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Non-discrimination

Romania

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Country report
Non-discrimination
Romania

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EXECUTIVE SUMMARY

1. Introduction

Though theoretically a diverse society,[1] the understanding of the principle of equality and non-discrimination in Romania is marked by three historical periods. Firstly, Romanian society had to come to terms with the Communist experience of an imposed rhetoric of equality, de facto contradicted by aggressive assimilationist policies in regard to national or ethnic minorities, refusal to recognise Roma as an ethnic minority, criminalisation of consensual homosexual activities and denial of religious freedom. Secondly, Romania still has to cope with the transition started in 1989. This was a period of increased awareness of the situation of minorities, doubled by a process of asserting the rights of these groups and the principles of equality and non-discrimination, including the adoption in 2000 of the Anti-discrimination Law. The third period, following accession to the EU in 2007, is one of regression in the protection of human rights and revival of nationalistic and extremist discourse and conduct in relation to vulnerable groups, particularly Roma, LGBT people and religious minorities. This last stage of regression was more obvious in electoral years.

The Romanian Anti-discrimination Law, Governmental Ordinance 137/2000 (GO 137/2000), was adopted in 2000 as delegated legislation and subsequently amended, with the last three rounds of amendments in 2013 having been made in the context of the proceedings before the Court of Justice of the European Union (CJEU) in the case C-81/12.[2] The 2000 adoption took place in a sensitive environment. The discussions regarding the two European Equality Directives influenced the wording of the Romanian law, the provisions of which, in many ways, went beyond the acquis. Most of the cases before the national equality body – the National Council for Combating Discrimination (NCCD) – mention infringements of the right to dignity, which is a distinct feature of the law.

Seventeen years after adopting the Anti-discrimination Law, Romania remains tainted by discrimination. The Romanian Roma minority, for which official statistics are contested but which is considered to be the largest in Europe, faces discrimination in access to employment, to healthcare, to services and goods, to housing, including public housing, and to education. The revival of the extreme nationalist discourse characteristic of the cases of arson and mob violence against Roma communities of the early 1990s permeates the public sphere. Media reports of Italian, French, British or German concerns regarding Romanian Roma provided new opportunities for discriminatory public statements against Roma, including by officials. This gradual acquiescence to racism led to the construction of a wall of 100 metres long and 1.8-2 metres high in Baia Mare in 2011 as 'safety measure'.[3]

Though expressly protected by the Anti-discrimination Law, the LGBTI minority remains the group most under attack, with legislative proposals aiming to restrict their rights and acts of aggression every year during NGO-organised events. These attacks remain uninvestigated and have attracted no sanctions, suggesting that authorities are liable for 'resultant indifference (which) would be tantamount to official acquiescence to, or even connivance with, hate crimes.'[4] The Civil Code, in force since 2011, includes a specific prohibition of same-sex partnership and marriage, including denial of recognition to

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1 According to the 2011 national census, the Romanian population includes 88.9 % Romanians, 6.5 % Hungarians, 2.46 % Roma and less than 1 % Ukrainians, Germans, Russians, Turks, Tatars, Serbs, Slovaks, Croats, Jews, Armenians and Bulgarians. Information available at: http://www.edrc.ro/recensamant.jsp?language=0, accessed 24 March 2017.

2 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination *(Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), was published in *Monitorul Oficial al României* No. 431, September 2000.

3 Though the NCCD sanctioned the construction of the wall, the Court of Appeal quashed the NCCD decision. In 2013, the High Court of Cassation and Justice eventually upheld the sanctions the NCCD imposed on the mayor of Baia Mare. However, in separate court proceedings seeking demolition of the segregating wall, the Bucharest Tribunal upheld the legality of the wall, which still stands.

4 ECtHR, *M.C. and A.C. v. Romania (*Application no. 12060/12*)* from 12 April 2016, paragraph 124.

partnerships and marriages legally registered abroad (even when contracted between foreigners). In 2016, a proposal to hold a referendum on amending the definition of family in the Romanian Constitution as 'marriage between man and woman' was presented to the Parliament. The initiative was approved by the Constitutional Court and the Chamber of Deputies and it is still pending in the Senate as of May 2018. Transgender persons cannot invoke any legal protection, as the legislation does not provide any clear and predictable procedures and applicable standards on gender reassignment procedures or issuing of identity papers.

Specific programmes and positive action targeting persons with disabilities or people living with HIV/AIDS are scarce and still do not cover the wide range of problems encountered. Though it signed the UN Convention on the Rights of Persons with Disabilities in September 2007, Romania only ratified it in November 2010. No subsequent legislation for harmonisation has been adopted. Romanian legislation still uses the concept 'handicap' instead of 'person with disability', promoting a medically focused approach.

The national equality body (NCCD) has contributed to the process of dialogue and consultation with NGOs and social partners but the NCCD itself is under siege, as it has limited human and material resources. The NCCD is the victim of increased politicisation of its Steering Board due to the appointment process for its members.

2. Main legislation

The Romanian Constitution guarantees equal treatment of all citizens in Article 4.2, providing for citizenship without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin, and in Article 16 providing for equality of all citizens before the law and public authorities, without any privilege or discrimination. Article 30.7 prohibits 'any instigation … to national, racial, class or religious hatred, any incitement to discrimination'.

Romania has signed all major European and international human rights instruments and the Constitution asserts that constitutional provisions concerning the rights of citizens shall be interpreted and enforced in conformity with the UDHR, the covenants and other treaties Romania is a party to. Article 20 of the Constitution also provides for the primacy of international regulations where any inconsistencies exist between treaties on fundamental human rights and the national laws, unless the national laws are more favourable.

Besides the specific Anti-discrimination Law (GO 137/2000), the Civil Code allows for torts claims for damages (including damages generated by discrimination) and the Criminal Code includes provisions on aggravating circumstances when criminal intention is based on any of the grounds protected by anti-discrimination legislation. The ECRIS database, the national statistical application aggregating statistical data introduced by all courts, does not record the number of complaints or decisions on discrimination filed in application of the Romanian Anti-discrimination Law (Government Ordinance 137/2000).[5] Subsequently, it is impossible to assess the use or the enforcement of these provisions.

The Criminal Code, which entered into force in February 2014, includes protection against incitement to discrimination, hate crimes and abuse with a discriminatory intent in the exercise of an official function. These are, however, norms with limited applicability, as proved by the specific statistics provided by the Prosecutor General.

The Labour Code, as amended in 2011, includes general prohibitions of discrimination in employment. The Law on Equal Opportunities between Women and Men replicates some

[5] The Superior Council of Magistracy (*Consiliul Superior al Magistraturii),* response 5/27805 to a public information request, 17 December 2015.

of the provisions of the Anti-discrimination Law but lacks effective remedies and adequate implementation mechanisms– de facto, the NCCD covers all grounds of discrimination.

In 2008 and 2009, the Anti-discrimination Law was reviewed by the Romanian Constitutional Court in a series of cases and its application was partially limited. The Constitutional Court restricted the applicability of the Anti-discrimination Law in relation to legislative acts (*de jure* discrimination), as the relevant provision of the law was declared unconstitutional when interpreted as enabling courts or the NCCD to quash discriminatory legal provisions. However, both in 2008 and 2009, during the constitutional review of the mandate of the NCCD, its role as a quasi-judicial body was confirmed.

3. Main principles and definitions

The Anti-discrimination Law introduces a broad, comprehensive definition of direct discrimination, going beyond the substance and coverage of Directives 43/2000/EC and 78/2000/EC.[6] Even though the list of protected grounds is very generous and includes grounds outside the five grounds mentioned by the directives, the catch-all phrase 'any other criterion' creates the possibility for the courts or for the NCCD to apply the Law to a wide list of categories going beyond the mere experience of discrimination and turning the anti-discrimination norm into a wider equality principle - this 'hyperinflation' of grounds has the potential for negative impact on enforceability.

Since 2006, the Law has defined indirect discrimination[7] as well as harassment.[8] Harassment is also sanctioned in the Equal Opportunities Law and in the Criminal Code but none of the definitions fully complies with the definition set out in the directives.

Victimisation is defined as any adverse treatment triggered by a complaint submitted to the NCCD or by a case lodged with the courts of law regarding infringement of the principle of equal treatment and non-discrimination. Instruction to discriminate is defined as 'order' to discriminate, leaving room for further clarification. Multiple discrimination is defined and constitutes an aggravating circumstance in cases of discrimination, though enforcement in the jurisprudence of the NCCD is scant and suggests lack of understanding of the concept.

The Anti-discrimination Law was amended in 2013 to include a definition of genuine and determining occupational requirements which still needs interpretation. The Anti-discrimination Law does not mention reasonable accommodation but specifically includes a definition of positive measures. Reasonable accommodation is defined in the legislation on the rights of persons with disabilities as a facility granted to the employee but not as a duty of the employer.[9] The notions put forward in the ECRI General Policy Recommendation no. 7 are not set out in the Romanian law, although some of these have been incorporated by the NCCD in its jurisprudence, specifically segregation in education; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting to discriminate; aiding another to discriminate. A 2011 case, which made the

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6 Romania, Anti-discrimination Law (GO 137/2000) sanctions 'any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.'

7 Indirect discrimination is defined as 'any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected groups, excepting the cases when these practices, criteria and provisions have an objective justification based on a legitimate purpose and the methods used to reach that purpose are adequate and necessary.'

8 Harassment is defined and sanctioned as 'any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, handicap, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.'

9 Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 06 December 2006.

headlines in the national media, evidenced the failure to include in the law the prohibition of residential segregation, a form of discrimination which is prevalent in relation to Roma. The NCCD sanctioned the case as discrimination and the courts upheld its decision.[10]

4. Material scope

The material scope of the Anti-discrimination Law encompasses the areas protected by both Directive 43/2000/EC and Directive 78/2000/EC. The law goes beyond these areas, in addition providing for protection in relation to freedom of movement, as well as for protection of the right to dignity. The latter has led to diverse jurisprudence from the NCCD, promoting an anti-stereotyping approach. When defining discrimination, the legislature took a comprehensive approach and thus the principle of equality and the prohibition of discrimination apply in relation to all fundamental rights and freedoms. Both public and private actors are obliged to observe the Anti-discrimination Law (GO 137/2000).

Following the decisions issued by the Romanian Constitutional Court in 2008 and reconfirmed in 2009, the provisions of the Anti-discrimination Law are not applicable in cases of discrimination triggered by discriminatory legislative norms (laws or delegated legislation), and the courts and the NCCD do not have the authority to nullify or to refuse the application of legal norms when they consider that such norms are discriminatory. While during court proceedings any party can ask for the case to be brought before the Constitutional Court to assess the unconstitutionality of legal provisions, this option is not available in the case of proceedings before the NCCD, which does not have constitutional standing. The Ombudsman, which has standing in this regard, has not so far reported using its power to bring discriminatory legislation before the Constitutional Court.

5. Enforcing the law

The Anti-discrimination Law creates a dual system of remedies: the complainant can choose between filing a petition with the NCCD on the administrative track or/and lodging a civil complaint for damages with the courts (the cases are exempt from court fees for both options). Victims can also choose to use both options simultaneously, which creates difficulties in practice and overstretches the scarce resources of the NCCD, as the institution is required by law to participate as an expert in all such civil proceedings. Another challenge is the possibility of obtaining conflicting judgments in the administrative and civil courts.

Any individual or any legal person with an interest in a case, including human rights NGOs and minority groups, can file a complaint with the NCCD within one year of occurrence of the alleged discrimination. The NCCD can also start a case ex officio. The NCCD has 90 days to investigate the case, organise hearings and rule on whether anti-discrimination provisions were breached. When the NCCD finds that discrimination took place, it can issue an administrative sanction (warning or fine). The NCCD rulings can be appealed before the administrative courts. If the victim is an individual, the amount of the fine is within the range of EUR 250-7 500 (RON 1 000-30 000); if the victims are a group or a community, the fine is within the range of approximately EUR 500-25 000 (RON 2 000-100 000).

The NCCD has developed the practice of issuing recommendations carrying no financial or administrative penalties, particularly in cases against public authorities. In doing so, the NCCD invoked the statutory limitations established by the general regime on minor offences. The impact of this practice, however, was that it called into question the effectiveness, proportionality and dissuasiveness of the remedies provided in cases of discrimination. The 2013 amendments to the Anti-discrimination Law addressed this challenge, introducing a statutory limitation term of six months for applying a sanction,

[10] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 640, file 1741/33/2011, 27 September 2013.

calculated from the date when the NCCD decision is issued, thus replacing the controversial administrative statutory limitation, an aspect also discussed by the Court of Justice of the European Union (CJEU) in C-81/12. In the 2015 decision of the High Court of Cassation and Justice in the case providing the basis for the referral in C-81/12, the domestic courts did not address the guidance issued by the CJEU regarding symbolic sanctions and maintained that the mere warning issued by the NCCD when finding discrimination can be considered a dissuasive, proportionate and adequate remedy.[11]

Victims seeking to claim compensation for discrimination have to lodge complaints with the civil courts - a decision from the NCCD is not required but it may play an important role in ascertaining whether discrimination took place and in establishing the quantum of the damages. The NCCD is called in as an expert entity. In the case of a civil complaint for damages, the complainant can request pecuniary and moral damages and other types of sanctions (e.g. withdrawal or suspension of licences of private entities providing services). According to Article 27 of the Anti-discrimination Law the courts of law can rule that public authorities withdraw or suspend the authorisation to operate of legal persons who cause significant damage as a result of discriminatory action or who are repeat offenders.

Victims of discrimination can choose to contact a human rights NGO and seek representation or can start the case in nome proprio. Under NCCD procedures victims can choose to communicate with the NCCD confidentially in order to avoid media attention. The same request for confidentiality can be filed with the courts. The 2006 amendment to the Anti-discrimination Law specifically allowed for any type of evidence to be used in cases of discrimination, including audio and video recordings as well as statistical data, and the NCCD uses statistics as evidence. Though the NCCD and (mainly) Roma NGOs used situation testing in the past, this method has not been used in more recent cases.

The 2013 amendment to the Anti-discrimination Law redefines the burden of proof.[12] The case law of the NCCD interpreted provisions on the burden of proof along the lines of the directives in some cases but not consistently, with the NCCD leaving the onus of proof on the complainants in a number of cases. The ambiguous understanding of the burden of proof by the NCCD and the courts alike is confirmed by the decisions of the Court of Appeal and of the High Court of Cassation and Justice in the case following up on C-81/12.[13] Both courts upheld the NCCD decision, denying the appeal filed by ACCEPT Romania and finding the homophobic and exclusionary statements of George Becali, the person publicly known as the owner of Steaua București Football Club, as not amounting to discrimination in employment on grounds of sexual orientation.[14]

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[11] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 2224/2014, 29 May 2015. The High Court stated: 'contrary to the statements of the complainant (ACCEPT), warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction (Italics used by the Court). In applying this sanction the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society.' The decision also states that 'the High Court also concludes that the complainant association cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (*Legea Contenciosului Administrativ*), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.'

[12] The new wording of the burden of proof provides that 'the interested person will present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred. Before the Steering Board (the courts) any means of proof can be brought, observing the constitutional regime of fundamental rights, including audio and video recordings and statistical data.'

[13] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 2224/2014, 29 May 2015.

[14] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 2224/2014, 29 May 2015. The High Court uses the conclusions of the Court of Appeal by stating that 'it was correctly concluded by the first instance that there are no elements which would allow to find that the Football Club initiated any step, of any type, to contract the sportive services of the player I.I.' The High Court follows: 'In reality, the entire procedure had been launched based of purely speculative statements (of Mr. Becali) even

NGOs have legal standing and can file cases either on behalf of or in support of victims of discrimination. However, the remedies provided in such cases are limited, as personal damages are required for the courts to order compensation.

There is no clear picture and no assessment of the sanctions issued by courts in cases of discrimination. Given the limited number of cases that are publicly available, drawing on anecdotal evidence it can be concluded that the courts have established a ceiling of a maximum of EUR 10 000 for moral damages – the amount granted in a limited number of cases. Pecuniary damages need to be proved on the basis of civil procedure norms on torts.

In spite of the failure to ensure online publication of all court and NCCD decisions and adequate monitoring of the enforcement of these decisions, information regarding repeat offenders may indicate that the remedies are increasingly effective, although the practice is not yet uniform. The 2013 amendments to the Law allow the NCCD and the courts to establish a duty for offenders to publish summaries of decisions at their own expense.

6. Equality bodies

Provision for the national equality body, the National Council on Combating Discrimination (NCCD) (*Consiliul Naţional pentru Combaterea Discriminării*) was made in 2000, in the Anti-discrimination Law, but it was effectively established in the autumn of 2002. From 2007, the NCCD started opening regional offices and it currently has two such offices.

The NCCD is an autonomous public authority under the control of the Parliament, whose independence is established in the Anti-discrimination Law. The appointment of its Steering Board members by the six relevant parliamentary committees, as a guarantee of its institutional independence, proved in practice to be a hindrance, as politicisation of the nomination process led to paralysis of the NCCD between the summer of 2009 and April 2010. The appointments made in April 2010 were criticised by NGOs and by independent candidates for failing to observe the legal requirements and for politicisation of the process, seriously hampering the professionalisation the NCCD needs. Calls against the politicisation of the institution also came from inside the NCCD itself, including from its president. Three new appointments in 2012 were met with mixed reactions, as while two candidates were political appointees with limited relevant experience, the third was a well-established anti-discrimination expert, whose mandate was renewed on the basis of his expertise and commitment and in spite of his lack of any political affiliation. NGOs contested the procedures for appointing six new members of the Steering Board in 2015 as not observing the legal requirements, privileging candidates supported by political parties and lacking transparency. The current composition of the Steering Board does not respect the legal requirement in Article 23 of the GO 137/2000 that a minimum of two-thirds of its members must be law graduates (as four of the nine members do not have a legal background).

