point the equality body usually conducts a hearing where both parties are present. A decision may also be handed down without a hearing.

Before 1 January 2018, it was mandatory as a rule to conduct a hearing. As of that date, under Article 74 of the GAP, decisions are usually made without a hearing. While the legal amendment did not change the Equal Treatment Authority's practice of holding hearings as a main rule, the Ombudsman does not seem to follow this practice. In 2021, only nine hearings were held, and although according to the 2021 annual report, this was due to the epidemic,[223] the end of the health crisis has not changed the trend: in 2022, the Ombudsman dealt with 463 cases, handed down 180 decisions, but held as few as 18 hearings.[224]

The equality body is obliged by law to discover and establish all the facts of the case, so it does not only rely on evidence provided by the parties. The equality body may resort to

[219] See: https://drive.google.com/file/d/1wVlbHojxtASIs6WwvOIDrVfrR9zz0UOi/view.
[220] Source: the Ombudsman's response no. AJB-812-2/2023 provided on 10 February 2023 to the Háttér Society's freedom of information request.
[221] Information from Authority staff.
[222] See: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 106.
[223] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 97.
[224] Commissioner for Fundamental Rights (2023), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2022* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2022), available at: https://nemzetisegijogok.hu/documents/2657648/7632484/%C3%89ves+besz%C3%A1mol%C3%B3+2022.pdf/bc5c99e1-cfb0-1c16-6a4b-034afe9a7a7f?version=1.0&t=1681298655503, p. 106.

different sources of evidence, witnesses, documents and expert opinions; these are the methods it most frequently applies.

Based on the results of the proceedings, the equality body hands down a binding decision. Under Article 17/A of the ETA, if the equality body has established that the provisions ensuring the principle of equal treatment have been violated, it may apply sanctions.

(ii) Nature and level of sanctions that can be imposed: within the scope of its sanctioning powers, the equality body may a) order that the situation constituting a violation of law be terminated; b) prohibit the future continuation of the conduct constituting a violation of law; c) order that its decision establishing the violation of law be published; d) impose a fine; e) apply a sanction determined in a special act. The sanctions can be applied jointly.

Under Paragraph (5), the sum of the fine imposed by the equality body can range from approximately EUR 140 (HUF 50 000) to approximately EUR 16 665 (HUF 6 million).

There is thus a relatively wide variety of sanctions set by law that may be effectively imposed by the equality body.

The trends in sanctioning are described in detail in section 6.5 above. Here it suffices to reiterate that while during its last years of operation, the Equal Treatment Authority imposed fines in about half of the cases where it concluded that discrimination had taken place, the Ombudsman seems much more cautious in this regard and usually refrains from applying fines: in 2021, he imposed a fine in 5 out of 26 cases where the perpetration of discrimination was concluded, whereas in 2022, only 3 sanctions were applied.

As far as non-pecuniary sanctions are concerned, the court decision handed down in the Numbered Streets case opened up a number of possibilities for the Authority. In its Decision No. EBH/67/22/2015,[225] the Authority established that the municipality of Miskolc subjected the residents of a segregated, mostly Roma neighbourhood to the threat of homelessness or having to move to other segregated areas through a series of highly controversial measures. By doing so, the municipality discriminated against the residents on the basis of their social status, financial situation and Roma origin. In addition to other sanctions, the Authority obliged the municipality to put an end to the discriminatory situation by developing an action plan detailing where it could provide the tenants of the Numbered Streets with adequate housing in Miskolc. The municipality was required to explain how it would do this and the resources it would use. The Authority also obliged the municipality to prepare another action plan detailing how it would provide housing to those who had already become homeless or faced a direct threat of becoming so due to the municipality's discriminatory practices.

The municipality challenged the court's decision, claiming – among other things – that the ETA's provision mandating the Authority to oblige discriminators to terminate a violation does not allow the Authority to prescribe specific obligations for the party it finds to be at fault. In its Decision No. 6.K.33.048/2015/17, handed down on 25 January 2016,[226] the Metropolitan Administrative and Labour Court rejected the municipality's request. The court pointed out that the statutory possibility of obliging the discriminator to terminate the injurious situation would be devoid of meaning when the violation is an omission if the Authority could not oblige the violator to take specific action. The Authority was thus authorised to oblige the municipality to draft action plans.

(iii) Possibility to appeal (to the body itself or to courts): as explained above, the Ombudsman's decision may not be appealed within a public administrative procedure, but

[225] Equal Treatment Authority, EBH/67/22/2015, 15 July 2015.
[226] Metropolitan Administrative and Labour Court, 6.K.33.048/2015/17, 25 January 2016, available at: http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara using the search function.

a judicial review of the decision is possible. The lawsuit falls within the scope of authority and exclusive competence of the Metropolitan Court.

(iv) Enforcement of binding decisions: the Authority did not usually take specific follow-up measures to track and ensure implementation of its decisions. It remains to be seen whether the Ombudsman's practice will be different in this regard.

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

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

It remains to be seen whether the Ombudsman's approach will in any way be different.

b) Amicable settlements

As explained in section 6.1 above, under Article 75 of the GAP, public administrative authorities are obliged to try to resolve the conflict by forging an agreement between the parties, if the case is decided in a hearing. Pursuant to Article 83 of the GAP, if the parties reach an agreement at the hearing or otherwise, and the agreement complies with the laws and the Fundamental Law and contains adequate provisions concerning the deadline for compliance and the bearing of procedural costs, then the proceeding authority approves it and includes it in a formal decision.

As a public administrative body, the equality body is also subject to the above obligations regarding friendly settlements. Under Article 16 of the ETA, the Ombudsman as the equality body is obliged to try to forge a friendly settlement between the parties. In 2021, the parties concluded a friendly settlement in 8 cases (a total 462 complaints were submitted and 26 decisions were made concluding that discrimination had taken place).

7.9 Procedural safeguards

There are no specific limitations and safeguards regarding the different roles of the equality body, and the Hungarian context is especially complicated in this regard.

Since non-discrimination is a fundamental right enshrined in the Fundamental Law (Hungary's constitution), the Ombudsman was already authorised to examine discrimination complaints under his mandate stemming from the Ombudsman Act even before his office's merger with the Equal Treatment Authority. Under his original mandate, if the examination based on the procedural rules of the law on the Ombudsman Act concludes that there was a violation, the Ombudsman may issue non-binding opinions. After the transition, the complainant now has a choice as to whether he/she wants the Ombudsman to act in his original capacity on the basis of the Ombudsman Act or in his capacity as successor to the Authority on the basis of the ETA.