The mandate of the NCCD encompasses: providing support for victims of discrimination through independent assistance; preventing discrimination through awareness-raising and conducting studies and research; compilation of relevant data; independent surveys and independent reports; mediating between parties; investigating and sanctioning discrimination; and initiating legislative bills to ensure harmonisation of legal provisions with the equality principle. In practice, the main function of the NCCD is as a quasi-judicial body which can find that certain acts amount to discrimination and can subsequently issue administrative sanctions (warnings or fines). The mandate of the NCCD was extended in 2017 by Law 106/2017; Article 4 added to the NCCD tasks the monitoring of the rights of EU citizens exercising their freedom of movement in Romania and acting as national focal

if the author of the statement is a person which cannot be dissociated in the public perception from the Football Club Steaua București, from this unique occurrence it cannot be drawn the conclusion that the complainant is laying its account for (bets), particularly given that during the entire procedure the Football Club Steaua București denied any connection with the statements and the lack of basic facts.'

point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.[15]

The visibility of the NCCD has increased exponentially in the last seven years, following a series of cases involving key Romanian politicians (the President, several Prime Ministers, two former Ministers of Foreign Affairs, a Minister of Culture and a Member of the European Parliament), as well as cases which generated a lot of media attention (e.g. the decision on the presence of religious symbols in public classrooms, school segregation cases, decisions against various sports clubs) and public positions taken against racist, homophobic and populist conduct. The institution gradually became a proactive body, engaged in a multitude of projects and established itself as a serious voice in the sphere of combating discrimination in a very sensitive environment. Concerns regarding the politicisation of the Steering Board taint this generally commendable image.

7. Key issues

a. Failure to ensure adequate sanctions which are dissuasive, proportionate and effective

The NCCD practice of sanctioning some cases of discrimination only with administrative warnings or recommendations and not issuing administrative fines in all cases where it has found discrimination erodes the effective, proportionate and dissuasive character of its remedies. Warnings do not carry financial penalties and there is no policy on monitoring and engaging with perpetrators to secure enforcement and prevent further discrimination.

b. The NCCD and the courts cannot find against and sanction discrimination in cases of discriminatory norms

The limitation of the Anti-discrimination Law by the Romanian Constitutional Court in a series of decisions issued in 2008 and 2009, which limited both the mandate of the NCCD[16] and of the civil courts in relation to discrimination generated by legislative provisions,[17] created a gap in the effective protection against discrimination. The NCCD does not have standing to bring cases for constitutional review before the Constitutional Court when identifying discriminatory norms and the Ombuds has failed to act in such cases.

c. Legal concepts still needing clarification and interpretation

The Romanian Anti-discrimination Law uses the word 'order' instead of 'instruction' in Article 2(2), which might lead to a restrictive interpretation of the instruction to discriminate, limiting the prohibition to hierarchical relations.

The concept of reasonable accommodation for persons with disabilities is not included in the Romanian Anti-discrimination Law and is currently defined in the special legislation on the promotion and protection of the rights of persons with disabilities as a facility in the workplace for the employee but without provision for sanction in case of failure by the employer to ensure it.

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[15] Romania, Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.05.2017).

[16] Romania, Constitutional Court (*Curtea Constituțională*), Decision 997, 7 September 2008, finding Art. 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions to be unconstitutional.

[17] Romania, Constitutional Court (*Curtea Constituțională*), Decisions 818, 819 and 820, 3 July 2008. The Constitutional Court concluded that the dispositions of Art. 1(2) e) and of Art. 27 of the Anti-discrimination Law (GO 137/2000) are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

Intersectional discrimination is not defined or understood in the Romanian legal context.

d. Institutional limitations of the national equality body

The NCCD has not so far developed an operational mechanism to monitor infringements of the legislation or to monitor compliance with its decisions, hence it is difficult to assess the effectiveness of its mandate and the effectiveness of its remedies.

The institutional paralysis of the NCCD between the summer of 2009 and April 2010, caused by the failure of the Parliament to appoint new members to the Steering Board of the NCCD due to a political standstill, as well as the NGO protests following the nominations of six new members in April 2010 and again in 2012 and 2015, as some appointees did not fulfil the legal criteria of expertise, indicated that appointment of NCCD Steering Board members by the Parliament, as a guarantee of institutional independence, has in practice proved to be a hindrance. Politicisation of the Steering Board was visible in several areas: controversial decisions in cases involving politicians; demise of effective remedies in favour of recommendations lacking any legal power; limited quality of legal reasoning; decrease in the number of decisions of the NCCD upheld by the courts after being appealed.

According to the NCCD annual reports, no new staff were recruited due to the budgetary cuts and to a general ban on recruitment in the public system. In addition, some of the activities of the NCCD (e.g. investigations or awareness campaigns) have been affected by the lack of funds or delays in making funds available.

e. Lack of equality data

Misinterpretation of the legislation for the protection of private data leads to generalised absence of equality data which could facilitate development of public policies responding to the needs of different vulnerable groups, allow adequate monitoring of the special measures or could be used in courts or before the NCCD when proving discrimination.

f. Emerging practice of asking for evidence of intention to discriminate when infringing the right to dignity

Romanian legal provisions go beyond the minimum requirements of the directives and provide protection for 'the right to dignity' in combating discrimination. This increased the effectiveness of the anti-discrimination mechanism and helped to increase the visibility of the NCCD. The 'right to dignity' has been invoked in cases where the legal provisions were not sufficient, as was the case in regard to the dividing wall segregating the Roma community in Baia Mare.[18] However, in relation to the right to dignity, a worrying practice is being developed by the NCCD and by the courts, requiring claimants to produce evidence that defendants actually had an intention to discriminate.

g. Freedom of expression used as an excuse in cases of discriminatory speech

Article 2(8) of the Anti-discrimination Law states that its provisions cannot be interpreted so as to limit freedom of expression. Although the NCCD usually invokes the ECtHR jurisprudence in understanding the limitations to freedom of expression, the practice of the NCCD and of the courts is not unitary and many discriminatory speeches made by politicians remain unpenalised on the basis of this justification and are not sanctioned as abuse of the freedom of expression.

[18] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision No. 439, file no. 4A/2011, *ex officio v. Chereches*, 15 November 2011.

RÉSUMÉ

1. Introduction

Bien qu'il s'agisse théoriquement d'une société plurielle,[19] l'approche du principe d'égalité et de non-discrimination a été marquée en Roumanie par trois périodes historiques. Premièrement, la société roumaine a dû composer avec l'expérience communiste d'un discours d'égalité imposé mais contredit de facto par des politiques assimilationnistes agressives vis-à-vis des minorités nationales ou ethniques, par un refus de reconnaître les Roms en tant que minorité ethnique, par une pénalisation des activités homosexuelles consensuelles et par un déni de liberté religieuse. Deuxièmement, la Roumanie a dû composer avec la transition amorcée en 1989. Il s'est agi d'une période de prise de conscience de la situation des minorités s'accompagnant d'un processus d'affirmation des droits de ces groupes et des principes d'égalité et de non-discrimination, y compris l'adoption en 2000 de la loi anti discrimination. La troisième période, qui a suivi l'adhésion à l'UE en 2007, constitue une phase de régression en matière de protection des droits de l'homme ainsi que de résurgence de discours et de comportements nationalistes et extrémistes à l'égard des groupes vulnérables, et notamment des Roms, des personnes LGBT et des minorités religieuses. Cette phase de régression a été particulièrement visible durant les années électorales.

La loi anti discrimination roumaine (Ordonnance gouvernementale n° 137/2000) a été adoptée en 2000 en tant que législation secondaire et ultérieurement modifiée, les trois séries d'amendements les plus récents ayant été effectués en 2013 dans le cadre des procédures engagées devant la Cour de justice de l'Union européenne (CJUE) dans l'affaire C-81/12.[20] L'adoption du texte initial en 2000 est intervenue dans un climat sensible. Les discussions à propos des deux directives européennes en matière d'égalité ont influencé le libellé de la loi roumaine dont les dispositions vont, à de nombreux égards, au-delà de l'acquis. La plupart des affaires portées devant l'organisme national pour l'égalité, à savoir le Conseil national de lutte contre la discrimination, font état d'atteintes au droit à la dignité, ce qui constitue une caractéristique particulière de la loi.

Dix-sept ans après l'adoption de la loi anti discrimination, la Roumanie reste entachée de discrimination. La minorité rom, à propos de laquelle les statistiques officielles sont contestées mais qui est considérée comme la plus importante d'Europe, se heurte à une discrimination en termes d'accès à l'emploi, aux soins de santé, aux biens et aux services, au logement, y compris aux logements publics, et à l'éducation. La résurgence du discours nationaliste extrémiste associé à la vague d'incendies criminels et de violence collective du début des années 1990 à l'encontre des communautés roms, imprègne la sphère publique. Des articles de presse faisant état de l'inquiétude des Italiens, des Français, des Britanniques et des Allemands à propos des Roms roumains ont été autant d'occasions nouvelles de déclarations publiques discriminatoires à l'encontre de cette communauté, y compris par des responsables officiels. Cette acceptation progressive du racisme a conduit en 2011 à présenter comme «mesure de sécurité» la construction d'un mur de 100 mètres de long et 1,8 à 2 mètres de hauteur à Baia Mare.[21]

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[19] Selon le recensement national de 2011, la population roumaine comprend 88,9 % de Roumains, 6,5 % de Hongrois, 2,46 % de Roms et moins de 1 % d'Ukrainiens, d'Allemands, de Russes, de Turcs, de Tatars, de Serbes, de Slovaques, de Croates, de Juifs, d'Arméniens et de Bulgares. Informations disponibles sur: http://www.edrc.ro/recensamant.jsp?language=0, consulté le 24 mars 2017.

[20] Roumanie, l'ordonnance gouvernementale n° 137/2000 sur la prévention et la sanction de toutes les formes de discrimination *(Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) a été publiée au *Monitorul Oficial al României* n° 431 en septembre 2000.

[21] Le Conseil national de lutte contre la discrimination a condamné l'édification de ce mur, mais la Cour d'appel a cassé cette décision. En 2013, la Haute Cour de cassation et de justice a confirmé en définitive la sanction imposée au maire de Baia Mare par le Conseil national de lutte contre la discrimination. Dans une procédure judiciaire distincte visant à faire démolir le mur de séparation, toutefois, le tribunal de Bucarest a confirmé la légalité du mur, qui est toujours debout.

Tout en étant expressément protégée par la loi anti discrimination, la minorité LGBTI reste le groupe le plus ciblé par les attaques: des propositions de loi visent à limiter ses droits et elle est victime chaque année d'agressions lors d'évènements organisés par des ONG – lesquelles agressions sont classées sans suite et restent impunies, ce qui conduit à conclure que les autorités font preuve d'une indifférence pouvant être assimilée à un acquiescement officiel, voire à une connivence avec des crimes de haine.[22] Le code civil entré en vigueur en 2011 interdit spécifiquement le partenariat ou le mariage entre personnes de même sexe, y compris la reconnaissance de partenariats et de mariages homosexuels légalement enregistrés à l'étranger (même lorsqu'ils sont contractés entre étrangers). Une proposition d'organiser un référendum sur la modification de la définition de la famille dans la Constitution roumaine en tant que «mariage entre un homme et une femme» a été soumise au Parlement en 2016. L'initiative a été approuvée par la Cour constitutionnelle et la Chambre des députés; elle était toujours en discussion au Sénat en mai 2018. Les transsexuels ne peuvent davantage prétendre à la moindre protection juridique, étant donné que la législation roumaine ne contient aucune procédure claire et prévisible, ni aucune norme applicable, en ce qui concerne les procédures de changement de sexe ou la délivrance de documents d'identité.

Les programmes spécifiques et les actions positives à l'intention des personnes handicapées ou séropositives sont rares et ne répondent toujours pas à l'ensemble des problèmes rencontrés. Bien qu'elle l'ait signée en septembre 2007, la Roumanie n'a ratifié qu'en novembre 2010 la Convention des Nations unies relative aux droits des personnes handicapées. Aucune législation n'a été adoptée par la suite dans une perspective d'harmonisation. La législation roumaine continue d'utiliser la notion de «handicap» d'une manière qui favorise une approche à focalisation médicale.

L'organisme national pour l'égalité (le Conseil national de lutte contre la discrimination) a contribué au processus de dialogue et de consultation avec les ONG et les partenaires sociaux, mais il a lui-même été mis en difficulté du fait qu'il manque de ressources humaines et matérielles. Il fait l'objet d'une politisation croissante au niveau de son comité directeur en raison du processus de nomination de ses membres.

2. Législation principale

La Constitution roumaine garantit l'égalité de traitement de tous les citoyens en son article 4, paragraphe 2, qui prévoit la citoyenneté sans aucune discrimination fondée sur la race, la nationalité, l'origine ethnique, la langue, la religion, le sexe, les opinions, l'allégeance politique, la fortune ou l'origine sociale, ainsi qu'en son article 16 qui prévoit l'égalité de tous les citoyens devant la loi et les autorités publiques, sans aucun privilège ni aucune discrimination. L'article 30, paragraphe 7, interdit «toute instigation […] à la haine nationale, raciale, de classe ou religieuse, ainsi que toute incitation à la discrimination».

La Roumanie a signé les principaux instruments européens et internationaux en matière de droits de l'homme et sa Constitution affirme que les dispositions constitutionnelles relatives aux droits des citoyens seront interprétées et appliquées conformément à la Déclaration universelle des droits de l'homme, ainsi qu'aux pactes et autres traités auxquels la Roumanie est partie. L'article 20 de la Constitution prévoit également la primauté des réglementations internationales en cas d'incohérence entre les traités en matière de droits fondamentaux et la législation nationale, à moins que les lois nationales ne soient plus favorables.

Parallèlement à la loi anti discrimination proprement dite (Ordonnance gouvernementale n° 137/2000), le code civil autorise les actions en réparation (y compris lorsque le préjudice découle d'une discrimination) et le code pénal comporte des dispositions stipulant

[22] CouEDH, *M.C. et A.C. c. Roumanie (*requête n° 12060/12*),* arrêt du 12 avril 2016, point 124.

des circonstances aggravantes lorsque l'intention criminelle se fonde sur l'un quelconque des motifs protégés par la loi anti discrimination. La base de données ECRIS (application statistique nationale regroupant les données statistiques introduites par l'ensemble des cours et tribunaux) ne consigne pas le nombre de plaintes ou de décisions en matière de discrimination invoquant la loi anti discrimination roumaine (Ordonnance gouvernementale n° 137/2000). [23] Il s'avère dès lors impossible d'évaluer dans quelle mesure ces dispositions sont utilisées ou mises en œuvre.

Le code pénal entré en vigueur en février 2014 prévoit une protection contre l'incitation à la discrimination, aux crimes haineux et aux pratiques abusives avec intention discriminatoire dans l'exercice d'une fonction officielle – dispositions dont l'applicabilité reste toutefois limitée comme en témoignent les statistiques en la matière communiquées par le procureur général.

Le code du travail, tel que modifié en 2011, contient des interdictions générales de discrimination dans l'emploi. La loi sur l'égalité des chances entre les femmes et les hommes reproduit certaines dispositions de la loi anti discrimination, mais elle est dépourvue de voies de recours efficaces et de mécanismes de mise en œuvre appropriés. L'organisme national pour l'égalité couvre de facto tous les motifs de discrimination.

La Cour constitutionnelle a procédé en 2008 et 2009, dans le cadre d'une série d'affaires, à une révision de la loi anti discrimination dont l'application a été partiellement restreinte. Cette restriction d'applicabilité décidée par la Cour concerne les actes législatifs (discrimination de jure), la disposition pertinente de la loi anti discrimination ayant été déclarée inconstitutionnelle lorsqu'elle est interprétée comme habilitant les juridictions ou le Conseil national de lutte contre la discrimination à invalider des dispositions légales discriminatoires. Ceci étant dit, tant en 2008 qu'en 2009, le rôle du Conseil national de lutte contre la discrimination en qualité d'instance quasi-judiciaire a été confirmé lors du processus de révision constitutionnelle de son mandat.

3. Principes généraux et définitions

La loi anti discrimination introduit une définition large et générale de la discrimination directe qui va au-delà du fond et de la portée des directives 43/2000/CE et 78/2000/CE.[24] Alors que la liste des motifs protégés est déjà très généreuse et inclut d'autres motifs que les cinq visés par les directives, l'expression fourre-tout «tout autre critère» a donné la possibilité aux tribunaux roumains ou à l'organisme national pour l'égalité d'appliquer la loi anti discrimination à toute une série de catégories allant au-delà de la simple expérience d'une discrimination et faisant de la norme anti discrimination un large principe d'égalité – une «hyperinflation» de motifs qui risque d'avoir une incidence négative sur l'applicabilité de la loi.

[23] Conseil supérieur de la Magistrature (*Consiliul Superior al Magistraturii),* réponse 5/27805 à une demande d'information publique, 17 décembre 2015.

[24] Roumanie, la loi antidiscrimination (Ordonnance gouvernementale n° 137/2000) sanctionne «toute différence de traitement, exclusion, restriction ou préférence fondée sur la race, la nationalité, l'origine ethnique, la langue, la religion, le statut social, les convictions, le genre, l'orientation sexuelle, l'âge, un handicap, une maladie chronique, la séropositivité, l'appartenance à un groupe défavorisé ou tout autre critère ayant pour but ou pour effet de restreindre ou d'empêcher l'égalité de reconnaissance, l'usage ou l'exercice des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social et culturel, ou tout autre domaine de la vie publique».

La loi définit depuis 2006 la discrimination indirecte[25] ainsi que le harcèlement.[26] Le harcèlement est également puni par la loi sur l'égalité des chances et par le code pénal, mais aucune des définitions n'est totalement conforme à celle énoncée dans les directives.

La rétorsion est définie comme tout traitement défavorable engendré par le dépôt d'une plainte auprès du Conseil national de lutte contre la discrimination ou par l'engagement d'une action en justice pour violation du principe d'égalité de traitement et de non-discrimination. L'injonction de discriminer est définie comme un «ordre» de discriminer, ce qui pourrait demander une clarification complémentaire. La discrimination multiple est définie et constitue une circonstance aggravante en cas de discrimination; ceci dit, l'application de cette disposition reste rare dans la jurisprudence du Conseil national de lutte contre la discrimination, ce qui suggère un manque de compréhension du concept.

La loi anti discrimination a été modifiée en 2013 afin d'y inclure une définition des exigences professionnelles essentielles et déterminantes, laquelle doit encore faire l'objet d'une interprétation. Cette loi ne mentionne pas l'aménagement raisonnable, mais inclut spécifiquement une définition des mesures positives. L'aménagement raisonnable est défini dans la législation relative aux droits des personnes handicapées en tant que facilité accordée au salarié mais pas en tant qu'obligation pour l'employeur.[27] Les notions exposées dans la Recommandation de politique générale n° 7 de la Commission européenne contre le racisme et l'intolérance (ECRI) ne sont pas clairement énoncées dans la loi roumaine, même si certaines d'entre elles ont été incorporées par le Conseil national de lutte contre la discrimination dans sa jurisprudence, et en particulier la ségrégation dans l'enseignement; la discrimination par association; l'intention proclamée de pratiquer une discrimination; l'injonction de discriminer; l'incitation à pratiquer une discrimination; et le fait d'aider une autre personne à pratiquer une discrimination. Une affaire a fait en 2011 les grands titres des médias nationaux en mettant en lumière la non-inclusion dans la loi de l'interdiction de ségrégation résidentielle, une forme de discrimination répandue vis-à-vis des Roms. Le Conseil national de lutte contre la discrimination a sanctionné l'affaire en tant que discrimination, et les tribunaux ont confirmé cette décision.[28]

4. Champ d'application matériel

Le champ d'application matériel de la loi anti discrimination englobe les domaines protégés par la directive 43/2000/CE et par la directive 78/2000/CE. Elle va au-delà de ces domaines dans la mesure où elle prévoit en outre une protection par rapport à la liberté de circulation ainsi qu'une protection du droit à la dignité. Cette dernière est à l'origine d'une jurisprudence diversifiée de la part du Conseil national de lutte contre la discrimination visant à éviter une approche stéréotypée. Le pouvoir législatif a défini la discrimination en optant pour une approche globale, et le principe d'égalité et l'interdiction de discrimination s'appliquent donc à l'ensemble des droits fondamentaux et des libertés fondamentales. Tant les acteurs du secteur public que ceux du secteur privé sont tenus de respecter la loi anti discrimination (Ordonnance gouvernementale n° 137/2000).

Il découle des arrêts prononcés par la Cour constitutionnelle de Roumanie en 2008 et confirmés en 2009 que les dispositions de la loi anti discrimination ne s'appliquent pas aux

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[25] La discrimination indirecte est définie comme «toute disposition, tout critère ou toute pratique apparemment neutre qui désavantage des personnes en raison de leur appartenance à l'un des groupes protégés, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens utilisés pour atteindre ce but soient appropriés et nécessaires».

[26] Le harcèlement est défini et sanctionné comme étant «tout comportement fondé sur des motifs de race, de nationalité, d'origine ethnique, de langue, de religion, de statut social, de convictions, de genre, d'orientation sexuelle, d'appartenance à un groupe défavorisé, d'âge, de handicap, de statut de réfugié ou de demandeur d'asile, ou de tout autre critère qui a pour effet d'instaurer un environnement intimidant, hostile, dégradant ou offensant».

[27] Roumanie, loi n° 448/2006 relative à la protection et à la promotion des droits des personnes handicapées, 6 décembre 2006.

[28] Roumanie, Haute Cour de cassation et de justice (*Inalta Curte de Casație și Justiție*), arrêt n° 640, affaire 1741/33/2011, 27 septembre 2013.

situations discriminatoires causées par des dispositions législatives discriminatoires (lois ou législation secondaire) et que les tribunaux et le Conseil national de lutte contre la discrimination ne sont pas habilités à invalider ou refuser l'application de dispositions légales lorsqu'ils estiment qu'elles sont discriminatoires. Si lors de procédures judiciaires toute partie peut demander que la Cour constitutionnelle soit saisie de l'affaire pour établir le caractère inconstitutionnel des dispositions juridiques en cause, cette option n'est pas prévue dans le cas de procédures devant le Conseil national de lutte contre la discrimination, lequel n'a pas de statut constitutionnel. Le Médiateur, habilité à cette fin, n'a pas signalé à ce jour avoir fait usage de cette compétence pour soumettre une législation discriminatoire à la Cour constitutionnelle.

5. Mise en application de la loi

La loi anti discrimination institue un double système de recours: la victime peut à son choix déposer une requête auprès du Conseil national de lutte contre la discrimination en suivant la filière administrative et/ou une plainte au civil en dommages et intérêts devant les tribunaux (avec exonération des droits de timbre quelle que soit l'option choisie). La victime peut également décider de faire usage des deux options, ce qui suscite certaines difficultés pratiques et grève les ressources limitées du Conseil de lutte contre la discrimination car il est tenu par la loi de participer en qualité d'expert à ce type de procédures civiles. Un autre problème réside dans le risque d'obtenir des arrêts contradictoires de la part de la juridiction administrative et de la juridiction civile.

Toute personne physique ou morale ayant un intérêt dans une affaire, y compris des ONG de défense des droits de l'homme et des groupes minoritaires, peut déposer plainte auprès du Conseil national de lutte contre la discrimination dans un délai d'un an à compter de la date à laquelle l'acte présumé discriminatoire a été commis. Ce Conseil peut également engager une action d'office. Il dispose de 90 jours pour instruire l'affaire, organiser des audiences et établir si les dispositions anti discrimination ont été ou non violées. Lorsque le Conseil national de lutte contre la discrimination constate l'existence d'une discrimination, il peut infliger une sanction administrative (avertissement ou amende). Il est possible de faire appel des décisions du Conseil devant les tribunaux administratifs. Si la victime est une personne physique, le montant de l'amende s'échelonne de EUR 250 à 7 500 (RON 1 000 à 30 000); si les victimes sont un groupe ou une communauté, l'amende se situe dans une fourchette de EUR 500 à 25 000 (RON 2 000 à 100 000) environ.

Le Conseil national de lutte contre la discrimination a développé une pratique consistant à émettre des recommandations qui ne sont assorties d'aucune pénalité financière ou administrative, en particulier dans des actions intentées contre les autorités publiques. Le Conseil a justifié cette manière de procéder en invoquant les règles de prescription fixées par le régime contraventionnel général. Cette pratique a néanmoins eu pour effet de mettre en question le caractère efficace, proportionné et dissuasif des sanctions en cas de discrimination. Les amendements apportés à la loi en 2013 ont répondu à cette problématique en incluant un délai légal de prescription de six mois pour l'application d'une sanction – calculé à partir de la date de publication de la décision du Conseil national de lutte contre la discrimination – remplaçant ainsi le délai de prescription administratif controversé; cet aspect a également été examiné par la Cour de justice dans l'affaire C-81/12. Dans l'arrêt prononcé en 2015 par la Haute Cour de cassation et de justice dans l'affaire qui fonde la saisine C-81/12, les juridictions nationales n'ont pas donné suite aux orientations formulées par la CJUE pour ce qui concerne les sanctions symboliques, et ont soutenu que le simple avertissement donné par le Conseil national de lutte contre la discrimination lorsqu'il constate une discrimination peut être considéré comme une sanction dissuasive, proportionnée et adéquate.[29]

[29] Roumanie, Haute Cour de cassation et de justice (*Inalta Curte de Casație și Justiție*), arrêt 2224/2014 du 29 mai 2015. La Haute Cour a déclaré que, contrairement aux affirmations de la partie plaignante (ACCEPT), l'avertissement (en tant que sanction) n'est pas incompatible avec l'article 17 de la directive 2000/78/CE et ne peut être considéré *de plano* comme une sanction *purement symbolique* (italique utilisé par la Cour).

Les victimes réclamant réparation pour discrimination doivent déposer plainte auprès des juridictions civiles (une décision du Conseil national de lutte contre la discrimination n'est pas requise, mais elle peut jouer un rôle important pour établir s'il y a eu discrimination et pour déterminer le montant des dommages et intérêts). Le Conseil est appelé en qualité d'expert. Le plaignant peut, dans le cas d'une action civile en dommages-intérêts, réclamer une indemnisation pécuniaire et morale ainsi que d'autres types de sanctions (retrait ou suspension de licences d'entités privées offrant des services, par exemple). En vertu de l'article 27 de la loi anti discrimination, les cours et tribunaux peuvent ordonner aux autorités publiques de retirer ou de suspendre le permis d'exploitation de personnes morales qui causent un préjudice important par suite d'un acte discriminatoire ou qui sont des récidivistes.

Une victime de discrimination peut demander à une ONG de défense des droits de l'homme de la représenter, ou opter pour l'engagement de poursuites en son nom propre. En vertu des procédures du Conseil national de lutte contre la discrimination, elle peut choisir de communiquer de manière confidentielle avec ledit Conseil afin de ne pas attirer l'attention des médias. La même demande de confidentialité peut être adressée aux tribunaux. L'amendement apporté en 2006 à la loi anti discrimination autorise spécifiquement l'utilisation de tout type de preuve dans les affaires de discrimination, y compris des enregistrements audio et vidéo, et des données statistiques; le Conseil national de lutte contre la discrimination recourt aux statistiques en tant qu'éléments probants. Si le Conseil et (surtout) les ONG de défense des droits des Roms ont recouru par le passé aux tests de situation, cette méthode n'a pas été utilisée lors d'affaires plus récentes.

L'amendement de la loi anti discrimination effectué en 2013 redéfinit la charge de la preuve.[30] La jurisprudence du Conseil de lutte contre la discrimination interprète les dispositions relatives à la charge de la preuve conformément aux directives dans certains cas, mais pas systématiquement – le Conseil laissant cette charge aux plaignants dans un certain nombre d'affaires. L'interprétation ambiguë de la charge de la preuve tant de la part du Conseil national de lutte contre la discrimination que de la part des juridictions, est confirmée par les arrêts prononcés par la Cour d'appel et la Haute Cour de cassation et de justice qui font suite à l'affaire C-81/12.[31] Les deux instances ont confirmé la décision du Conseil national de lutte contre la discrimination en rejetant l'appel interjeté par ACCEPT Roumanie et en estimant que les déclarations à caractère homophobe et d'exclusion faites par George Becali, personne publiquement connue comme étant le propriétaire du club de football Steaua București, n'étaient pas constitutives d'une discrimination en matière d'emploi fondée sur l'orientation sexuelle.[32]

Lorsqu'il inflige cette forme de sanction, le Conseil national de lutte contre la discrimination dispose d'une marge d'appréciation dans le cadre de laquelle il évalue de multiples éléments, parmi lesquels le contexte dans lequel l'acte a été commis, les effets ou le résultat, et la personnalité de l'auteur des faits sont plus particulièrement pris en compte. Élément qui n'est pas le moins important, la publicité suscitée par la décision de sanctionner l'auteur de l'acte discriminatoire ayant abusé de sa liberté d'expression a eu un rôle dissuasif au sein de la société. La Cour conclut également dans son arrêt que l'association plaignante ne peut justifier le non-respect d'un intérêt public légitime, au sens de l'article 2, paragraphe 1 sous r), de la loi 554/2004 (*Legea Contenciosului Administrativ*), du fait que le Conseil national de lutte contre la discrimination a sanctionné George Becali d'un avertissement et non d'une amende administrative.

30 Le nouveau libellé de la charge de la preuve dispose que «la personne concernée doit présenter des faits conduisant à présumer l'existence d'une discrimination directe ou indirecte, et que la personne à l'encontre de laquelle la plainte a été déposée a l'obligation de prouver qu'il n'y a pas eu de non-respect du principe de l'égalité de traitement. Tout élément de preuve peut être présenté au comité directeur du Conseil (aux tribunaux) dans le respect du régime constitutionnel des droits fondamentaux, y compris des enregistrements audio et vidéo et des données statistiques.»

31 Roumanie, Haute Cour de cassation et de justice (*Inalta Curte de Casație și Justiție*), arrêt 2224/2014, 29 mai 2015.

32 Roumanie, Haute Cour de cassation et de justice (*Inalta Curte de Casație și Justiție*), arrêt 2224/2014, 29 mai 2015. La Haute Cour reprend les conclusions de la Cour d'appel en disant pour droit que la juridiction de première instance a conclu à juste titre à l'absence d'éléments permettant d'établir que le club de football aurait effectué la moindre démarche, de quelque type que ce soit, en vue de s'assurer par contrat des services du joueur I.I. La Haute Cour ajoute qu'en réalité, toute la procédure a été initiée sur la base de déclarations purement spéculatives (de M. Becali); même si l'auteur de la déclaration est une personne qui ne peut être dissociée dans l'esprit du public du club de football Steaua București, on ne peut

Les ONG sont habilitées à ester en justice et peuvent engager des poursuites au nom ou en soutien de victimes de discrimination. Les sanctions prévues dans ce contexte sont néanmoins limitées dans la mesure où il faut qu'il y ait préjudice personnel pour que les tribunaux ordonnent une indemnisation.

On ne dispose d'aucun bilan précis ni d'aucune évaluation concernant les sanctions infligées par les juridictions en cas de discrimination. Étant donné le nombre limité de dossiers publiquement disponibles, on peut conclure sur la base de témoignages anecdotiques que les tribunaux ont fixé un plafond de EUR 10 000 pour ce qui concerne les dommages moraux – montant accordé dans un nombre limité de cas. Les dommages pécuniaires doivent être prouvés selon les normes de procédure en matière de responsabilité civile.

Même en l'absence de publication en ligne de l'ensemble des décisions des tribunaux et du Conseil national de lutte contre la discrimination, et en l'absence de suivi de l'application de ces décisions, il semblerait, sur la base d'informations concernant des récidivistes, que les sanctions deviennent davantage efficaces même si la pratique en la matière n'est pas encore homogène. Les amendements législatifs de 2013 autorisent le Conseil national de lutte contre la discrimination et les juridictions à prévoir pour les contrevenants l'obligation de publier à leurs propres frais des résumés des décisions.

6. Organismes de promotion de l'égalité de traitement

L'organisme national pour l'égalité, à savoir le Conseil national pour la lutte contre la discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) a été institué en 2000 par la loi antidiscrimination, mais il n'a été effectivement mis en place que dans le courant de l'automne 2002. Il a commencé à ouvrir des bureaux régionaux à partir de 2007, et deux sont opérationnels à ce jour.

Le Conseil national de lutte contre la discrimination est une autorité publique autonome placée sous le contrôle du parlement dont l'indépendance est consacrée par la loi antidiscrimination. La nomination des membres de son comité directeur par les six commissions parlementaires pertinentes, censée garantir son indépendance institutionnelle, s'est avérée constituer une entrave dans la pratique puisque la politisation de ce processus de nomination a eu pour effet que le Conseil s'est trouvé paralysé depuis l'été 2009 jusqu'en avril 2010. Les nominations effectuées en avril 2010 ont été critiquées par des ONG et par des candidats indépendants qui ont fait valoir que le non-respect des exigences légales et la politisation de la procédure nuisaient fortement à la professionnalisation dont le Conseil a besoin. Des voix à l'encontre de la politisation de l'institution se sont également fait entendre au sein même du Conseil national de lutte contre la discrimination, y compris celle de son président. Les trois nouvelles nominations intervenues en 2012 ont suscité des réactions mitigées: deux des candidats relevaient de nominations politiques et ne présentaient qu'une expérience pertinente limitée, mais le troisième était un expert réputé en matière de non-discrimination, dont le mandat a été renouvelé en raison de ses compétences et de son engagement – et en dépit de son absence d'allégeance politique. Des ONG ont contesté les procédures de nomination de six nouveaux membres du comité directeur en 2015 en faisant valoir qu'elles ne se conformaient pas aux exigences légales, qu'elles privilégiaient des candidats soutenus par des partis politiques et qu'elles manquaient de transparence. La composition actuelle du comité directeur ne respecte pas l'obligation légale visée à l'article 23 de l'ordonnance gouvernementale n° 137/2000 selon laquelle deux tiers au moins de ses membres doivent être diplômés en droit (étant donné que quatre des neuf membres n'ont aucune formation juridique).

considérer que cet épisode unique puisse étayer les conclusions tirées par la partie plaignante (suppositions), d'autant plus que le club de football Steaua București a nié durant toute la procédure le moindre lien avec les déclarations en question et que des faits de base font défaut.

Le mandat du Conseil national de lutte contre la discrimination englobe le soutien aux victimes de discrimination par l'apport d'une assistance indépendante; la prévention de la discrimination au travers d'une sensibilisation et de la réalisation d'analyses et d'autres travaux de recherche; la collecte de données pertinentes; des études indépendantes et des rapports indépendants; la médiation entre parties; des enquêtes et l'application de sanctions en cas de discrimination; et l'initiative de propositions législatives visant à assurer l'harmonisation des dispositions légales avec le principe d'égalité. Concrètement, le rôle principal du Conseil national de lutte contre la discrimination est celui d'une instance quasi-judiciaire habilitée à établir si certains actes constituent une discrimination et à prendre subséquemment des sanctions administratives (avertissements ou amendes). Le mandat du Conseil national de lutte contre la discrimination a été élargi en 2017 par la loi n° 106/2017, dont l'article 4 confère au dit Conseil la tâche de surveiller les droits des citoyens de l'UE exerçant leur libre circulation en Roumanie, et de remplir le rôle de point focal national au titre du règlement (UE) n° 492/2011 du Parlement européen et du Conseil du 5 avril 2011 relatif à la libre circulation des travailleurs à l'intérieur de l'Union.[33]

La visibilité du Conseil national de lutte contre la discrimination s'est accrue de façon exponentielle au cours des sept dernières années à la suite d'une série d'affaires impliquant des politiciens roumains de premier plan (le Président, plusieurs Premiers ministres, deux anciens ministres des Affaires étrangères, un ministre de la Culture et un membre du Parlement européen), ainsi que d'affaires ayant fortement mobilisé l'attention des médias (décision concernant la présence de symboles religieux dans les classes d'écoles publiques, affaires de ségrégation scolaire, décisions à l'encontre de divers clubs de sport notamment) et de prises de positions publiques à l'encontre de comportements racistes, homophobes et populistes. L'institution est progressivement devenue une instance proactive qui, engagée dans une multitude de projets, s'impose aujourd'hui comme un interlocuteur sérieux dans la lutte contre la discrimination dans un contexte extrêmement sensible. Certaines préoccupations quant à la politisation du comité directeur viennent ternir cette image globalement louable.

7. Points essentiels

a. La non-adoption de sanctions qui soient dissuasives, proportionnées et efficaces

La pratique du Conseil national de lutte contre la discrimination consistant à sanctionner certains cas de discrimination au moyen d'avertissements administratifs ou de recommandations seulement, sans infliger d'amendes administratives dans tous les cas où il a établi l'existence d'une discrimination, tend à éroder le caractère efficace, proportionné et dissuasif des sanctions qu'il prononce. Les avertissements ne sont pas assortis de pénalités financières et rien n'est prévu pour assurer le suivi des auteurs de faits discriminatoires en vue d'assurer l'application des sanctions et de prévenir toute nouvelle discrimination.

b. Le Conseil national pour la lutte contre la discrimination et les tribunaux ne peuvent statuer contre une discrimination et la sanctionner lorsque des dispositions législatives discriminatoires sont en cause

Le fait que la Cour constitutionnelle roumaine ait restreint la portée de la loi antidiscrimination dans une série d'arrêts prononcés en 2008 et 2009, lesquels ont limité le mandat à la fois du Conseil national de lutte contre la discrimination[34] et des juridictions

[33] Roumanie, loi n° 106/2017 relative aux mesures visant à améliorer l'exercice des droits dans le cadre de la libre circulation au sein de l'UE (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.5.2017).