The law expressly stipulates that it is possible for the Ombudsman to investigate a complaint in his capacity as Ombudsman first, and then, after that examination is completed (e.g. with an opinion) also as the successor to the Authority if the complainant requests so or the Ombudsman decides so *ex officio* on the basis of the results of the first investigation.

Although in such cases, a different person would act on behalf of the Ombudsman (since the equality body functions to be fulfilled under the ETA are performed by a separate directorate within the Ombudsman's Office), the quasi-judicial role that the Ombudsman's Office plays in the second type of procedure requires qualities (such as impartiality) that are impossible to guarantee if it has already investigated the case and concluded that there has been discrimination. Procedural requirements regarding quasi-judicial procedures would also be compromised. By way of example, under the Ombudsman Act, the Ombudsman may hear any employee of the authority that he is investigating. However, the Act does not prescribe the types of warnings that the code of administrative procedure requires when an administrative authority hears a witness. This can cause significant problems if the Ombudsman hears in the quasi-judicial follow-up procedure a witness who was already heard in the first examination and was not duly warned (even if the earlier hearing could not formally be taken into account during the hearing in the follow-up procedure).

These concerns were mostly shared by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, which examined the transfer of the Authority's tasks and powers based on a request from the Parliamentary Assembly of the Council of Europe. In its opinion,[227] the Venice Commission elaborated on the procedural concerns stemming from the dual nature of the Ombudsman's procedure, depending on the capacity in which he acts in a case of discrimination: 'Finally, the new legislation enables the Commissioner (i) to investigate a complaint first in his capacity as Ombudsman, and then, after that examination is completed (ii) to act as the successor of the ETA if the complainant requests or the Commissioner decides so ex officio (Section 39/M(6)). The Venice Commission observes in this respect that the Commissioner's quasi-judicial role in the second type of proceedings requires an impartiality that he/she is unlikely to guarantee after having already examined the case under the Commissioner Act'. The Commission held that the 'collision of the competences already enjoyed by the Commissioner under Act CXI [of 2011] and those acquired in his/her capacity as successor of the Equal Treatment Authority, is a clear demonstration of a risk that may undermine the effectiveness of the work in the field of promoting equality and combating discrimination'.

With regard to the relationship between investigations and litigation, the following issue is raised. If the Ombudsman as equality body starts an investigation (upon request or *ex officio*), he must finish that investigation with a formal decision concluding that (i) there has been no violation of the principle of equal treatment; or (ii) there has been a violation of the principle of equal treatment (in which case the Ombudsman can also impose sanctions, including a fine). Alternatively, if the parties reach a friendly settlement and it meets the requirements of the law, the Ombudsman as the equality body approves the settlement with a formal decision. These decisions are open to judicial review, so the concerned parties may challenge them before the Metropolitan Regional Court (which has exclusive competence for such cases). In this case, the equality body becomes a litigant party (as the defendant in the case), and will obviously have to rely on the information gathered in the course of the investigation (as a conclusion to which it has delivered the decision that is the subject of the judicial review).

[227] Venice Commission (2021), *Hungary – Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-eu.

The equality body can be a litigant in the position of the claimant when it launches an *actio popularis* lawsuit. However, based on the above, it seems fair to conclude that the equality body cannot end up in the position whereby it uses information gathered through its own investigation in a lawsuit that it launches as an *actio popularis* litigant, since all of its investigations (launched upon request or *ex officio*) must end in a formal decision, so it cannot simply drop a case and then take it up as an *actio popularis* lawsuit that it brings before a court.

7.10 Data collection by the designated body

a) Registration of complaints and decisions

In Hungary, the designated body registers the number of complaints of discrimination made and/or decisions (by ground, field, type of discrimination, etc). These data are available to the public.

According to the Ombudsman's 2021 annual report, the equality body processed 462 cases in 2021. The Ombudsman reached 169 administrative decisions: 76 inadmissibility decisions, 85 substantive decisions (with 26 concluding that discrimination had taken place) and 8 approvals of friendly settlement. Out of the 26 cases where discrimination had occurred, 11 concerned goods and services, 5 concerned employment, 3 concerned education, 1 concerned social protection and healthcare, and 6 concerned miscellaneous areas.

Out of these 26 cases, 18 concerned disability, 3 concerned motherhood, and there was one case each for the following grounds: gender, ethnic origin (Roma), gender identity and sexual orientation.[228]

b) Equality data collection

In Hungary, the designated body does not collect general equality data, nor does it have access to such data collected by others.

7.11 Roma and Travellers

As outlined above, the equality body is an administrative decision-making body that investigates complaints, hands down decisions and imposes sanctions on the perpetrators. It does not set its own agenda or priority issues, but rather acts reactively – in accordance with the types of complaints it receives. This prevents the Ombudsman from being consistent in his approach within its equality mandate (whereas in his traditional mandate he can take a consistent approach and implement it through the Minorities Deputy, who has conducted targeted investigations into certain systemic problems concerning the Roma minority).

However, it must also be pointed out that due to the structural characteristics of discrimination in Hungary, a large proportion of the Equal Treatment Authority's complainants came from the Roma minority. For instance, in 2019, racial or ethnic origin was the third most frequently occurring protected ground among the complainants (in 74 cases the alleged ground for discrimination was disability, in 46 cases it was health status, and in 44 cases it was ethnicity). Out of the 44 cases where discrimination was found to have occurred, health status and disability were the grounds in a total of 19 cases (10 and

[228] Commissioner for Fundamental Rights (2022), *Beszámoló az alapvető jogok biztosának és felyetteseinek tevékenységéről 2021* (Report on the activities of the Commissioner for Fundamental Rights and his Deputies, 2021), available at: https://nemzetisegijogok.hu/documents/2657648/7488643/AJBH+besz%C3%A1mol%C3%B3+2021.pdf/98864dd3-2d46-3186-b0be-265d8c6f2d1a?version=1.0&t=1674640241447, p 97.

9, respectively), whereas the discrimination was based on affiliation with a national minority in 7 cases.[229]

Since the 2021 annual report of the Ombudsman does not contain a distribution of the complaints broken down on the basis of the ground concerned, it is not possible to tell whether this trend has continued after the dissolution of the Equal Treatment Authority.