[34] Roumanie, Cour constitutionnelle (*Curtea Constituțională*), arrêt n° 997 du 7 septembre 2008 constatant le caractère inconstitutionnel de l'article 20, paragraphe 3, de la loi antidiscrimination (Ordonnance gouvernementale n° 137/2000) qui définit le mandat du Conseil national de lutte contre la discrimination pour ce qui concerne la discrimination découlant de dispositions législatives.

civiles pour ce qui concerne la discrimination découlant de dispositions législatives,[35] a créé un vide en termes de protection contre la discrimination. Le Conseil national de lutte contre la discrimination n'est pas habilité à saisir la Cour constitutionnelle en vue d'une révision constitutionnelle lorsqu'il constate des normes discriminatoires et le Médiateur n'a pas agi en pareils cas.

c. Certains concepts juridiques doivent encore être éclaircis et interprétés

La loi antidiscrimination roumaine utilise le terme «ordre» au lieu du terme «injonction» à l'article 2, paragraphe 2, ce qui pourrait conduire à une interprétation restrictive de l'injonction de discriminer en limitant l'interdiction aux relations hiérarchiques.

Le concept d'aménagement raisonnable pour les personnes handicapées ne figure pas dans la loi anti discrimination roumaine; il est actuellement défini dans la législation spéciale sur la promotion et la protection des droits des personnes handicapées en tant que facilité à l'intention du salarié sur le lieu de travail, mais aucune sanction n'est prévue si l'employeur n'y procède pas.

La discrimination intersectionnelle n'est ni définie ni bien comprise dans le contexte juridique roumain.

d. Limitations institutionnelles de l'organisme national pour l'égalité

Le Conseil national de lutte contre la discrimination n'ayant pas encore instauré à ce jour de mécanisme opérationnel pour surveiller les infractions à la législation et le respect de ses décisions, il s'avère difficile de mesurer la performance de sa mission et l'efficacité des réparations qu'il impose.

La paralysie institutionnelle que le Conseil national de lutte contre la discrimination a connu entre l'été 2009 et avril 2010 parce qu'un blocage politique a empêché le parlement de nommer de nouveaux membres auprès de son comité directeur, ainsi que les protestations exprimées par les ONG lors de la nomination de six nouveaux membres en avril 2010, et à nouveau en 2012 et 2015, parce que certaines personnes nommées ne satisfaisaient pas aux critères légaux de compétence, ont montré que la désignation des membres du comité directeur du Conseil par le parlement, censée être une garantie d'indépendance institutionnelle, constitue en réalité une entrave. La politisation du comité directeur s'est manifestée dans plusieurs domaines: décisions controversées dans des affaires impliquant des politiciens; abandon de sanctions efficaces au profit de recommandations n'ayant aucun effet légal; qualité limitée du raisonnement juridique; diminution du nombre de décisions du Conseil national de lutte contre la discrimination confirmées par les tribunaux après avoir fait l'objet d'un appel.

Selon les rapports annuels du Conseil national de lutte contre la discrimination, aucun nouveau personnel n'a été engagé en raison de coupes budgétaires et d'une interdiction générale d'embauche dans le réseau public. Plusieurs activités du Conseil national de lutte contre la discrimination (enquêtes ou campagnes de sensibilisation notamment) ont été affectées en outre par la pénurie de fonds ou par des retards dans leur mise à disposition.

e. Insuffisance de données sur l'égalité

[35] Roumanie, Cour constitutionnelle (Curtea Constituţională), arrêts n° 818, 819 et 820 du 3 juillet 2008. La Cour constitutionnelle conclut en l'espèce que les dispositions de l'article 1, paragraphe 2, et de l'article 27 de la loi anti discrimination (Ordonnance gouvernementale n° 137/2000) sont inconstitutionnelles dans la mesure où elles sont interprétées comme impliquant que les tribunaux sont habilités à invalider ou à refuser l'application de dispositions législatives lorsqu'ils estiment que les dispositions en question sont discriminatoires.

Une mauvaise interprétation de la législation relative à la protection des données à caractère personnel conduit à une absence généralisée de données de qualité, lesquelles faciliteraient le développement de politiques publiques répondant aux besoins des différents groupes vulnérables; permettraient un suivi adéquat des mesures spéciales; ou pourraient servir à prouver l'existence d'une discrimination devant un tribunal ou devant le Conseil national de lutte contre la discrimination.

f. Pratique nouvelle consistant à réclamer des preuves de l'intention de discriminer en cas d'atteinte au droit à la dignité

Les dispositions légales roumaines vont au-delà des exigences minimales des directives et prévoient une protection du «droit à la dignité» dans la lutte contre la discrimination – ce qui a accru l'efficacité du mécanisme antidiscrimination et contribué à renforcer la visibilité du Conseil national de lutte contre la discrimination. Le «droit à la dignité» a été invoqué dans des cas où les dispositions légales n'étaient pas suffisantes, et notamment dans l'affaire relative au mur de séparation bâti à Baia Mare pour isoler la communauté rom.[36] On observe toutefois, en rapport avec le droit à la dignité, le développement d'une pratique inquiétante de la part du Conseil national de lutte contre la discrimination et de la part des tribunaux, qui consiste à exiger du plaignant qu'il fournisse la preuve que la partie défenderesse avait véritablement une intention de discrimination.

g. La liberté d'expression servant d'excuse à des discours discriminatoires

L'article 2, paragraphe 8, de la loi anti discrimination stipule que ses dispositions ne peuvent être interprétées comme une limitation de la liberté d'expression. Même si le Conseil national de lutte contre la discrimination invoque généralement la jurisprudence de la CouEDH pour interpréter les limites de cette liberté, la pratique du Conseil et des juridictions n'est pas unitaire en la matière, et de nombreux discours discriminatoires prononcés par des politiciens restent impunis sur la base de cette justification et ne sont pas sanctionnés en tant qu'abus de la liberté d'expression.

[36] Conseil national de lutte contre la discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), décision n° 439 du 15 novembre 2011 dans le dossier n° 4A/2011 *ex officio* c. Chereches.

ZUSAMMENFASSUNG

1. Einleitung

Theoretisch ist Rumänien eine pluralistische Gesellschaft.[37] Allerdings durchlief das Verständnis der Prinzipien von Gleichbehandlung und Nichtdiskriminierung drei historische Phasen. Zunächst musste Rumänien die kommunistische Erfahrung einer erzwungenen Gleichheitsrhetorik aufarbeiten, die *de facto* durch eine aggressive Assimilationspolitik gegenüber nationalen oder ethnischen Minderheiten, die Nichtanerkennung der Roma als ethnische Minderheit, die Kriminalisierung einvernehmlicher homosexueller Handlungen und fehlende Religionsfreiheit konterkariert wurde. Zweitens hat Rumänien noch immer nicht die politischen Reformprozesse abgeschlossen, die im Jahr 1989 begannen. In ihrem Verlauf wurde der Lage von Minderheiten mehr Beachtung geschenkt, wobei die Rechte dieser Gruppen und die Grundsätze der Gleichbehandlung und Nichtdiskriminierung gestärkt wurden. In diese Phase fällt auch die Verabschiedung des Antidiskriminierungsgesetzes im Jahr 2000. Nach dem Beitritt zur EU im Jahr 2007 begann einer Phase der Rückschritte beim Schutz der Menschenrechte und eine Wiederbelebung nationalistischer und rechtsextremer Rhetorik und Verhaltensweisen gegenüber benachteiligten Gruppen, insbesondere gegenüber den Roma, LGBT-Personen und religiösen Minderheiten. Diese Regression war in Wahljahren besonders stark zu spüren.

Das rumänische Antidiskriminierungsgesetz, die Regierungsverordnung 137/2000 (GO 137/2000), wurde im Jahr 2000 als delegierte Rechtsvorschrift erlassen und später mehrfach überarbeitet, wobei die letzten drei Überarbeitungen im Jahr 2013 im Kontext des vor dem Gerichtshof der Europäischen Union (EuGH) geführten Verfahrens in der Rechtssache C-81/12 stattfanden.[38] Bei der Verabschiedung im Jahr 2000 war die politische Lage angespannt. Die Diskussionen über die beiden europäischen Gleichbehandlungsrichtlinien beeinflussten die Abfassung des rumänischen Gesetzes, das in vielen Bereichen über den Besitzstand der Union hinausgeht. Die Mehrzahl der Fälle, die der rumänischen Gleichbehandlungsstelle, dem *Consiliul Naţional pentru Combaterea Discriminării* (CNCD – Nationaler Rat zur Bekämpfung von Diskriminierung, im Folgenden NRBD), vorgelegt werden, bezieht sich auf Verletzungen der Menschenwürde – eine Besonderheit des Gesetzes.

Siebzehn Jahre nach Verabschiedung des Antidiskriminierungsgesetzes ist Diskriminierung in Rumänien weiterhin stark verbreitet. Die Roma-Minderheit in Rumänien, für die keine zuverlässigen öffentlichen Zahlen vorliegen, die jedoch als die größte in Europa gilt, wird beim Zugang zu Beschäftigung, Gesundheitswesen, Dienstleistungen und Gütern, Wohnraum, einschließlich Sozialwohnungen, sowie Bildung benachteiligt. Die Wiederbelebung eines extrem nationalistischen Diskurses, der auch die Fälle von Brandstiftung und Massenausschreitungen gegen Roma-Gemeinschaften Anfang der 1990er Jahre geprägt hatte, durchdringt den öffentlichen Raum. Medienberichte über italienische, französische, britische oder deutsche Kritik am Umgang mit den Roma wird selbst von Amtsträgern zu neuen öffentlichen Diskriminierungen gegen die Roma genutzt. Dieses schrittweise Abstumpfen gegenüber Rassismus führte im Jahr 2011 dazu, dass in Baia Mare eine 100 Meter lange und 1,8 bis 2 Meter hohe Mauer als „Sicherheitsmaßnahme" errichtet wurde.[39]

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[37] Nach der Volkszählung von 2011 setzt sich die Bevölkerung des Landes zusammen aus 88,9 % Rumänen, 6,5 % Ungarn, 2,46 % Roma und weniger als 1 % Ukrainern, Deutschen, Russen, Türken, Tartaren, Serben, Kroaten, Juden, Armeniern und Bulgaren. Die Zahlen sind verfügbar unter: http://www.edrc.ro/recensamant.jsp?language=0 (letzter Zugriff am 24. März 2017).

[38] Rumänien, Regierungsverordnung 137/2000 über die Prävention und Bestrafung jeder Form der Diskriminierung *(Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), veröffentlicht in *Monitorul Oficial al României* Nr. 431, September 2000.

[39] Der NRBD verhängte wegen des Baus der Mauer Sanktionen, seine Entscheidung wurde jedoch vom Berufungsgericht aufgehoben. 2013 bestätigte schließlich der Oberste Kassations- und Strafgerichtshof die Sanktionen, die der NRBD gegen den Bürgermeister von Baia Mare verhängt hatte. In einem eigenständigen

Wenn auch durch das Antidiskriminierungsgesetz ausdrücklich geschützt, ist die LGBTI-Minderheit nach wie vor die Gruppe, die am stärksten unter Beschuss steht, sei es durch Gesetzentwürfe, mit denen ihre Rechte eingeschränkt werden, sei es durch Übergriffe bei Veranstaltungen, die von NROs organisiert werden. Diese Übergriffe wurden nicht untersucht und haben keinerlei Sanktionen nach sich gezogen, was nahelegt, dass die staatlichen Behörden für die resultierende Gleichgültigkeit, die „einer offiziellen Duldung, wenn nicht sogar Billigung von Hassverbrechen gleichkäme", verantwortlich sind.[40] Die Initiative wurde vom Verfassungsgericht und der Abgeordnetenkammer gebilligt und ist seit Mai 2018 im Senat anhängig. Transgender-Personen genießen keinen Rechtsschutz, weil das rumänische Recht keinerlei klare, vorhersehbare Verfahren und anwendbare Standards bietet, was Verfahren zur Geschlechtsangleichung oder die Ausstellung von Ausweispapieren betrifft.

Spezielle Programme und positive Maßnahmen für Menschen mit Behinderungen oder Menschen mit HIV bzw. AIDS sind selten und decken bei weitem nicht alle Problemfelder ab. Rumänien hat das Übereinkommen über die Rechte von Menschen mit Behinderungen der Vereinten Nationen zwar bereits im September 2007 unterzeichnet, jedoch erst im November 2010 ratifiziert. Es wurden noch keine Gesetze zur Harmonisierung verabschiedet. Das rumänische Recht verwendet immer noch den Begriff „Behinderte" statt „Menschen mit Behinderung", wodurch der medizinische Aspekt betont wird.

Die nationale Gleichbehandlungsstelle, der NRBD, hat den Dialog und Konsultationen mit NROs und den Sozialpartnern angestoßen, steht aber selbst unter Druck, weil ihre personellen und finanziellen Mittel beschränkt sind. Der NRBD ist Opfer einer zunehmenden Politisierung seines Lenkungsausschusses, die dem Verfahren zur Ernennung seiner Mitglieder geschuldet ist.

2. Wichtigste Rechtsvorschriften

Die rumänische Verfassung garantiert in Artikel 4 Absatz 2 die Gleichbehandlung aller Bürger, wobei die Staatsbürgerschaft ohne Diskriminierung aufgrund von „Rasse", Nationalität, ethnischer Zugehörigkeit, Sprache, Religion, Geschlecht, Überzeugung, politischer Zugehörigkeit, Eigentum oder sozialer Herkunft gewährt wird. Artikel 16 garantiert die Gleichbehandlung aller Bürger vor dem Gesetz und öffentlichen Behörden ohne Bevorzugung oder Diskriminierung. Artikel 30 Absatz 7 verbietet „Anstachelung … zu nationalem, rassistischem, klassenbezogenem oder religiösem Hass und Aufhetzung zur Diskriminierung".

Rumänien hat alle wichtigen europäischen und internationalen Menschenrechtsabkommen unterzeichnet und gemäß der Verfassung müssen bei der Auslegung und Durchsetzung der in der Verfassung verankerten Rechte der Bürger die Allgemeine Erklärung der Menschenrechte und alle internationalen Pakte und sonstigen Verträge berücksichtigt werden, die Rumänien unterzeichnet hat. Artikel 20 der Verfassung garantiert bei Widersprüchen zwischen den Menschenrechtsabkommen und dem nationalen Recht den Vorrang der internationalen Rechtsvorschriften, es sei denn, die nationalen Gesetze sind vorteilhafter.

Neben dem speziellen Antidiskriminierungsgesetz (GO 137/2000) erlaubt das Zivilgesetzbuch Schadensersatzklagen bei Schäden (einschließlich von Schäden wegen einer Diskriminierung) und das Strafgesetzbuch enthält Bestimmungen über erschwerende Umstände, wenn eine Straftat aus den im Antidiskriminierungsrecht geschützten Diskriminierungsgründen begangen wurde. Die ECRIS-Datenbank, die nationale Statistikanwendung zur Sammlung statistischer Daten von allen Gerichten, erfasst nicht, wie viele Beschwerden oder Entscheidungen in Anwendung des rumänischen

Verfahren vor dem Amtsgericht Bukarest, in dem auf den Abriss der Mauer geklagt wurde, kam das Gericht zu dem Urteil, dass die Mauer rechtmäßig ist. Die Mauer steht immer noch.

[40] EGMR, *M.C. and A.C. v. Romania* (Individualbeschwerde Nr. 12060/12) vom 12. April 2016, Ziffer 124.

Antidiskriminierungsgesetzes (Regierungsverordnung 137/2000) im Bereich Diskriminierung eingereicht werden bzw. ergehen. [41] Es ist daher unmöglich, die Anwendung bzw. Durchsetzung dieser Vorschriften zu beurteilen.

Das Strafgesetzbuch, das seit Februar 2014 in Kraft ist, bietet Schutz vor Anstachelung zu Diskriminierung, Hassverbrechen und Beschimpfung mit diskriminierender Absicht während der Ausübung eines öffentlichen Amts. Wie die gesonderten Statistiken des Generalstaatsanwalts zeigen, sind diese Normen jedoch nur beschränkt durchsetzbar.

Die Neufassung des Arbeitsgesetzes aus dem Jahr 2011 enthält ein allgemeines Verbot von Diskriminierung im Bereich der Beschäftigung. Das Gesetz über Chancengleichheit zwischen Frauen und Männern wiederholt einige der Bestimmungen des Antidiskriminierungsgesetzes, sieht aber keine wirksamen Rechtsmittel und geeigneten Umsetzungsmechanismen vor – *de facto* ist der NRBD für alle Diskriminierungsgründe zuständig.

2008 und 2009 wurde das Antidiskriminierungsgesetz vom Rumänischen Verfassungsgericht in einer Reihe von Fällen überprüft und seine Anwendung teilweise limitiert. Das Verfassungsgericht schränkte die Anwendbarkeit des Antidiskriminierungsrechts für Gesetzgebungsakte (Diskriminierung *de jure*) ein und erklärte die entsprechende Gesetzesvorschrift für verfassungswidrig, sofern sie so ausgelegt wurde, dass sie es Gerichten oder dem NRBD erlaubte, diskriminierende Rechtsvorschriften aufzuheben. Nichtsdestotrotz wurde sowohl 2008 als auch 2009, anlässlich der verfassungsrechtlichen Prüfung des Mandats des NRBD, dessen Rolle als quasi-gerichtliche Stelle bestätigt.

3. Wichtigste Grundsätze und Begriffe

Das Antidiskriminierungsgesetz führt eine weite, umfassende Definition von unmittelbarer Diskriminierung ein, die über den Inhalt und den Anwendungsbereich der Richtlinien 2000/43/EG und 2000/78/EG hinausgeht. [42] Obwohl die Liste der geschützten Diskriminierungsgründe sehr großzügig ist und mehr als die fünf Gründe der Richtlinien enthält, ermöglicht es den Gerichten oder dem NRBD durch die allgemeine Wendung „irgendeinem anderen Kriterium", das Gesetz auf Kategorien anzuwenden, die über reine Diskriminierung hinausgehen, und das Diskriminierungsverbot in einen breiter gefassten Gleichbehandlungsgrundsatz zu verwandeln. Diese „Hyperinflation" von Diskriminierungsgründen kann sich aber auch negativ auf die Durchsetzbarkeit auswirken.

Seit 2006 enthält das Gesetz eine Definition von mittelbarer Diskriminierung [43] und Belästigung. [44] Belästigung wird auch im Gesetz für Chancengleichheit und im Strafgesetzbuch verboten, jedoch erfüllt keine der Definitionen vollständig die Vorgaben der Richtlinien.