Some of the investigations launched *ex officio* by the Authority concerned Roma persons (for instance, the Rimóc 'bike' case concerning disproportionate fining practices applied by the local police in relation to petty offences committed by cyclists). In 2021, the Minorities Deputy conducted a very thorough *ex officio* examination into the educational situation of Roma children in Gyöngyöspata, as a result of which she issued a 70-page position paper outlining the systemic problems and offering solutions.[230] This, however, was not carried out within the Ombudsman's mandate as the successor to the Equal Treatment Authority, but within its original mandate.

[229] The source of these statistics was the Authority's website that was made unavailable by the Ombudsman six months after taking over the Authority's mandate.

[230] Deputy Ombudsman Responsible for the Rights of National Minorities Living in Hungary (2021), *5/2021. számú elvi állásfoglalás a gyöngyöspatai roma gyermekek nevelési-oktatási helyzetével kapcsolatban feltárt egyedi és általános problémákról* (Position Paper No. 5/2021 on the Individual and General Problems Revealed Regarding the Education Situation of the Roma Children in Gyöngyöspata, hereafter: Position Paper No. 5/2021), 5 November 2021, https://www.ajbh.hu/documents/2657648/adba0e8d-7646-7c6d-d13d-2eb39fa4e847.

8 IMPLEMENTATION ISSUES

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

a) Dissemination of information about legal protection against discrimination

The Equal Treatment Authority, which as a Government agency worked under the supervision of the Government, was active in disseminating information about the legal protection against discrimination. The Authority's website (www.egyenlobanasmod.hu) contained a lot of information on the issue, including the relevant legislation, a brief and clearly formulated description of the Authority's scope of competence and the Authority's case law. Unfortunately, the website was made unavailable shortly after its merger with the Ombudsman's Office.

The Ombudsman's website also contains information about the ETA and the Ombudsman's procedure within his equality mandate. However, this is mostly confined to a repetition of the text of the law, and is therefore not sufficiently accessible.

b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment

Mention may be made of the working groups of the Human Rights Roundtable established by the Government in 2012 to discuss the legal, practical and policy issues concerning members of vulnerable groups. However, the working groups meet rather infrequently, and criticism has been voiced regarding the merits of the consultations, too.

For instance, according to the Government website dedicated to the work of the human rights working groups,[231] it seems that out of the 11 working groups (including the working groups on Roma issues, women's rights, disability rights, children's rights, LGBT rights, etc.), only one working group had a meeting in 2022: the civil subgroup on family rights of the Thematic Working Group on Other Civil and Political Rights held a meeting in July 2022.[232] All the other working groups have not had meetings since November 2021.

c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring

There are no systematic measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring.

d) Addressing the situation of Roma and Travellers

Several different bodies and positions have been established with a mandate in relation to Roma inclusion. In 2010, a Secretariat of State for Social Inclusion was set up with responsibility for the social inclusion of the Roma community. Until 30 April 2019, it operated within the Ministry of Human Capacities, but as of 1 May 2019 it was transferred to the Ministry of the Interior with the reasoning that the municipal councils can be very important agents of cooperation, and the affairs related to municipal self-governance belong under the responsibility of the Ministry of the Interior.

Two special commissioners have also been appointed: one of them is responsible for coordinating the preparation and implementation of the 'diagnosis-based' social integration

[231] See: https://emberijogok.kormany.hu/emberi-jogi-munkacsoport
[232] See: https://emberijogok.kormany.hu/download/9/d8/f2000/Eml%C3%A9keztet%C5%91-2022-07-07-Csal%C3%A1djogi%20Civil%20Munkacsoport%20%C3%BCl%C3%A9s.pdf

of Roma people (i.e. the complex programme aimed at promoting the catching up of the 300 most disadvantaged Hungarian villages);[233] the second commissioner is responsible for – among other things – coordinating all governmental activities that are related to the Roma community and require social consultation, and maintaining contact with the national and local Roma minority self-governments.[234]

The Roma Coordination Council was established by Government Resolution 1102/2011,[235] and is tasked with monitoring the progress of the inclusion policies. Its 33 members include the Minister of the Interior, the two special commissioners, the Ombudsman's Minority Deputy, the President of the National Roma Self-Government, and representatives of certain denominations, employers' and employees' unions and the Hungarian Academy of Sciences. The representative of the Equal Treatment Directorate of the Ombudsman's Office is a permanent invitee to the Council's sessions.

Another body is the Inter-Ministerial Committee for Social Inclusion and Roma Affairs, which was set up by Government Resolution 1199/2010[236] with the purpose of coordinating Government activities aimed at promoting the social integration of people living in extreme poverty and improving their living conditions and social situation. The committee consists of representatives of the relevant ministries and is chaired by the Secretary of State of the Ministry of the Interior. The committee's working groups hold consultations with the relevant Government agencies on various issues, including regional development, employment policy, education policy, social policy and healthcare.

The above bodies and functionaries have important roles to play regarding the inclusion of the Roma community. According to an independent monitoring report prepared by civil society organisations on the previous inclusion strategy, 'it is fair to say that affairs of Roma integration have a proper position in governmental structures. According to the interviewed staff members of the Ministry, the decision-making mechanisms need some improvement, but the structure itself provides proper support to issues at hand, all the relevant questions could have significant high-level policy support'.[237]

However, none of these bodies has a very specific, expressly defined role regarding the fight against racism and discrimination. As the same civil society monitoring report states, 'there is no public body specifically tasked to analyse and address antigypsyism in Hungary. Two public bodies that have relevant roles though are the ombudsman for the rights of national minorities and the Roma national self-government. […] Theoretically the [Roma]

[233] Instruction 2/2022 of the Prime Minister on the appointment and the tasks of the Prime Ministerial Commissioner responsible for the implementation of the diagnosis-based social integration strategy (*2/2022 (VI. 7.) ME utasítás a diagnózis alapú felzárkózási stratégia végrehajtásáért felelős miniszterelnöki biztos kinevezéséről és feladatairól*, https://magyarkozlony.hu/dokumentumok/cdf0ade3374965d6ae6a2a17f0bee2465922a7cc/letoltes, http://www.kozlonyok.hu/kozlonyok/index.php?m=0&p=kozltart&ev=2019&szam=24&k=12.

[234] Government Resolution 1297/2022 on the appointment and the tasks of the Government Commissioner Responsible for Roma Relations (*1297/2022. (VI. 17.) Korm. határozat a roma kapcsolatokért felelős kormánybiztos kinevezéséről és feladatairól*), https://magyarkozlony.hu/dokumentumok/6c8ecece3191d585db7347cdf5eff18aa5c9c98c/letoltes.

[235] Government Resolution 1102/2011 on establishing the Roma Coordination Council (*1102/2011. (IV. 15.) Korm. határozat a Roma Koordinációs Tanács (ROK-T) létrehozásáról*), 15 April 2011, https://net.jogtar.hu/jogszabaly?docid=A11H1102.KOR&txtreferer=00000003.TXT.

[236] Government Resolution 1199/2010 on establishing the Inter-Ministerial Committee for Social Inclusion and Roma Affairs (*1199/2010. (IX. 29.) Korm. határozat a Társadalmi Felzárkózási és Cigányügyi Tárcaközi Bizottság létrehozásáról*), 29 September 2010, https://net.jogtar.hu/jogszabaly?docid=A10H1199.KOR&txtreferer=A1000043.TV.

[237] Association of Roma Minority Representatives and Advocates of Nógrád County, Idetartozunk Association, Romaversitas Foundation, UCCU Roma Informal Foundation, Khetanipe Association, Eger Foundation of SZETA, Pro Cserehát Association, Motiváció Educational Association, National Association of Roma Police Officers, Együtt Közösen Egymásért Association, Autonómia Foundation (2018), *Civil society monitoring report on implementation of the national Roma integration strategies in Hungary. Focusing on structural and horizontal preconditions for successful implementation of the strategy*, Brussels, Directorate-General for Justice and Consumers, pp. 7-11, http://autonomia.hu/wp-content/uploads/2018/07/rcm-civil-society-monitoring-report-1-hungary-2017.pdf.

national self-government could have a major role in addressing prejudices. Unfortunately, this was not set as an objective when national self-governments were set up in Hungary. The Roma national self-government has had no memorable public activity to address antigypsyism.'[238]

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

Hungary has taken the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished, although there are certain areas where, in the author's opinion, full compliance with the *acquis* has not been achieved (for details, see sections 11.1 and 11.2).

When adopted in 2003, the ETA itself (Articles 37–62) amended a number of existing laws. Furthermore, in the framework, and as a result of the Government's dialogue with the EU Commission, the ETA and other laws were also amended on a number of occasions so that they would be in line with the non-discrimination *acquis*.

As a result, in the areas covered by the directives, most legislation is in line with the principle of equal treatment. There are a number of statutes with regard to which the infringement of the principle of equal treatment may be argued.

Municipal councils increasingly use their statutory authorisation for adopting decrees governing certain aspects of local societal life to pass sometimes overtly discriminatory legislation in order to gain – real or assumed – political popularity among the majority population. While some of the most conspicuously unlawful decrees raise wider (sometimes nationwide) attention and the remedial forums eliminate these laws, it seems highly likely that there are numerous such decrees and provisions in smaller settlements where the local minority communities' ability to enforce their rights is limited.

The mechanism to eliminate laws that are contrary to the principle of equal treatment is in place. Under the provisions of Act CLI of 2011 on the Constitutional Court,[239] the body is entitled to subsequently examine the constitutionality of any legal provision (with the exception of certain provisions relating to the central budget and taxes). Any law that is contrary to the constitutional non-discrimination clause is unconstitutional. Under Article 26, any person whose constitutional rights (including the right to non-discrimination) have been violated because a court has applied an unconstitutional norm, or applied a norm in an unconstitutional manner, has the right to petition (within 60 days from the date the final and binding decision is served to him or her) the Constitutional Court and ask the court to abolish the provision or quash the judicial decision.

If there is no judicial remedy against the particular law, it is also possible to petition the Constitutional Court within 180 days of the coming into force of the norm in question. This limitation is highly problematic, as it does not allow the individual to request a constitutional review if he or she suffers the consequences of the unconstitutional legislation more than 180 days after the law comes into effect. In such cases, the

[238] Association of Roma Minority Representatives and Advocates of Nógrád County, Idetartozunk Association, Romaversitas Foundation, UCCU Roma Informal Foundation, Khetanipe Association, Eger Foundation of SZETA, Pro Cserehát Association, Motiváció Educational Association, National Association of Roma Police Officers, Együtt Közösen Egymásért Association, Autonómia Foundation (2018), *Civil society monitoring report on implementation of the national Roma integration strategies in Hungary. Focusing on structural and horizontal preconditions for successful implementation of the strategy*, Brussels, Directorate-General for Justice and Consumers, pp. 38, http://autonomia.hu/wp-content/uploads/2018/07/rcm-civil-society-monitoring-report-1-hungary-2017.pdf.

[239] Act CLI of 2011 on the Constitutional Court (*2011. évi CLI. törvényaz Alkotmánybíróságról*), 21 November 2011, http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100151.TV.

Ombudsman can be requested to turn to the Constitutional Court (as the Ombudsman can request the constitutional review of any law irrespective of when it came into effect). However, the Ombudsman has a discretionary right to decide whether or not to comply with such a request.

In a 2017 case where the constitutionality of an amendment to a municipal decree was at stake, the Ombudsman exercised the above-mentioned power and turned to the Constitutional Court. The amendment banned certain religious activities (muezzin prayer calls) and religious clothing (burqas, chadris, niqabs) and the expression of support for homosexual marriage. In its Decision No. II/2034/2016 handed down on 11 April 2017,[240] the Constitutional Court declared the amendment null and void with a retroactive effect on the basis that fundamental rights and duties shall be regulated in acts of Parliament, and municipal councils are not authorised to adopt legislation (decrees) that would directly impact or limit the exercising of such rights.

The unconstitutional statute loses effect on the day of the publication of the Constitutional Court's decision and from this day on, it may not be applied. In certain cases, the Constitutional Court may abolish norms retroactively or *pro futuro*, leaving time for the legislature to amend them or adopt new legislation.

There is no publicly accessible information on whether and how legislative drafts are vetted for compliance with the EU's non-discrimination *acquis* or potential discriminatory impact. The frequent disregard for the rules of public consultation about draft laws, however, certainly prevents interested parties (NGOs, academia, social partners, etc.) from monitoring legislation from this point of view and from channelling their non-discrimination related comments, ideas or concerns into the legislative process. Although public consultation is obligatory for laws prepared by ministers, and shall involve publishing the bills online before they are submitted to the Parliament for the public to comment upon, there are many examples of when this is not done, and even if it happens, deadlines for commenting are often very tight.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Hungary has taken the necessary measures to ensure that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations that are contrary to the principle of equal treatment can be declared null and void.