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41 Oberster Magistraturrat (*Consiliul Superior al Magistraturii),* Antwort 5/27805 auf eine öffentliche Informationsanfrage, 17. Dezember 2015.

42 Rumänien, das Antidiskriminierungsgesetz (GO 137/2000) verbietet „die Unterscheidung, Ausgrenzung, Beschränkung oder Bevorzugung aufgrund von Rasse, Nationalität, ethnischer Zugehörigkeit, Sprache, Religion, sozialem Status, Glaube, sexueller Ausrichtung, Alter, Behinderung, nicht ansteckender chronischer Erkrankung, HIV-Infektion, Zugehörigkeit zu einer benachteiligten Gruppe oder irgendeinem anderen Kriterium, die eine Einschränkung oder Verhinderung der gleichwertigen Anerkennung oder der Ausübung der Menschenrechte und Grundfreiheiten im politischen, wirtschaftlichen, sozialen und kulturellen Bereich oder jedem anderen Bereich des öffentlichen Lebens bewirkt oder bezweckt."

43 Mittelbare Diskriminierung ist definiert als „dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren, die Personen aufgrund eines der geschützten Gründe benachteiligen, mit Ausnahme von Fällen, in denen diese Vorschriften, Kriterien oder Verfahren durch ein rechtmäßiges Ziel sachlich gerechtfertigt, und die Mittel zur Erreichung dieses Ziels angemessen und erforderlich sind."

44 Belästigung ist definiert als „Verhaltensweisen aufgrund von Rasse, Nationalität, ethnischer Zugehörigkeit, Sprache, Religion, sozialem Status, Glauben, Geschlecht, sexueller Ausrichtung, Zugehörigkeit zu einer benachteiligten Gruppe, Alter, Behinderung, Status als Flüchtling oder Asylsuchender oder irgendeinem anderen Kriterium, mit denen ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird". Belästigung ist durch das Gesetz verboten.

Viktimisierung wird definiert als Benachteiligungen, die als Reaktion auf Beschwerden beim NRBD oder auf die Einleitung eines Verfahrens vor Gericht zur Durchsetzung des Gleichbehandlungsgrundsatzes und des Diskriminierungsverbots erfolgen. Anweisung zur Diskriminierung wird als „Befehl" zur Diskriminierung definiert, was Raum für eine weitere Klärung des Begriffs lässt. Mehrfachdiskriminierung wird definiert und stellt einen erschwerenden Umstand in Diskriminierungsfällen dar, diese Bestimmung wird jedoch in der Rechtsprechung des NRBD kaum umgesetzt, was darauf hindeutet, dass das Konzept dort nicht verstanden wird.

2013 wurde eine Definition von wesentlichen und entscheidenden beruflichen Anforderungen in das Antidiskriminierungsgesetz aufgenommen, die aber noch auf ihre Auslegung vor Gericht wartet. Das Antidiskriminierungsgesetz kennt keine angemessenen Vorkehrungen, enthält aber eine Definition des Begriffs „positive Maßnahmen." In den Rechtsvorschriften über die Rechte von Menschen mit Behinderungen werden angemessene Vorkehrungen als eine Erleichterung definiert, die dem Arbeitnehmer gewährt wird, nicht jedoch als Pflicht des Arbeitgebers.[45] Die allgemeinen politischen Empfehlungen Nr. 7 der ECRI wurden nicht in rumänisches Recht umgesetzt, obwohl einige Elemente vom NRBD bei seiner Rechtsprechung berücksichtigt wurden, insbesondere in Bezug auf Segregation im Bildungswesen, Diskriminierung durch Assoziierung, angekündigte Absicht zur Diskriminierung, Anweisung zur Diskriminierung, Aufhetzung zur Diskriminierung und Unterstützung bei diskriminierenden Handlungen. Ein Fall aus dem Jahr 2011, der für landesweite Schlagzeilen sorgte, machte deutlich, dass das Gesetz kein Verbot von Wohnsegregation enthält, eine Form der Diskriminierung, von der Roma stark betroffen sind. Der NRBD stufte den Fall als Diskriminierung ein, und die Gerichte bestätigten seine Entscheidung.[46]

4. Sachlicher Geltungsbereich

Der sachliche Geltungsbereich des Antidiskriminierungsgesetzes umfasst alle Bereiche, die durch die Richtlinien 2000/43/EG und 2000/78/EG geschützt sind. Das Gesetz geht aber noch darüber hinaus und sieht sowohl den Schutz der Freizügigkeit als auch den Schutz des Rechts auf Menschenwürde vor. Letzteres hat zu diversen Entscheidungen des NRBD geführt, die einen anti-stereotypisierenden Ansatz fördern. Bei der Definition von Diskriminierung folgte der Gesetzgeber einem umfassenden Ansatz, weshalb der Grundsatz der Gleichheit und das Verbot von Diskriminierung für alle Grundrechte und Grundfreiheiten gelten. Das Antidiskriminierungsgesetz (GO 137/2000) gilt für öffentliche und private Akteure gleichermaßen.

Urteilen zufolge, die das rumänische Verfassungsgericht 2008 fällte und 2009 bestätigte, gelten die Bestimmungen des Antidiskriminierungsgesetzes nicht für Fälle von Diskriminierung, die durch diskriminierende Rechtsvorschriften (Gesetzen oder Verordnungen) ausgelöst werden, und sind die Gerichte und der NRBD nicht befugt, Rechtsnormen, die sie für diskriminierend halten, für ungültig zu erklären oder ihre Anwendung abzulehnen. Während in Gerichtsverfahren jede der beteiligten Parteien beantragen kann, den Fall dem Verfassungsgericht vorzulegen, um Rechtsvorschriften auf ihre Verfassungsmäßigkeit zu überprüfen, existiert diese Möglichkeit bei Verfahren vor dem NRBD nicht, da dieser vor dem Verfassungsgericht nicht klageberechtigt ist. Die Ombudsstelle hat zwar eine solche Klagebefugnis, hat bislang aber noch nie gemeldet, dass es diese genutzt hätte, um diskriminierende Rechtsvorschriften vor das Verfassungsgericht zu bringen.

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[45] Rumänien, Gesetz 448/2006 über Schutz und Förderung der Rechte von Menschen mit Behinderung, 6. Dezember 2006.

[46] Rumänien, Oberster Kassations- und Strafgerichtshof (*Inalta Curte de Casație și Justiție*), Urteil 640, Rechtssache 1741/33/2011, 27. September 2013.

5. Rechtsdurchsetzung

Das Antidiskriminierungsgesetz sieht ein duales System von Rechtsmitteln vor: Kläger können beim NRBD eine Eingabe auf dem Verwaltungsweg machen und/oder Zivilklage vor Gericht einreichen (in beiden Fällen werden keine Gerichtsgebühren erhoben). Opfer können auch beide Wege gleichzeitig beschreiten, was jedoch praktische Schwierigkeiten aufwirft und die sowieso schon knappen Ressourcen des NRBD weiter strapaziert, weil die Stelle gesetzlich verpflichtet ist, als Gutachter an all diesen Zivilverfahren teilzunehmen. Ein weiteres Problem besteht darin, dass die Verwaltungs- und Zivilgerichte möglicherweise zu sich widersprechenden Entscheidungen kommen.

Einzelpersonen und juristische Personen mit einem rechtmäßigen Interesse, einschließlich von Menschenrechtsorganisationen und Minderheitenverbänden, können innerhalb eines Jahres nach der mutmaßlichen Diskriminierung beim NRBD Beschwerde einreichen. Der NRBD kann auch von Amts wegen eigene Untersuchungen einleiten. Der NRBD muss innerhalb von 90 Tagen den Fall untersuchen, die Parteien hören und entscheiden, ob ein Verstoß gegen das Diskriminierungsverbot vorliegt. Wenn der NRBD eine Diskriminierung feststellt, kann er Ordnungsstrafen verhängen (Verwarnungen oder Geldbußen). Gegen Entscheidungen des NRBD kann vor den Verwaltungsgerichten Einspruch eingelegt werden. Wenn das Opfer eine Einzelperson ist, liegt die Geldbuße im Bereich von EUR 250-7 500 (RON 1 000-30 000); wenn eine Gruppe oder Gemeinschaft diskriminiert wurde, liegt die Geldbuße im Bereich von rund EUR 500-25 000 (RON 2 000-100 000).

Der NRBD hat die Praxis entwickelt, Empfehlungen auszusprechen, die nicht mit finanziellen oder sonstigen Strafen einhergehen, insbesondere in Verfahren, die sich gegen staatliche Behörden richten. Dabei beruft sich der NRBD auf die Verjährungsfristen gemäß den allgemeinen Regeln in Bezug auf leichte Straftaten. Eine Folge dieser Praxis war aber auch, dass inzwischen bezweifelt werden muss, ob die Rechtsmittel in Diskriminierungsfällen wirksam, verhältnismäßig und abschreckend sind. Durch die Überarbeitung des Antidiskriminierungsgesetzes von 2013 sollte das Problem gelöst werden, indem für Sanktionen eine Verjährungsfrist von sechs Monaten ab der Entscheidung des NRBD eingeführt wird, die die umstrittene verwaltungsrechtliche Verjährungsfrist ersetzt. Dieser Aspekt spielt auch in der Rechtssache C-81/12 vor dem Gerichtshof der Europäischen Union (EuGH) eine Rolle. In der Entscheidung des Obersten Gerichts- und Kassationshofs von 2015, die Grundlage für die Anrufung in der Rechtssache C-81/12 war, gingen die nationalen Gerichte nicht auf die Orientierungshilfen des EuGH bezüglich symbolischer Sanktionen ein und bekräftigten, dass die bloße Verwarnung, die der NRBD bei Vorliegen einer Diskriminierung ausspricht, als abschreckende, verhältnismäßige und angemessene Sanktion anzusehen sei.[47]

Betroffene, die aufgrund einer Diskriminierung auf Entschädigung klagen möchten, müssen dies vor einem Zivilgericht tun – dabei ist eine Entscheidung des NRBD keine Voraussetzung, kann aber beim Nachweis der Diskriminierung und bei der Bestimmung des Schadens eine wichtige Rolle spielen. Der NRBD wird in diesem Fall als Gutachter gehört. In einem Zivilverfahren kann der Kläger auf Schadensersatz und Schmerzensgeld

[47] Rumänien, Oberster Gerichts- und Kassationshof (*Inalta Curte de Casație și Justiție*), Entscheidung 2224/2014, 29. Mai 2015. Der Gerichtshof erklärte: „Entgegen den Ausführungen der Beschwerdeführerin (ACCEPT) ist eine Verwarnung (als Sanktion) mit Art. 17 der Richtlinie 2000/78/EG nicht unvereinbar und kann rundweg als *rein symbolische* Sanktion gelten [Hervorhebung durch das Gericht]. Bei der Anwendung dieser Sanktion hat der NRBD einen Ermessensspielraum, in dessen Rahmen er zahlreiche Elemente würdigt; der Kontext, in dem die Tat verübt wurde, die Auswirkungen bzw. das Ergebnis und die Person des Täters spielten dabei eine wichtige Rolle. Nicht zuletzt hatte die durch die Entscheidung, die Person, die sich durch exzessive Ausübung ihres Rechts auf freie Meinungsäußerung einer Diskriminierung schuldig gemacht hat, mit einer Sanktion zu belegen, hervorgerufene öffentliche Aufmerksamkeit in der Gesellschaft eine abschreckende Wirkung." Weiter heißt es in der Entscheidung: „Der Oberste Gerichtshof kommt desweiteren zu dem Ergebnis, dass der beschwerdeführende Verband den Verstoß gegen ein legitimes öffentliches Interesse nicht mit Art. 2 Abs. 1 Buchst. r Gesetz 554/2004 (*Legea Contenciosului Administrativ*) begründen kann, da der NRBD eine Verwarnung gegen George Becali ausgesprochen und keine Verwaltungsstrafe verhängt hat."

sowie sonstige Sanktionen klagen (z. B. Entzug oder Sperre der Genehmigung privater Unternehmen zur Erbringung von Dienstleistungen). Nach Artikel 27 des Antidiskriminierungsgesetzes können die Gerichte öffentliche Behörden dazu verpflichten, juristischen Personen, die durch diskriminierende Handlungen erhebliche Schäden verursachen oder Wiederholungstäter sind, die Betriebserlaubnis zu entziehen oder diese zeitweilig aufzuheben.

Personen, die von Diskriminierung betroffen sind, können sich an eine Menschenrechtsorganisation wenden, die sie dann vor Gericht vertritt oder in eigenem Namen klagt. Im Rahmen von NRBD-Verfahren können Betroffene sich dafür entscheiden, vertraulich mit dem NRBD zu kommunizieren, um mediales Interesse zu vermeiden. Auch vor Gericht kann ein Antrag auf Vertraulichkeit gestellt werden. Seit der Reform des Antidiskriminierungsgesetzes von 2006 sind in Diskriminierungsfällen ausdrücklich alle Arten von Beweis zugelassen, einschließlich Audio- und Videoaufzeichnungen sowie statistische Daten, und der NRBD setzt statistische Daten als Beweismittel ein. Obwohl der NRBD und (vorwiegend) Roma-NROs früher häufiger Testing-Verfahren eingesetzt haben, wurden diese Verfahren in aktuellen Fällen nicht mehr verwendet.

Mit der Novellierung des Antidiskriminierungsgesetzes im Jahr 2013 wurde die Beweislast neu definiert.[48] Der NRBD legt die Bestimmungen zur Beweislast in einigen Fällen gemäß den Richtlinien aus, jedoch nicht durchgehend. In einigen Fällen lässt der NRBD die Beweislast auch beim Kläger. Das unklare Verständnis von Beweislast, das sowohl beim NRBD als auch bei den Gerichten festzustellen ist, wird durch die Urteile des Berufungsgerichts und des Obersten Gerichts- und Kassationshofs in dem auf die Rechtssache C-81/12 folgenden Verfahren untermauert.[49] Beide Gerichte bestätigten die Entscheidung des NRBD, mit der die Beschwerde von ACCEPT Bulgarien abgewiesen und festgestellt wurde, die homophoben, ausgrenzenden Bemerkungen von George Becali, der in der Öffentlichkeit als Eigentümer des Fußballvereins Steaua București bekannt ist, stellten keine Diskriminierung am Arbeitsplatz aufgrund der sexuellen Ausrichtung dar.[50]

NROs können sich entweder im Namen oder zur Unterstützung der Opfer von Diskriminierung an Verfahren beteiligen. In diesen Fällen sind die Rechtsmittel jedoch eingeschränkt, weil die Gerichte nur bei einer persönlichen Schädigung einen Schadensersatz zusprechen.

Es gibt keine Übersicht oder Kontrolle der Sanktionen, die die Gerichte in Diskriminierungsfällen verhängen. Die Zahl der öffentlich zugänglichen Fälle ist beschränkt; aus vereinzelten Belegen kann jedoch geschlossen werden, dass die Gerichte eine Obergrenze von EUR 10 000 für immaterielle Schäden festgelegt haben – ein Betrag, der in einer begrenzten Anzahl von Fällen zugesprochen wurde. Materielle Schäden müssen

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[48] Nach dem neuen Wortlaut zur Beweislast muss „die betroffene Person Tatsachen vorlegen, die das Vorliegen einer unmittelbaren oder mittelbaren Diskriminierung vermuten lassen, und es obliegt dem Beklagten zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorgelegen hat. Dem Lenkungsausschuss (den Gerichten) kann jede Art von Beweis vorgelegt werden, der nicht gegen die verfassungsmäßigen Grundrechte verstößt, einschließlich von Audio- und Videoaufzeichnungen und statistischen Daten."

[49] Rumänien, Oberster Gerichts- und Kassationshof (*Înalta Curte de Casație și Justiție*), Urteil 2224/2014, 29. Mai 2015.

[50] Rumänien, Oberster Gerichts- und Kassationshof (*Înalta Curte de Casație și Justiție*), Urteil 2224/2014, 29. Mai 2015. Der Gerichtshof zieht die Schlussfolgerungen des Berufungsgerichts heran und stellt fest, die erste Instanz habe zu Recht entschieden, dass es keine Elemente gebe, die den Schluss zuließen, dass der Fußballverein irgendeinen wie auch immer gearteten Schritt unternommen habe, um sich die Dienste des Spielers I.I. vertraglich zu sichern. „In Wirklichkeit", so der Gerichtshof weiter, „wurde das gesamte Verfahren auf der Grundlage rein spekulativer Äußerungen (des Herrn Becali) initiiert; auch wenn der Urheber der Äußerung eine Person ist, die in der öffentlichen Wahrnehmung nicht vom Fußballverein Steaua București zu trennen ist, kann aus diesem einmaligen Vorgang nicht die Schlussfolgerung gezogen werden, welche die Beschwerdeführerin erwartet (auf die sie setzt), insbesondere weil der Fußballverein Steaua București während des gesamten Verfahrens jeglichen Zusammenhang mit den Äußerungen bestritten hat und wesentliche Fakten fehlten."

auf der Grundlage der Zivilprozessnormen für unerlaubte Handlungen nachgewiesen werden.

Die Veröffentlichung der Entscheidungen der Gerichte und des NRBD im Internet und die angemessene Überwachung ihrer Durchsetzung ist zwar nicht gewährleistet, Informationen zu Wiederholungstaten weisen jedoch darauf hin, dass die Mittel zur Rechtsdurchsetzung zunehmend wirksam sind, auch wenn die Praxis noch nicht einheitlich ist. Nach der Gesetzesnovellierung von 2013 können der NRBD und die Gerichte Täter dazu verpflichten, Zusammenfassungen der ergangenen Entscheidungen auf eigene Kosten zu veröffentlichen.

6. Gleichbehandlungsstellen

Die nationale Gleichbehandlungsstelle, der Nationale Rat zur Bekämpfung von Diskriminierung (NRBD) (*Consiliul Naţional pentru Combaterea Discriminării*) wurde bereits im Jahr 2000 mit dem Antidiskriminierungsgesetz ins Leben gerufen, nahm aber erst im Herbst 2002 ihre Arbeit auf. Seit 2007 hat der NRBD Regionalbüros eröffnet, von denen es derzeit zwei gibt.