Under Articles 6:95 and 6:96 of the Civil Code, contracts that are contrary to a law, or are concluded with the intention of circumventing a legal obligation shall be deemed null and void. Contracts that are manifestly immoral are also deemed null and void.

Furthermore, under Article 27 of the Labour Code, an agreement (individual or collective) that violates labour law regulations shall be deemed null and void. If annulled or successfully contested, the agreement shall be deemed invalid (Article 28). If invalidity results in damages, these shall be paid (Article 30).

Furthermore, as outlined in relation to the personal scope of the ETA, public foundations and public associations and organisations representing employees' and employers' interests are obliged to comply with the requirement of equal treatment. If their internal rules violate this principle, a complaint may be filed with the equality body. However, the internal operations of other associations and legal entities – with the exception of establishing and terminating membership – are expressly exempted by the ETA from the requirement of equal treatment, so if such rules are contrary to the principle of non-discrimination, they may not be challenged through legal means.

[240] Constitutional Court, Decision No. II/2034/2016, 11 April 2017, http://public.mkab.hu/dev/dontesek.nsf/0/47B426E665B28347C125808E00439F1D?OpenDocument.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Justice, the Ministry of the Interior, the Ministry of Human Capacities and the Ombudsman are primarily responsible for dealing with or coordinating issues regarding anti-discrimination on the grounds covered by this report.

Several different bodies have also been established with the aim of discussing and coordinating issues and activities falling under the scope of this report. In addition to bodies vested with tasks pertaining to Roma inclusion (see section 8.2), mention must also be made of the National Disability Council (NDC), which was set up by Government Resolution 1330/2013.[241] Out of the 15 NDC members, only the chair represents the Government, whilst the other 14 members are nominated by the largest disability organisations or by an alliance of smaller disability organisations. The NDC is also a consultative forum; it provides the Government and the minister responsible for promoting equal opportunities with advice. The Government Resolution does not envisage any consequence or sanctions if the NDC's advice is not taken into account. The NDC also serves as the focal point of the Committee on the Rights of Persons with Disabilities.

There are also a number of general strategic documents that are worth mentioning under this heading. The national strategy for social inclusion adopted for the period 2021-2030 (Hungarian National Strategy for Social Inclusion 2030)[242] touches upon issues related to discrimination. Its core objective is 'to reduce poverty and the differences that exist between the Roma and non-Roma population regarding the most important indicators of indigence and social mobility'.[243] The strategy covers seven thematic areas: (i) birth and childhood; (ii) education from kindergarten to university; (iii) youth and family matters; (iv) employment; (v) regional inequalities and housing; (vi) healthcare; (vii) Roma identity, community building and the enforcement of rights.

The strategy is formulated in a rather general manner; it is described as an 'umbrella strategy' outlining action to be taken in very broad terms and requiring further decisions to narrow down who is to do what in order for those actions to be actually realised. The description of the context regarding most areas concerned by the strategy is sound and mentions discrimination as one of the issues contributing to the disadvantaged, deprived situation of the Roma. However, when it comes to the listing of the challenges and the proposed directions of intervention, discrimination is either not addressed or addressed in very broad terms. While some of the proposed lines of action have the potential to address certain systemic elements of the discrimination the Roma face in Hungary, the undertakings in the strategy are very broad and soft, and therefore the efficacy of the strategy depends on how those are taken further by the persons and bodies responsible for the individual areas.

There is also an unevenness among the different areas and parts of the strategy as to the sensitivity to the issue of discrimination. For instance, the section on the labour market, acknowledges the need to systematically address discrimination in employment, whereas the section on healthcare does not even mention discrimination as a reason for the acknowledged situation that the life expectancy of the Roma is much lower than that of the majority population.

[241] Government Resolution on the National Disability Council 1330/2013 (*1330/2013. (VI. 13.) Korm. határozat az Országos Fogyatékosságügyi Tanácsról*), 13 June 2013, https://net.jogtar.hu/jogszabaly?docid=A13H1330.KOR&txtreferer=A1000043.TV.

[242] Government of Hungary (2021), Hungarian National Strategy for Social Inclusion 2030 (*Magyar Nemzeti Társadalmi Felzárkózási Stratégia 2030*), https://szocialisportal.hu/wp-content/uploads/2023/03/MNTFS2030.pdf.

[243] Government of Hungary (2021), Hungarian National Strategy for Social Inclusion 2030 (*Magyar Nemzeti Társadalmi Felzárkózási Stratégia 2030*), pp. 5-6.

In 2020, a platform of NGOs provided comments and suggestions for the Roma inclusion strategy for the period 2020-2030.[244] While there was no meaningful and transparent consultation with civil society regarding the strategy before the first draft was published, eventually some of their suggestions (e.g. references to the majority population's responsibility for integration) were included in the document.

In the area of disability, the framework for strategic planning is Decision 15/2015 (IV. 7.) OGY of the National Assembly on the National Disability Programme.[245] The Decision calls on the Government to adopt shorter-period action plans with the objective of implementing the programme. The most recent action plan (for the period 2020-2022) was adopted in April 2020.[246] The deadlines in the action plan were extended in November 2022 by Government Decree 1522/2022. (XI. 2.), so at present, the plan determines the envisaged actions to be carried out until 31 December 2023 (and in some cases even October 2024).

The action plan prescribes several measures to be taken in the following areas: (i) social inclusion; (ii) healthcare; (iii) early development, education and training; (iv) employment; (v) social services; (vi) complex rehabilitation; (vii) independent living; (viii) family matters; (ix) transportation; (x) sports, culture and tourism; (xi) groups with multiple disadvantages (such as women and children with disabilities); (xii) accessibility; (xiii) the institutional framework for the implementation of the action plan. Under this latter heading, the plan envisages the review of the operation of the NDC with a view to complying with the requirements of Article 33 of the CRPD.

There is no national plan on LGBTIQ equality in Hungary.

[244] The following Roma and non-Roma organisations focusing on integration took part in the work: Polgár Foundation, 1Hungary Initiative, Bagázs Public Interest Association, InDaHouse Hungary Association, Romaversitas Foundation, Give Kids a Chance Association, Partners Hungary Foundation, Számá Dá Noj Association, Digi Tanoda Foundation, We Belong Here Association, Autonómia Foundation.

[245] Decision 15/2015 (IV. 7.) OGY of the National Assembly on the National Disability Programme (*15/2015. (IV. 7.) OGY határozat - az Országos Fogyatékosságügyi Programról (2015-2025.)*), 7 April 2015, https://mkogy.jogtar.hu/jogszabaly?docid=a15h0015.OGY.

[246] Government Resolution 1187/2020. (IV. 28.) on the action plan regarding the implementation of the National Disability Programme until 2022 (*1187/2020. (IV. 28.) Korm. határozat az Országos Fogyatékosságügyi Program végrehajtásának 2022. évig tartó Intézkedési Tervéről*), 28 April 2020, https://njt.hu/jogszabaly/2020-1187-30-22.

10 CURRENT BEST PRACTICES

- *Testing by the equality body*: NGOs and the equality body (based on a specific statutory authorisation in the case of the latter) use testing to establish discrimination in cases that allow for this type of evidence to be gathered.
- *After-school education programmes (tanodas):* after-school education programmes are a specific form of education organised for underprivileged children with the aim of promoting their success in education. They offer extracurricular programmes, such as tutoring and community building programmes. They fill a crucial gap in the education system (namely that schools very rarely have the financial and human resources to effectively help underprivileged children to catch up and to promote their educational success).
- *Evolving jurisprudence concerning ways to end systemic discrimination*: following the Curia's Judgment No. Pfv.IV.20.085/2017[247] upholding a judicial order to close down a segregated school, Hungarian courts have started to move away from the interpretation that they may only declare the existence of systemic discrimination and order in general terms – without specifying the 'how' – that the respondent should put an end to the discrimination. In an increasing number of cases, courts have started to prescribe specific measures to be taken in order to enforce the requirement of equal treatment.

- *Artificial intelligence*: there is currently no best practice regarding the use of artificial intelligence in Hungary.

[247] Curia, Pfv.IV.20.085/2017/9., 4 October 2017, http://cfcf.hu/sites/default/files/Kaposvar2_Kuria.pdf.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Although the Commission closed the infringement procedures launched against Hungary for the ETA's non-compliance with Directives 2000/43 and 2000/78 (in 2007 and 2010 respectively), and found that Hungarian legislation was in accordance with the directives, it is the view of the author that full compliance is uncertain in some areas and is highly dependent on the judicial interpretation of the regulations in question. The areas in which possible breaches may occur are summarised below.

- Due to the comprehensive material scope of the ETA, the requirement of equal treatment as set forth by the ETA applies only to a restricted circle of private actors. Therefore, with regard to the sectors falling under the material scope of the directives, Hungarian law may be in breach of the *acquis*, as it does not impose the obligation of non-discrimination on all persons in the private sector (for a detailed explanation, see section 3.1.2.)
- Article 7(2) of the ETA allows for objective justification in certain cases of direct discrimination, depending on the ground for discrimination and on the nature of the right concerned (fundamental right or not) (for a detailed explanation, see section 2.4.)
- The rules for the justification of indirect discrimination are also not fully in line with the directives (for a detailed explanation, see section 2.5.)
- The 'special exempting clauses' also contain certain inconsistencies, unjustified distinctions between certain grounds and wider possibilities for exemption than allowed by the directives (see for example section 4.1 on the equal pay for equal work principle and section 4.2 on employers with an ethos based on religion or belief and the regulation of genuine and determining occupational requirements). Depending on judicial interpretation, some provisions of the new law on churches and religion and the new law on public education may cause a contradiction between domestic and EU law in relation to organisations with a religious ethos (for a detailed explanation, see section 4.2.)
- The Labour Code's capping of the damages that may be granted if an employee is dismissed in a discriminatory manner and does not request their reinstatement seems to contradict the relevant jurisprudence of the CJEU (for a detailed analysis, see section 6.5.)
- The exclusion of workers of pension age from a severance payment may be in violation of the relevant CJEU jurisprudence (for a detailed analysis, see section 4.6.4)
- The obligation of reasonable accommodation has not been unambiguously transposed into Hungarian law. The problem is especially acute with regard to employing persons with disabilities, in spite of an amendment to the RPD Act, which – if interpreted from a strictly literal point of view – only guarantees the requirement of reasonable accommodation in relation to the recruitment procedure (i.e. primarily the job interview) and the specific needs of workers who are already employed, but does not prescribe that reasonable efforts shall be made to adapt the workplace to the specific needs of persons with disabilities to promote their actual employment. (The situation in this regard is rather complex. For details, see section 2.8.)
- Following a successful group lawsuit of 60 segregated Roma pupils, the National Public Education Act was amended with a view to excluding the possibility of demanding moral damages for the violation of inherent personal rights (including segregation and other forms of discrimination) committed by educational institutions. In the author's view, the amendment is disadvantageous to the victims, since – compared to all other victims of rights violations – it reduces their freedom of choice regarding the types of sanctions they can ask the courts to apply, and deprives them of the possibility of claiming a particularly effective type of sanction that is available to all other persons in a similar situation. It is also obvious that it disproportionately

concerns segregated Roma pupils, as the majority of known cases of inherent rights violations committed by educational institutions are segregation cases. For these reasons, the amendment has reduced the degree of dissuasiveness of the system of sanctions, thus breaching the requirements provided by Articles 6 and 15 of the Racial Equality Directive and – in relation to vocational training – Articles 8 and 17 of Directive 2000/78 (for further details, see section 6.1.)

- As of 1 January 2021, the Equal Treatment Authority was abolished and its mandate and powers were transferred to the Ombudsman. The change, which was not preceded by any meaningful consultation with stakeholders, many of whom explicitly and publicly objected to the transfer, is, in the author's view, an organisational 'downgrading' of the issue of non-discrimination, in the sense that this was the single focus and mandate for the Authority, whereas the Ombudsman's Office is a large organisation with a wide mandate ranging from environmental protection through children's rights to the monitoring of prisons. Consequently, as also suggested by the statistics of the first two years of the Ombudsman's operation as the equality body, much less attention is paid to non-discrimination, and far fewer resources are available to address non-discrimination issues within the Ombudsman's Office than was the case in the Authority. This assessment is substantiated by the opinion of the Venice Commission, which raised concerns over a number of issues related to the merger, including the understaffing of the unit responsible for the equality mandate, the uncertainties regarding its budget within the overall budget of the Ombudsman's Office and the Ombudsman's failure to appoint either a Director General for Equal Treatment or a Deputy Director General in the nine months that passed between the merger and the Venice Commission's visit.[248] Thus, the reorganisation of the institutional framework has decreased the level of protection against discrimination in Hungary, raising, in the author's view, the possibility of breaching the non-regression clause of Directive 2000/43. The termination of the referee network of the Equal Treatment Authority after the transfer of the mandate could negatively impact the Hungarian equality body's ability to provide independent assistance to victims of discrimination in pursuing their complaints under Article 13 of the Racial Equality Directive, which also raises a potential violation of the Directive's non-regression clause (for further details, see chapter 7).