Der NRBD ist eine eigenständige öffentliche Behörde, die dem Parlament untersteht und deren Unabhängigkeit im Antidiskriminierungsgesetz garantiert ist. Die Ernennung der Mitglieder seines Lenkungsausschusses durch sechs relevante Parlamentsausschüsse sollte seine institutionelle Unabhängigkeit gewährleisten, hat sich aber in der Praxis als Hindernis erwiesen, weil der NRBD durch die Politisierung des Ernennungsverfahrens vom Sommer 2009 bis April 2010 praktisch handlungsunfähig war. Die Ernennungen vom April 2010 wurden von NROs und unabhängigen Bewerbern kritisiert, weil rechtliche Vorgaben verletzt wurden und der Prozess politisiert war, wodurch die Professionalisierung, die der NRBD braucht, erheblich behindert wurde. Stimmen gegen diese Politisierung der Institutionen stammen auch aus dem NRBD selbst und sogar vom Vorsitzenden des Rates. Drei neue Ernennungen im Jahr 2012 riefen gemischte Reaktionen hervor, weil zwar zwei politischen Kandidaten die nötigen Erfahrungen fehlten, der dritte aber ein renommierter Antidiskriminierungsexperte ist, dessen Amtszeit dank seines Fachwissens und Engagements und trotz mangelnder Parteizugehörigkeit verlängert wurde. Die Verfahren zur Berufung von sechs neuen Mitgliedern des Lenkungsausschusses im Jahr 2015 wurden von NROs wegen Nichteinhaltung der gesetzlichen Bestimmungen, Bevorzugung von Kandidaten, die von politischen Parteien unterstützt wurden, und wegen mangelnder Transparenz angefochten. Die derzeitige Zusammensetzung des Lenkungsausschusses erfüllt nicht die in Artikel 23 des Gesetzes GO 137/2000 enthaltenen Anforderungen, wonach mindestens zwei Drittel seiner Mitglieder Juristen oder Juristinnen sein müssen (da vier der neun Mitglieder keinen juristischen Background haben).

Der NRBD ist für folgenden Aufgaben zuständig: Unterstützung der Opfer von Diskriminierung durch unabhängige Rechtshilfe, Bekämpfung von Diskriminierung durch Aufklärungskampagnen, Studien und Forschungsprojekte, Erhebung relevanter Daten, unabhängige Befragungen und Berichte, Schlichtungen, Untersuchung und Sanktionierung von Diskriminierungsfällen und Vorbereitung von Rechtsvorschriften, die die Harmonisierung des Rechts mit dem Gleichbehandlungsgrundsatz gewährleisten. In der Praxis fungiert der NRBD vorwiegend als außergerichtliche Stelle, die untersucht, ob bestimmte Handlungen eine Diskriminierung darstellen, und entsprechende Ordnungsstrafen (Verwarnungen oder Geldbußen) verhängt. 2017 wurde das Mandat des NRBD im Zuge des Gesetzes 106/2017 erweitert; Artikel 4 fügte den Aufgaben des NRBD die Überwachung der Rechte von EU-Bürgern, die ihre Freizügigkeit in Rumänien ausüben, und die Funktion als nationale Anlaufstelle im Sinne der Verordnung (EU) Nr. 492/2011

des Europäischen Parlaments und des Rates vom 5. April 2011 über die Freizügigkeit der Arbeitnehmer innerhalb der Union hinzu.[51]

Der Bekanntheitsgrad des NRBD ist in den letzten sieben Jahren exponentiell gestiegen. In dieser Zeit hat der Rat eine Reihe von Fällen behandelt, an denen führende rumänische Politiker beteiligt waren (der Präsident, verschiedene Premierminister, zwei ehemalige Außenminister, ein Kulturminister und ein Mitglied des Europäischen Parlaments) sowie andere Fälle, über die die Medien ausführlich berichteten (z. B. das Urteil über religiöse Symbole in staatlichen Schulen, segregierte Schulen und Urteile gegen mehrere Sportclubs). Außerdem äußert er sich öffentlich gegen rassistisches, homophobes und populistisches Verhalten. Die Institution hat allmählich eine proaktive Rolle übernommen, ist an zahlreichen Projekten beteiligt und hat sich als ernstzunehmende Stimme im Kampf gegen Diskriminierung in einem sehr sensiblen Umfeld etabliert. Bedenken hinsichtlich der Politisierung des Lenkungsausschusses schaden diesem insgesamt positiven Image.

7. Zentrale Punkte

a. Die vorgesehenen Sanktionen sind nicht abschreckend, verhältnismäßig und wirksam

Die Praxis des NRBD, in einigen Fällen von Diskriminierung lediglich Verwarnungen oder Empfehlungen auszusprechen und nicht in allen Fällen, in denen er Diskriminierung feststellt, Geldbußen zu verhängen, unterhöhlt die Wirksamkeit, Verhältnismäßigkeit und Abschreckung der Rechtsmittel. Verwarnungen sind nicht mit Geldbußen verbunden und es gibt keine Verfahren, mit denen sichergestellt und kontrolliert wird, dass die Täter die Empfehlungen umsetzen und keine weiteren Diskriminierungen begehen.

b. Weder der NRBD noch die Gerichte können gegen diskriminierende Rechtsvorschriften vorgehen

Die Einschränkung des Antidiskriminierungsgesetzes durch das Rumänische Verfassungsgericht in mehreren Urteilen aus dem Jahr 2008 und 2009, die sowohl dem NRBD,[52] als auch den Zivilgerichten die Zuständigkeit für Diskriminierung aufgrund von Gesetzesvorschriften[53] abgesprochen haben, schuf eine Lücke im Rechtsschutz gegen Diskriminierung.

Der NRBD ist nicht einmal befugt, beim Verfassungsgericht eine verfassungsrechtliche Prüfung zu beantragen, wenn er feststellt, dass Rechtsvorschriften gegen das Diskriminierungsverbot verstoßen, und der Ombudsmann hat es unterlassen, in solchen Fällen zu handeln.

c. Viele Begriffe sind noch nicht ausreichend geklärt und durch das Fallrecht ausgelegt

Das rumänische Antidiskriminierungsgesetz verwendet in Artikel 2 Absatz 2 anstelle von „Anweisung" den Begriff „Befehl", was zu einer restriktiven Auslegung des Konzepts „Anweisung zur Diskriminierung" führen und das Verbot einer Rangordnung von Diskriminierungsformen schwächen könnte.

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[51] Rumänien, Gesetz 106/2017 über Maßnahmen zur Verbesserung der Rechtsausübung im Rahmen der Freizügigkeit innerhalb der EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.05.2017).

[52] Rumänien, Verfassungsgericht (*Curtea Constituțională*), Urteil 997, 7. September 2008, in dem das Gericht zu dem Schluss kommt, dass Art. 20 Abs. 3 des Antidiskriminierungsgesetzes (GO 137/2000), in dem die Zuständigkeit des NRBD für Diskriminierung infolge von Rechtsvorschriften festgelegt wird, gegen die Verfassung verstößt.

[53] Rumänien, Verfassungsgericht (*Curtea Constituțională*), Urteile 818, 819 und 820, 3. Juli 2008. Das Verfassungsgericht kam zu dem Ergebnis, das die Bestimmungen in Art. 1 Abs. 2 lit. e und Art. 27 des Antidiskriminierungsgesetzes (GO 137/2000) verfassungswidrig sind, sofern sie dahingehend ausgelegt werden, dass Gerichte befugt sind, Rechtsvorschriften aufzuheben oder deren Anwendung abzulehnen, wenn das Gericht diese Vorschriften für diskriminierend hält.

Der Begriff der „angemessenen Vorkehrungen" für Menschen mit Behinderung ist im rumänischen Antidiskriminierungsgesetz nicht enthalten und in dem speziellen Gesetz zur Förderung und zum Schutz der Rechte von Menschen mit Behinderung derzeit als eine Erleichterung für den Arbeitnehmer am Arbeitsplatz definiert; für den Fall, dass der Arbeitgeber dieser Verpflichtung nicht nachkommt, sind jedoch keine Sanktionen vorgesehen.

Intersektionelle Diskriminierung wird im rumänischen Rechtskontext weder definiert noch verstanden.

d. Institutionelle Beschränkungen der nationalen Gleichbehandlungsstelle

Der NRBD hat bislang noch keine Mechanismen entwickelt, um Verstöße gegen das Gesetz und die Durchsetzung seiner Urteile zu überwachen. Daher lässt sich nur schwer beurteilen, ob sein Mandat effizient und seine Abhilfemaßnahmen wirksam sind.

Aufgrund eines politischen Stillstands im Parlament blieben vom Sommer 2009 bis April 2010 Sitze im Lenkungsausschuss des NRBD unbesetzt, was zu einer institutionellen Lähmung des Gremiums führte. Die Ernennung von sechs neuen Ausschussmitgliedern im April 2010 bzw. in 2012 und 2015 wurde von Protesten mehrerer NROs begleitet, weil einige der Ernannten die gesetzlichen Anforderungen in Bezug auf fachliche Kompetenz nicht erfüllten. All dies zeigte, dass die Ernennung der Mitglieder des NRBD-Lenkungsausschusses durch das Parlament, als Garantie für institutionelle Unabhängigkeit, sich in der Praxis als ein Hindernis erwiesen hat. Die Politisierung des Lenkungsausschusses machte sich in mehreren Bereichen bemerkbar: kontroverse Urteile in Fällen, in die Politiker verwickelt waren; Aufgabe wirksamer Sanktionen zugunsten von Empfehlungen ohne Rechtswirkung; eingeschränkte Qualität der juristischen Argumentation; Rückgang der Zahl der Entscheidungen des NRBD, die nach einer Anfechtung von den Gerichten bestätigt wurden.

Den Jahresberichten des NRBD zufolge konnte aufgrund der Mittelkürzungen und des allgemeinen Einstellungsstopps für Behörden kein neues Personal eingestellt werden. Auch einige Aktivitäten des NRBD (z.B. Untersuchungen und Aufklärungskampagnen) wurden durch den Mangel an finanziellen Mitteln bzw. durch Verzögerungen bei der Bereitstellung von Mitteln beeinträchtigt.

e. Fehlen von Daten zum Stand der Gleichstellung

Eine falsche Auslegung der Datenschutzvorschriften hat dazu geführt, dass keine Daten über den Stand der Gleichstellung vorliegen, auf deren Grundlage politische Maßnahmen entwickelt werden können, die die Bedürfnisse besonders benachteiligter Gruppen berücksichtigen. Das Fehlen von Daten verhindert außerdem eine wirksame Kontrolle von bestehenden Maßnahmen und erschwert den Nachweis von Diskriminierung vor Gericht oder vor dem NRBD.

f. Zunehmender Trend, bei Verletzungen der Menschenwürde Beweise für eine Diskriminierungsabsicht zu fordern

Die rumänischen Rechtsvorschriften gehen über die Mindestanforderungen der Richtlinien hinaus und schützen das „Recht auf Würde" bei der Bekämpfung von Diskriminierung. Dies hat die Wirksamkeit des Antidiskriminierungsmechanismus verbessert und dazu beigetragen, die Außenwirkung des NRBD zu steigern. Das „Recht auf Menschenwürde" wurde in Fällen geltend gemacht, in denen die rechtlichen Bestimmungen für eine Verurteilung nicht ausreichten, zum Beispiel bei der Klage gegen die Trennmauer, mit der

die Roma-Gemeinschaft in Baia Mare ausgegrenzt wird.[54] In Bezug auf das Recht auf Menschenwürde ist beim NRBD und den Gerichten jedoch ein besorgniserregender Trend dahingehend zu beobachten, dass von der Klägerpartei verlangt wird nachzuweisen, dass die beklagte Partei tatsächlich eine Diskriminierungsabsicht verfolgte.

g. Meinungsfreiheit dient als Ausrede für diskriminierende Äußerungen

Nach Artikel 2 Absatz 8 Antidiskriminierungsgesetz dürfen die Bestimmungen des Gesetzes nicht so ausgelegt werden, dass sie die Freiheit der Meinungsäußerung beschränken. Zwar bezieht sich der NRBD bei der Auslegung der Grenzen der Meinungsfreiheit in der Regel auf die Rechtsprechung des EGMR, seine Praxis und die der Gerichte ist jedoch nicht einheitlich: Viele diskriminierende Äußerungen von Politikern bleiben unter Berufung auf diese Bestimmung straffrei und werden nicht als Missbrauch der Meinungsfreiheit geahndet.

[54] Rumänien, Nationaler Rat zur Bekämpfung von Diskriminierung (*Consiliul Naţional pentru Combaterea Discriminării*), Entscheidung Nr. 439, Verfahren 4A/2011, *NRBD gegen Chereches*, 15. November 2011.

INTRODUCTION

The national legal system

The Romanian Constitution provides for equality and non-discrimination in broad terms as general principles applicable to all citizens, irrespective of 'race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin'.[55] These provisions are implemented in practice by specific anti-discrimination legislation adopted in August 2000 through delegated legislation, Governmental Ordinance 137/2000 – hereafter generally referred to as the Anti-discrimination Law.[56] Governmental Ordinance 137/2000 was amended subsequently in 2002, 2003, 2004, 2006 and three times in 2013 to enhance transposition of Directive 2000/43/EC and Directive 2000/78/EC. The Anti-discrimination Law introduces a mixed system of remedies, both civil and administrative (minor offences), which can be pursued separately or simultaneously.

The Anti-discrimination Law provides for the establishment of the National Council for Combating Discrimination (NCCD) (*Consiliul Naţional pentru Combaterea Discriminării*), which has a broad quasi-judicial and promotional type mandate.[57]

Alternatively, the Anti-discrimination Law can be enforced by civil courts if the complainant seeks only civil remedies under general torts procedures. A decision of the NCCD is not required in such cases but might help in making a claim for damages under general torts provisions. The courts have an obligation to communicate with the NCCD in discrimination cases and invite it in as an expert. Civil complaints on the basis of the Anti-discrimination Law are exempt from court fees, and the locus standi and burden of proof provisions are prescribed by the anti-discrimination legislation.

The grounds of unlawful discrimination as well as the material scope of the protection of the Romanian Anti-discrimination Law go beyond the requirements of the directives. The list of protected grounds is an open list modelled after Article 14 of the ECHR. In addition, the prohibition of discrimination on all grounds applies to employment as well as education, access to services and goods, including health services or public services and housing. The law includes a distinct feature, the right to dignity, which is often used as a catch-all concept. However, the scope of application of the Anti-discrimination Law was substantially diminished after 2008, following a series of decisions by the Romanian Constitutional Court (RCC) (*Curtea Constituţională*) which limited both the mandate of the NCCD,[58] and of the civil courts in relation to cases of discrimination generated by legislative provisions.[59]

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55 See Section 1 a) Constitutional provisions on protection against discrimination and the promotion of equality.

56 Ordinance 137/2000 was adopted by the Government based on a constitutional procedure which allows the Parliament to delegate limited legislative powers to the Government during the parliamentary vacation in accordance with Art. 114 and Art. 107 (1) and (3) of the Constitution. The ordinances (statutory orders) must be submitted to the Parliament for approval, though in the interval between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and generate legal consequences.

57 Romania, National Council for Combating Discrimination (NCCD) (*Consiliul Naţional pentru Combaterea Discriminării*). The official website of the institution is available at: http://www.cncd.org.ro. All hyperlinks accessed on 22 March 2018.

58 Romania, Constitutional Court (*Curtea Constituţională*), Decision 997 of 7 October 2008, concluding that the interpretation of Art. 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to identifying and sanctioning discrimination triggered by legislative provisions, is unconstitutional. All decisions of the Constitutional Court are available for research by decision number on the search engine of the Court at http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx.

59 Romania, Constitutional Court (*Curtea Constituţională*), Decisions 818, 819 and 820 of 3 July 2008. In these three decisions, the Constitutional Court concluded that the dispositions of Art. 1(2) e) and of Art. 27 of the Anti-discrimination Law are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Anti-discrimination Law but asserted that the enforcement of the Law by some courts is unconstitutional, due to the fact that during its application, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other

Following these RCC decisions, the NCCD refrained from issuing decisions in cases of potential de jure discrimination, invoking its lack of competence. However, the courts started to issue decisions obliging the NCCD to assess such cases and to find whether discrimination took place or not.[60] This practice is not uniform so far.

In 2008, the Romanian Constitutional Court (RCC) seized the opportunity to clarify the legal status of the NCCD as a tribunal-type equality authority in a case challenging the constitutionality of Articles 16-25 of the Anti-discrimination Law, which establish the mandate of the NCCD. The RCC affirmed that 'the NCCD is an administrative authority with jurisdictional mandate, which enjoys the independence required in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Art. 124 of the Constitution on administration of justice and Art. 126(5) prohibiting the establishment of extraordinary courts of law.'[61] In a similar case in 2009, the RCC reaffirmed the role of the national equality body as an autonomous specialised public administrative body with a mandate to combat discrimination. The decision of the RCC clearly sets out the role of the NCCD as an administrative body which is granted a mandate to interpret and apply the Anti-discrimination Law, and which enjoys the independence entailed by an administrative-jurisdictional activity.[62]

In 2013, the Court of Justice of the European Union (CJEU) had the opportunity to respond to a request for a preliminary ruling under Article 267 of the TFEU in C-81/12 *ACCEPT v. Consiliul Național pentru Combaterea Discriminării* (NCCD), clarifying the understanding of the burden of proof in the context of prohibition of discrimination on the ground of sexual orientation in relation to public statements made by a person who presented himself and was perceived by the general public as playing a leading role in a professional football club and who ruled out recruitment of a footballer who was rumoured to be homosexual. The judgment also provided the opportunity to discuss the issue of the effectiveness, proportionality and dissuasiveness of sanctions in cases of discrimination and the enforcement of statutory limitations specific to the general minor offences regime in cases of discrimination.[63] In spite of the clear ruling of the CJEU, the Bucharest Court of Appeal ignored the guidance provided in C-81/12 and rejected the appeal of ACCEPT as unfounded, deciding to uphold the decision of the NCCD.[64] The decision was challenged by

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norms, thus 'creating legal norms or substituting them with other norms of their choice.' All decisions of the Constitutional Court are available for research by decision number on the search engine of the Court at http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx.

60 For example: Romania, High Court of Justice and Cassation (*Inalta Curte de Casație și Justiție*) Decision 5060/2013 of 18 April 2013, available at: http://legeaz.net/spete-contencios-inalta-curte-iccj-2013/decizia-5060-2013.

61 Romania, Constitutional Court (*Curtea Constituţională*), Decision 1096, 15 October 2008. The Court maintained the constitutionality of Arts. 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body. All decisions of the Constitutional Court are available for research by decision number on the search engine of the Court at http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx.