11.2 Other issues of concern

- Public premises and services are still far from being completely accessible, even though the obligation to provide an accessible environment has been in place for over a decade.
- There is a general climate of intolerance, xenophobia and hostility to 'otherness', most powerfully expressed by the Prime Minister, who openly stated that 'we [Hungarians] do not want to become diverse in a way that we get mixed, our colour, our traditions, our national culture get mixed with others. We don't want that. […] We want to stay like we have been for 1 100 years here in the Carpathian Basin.' Comments by high-ranking government politicians questioning the 'justness' of damages granted to Roma pupils educated in a segregated manner are capable of inciting and reinforcing existing anti-Roma sentiment in Hungarian society and undermining public trust in the judiciary. 2022 also saw the continuation of the 2021 surge of anti-LGBTIQ statements from high-ranking politicians including the Prime Minister, and the passing of laws that are clearly hostile to this group.

No issues of concern can be identified regarding the use of artificial intelligence in relation to the implementation of the national legislation transposing the directives, or regarding the regulation of artificial intelligence.

[248] Venice Commission (2021), *Hungary - Opinion on the amendments to the Act on Equal Treatment and Promotion of Equal Opportunities and to the Act on the Commissioner for Fundamental Rights as adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session*, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)034-e. v

12 LATEST DEVELOPMENTS IN 2022

12.1 Legislative amendments

On 30 November 2022, Act L of 2022 on the amendment of certain laws guaranteeing Hungary's security[249] was promulgated, which amended – as of 1 January 2023 – the Ombudsman Act, designating the Ombudsman to act as the independent mechanism established under the UN CRPD to promote, protect and monitor implementation of the CRPD. Under Articles 39/N-39/Q of the Ombudsman Act, in this capacity, the Ombudsman has some additional rights and obligation compared to his general mandate. For instance, he may proceed *ex officio* regarding individual rights violations if the person with disability is unable to assert their rights or if the submission of a complaint would impose a disproportionate burden on them. In the course of his investigation, the Ombudsman may inspect court files and expert opinions regarding the person with disability even without the authorisation of the person concerned.

12.2 Case law

Relevant discrimination ground(s): Disability
Name of the court: Metropolitan Regional Court
Date of decision: 3 May 2022
Name of the parties: *Anonymous v. the Commissioner for Fundamental Rights (Ombudsman)*
Reference number: 105.K.704.617/2021/18.[250]
ECLI reference:
Address of the webpage: https://eakta.birosag.hu/anonimizalt-hatarozatok
Brief summary: The severely visually impaired complainant applied for a call centre customer service job opening published by the National Centre for Public Healthcare in December 2020. The complainant referred to his blindness in his cover letter and in his curriculum vitae. The application procedure, which was conducted by a third party agent appointed by the employer, consisted of three rounds, whereby each round was based on the successful completion of the previous round. The recruitment criteria published in the vacancy notice included past experience and preparation, skills and motivation, and verbal and written expressiveness. The complainant passed the first round, however, the time-limited online competency test of the second round was not fully accessible for him, so he could only complete it with the assistance of an external person, of which he informed the agent after completing the task. The agent then informed the complainant that his comments would be taken into account in the selection process and that he had successfully completed the online competency test and had progressed to the third round. The complainant participated in the third round (video interview). However, on 29 January 2021, the agent informed the claimant that the employer was unable to provide the technical conditions for his employment and therefore his application could not be considered further.

The complainant launched a proceeding before the Ombudsman as equality body, complaining about both the lack of accessibility of the second round of the application process and the fact that although he had fulfilled the conditions of the vacancy notice, his application had been unsuccessful because the employer had not provided him with the technical conditions necessary to access the infrastructure necessary for his work. The application sought a declaration of infringement and an injunction. The respondent employer did not dispute that the second round of the recruitment procedure was not accessible, but claimed that this was offset by the fact that the complainant's visual

[249] Act L of 2022 on the amendment of certain laws guaranteeing Hungary's security (*2022. évi L. törvény Magyarország biztonságát szolgáló egyes törvények módosításáról*), 30 November 2022, http://www.kozlonyok.hu/nkonline/index.php?menuindex=200&pageindex=kozltart&ev=2022&szam=197.
[250] The year in the case number indicates the year when the case arrived at the court, and not the year of the delivery of the judgment.

impairment had been taken into account and he had been able to go on to the next round. As to the second part of the complaint, the employer claimed that (i) the centre where the complainant was supposed to work was not accessible; (ii) there was no obligation to make the workplace accessible; and (iii) the use of screen-reading software would significantly increase the time required for the complainant to perform his tasks.

In its decision No. EBF-AJBH-126-13/2021, the Ombudsman as equality body rejected the complaint. It found that the complainant had not appropriately informed the agent of his specific needs until after the second round of the recruitment procedure, and that the complainant had not suffered a disadvantage, as his second round had been accepted as completed, and the requirement of equal treatment was therefore not violated. Furthermore, the Ombudsman held that the complainant had indeed been disadvantaged because he had not been employed due to his protected characteristic, but the Ombudsman considered the rejection of the job application to have been based on legitimate grounds for the following reasons. The websites that the complainant would have to use in the course of his work are not all accessible, which would hinder the timely performance of his duties (as he could not quickly transmit information from the non-accessible websites or browse together with customers). However, the employer was not responsible for the actions of organisations independent of him: the fact that other entities fail to create accessible websites shall not be attributed to the employer's detriment. The scanning of paper documents (that would be necessary for the use of the screen-reading software) would also lead to administrative inefficiencies. The 'creation of the conditions required for the complainant to be able to perform the necessary work would also go beyond the requirement of reasonable accommodation'. In summary, with a view to the nature of the working conditions, the Ombudsman concluded that the employer had complied with Article 22(1)(a) of the ETA and had applied lawful differentiation based on the complainant's disability.

The complainant challenged the decision before the court. In the context of the recruitment procedure, he complained that not all the tasks were accessible and that he was prejudiced by the fact that the skills measured by the tasks that were not accessible were not assessed in his case, irrespective of the fact that the employer had classified the round as completed as 'compensation'. With regard to the rejection of his application, he contested the Ombudsman's reasoning excluding the employer's liability. He also alleged a failure to clarify the facts, because the Ombudsman unilaterally accepted the employer's statements and did not consider the fact that an experienced user could read even non-accessible websites with sufficient speed with the help of screen-reading software. In his view, the Ombudsman should have acquired expert evidence on whether the websites required for work could be used by visually impaired people with a screen reader.

The court found for the complainant, quashed the Ombudsman's decision and ordered the re-examination of the case. The court concluded that for the employer's obligation regarding reasonable accommodation to apply, it is sufficient if the applicant informs the employer at the beginning of the recruitment process. Since it is the employer and not the applicant who is aware of the methodology to be followed in the application process (meaning that there is an information asymmetry between the parties), the applicant cannot be required to provide very specific information as to how his/her disability ought to be accommodated. Therefore, as the complainant informed the employer about his visual impairment, he sufficiently fulfilled his obligations in this regard. Furthermore, the lack of accessibility in the second round disadvantaged the complainant despite the fact that he was allowed to go on into the third round, as this prevented the actual assessment of his relevant skills and competencies, based on which the employer could have objectively judged whether he would be suitable for the job. Since the employer rejected the complainant's application on the basis of his visual impairment, which was known to the employer at the very beginning of the process, the applicant's acceptance into the third round cannot be regarded as compensation. Therefore, the court concluded that the complainant had been treated in a disadvantageous manner in the recruitment process

due to the fact that his competencies had not been measured to a full extent and in a manner duly taking his protected characteristics (i.e. his impairment) into account.

For that reason, the court did not find it necessary or even possible to examine whether the refusal of the complainant's application was justified. The court held that due to the deficiencies of the recruitment process it could not be established whether the complainant possessed all the required skills, and the second issue (i.e. whether the applicant's specific needs could have been reasonably accommodated) could have only been assessed if it had been concluded after a duly conducted recruitment process that the applicant was suitable for the job after certain accommodations of the working environment.

Based on the court's decision, the Ombudsman will have to re-examine the case and carry out all the evidentiary actions that are necessary for adjudicating the case, unless it deems the evidence already available sufficient for deciding on the matter. Based on the court's judgment, it cannot come to the conclusion that no discrimination has taken place.

Relevant discrimination ground(s): Racial or ethnic origin
Name of the court: Ombudsman (equality body)
Date of decision: December 2022
Name of the parties: *unknown*
Reference number: EBF-AJBH-28/2022
ECLI reference:
Address of the webpage:
https://www.ajbh.hu/documents/10180/7305081/EBF_AJBH_28_2022_nemzetis%C3%A9ghez+val%C3%B3+tartoz%C3%A1s_szolg%C3%A1ltat%C3%A1s.pdf/03f1aad6-6daa-8285-7df8-b1ab1c4d0cc9?version=1.0&t=1676023843408
Brief summary: A married couple, a Roma woman and a non-Roma man, complained that they had to move out of the flat they had rented, because of the wife's Roma origin. The husband rented the flat: he contacted the landlord and informed him that they had a child and that his wife was pregnant. They verbally agreed on the rent, the husband was given the keys and he handed over the deposit, for which a receipt was issued. The landlord went to the flat the day after the tenant moved in, where the wife and her family members were unpacking. He made various comments about the state of the apartment and then told the wife that they could not stay there. He then called the husband to tell him to move out and in the course of the conversation also told him that he did not have a problem with him, he had a problem with the wife, because she was a 'gypsy'.

The landlord acknowledged that in the course of the phone conversation he told the husband that part of the reason was his wife's Roma origin, but claimed that the main problem was that there was a mess in the apartment when he arrived, the wife and her family members were wearing street shoes and when he made a comment about it, the wife raised her voice.

The Ombudsman did not accept the respondent's arguments. It concluded that the untidy state of the apartment one day after moving in is inevitable, and the landlord could have simply called on the tenants to tidy up the apartment. The quarrel between the parties developed in connection with the landlord's decision to call on the wife to leave and to give up the tenancy. The Ombudsman concluded that the complainants had been disadvantaged by the landlord's decision to not allow them to rent the property. The Ombudsman concluded that not only the wife of Roma origin, but also the non-Roma husband was discriminated against on the basis of ethnic origin, since 'the requirement of equal treatment can primarily be violated in relation to the complainant's protected characteristic, but it can be qualified as discrimination by association if someone suffers a disadvantage not because of their own protected characteristic but due to the protected characteristic of a person who is in a direct (family or friendly) relationship with them, therefore, the husband could request protection on the basis of his wife's protected characteristics.'

The Ombudsman issued a warning to the defendant and banned him from engaging in the infringing conduct in the future. Apart from that, the Ombudsman would have had the power to impose a fine on the respondent, but (as described above in section 7), his practice is very restrictive in this regard. In the case of a repeated violation, the fact that there has already been a case where the respondent has been found in breach of the requirement of equal treatment could be taken into account, and somewhat increases the likelihood of a fine. The Ombudsman does not have the power to order the landlord to allow the couple to stay in the apartment.

ANNEX 1: INTERNATIONAL INSTRUMENTS

Country: **Hungary**
Date: **1 January 2023**

Instrument	Date of signature	Date of ratification	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	06.11.1990	05.11.1992	No	Yes	Theoretically yes, practically with some difficulties
Protocol 12, ECHR	04.11.2004	Not ratified	N/A	N/A	N/A
Revised European Social Charter	07.10.2004	20.04.2009	No	Collective complaints protocol signed but not ratified	Theoretically yes, practically with some difficulties
International Covenant on Civil and Political Rights	25.03.1969	17.01.1974	No	Yes	Theoretically yes, practically with some difficulties
Framework Convention for the Protection of National Minorities	01.02.1995	25.09.1995	No	N/A	Theoretically yes, practically with some difficulties
International Covenant on Economic, Social and Cultural Rights	25.03.1969	17.01.1974	No	No	Theoretically yes, practically with some difficulties
Convention on the Elimination of All Forms of Racial Discrimination	15.09.1966	04.05.1967	No	Yes	Theoretically yes, practically with some difficulties
ILO Convention No. 111 on Discrimination	Not indicated on ILO website	20.06.1961	No	N/A	Theoretically yes, practically with some difficulties

Instrument	Date of signature	Date of ratification	Derogations/reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of the Child	14.03.1990	07.10.1991	No	No	Theoretically yes, practically with some difficulties
Convention on the Rights of Persons with Disabilities	30.03.2007	20.06.2007	No	Yes	Theoretically yes, practically with some difficulties

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