62 Romania, Constitutional Court (*Curtea Constituţională*), Decision 444, 31 March 2009. The complainant based his complaint on Art. 20 (1) and (2) on international treaties and human rights, Art. 75 (1), (4) and (5) on the legislative procedures in adopting legislation, Art. 117 3) on establishment of autonomous administrative authorities, Art. 140 (1) on the Court of Audit, and Art. 126 (5) on the prohibition of establishing extraordinary courts of law and the conditions for establishing specialised courts, maintaining that the national equality body is an extraordinary court established by means of delegated legislation and that the fact that the Ministry of Finances issues an advisory opinion on the budget of the NCCD infringes the independence of this institution as a prerequisite for a quasi-judicial body. The Constitutional Court found that the complaint against Art. 2 is not a constitutional challenge but merely a complaint as to the interpretation of the law; that the challenge against Art. 16 is ill-founded and the complaint against Art. 20 (8), (9) and (10) is also ill-founded. Consequently, the Constitutional Court rejected the objection as to the constitutionality of the provisions of the Anti-discrimination Law regarding the quasi-judicial mandate of the national equality body.

63 Court of Justice of the European Union (CJEU), C-81/12, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013, request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Romania), judgment of 25.04.2013 available at: http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12.

64 Romania, Court of Appeal Bucharest (*Curtea de Apel Bucureşti*), file 12562/2/2010, civil sentence 4180, 23 December 2013. The Court of Appeal rejected the arguments of the complainant that the conflict should be

ACCEPT before the High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*), which also upheld the NCCD decision in a final decision issued on 29 May 2015. The reasoning of the High Court mentioned the comprehensive guidance of the CJEU only to underline that even the Luxembourg court, in its preliminary ruling, recognised that the competence for assessing the facts in the case belongs exclusively to the national court. There was no analysis or incorporation of the substantive guidance provided by the CJEU in the case.[65]

The Anti-discrimination Law is enforceable nationwide and is complemented by relevant provisions found in ground-specific legislation, such as legislation regarding the rights of persons with disabilities (defined by Romanian legislation as 'persons with handicap')[66] or in legislation regulating particular areas such as the Criminal Code,[67] and the Labour Code.[68] In cases where there are conflicting provisions in different relevant pieces of legislation, the Anti-discrimination Law would prevail as lex specialis.

Romania has signed and ratified most relevant international human rights documents. Though they are not directly applicable in the national legal order, when international human rights standards are in conflict with domestic legislation, they prevail, according to Article 20(2) of the Constitution. Though the UN Convention on the Rights of Persons with Disabilities was ratified, the special legislation has not yet been harmonised and the official Romanian translation includes major errors on key concepts such as 'legal capacity', which was translated as 'legal assistance'.

List of main legislation transposing and implementing the directives

Romania/ Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination[69]
Potential abbreviation: GO 137/2000, Anti-discrimination Law
Date of adoption: 31 August 2000
Date of entry into force: published in Monitorul Oficial al României No. 431 of 2 September 2000
Date of latest amendments: 27 March 2013

defined as discrimination in employment and defined the exclusionary statements of Mr Becali as an exercise of free speech.

65 Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 224 in file 12562/2/2010, 29 May 2015. See 01-RO- ND-2016-ICCJ Becali available at: http://www.equalitylaw.eu/country/romania.

66 Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 06 December 2006. English translation available at: http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf.

67 Romania, Criminal Code, Law 278/2006, 4 July 2006.

68 Romania, Labour Code, 24 January 2003.

69 Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination *(Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 30 August 2000, published in *Monitorul Oficial al României* No. 431 of September 2000. See also: Romania, Law 48/2002 concerning the adoption of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 31 January 2002; see also Romania, Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2003; see also Romania, Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 11 April 2004. See also: Romania, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20 July 2006; Romania, Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013; and Romania, Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.

Grounds covered: race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion.[70]

Material scope covered: the various aspects of discrimination in employment relationships without differentiating between the different types of actors (public or private, civilian or military, secular or religious),[71] access to public services, administrative and legal services, access to health services,[72] access to education,[73] freedom of movement, housing,[74] as well as protection of the right to dignity.[75]

The Anti-discrimination Law was most recently amended on three occasions in 2013. The first of these amendments, on 21 March 2013, clarified the selection procedure for members of the Steering Board of the NCCD and introduced new wording for the burden of proof before the NCCD and the courts.[76] The second, on 27 March, introduced more significant changes, including a definition of genuine occupational requirements; the repeal of provisions allowing for exemptions from the prohibition of direct discrimination in access to goods and services and housing; a significant increase in the quantum of fines; and clarification as to specific statutory limitations, including a statutory limitation term (prescription) of six months for applying a sanction, calculated from the date when the NCCD decision was issued.[77] Thirdly, ratification of the emergency ordinance, on 25 June 2013, led to further clarification on potential remedies – Article 26 of the Anti-discrimination Law introduced the option for the NCCD or for the court to oblige the perpetrator to publish a summary of the decision in the mass media.[78]

[70] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2.
[71] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Arts. 5-8.
[72] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 10.
[73] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 11.
[74] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Arts. 12-14.
[75] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 15.
[76] Romania, Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013.
[77] Romania, Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.
[78] Romania, Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Romanian Constitution includes the following articles dealing with non-discrimination: Articles 1 (3), 4 (2), 6, 16 and 30 (7):[79]

> 'Article 1 (3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.'
> 'Article 4 (1) The State foundation is laid on the unity of the Romanian people and the solidarity of its citizens. (2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.'
> 'Article 6 (1) The State recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity. (2) The protection measures taken by the Romanian State for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens.'
> 'Article 16 (1) Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law. (3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities. (4) After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies.'
> 'Article 30 (7) Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination … shall be prohibited by law.'[80]

The text of the Constitution does not explicitly provide for protection against discrimination on grounds of disability, age or sexual orientation, as stated in Directive 2000/78/EC; however, it mentions protection against discrimination on the additional grounds of language, opinion, political adherence, property and social origin. None of these categories is further defined by constitutional provisions or by implementing legislation.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

These provisions are not directly applicable.
These provisions cannot be enforced against private actors. They can be invoked against the State.

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[79] The Constitution of Romania of 1991 was amended by Law 429/2003 on the revision of the Constitution of Romania, 29 October 2003, available at http://www.cdep.ro/pls/dic/site.page?id=371. Also relevant is Article 20 on the priority order of international treaties and national law: '(1) Constitutional provisions concerning the citizen's rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.'

[80] Romania, Constitution of Romania of 1991, amended by the Law 429/2003 on the revision of the Constitution of Romania, 29 October 2003, available at http://www.cdep.ro/pls/dic/site.page?id=371.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in Article 2(1) of the Anti-discrimination Law: 'race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion.'[81]

The Romanian Anti-discrimination Law includes all grounds listed by the directives and extends to an even more inclusive approach as it also mentions other protected grounds such as 'social status,' 'belonging to a disadvantaged group' or 'any other criterion'. The catch-all phrase 'any other criterion', which turns the anti-discrimination principle into a broad equality principle, has in particular proved to be the most challenging in cases where discrimination was not based on any of the criteria specified in the law. In practice, the largest number of petitions is filed on 'other grounds' such as socio-professional category or other ad hoc categories.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The Romanian Anti-discrimination Law does not define the content of the protected grounds. The legislation does not include any definition of ethnicity or race, religion, age, sexual orientation and no attempts to define these concepts through judicial interpretation were identified.

A definition of national minority as 'the ethnicity which is represented in the Council of National Minorities' is included, without further details, in the electoral legislation.[82] When ratifying the European Charter for Regional or Minority Languages, the Parliament chose not to define minority languages but to list them.[83] The manual for the persons carrying out the survey for the 2011 census defined ethnicity as 'the option (self-determination) of a person to belong to a human group with common elements of civilization and culture, through one or more characteristics regarding language, religion, common traditions and customs, lifestyle and other specific characteristics'.[84] None of these elements is further legally defined or interpreted. In the same guidelines, mother tongue is defined as: 'the first language used regularly in the family of the person interviewed, during his or her early childhood.'[85] The manual defined religion as 'the creed or the religious or spiritual option, regardless if this is manifested or not through affiliation to a permanent religious community'.[86]

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[81] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(1).

[82] Romania, Law 35/2008 for the election of the Chamber of Deputies and of the Senate and for the amendment of Law 67/2004 on the election of local public administration authorities, of Law 215/2001 on local public administration and of Law 393/2004 on the Statute of officials elected in local elections (*Lege pentru alegerea Camerei Deputaţilor şi a Senatului şi pentru modificarea şi completarea Legii nr. 67/2004 pentru alegerea autorităţilor administraţiei publice locale, a Legii administraţiei publice locale nr. 215/2001 şi a Legii nr. 393/2004 privind Statutul aleşilor locali*), 13 March 2008, Art. 2 (29).

[83] Romania, Law 282/2007 for the ratification of the European Charter of Regional and Minority Languages (*Lege 282/2007 pentu ratificarea Cartei europene a limbilor regionale sau minoritare)*, 6 November 2007. Article 2 of the Law lists the following minority languages: Albanian, Armenian, Bulgarian, Czech, Croatian, German, Greek, Italian, Hebrew, Hungarian, Macedonian, Polish, Romani, Russian, Ruthenian, Serbian, Slovak, Tatar, Turkish and Ukrainian.

[84] Romania, Institutul Național de Statistică, *Recensământul populației și al locuințelor 2011, Instrumentar*. Manual available in Romanian on the website of the 2011 census, in Part 3: http://www.recensamantromania.ro/instrumentar/. Definition available on page 73.

[85] Romania, Institutul Național de Statistică, *Recensământul populației și al locuințelor 2011, Instrumentar*. Manual available in Romanian on the website of the 2011 census, in Part 3: http://www.recensamantromania.ro/instrumentar/. Definition available on page 73.

[86] Romania, Institutul Național de Statistică, *Recensământul populației și al locuințelor 2011, Instrumentar*Manual available in Romanian on the website of the 2011 census, in Part 3: http://www.recensamantromania.ro/instrumentar/. Definition available on page 73.

Article 2 of Law 448/2006 uses the following legal definition: ' … disabled persons shall be those persons who, due to a physical, mental or sensorial affection, do not have the abilities for normally performing the day to-day activities, requiring protection measures in support of their social recovery, integration and inclusion.'[87] In a 2012 decision, the NCCD discussed the meanings of the two concepts 'handicap' and 'disability' used in Romanian legislation, mentioning its option in favour of using the term 'disability in an inclusive manner' and clarifying that 'to the extent that an illness is not a non-contagious chronic disease (meaning a protected criterion), it becomes a disability depending on the duration, nature or severity of the disease'.[88] This approach might be interpreted as being in line with the definition provided subsequently by the Court of Justice of the European Union (CJEU) in *Joined Cases C-335/11* and *C-337/11 Skouboe Werge and Ring.*[89]

Government Decision 655 for the approval of the national strategy 'A Society without Barriers for Persons with Disabilities' 2016-2020 and the operational plan for the implementation of the strategy adopted on 14 September 2016 includes further definitions.[90] The strategy introduces the recognition of the social model of disability and defines disability as 'a generic term for deficiencies/impairments, limitations of the activity and restrictions in participation. The concept reflects the negative aspects of the interaction between the individual, who has a health problem, and environment and personal factors the person is living in.' Persons with disabilities are defined as 'persons with physical, mental, intellectual or sensorial deficiencies which are long lasting, deficiencies which, in interaction with various barriers, might limit full and effective participation of the persons in the society, in equal conditions with others.'[91]

Article 4 of the Anti-discrimination Law defines 'disadvantaged group' as 'the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to personal (identity) differences or is faced with rejection and marginalisation'. Prior to the 2006 amendment, the text included as exemplification 'non-contagious chronic disease, HIV infection or the status of refugee or asylum-seeker' but this exemplifying list was deleted by the Parliament in 2006 during subsequent rounds of amendments, thus leaving interpretation of the meaning of the concept of 'disadvantaged group' to the national equality body (NCCD) or to the courts. Migrants are not explicitly mentioned, but could be defined as disadvantaged group, although no such cases have been reported. Currently, 'disadvantaged group' is used to cover all these categories, also covering social status, property or education status, which might in themselves be defined as protected grounds given that the Romanian list of grounds is open. The case law of the NCCD suggests that the national equality body is prone to use belonging to a disadvantaged group as an isolated ground, not used together with other grounds.

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87 Romania, Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 5 (4). An unofficial translation of the law is available at: http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf.

88 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision 509, file no. 433/2012, *FEDRA v. SC SECOM SRL,* 26 November 2012.

89 Court of Justice of the European Union (CJEU), Joined Cases C-335/11 and C-337/11, Cases C-335/11 and C-337/11 *Ring and Skouboe Werge*, 11 April 2013.

90 Romania, Government Decision 655 for the approval of the national strategy, 'A Society without Barriers for Persons with Disabilities 2016-2020' and the Operational Plan for the Implementation of the Strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități" 2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități" 2016-2020*) 14 September 2016, (*Monitorul Oficial*, 737, 22 September 2016).

91 Romania, Government Decision 655 for the approval of the National Strategy "A Society without Barriers for Persons with Disabilities" 2016-2020 and the Operational Plan for the Implementation of the Strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități" 2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități" 2016-2020*) 14 September 2016, (*Monitorul Oficial*, 737, 22 September 2016).

2.1.2 Multiple discrimination

In Romania, prohibition of multiple discrimination is included in the Anti-Discrimination Law as an aggravating circumstance in cases of discrimination and sanctioned as a minor offence. If any of the elements of a case of multiple discrimination is covered by the provisions of the Criminal Code, the case will, however, be tried as a criminal offence. Article 2 (6) of the Anti-discrimination Law reads as follows:

> 'Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing the contraventional responsibility, unless one or more of its components is not subject to criminal law.'[92]

Romanian data on cases of multiple discrimination are contradictory and their correctness cannot be verified, as there is no public access to the databases of the NCCD or courts, given that the ECRIS database, the national statistical application aggregating statistical data introduced by all courts, does not record the number of complaints or decisions on discrimination filed in application of the Romanian Anti-discrimination Law (Government Ordinance 137/2000).[93] The NCCD reported sanctioning multiple discrimination falling under the scope of Directive 2000/43/EC in 7 cases in 2002 and in 2 cases in 2004 but no cases were reported subsequently.[94] However, in a 2011 response to a public information request, the NCCD reported 12 cases in 2003, 1 case in 2004, 18 cases in 2005, 4 cases in 2006, 6 cases in 2007, 8 cases in 2008, 1 case in 2009, 4 cases in 2010 and 1 case in 2011. The activity reports of the NCCD published after this date do not mention cases of multiple discrimination. Based on the cases made publicly available so far, it seems that most of the multiple discrimination cases include gender as one of the grounds.

In one of its most discussed cases, a case against the President of Romania, in which the complainants sought a harsher sanction on grounds of the aggravating circumstance of multiple discrimination (the expressions used by Traian Băsescu in relation to a female journalist were 'birdie', a pejorative with sexual connotations, and 'filthy Gypsy'), the NCCD Decision 92 of 23 May 2007 did not consider that gender discrimination occurred and did not assess the case from the perspective of multiple discrimination.[95]

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Romania, the Anti-discrimination Law does not prohibit discrimination based on perception or assumption of what a person is, although the case law developed by the NCCD proves that discrimination by assumption or by association is sanctioned in practice. The NCCD discussed the concept particularly in cases of discrimination on grounds of association with a particular group or assumption of belonging to a protected group (mostly in cases involving sexual orientation) but did not develop this in its reasoning.[96] It is still

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[92] Romania, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 2 (6).

[93] The Superior Council of Magistracy (*Consiliul Superior al Magistraturii),* response 5/27805 to public information request, 17 December 2015.

[94] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2011), *Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010*, Bucharest, available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/Raport_D43_2000_CNCD_final.pdf.

[95] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 92, *Andreea Pană v. Traian Băsescu,* 23 May 2007.

[96] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 92, 23 May 2007. Case *Romani CRISS v. Traian Băsescu*. The NCCD considered the assumption made by the President when calling a journalist 'filthy Gipsy' as being discriminatory to the Roma community in general.

up to the courts to decide if a prohibition of assumed discrimination can be inferred from the general definition of direct discrimination included in the Anti-discrimination Law, as applied by the NCCD.

b) Discrimination by association

In Romania, the Anti-discrimination Law does not prohibit discrimination based on association with persons with particular characteristics, though the definition of discrimination provided by Article 2 is broad/open enough to allow for enforcement in line with the CJEU judgment in *Coleman v. Attridge Law and Steve Law*.[97] However, the practice of the courts is not consistent.

In *D.Z. v. Distrigaz Sud*, Decision 4222, of 1 August 2007, the court of first instance in Bucharest ruled in favour of the complainant, who complained against being subjected to discriminatory conduct based on his affiliation with an NGO active in defending the rights of LGBT people in Romania (ACCEPT) when paying a monthly utilities bill at the offices of the defendant. The defendant was ordered to pay EUR 1 000 (amount awarded in euros) as civil damages but the court denied the request of the complainant for institutional measures on combating discrimination in the workplace (the complainant requested that the defendant be ordered by the court to engage in general measures to combat discrimination in future, such as diversity management, equality training for employees, adopting a code of conduct with clear prohibitions). The decision was appealed both by the defendant and by the complainant but the decision of the first court was upheld.[98]

However, in a 2006 case, the High Court of Cassation and Justice found that the NCCD wrongly issued a warning sanctioning as discrimination an advertising campaign targeting future mothers and encouraging them to undertake pre-natal screening by showing the difficulties experienced by mothers of children with disabilities.[99] As Romanian legislation allows for protection against discrimination, including on grounds of belonging to a 'social group' (such as mothers of children born with disabilities), the NCCD sanctioned the social campaign following requests from organisations of persons with disabilities, which deemed the message offensive and discriminatory. The NCCD defined mothers of children with disabilities as a social group and not as a group deserving protection against discrimination based on association with persons with disabilities. However, the High Court considered the subject of the advertising to be 'mothers raising their children born ill, persons for whose situation the law does not provide for a criterion of discrimination and it cannot be accepted ... that these mothers might constitute a "social category" as provided by Article 2(1) of the Ordinance ... From the evidence provided it is beyond any doubt that in the particular advertisements there are no children or adults with disabilities, and the NCCD takes into consideration mothers raising their children who were born ill.' This reasoning of the court, which has not been changed by subsequent jurisprudence, contradicts the CJEU judgment in *Coleman v. Attridge Law and Steve Law*.

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

a) Prohibition and definition of direct discrimination

In Romania, direct discrimination is prohibited in national law. It is defined in Article 2(1) of the Anti-discrimination Law as 'any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual

[97] Court of Justice of the European Union (CJEU) Case C-303/06 *Coleman v. Attridge Law and Steve Law*.

[98] Romania, Court of first instance No. 4, Bucharest (*Judecătoria sectorului 4 Bucureşti*), *DZ v. Distrigaz Sud*, Decision 4222 in File no. 710/4/2006, 1 August 2007. Upheld by Bucharest Court of Appeal from 17 September 2008. Available at: http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000163867&id_inst=2.

[99] Romania, High Court of Justice and Cassation (*Inalta Curte de Casație și Justiție*) Decision 3866/2006, file no. 34843/2/2005, *CAN v. CNCD*, 9 November 2006, available at: http://www.iccj.ro/cautare.php?id=37568.

orientation, age, disability, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.'[100]

b) Justification of direct discrimination

With the exception of genuine and determining occupational requirements, the Anti-discrimination Law does not permit justification of direct discrimination in general, or in relation to particular grounds. Justifications previously allowed in regard to direct discrimination in relation to housing, access to services and goods (Article 10 of the Anti-discrimination Law), where such a 'restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary'[101] were repealed in 2013 by means of an Emergency Ordinance.[102] The text of Article 10 as amended in 2013 lists the activities in which discrimination is prohibited without including further qualifications:

- refusal to sell or rent a land or buildings used as housing;
- refusal to grant a bank credit or to conclude any other kind of contract;
- denial of access for a person or a group to services offered by theatres, cinemas, libraries, museums, exhibitions;
- denial of access for a person or a group to services offered by shops, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public;
- denial of access for a person or a group to services provided by public transportation companies – plane, ship, train, underground railway, bus, trolleybus, tram, taxi cab, or any other means of transportation.

2.2.1 Situation testing

a) Legal framework

In Romania, situation testing as a planned method for investigating discrimination is not expressly permitted in national law but neither is it prohibited, so judicial interpretation is still required. In its first years of activity, the NCCD was involved in situation testing jointly with NGOs. However, this practice gradually ceased, reflecting limited resources as well as concerns that such situation testing would be perceived as provocation and dismissed by the courts.

The NCCD does not have particular guidelines or protocols on the use of situation testing and only anecdotal data reflect the use of testing as means of gathering evidence in judicial proceedings. The 2006 amendments to the Anti-discrimination Law make video and audio recordings admissible in cases of discrimination, both before the NCCD and before the domestic courts. This is an exception to the standard civil procedure norms.

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[100] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(1).

[101] Romania, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20.07.2006, Art. 10, stating: 'Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management (of the legal person) to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, sex or sexual orientation: .... g) denying of access for a person or a group to services provided for by public transportation companies – plane, ship, train, subway, bus, trolley, tram, cab, or any other means of transportation, excepting the cases when such a restriction is objectively justified by a legitimate purpose and the methods used to reach such a purpose are adequate and necessary.' (translation by the author).

[102] Romania, Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.

b) Practice

In Romania, situation testing is barely used in practice by NGOs. There is no recent case law on situation testing.

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

a) Prohibition and definition of indirect discrimination

In Romania, indirect discrimination is prohibited in national law. It is defined in Article 2 (3) of the Anti-discrimination Law, which prohibits

> 'any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para. (1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.'[103]

Though the legal definition complies with those in the directives, in practice, enforcement of the prohibition of indirect discrimination is problematic. In its report assessing the implementation of the Racial Equality Directive, the NCCD mentions that between 2002 and 2010 it sanctioned nine cases of indirect discrimination.[104] However, not all the cases presented as indirect discrimination are clear-cut. For example, in its Decision 222 of 7 April 2005, the NCCD found that the insistent objections of the local mayor against the appointment of the complainant as deputy director of the school on grounds of his being Romanian, and his advocacy in favour of employing a Hungarian deputy director, amounted to indirect discrimination.[105] In deciding thus, the NCCD stated that it took note of the apparently neutral justifications of the school (the position of deputy director was abolished) and of the fact that abolition of the position disadvantaged persons in a comparable situation (the Romanian community), and sanctioned the defendant with a warning. The jurisprudence of the NCCD also blurs the lines between direct and indirect discrimination in a 2006 case regarding discrimination in education. In this case, the NCCD reacted ex officio on the basis of media reports of separate classrooms for Roma pupils and classes with a higher percentage of Roma in a school in Tulcea. The NCCD found in Decision 75 of 2 March 2006 that indirect discrimination consisted in 'placing Roma children in separate classes or in classes with disproportional percentages of Roma' and sanctioned the school leadership with a warning.[106]

In a 2009 case, based on a petition from the Union of Hungarian Teachers, complaining against the annual educational plan of the Mureș county school inspectorate, the NCCD found in Decision 291 of 14 May 2009 that indirect discrimination on grounds of nationality had occurred. The inspectorate decreased the number of classes in the Hungarian language, thereby failing to observe the proportional presence and the options of Hungarian-speaking pupils, and was sanctioned with a fine of EUR 150 (RON 600).[107]

A 2010 decision regarding denial of access to public places (a club) to Roma, based on absence of club membership cards evidenced a more nuanced approach. The four

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[103] Romania, Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(3).

[104] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2011), *Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010*, Bucharest, available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/Raport_D43_2000_CNCD_final.pdf.

[105] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 222 of 7 April 2005.

[106] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 75 of 2 March 2006.

[107] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 291 of 14 May 2009.

complainants were denied access to a club due to lack of club membership cards, while these were not requested from other (non-Roma) persons. The defendant claimed that club membership cards were required for access. In order to apply for a membership card, potential clients were requested to supply a copy of their ID, a copy of the employment registry entry (official record of employment relations), the original of their criminal record document and a scan of their fingerprints. In its Decision 67 of 19 May 2010, the NCCD stated that while requesting a membership card for access to a club is justified by a legitimate scope such as ensuring order and protecting property, the conditions imposed do not differentiate, and disproportionally affect persons convicted for minor offences or persons who work as freelancers and do not have an employment registry entry. 'Lacking objective criteria regarding the requirements, the granting of the membership card becomes, in practice, arbitrary ... if the different treatment is caused by arbitrary requirements, it cannot be decided that it is objectively justified and is reasonable from the perspective of the principle of equality.' The NCCD found that the situation amounted to indirect discrimination: 'even if an apparently neutral criterion had been invoked, in practice this led to disadvantaging two Roma as compared to other persons (Romanians), without an objective justification, and the means for achieving the objective were not adequate.'[108]

b) Justification test for indirect discrimination

In its case law, the NCCD extensively relies on ECtHR and CJEU jurisprudence when discussing indirect discrimination and assessing legitimate aims, appropriate and necessary measures or objective justification.

In a 2006 case filed by Romani CRISS against the Dumbrăveni Theoretical High School, the NCCD sanctioned indirect discrimination and in its legal reasoning assessed the legitimate aims as well as the measures taken in order to pursue the declared aims.[109] The claimant, a Roma NGO, complained against the practice of transferring Roma pupils from the Theoretical High School to a special school, leading to a situation where almost 90 % of the pupils attending the special school were Roma. The High School instituted a procedure for transferring to the special school pupils who failed to attain the grades required to pass a class for more than two or three years in succession and who were evaluated for transfer by a special commission established by law at the level of the local general directorate for the protection of the child and for social assistance. The special commission decided if the pupils had intellectual disabilities and whether they needed special education. In its decision, issued on 11 June 2008, the NCCD referred to the ECtHR decision in *D.H. and Others v. the Czech Republic* of 13 November 2007,[110] assessed the adverse effect of incentives granted in support of children with disabilities (benefits in food, transportation, financial support etc.) and concluded that even if the procedure for transferring children to the special school observed the legal requirements, in practice it led to discriminatory outcomes. The NCCD decided that the case amounted to indirect discrimination and recommended the Ministry of Education to take all 'measures necessary in order to ensure implementation of the principle of equal opportunities in schools, and to take measures to redress the discriminatory treatment of Roma pupils who had been transferred from regular schools to special schools based on socio-economic needs' (and not based on disability).

c) Comparison in relation to age discrimination

[108] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 67 of 19 May 2010.
[109] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 733 of 11 June 2008.
[110] European Court of Human Rights (ECtHR), *D.H. and Others v. the Czech Republic*, Grand Chamber Decision No. 57325/00, 13 November 2007.

The Anti-discrimination Law does not specify if or how a comparison is to be made in relation to age discrimination.

2.3.1 Statistical evidence

a) Legal framework

In Romania, there are national rules permitting data collection under specific conditions, such as those provided in Law 677/2001 on the Protection of Persons regarding the Use of Personal Data and the Free Movement of Personal Data.[111] Articles 20 (6) and 27 (4) of the Anti-discrimination Law as amended in 2013 provide that:

> 'The interested person will present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred. Before the Steering Board (the courts) any means of proof can be brought, observing the constitutional regime of fundamental rights, including audio and video recordings and statistical data.'

The Anti-discrimination Law does not establish any subsequent criterion for the admissibility of such evidence before the NCCD or the courts of law. The NCCD has used statistical data in some of its cases. There were no particular requirements imposed for the assessment of the statistical data.

There are no reports regarding the use of statistical data before the courts of law or for purposes of public policy or positive action measures. Difficulty is caused by the absence of relevant equality data due to a faulty interpretation of the specific legislation. Article 7 (1) of Law 677/2001 on the Protection of Persons regarding the Use of Personal Data and the Free Movement of Personal Data prohibits 'the use of personal data regarding the racial or ethnic origin, political, religious, philosophical or similar beliefs, trade union membership, as well as personal data regarding health status or sexual life'.[112] However, collection of personal data is still possible under certain conditions, as provided by Article 7 (2) of Law 677/2001:

a) with the express consent of the person concerned;
b) when required for the purpose of observing specific duties or rights of the operator in the area of employment;
c) when required for the protection of life, physical integrity or health of the person concerned or of another person;
d) when conducted during legitimate activities by a foundation, association or any other not-for-profit organisation with a political, philosophical, religious or trade union-related purpose, if the person concerned is a member of or has regular dealings with that entity;
e) when carried out in relation to data made publicly available by the specific person;
f) when necessary for establishing, exercising or defending a right before a court of law;
g) when necessary for purposes of preventive medicine and other medical purposes;
h) where the law includes an express provision with the purpose of protecting important public interest, under the condition that data collection should be carried out in compliance with protection of the rights of the person concerned and with all guarantees provided by the law.

[111] Romania, Law 677 on the Protection of Persons regarding the Use of Personal Data and the Free Movement of Personal Data, 21 November 2001.
[112] Romania, Law 677 on the Protection of Persons regarding the Use of Personal Data and the Free Movement of Personal Data, 21 November 2001.

The list of exemptions, particularly the exemption regarding data collection in relation to important public interest (such as designing effective public policies in relation to minorities) allows for the possibility of compiling and using relevant statistical data, if there is a will to do this.

Similarly, Article 5 (5) of Law 489/2006 on Religious Freedom and the General Regime of Religious Denominations prohibits:

> 'the processing of personal data concerning religious beliefs or membership of denominations, except for the case of a national census as sanctioned under the law or the situation where the concerned individual has provided explicit agreement to that effect.'

Law 489/2006 provides that 'it is hereby forbidden to compel an individual to declare his or her religion, in any relationship with public authorities or private-law legal entities.'[113]

In Romania, statistical evidence is permitted by national law (in the Anti-discrimination Law) in order to establish indirect discrimination, not explicitly in the definition of indirect discrimination in Article 2 (3) but in general by Article 20 (6) and Article 27 (4) listing admissible evidence.

b) Practice

In Romania, statistical evidence in order to establish indirect discrimination is used in practice, though the use of such evidence is rather limited due to the absence of equality data.

In the case *A.M. v. Harghita county Public Finances General Inspectorate*, regarding the advertising of employment vacancies for civil servants with the local finances inspectorate, which mentioned 'knowledge of the Hungarian language' as a specific condition, the NCCD made extensive use of statistical data.[114] The NCCD compared the percentages of civil servants speaking only Romanian or Hungarian and their specific positions within the institution as well as their geographical representation in the context of the percentages of Hungarians or Romanians in each city, to assess the defendant's understanding and fulfilment of its legal obligation to make arrangements to respond to the needs of national minorities in counties where national minorities represent at least 20 % of the population. The NCCD sanctioned the Harghita county Public Finances General Inspectorate with an administrative fine of EUR 250 (RON 1 000).

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Romania, harassment is prohibited in national law. Harassment is defined in Article 2(5) of the Anti-discrimination Law as a specific form of discrimination, providing, however, for a list of protected grounds which differs from those in Article 2(1). The different wording is caused by the lack of consistency in the various rounds of amendments. However, harassment was interpreted as being covered by the main list of protected criteria, in spite of its remaining definition as:

> 'any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, belonging to a disadvantaged group, age,

[113] Romania, Law 489/2006 on Religious Freedom and the General Status of Religions, 28 December 2006, Art. 5 (6).

[114] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) decision *A.M. v. Direcţia Generală a Finanţelor Publice a judeţului Harghita*, [A.M. v. Harghita county Public Finances General Inspectorate], Decision no. 43, file number 353/2007, 9 January 2008.

handicap, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.'

A specific definition of sexual harassment is provided by the Law on Equal Opportunities between Men and Women, in the context of employment relations, in Article 4 (c).[115] Article 223 of the Criminal Code, which was adopted on 17 July 2009 and entered into force on 1 February 2014, uses a different wording to define and sanction sexual harassment.[116]

None of the definitions provided are in complete compliance with the definition of harassment set out in the directives, as they fail to sanction unwanted conduct related to any of the grounds in connection with the purpose of such actions, not just on the basis of the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. They are thus in need of judicial interpretation.

There are cases in which harassment was used as a catch-all concept to sanction against forms of discrimination not otherwise provided for in the Anti-discrimination Law. As a specific prohibition of residential segregation is lacking in the Law, in 2011, the NCCD defined as harassment the erection of a concrete wall 1.8-2 metres high and approximately 100 metres long between a Roma neighbourhood and the main road in the northern Romanian city of Baia Mare. In response to media outcry, the wall was presented by the mayor of the city as designed to prevent traffic accidents. In its Decision 439 of 15 November 2011, the NCCD discusses the impact of segregation on a community and condemns it as harassment provided for by Article 2(5) of the Anti-discrimination Law together with Article 15 on the infringement of human dignity. The NCCD decided that the erection of a concrete wall separating the area of social housing predominantly occupied by Roma from the rest of the neighbourhood 'is a very serious deed which negatively affects the life of the entire Roma community'. Subsequently, the NCCD decided to impose a fine of approximately EUR 1 500 (RON 6 000) and to recommend the demolition of the concrete wall. The NCCD decision was challenged by the Mayor of Baia Mare before the Cluj Court of Appeal, which decided that the aim invoked by Mayor Chereches (protection of public safety due to alleged traffic accidents in the area) was legitimate. The Court of Appeal underlined the proportionality of the measure, but failed to share the burden of proof and request evidence from the local authorities to support their justifications and it failed to interpret harassment correctly as unwanted conduct with the purpose or effect of creating an intimidating, hostile, degrading and humiliating environment by correlating the Romanian (incomplete) provision with the definition in Article 2 (3) of Directive 43/2000/EC. The NCCD appealed the decision of the Cluj Court of Appeal before the High Court of Cassation and Justice as the final court of appeal. The High Court decided to modify the judgment of the Cluj Court of Appeal by rejecting the challenge filed by Mayor Cătălin Chereches of Baia Mare, upheld the decision of the NCCD that discrimination had occurred and ruled that the mayor should pay a fine. The decision of the High Court is final.[117] The Cluj Court of Appeal decision, which differs from that of the High Court, indicates once more that judicial interpretation is required to confirm compliance of Article 2(5) of the Anti-discrimination Law with the EU non-discrimination directives, given

[115] Romania, Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men, (25 July 2006) defines sexual harassment as: 'any form of behaviour in relation to gender, which the person responsible knows affects the dignity of other persons, and where such behaviour is rejected and represents the motivation for a decision affecting those persons.'

[116] Romania, Law 286/2009 on the Criminal Code, 17 July 2009 defines sexual harassment as: 'repeatedly soliciting sexual favours as part of an employment relationship or a similar relationship, if by so doing the victim was intimidated or placed in a humiliating situation, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine.' Official translation available at: http://www.legislationline.org/documents/section/criminal-codes/country/8.

[117] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 640, file 1741/33/2011, 27 September 2013. The summary of the decision of the court is available in Romanian at: http://www.scj.ro/.

that the definition is not identical and only the actual outcome, the effect and not the purpose is covered by the law.

Findings regarding potential harassment are sometimes limited due to the use of two types of justification: invoking freedom of expression or presenting harassment as a violation of the right to dignity provided for in Article 15 of the Anti-discrimination Law which has, however, been interpreted by the NCCD as entailing the requirement to prove the intention to generate humiliation. In regard to the first limitation, Article 2(8) of the Romanian Anti-discrimination Law states that its provisions cannot be interpreted so as to limit freedom of expression, freedom of opinion and the right to information. Although the NCCD usually invokes the case law of the ECtHR in understanding the limitations to freedom of expression, the practice of the NCCD and of the courts is not unitary and many discriminatory speeches made by politicians remain unsanctioned on the basis of this justification and are not sanctioned as abuse of the freedom of expression. In regard to the requirement to establish intention to discriminate in order to find an infringement of the right to human dignity, this interpretation has also been developed by the NCCD in relation to cases involving politicians and has been confirmed by the courts. For example, in the case of the allegedly discriminatory statements made by Prime Minister Victor Viorel Ponta on 20 March 2013 in relation to the Roma community, the NCCD found that no discrimination occurred, given that the defendant was exercising his right to free speech as provided for in Article 2(8) and that the claimants did not prove the intention of the defendant to violate human dignity.[118] The Court of Appeal upheld the NCCD decision, finding that the claimant did not have the scope or intention to discriminate.[119] The High Court of Cassation and Justice upheld this judgment as final in its decision of 12 March 2015.[120]

b) Scope of liability for harassment

In Romania, when harassment is perpetrated by an employee, both the employer and the employee are liable. There is no specific provision in the Anti-discrimination Law and the general torts provisions apply. However, the NCCD and the courts consistently found that employers can be held liable together with their employees if discrimination occurs within an employment relationship but are not liable for the actions of third parties (tenants, customers etc.) over which they have no control. The liability can be both individual (the harasser) and joint (both the employer and the harasser). In order for the liability to be joint (solidary), a specific link between the employer and the harasser needs to be justified, evidencing the rights and duties of the employer or service provider in relation to the harasser.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Romania, instructions to discriminate are not explicitly prohibited in national law. Article 2(2) of the Anti-discrimination Law prohibits instead orders to discriminate. Instructions to discriminate are not defined. Article 2(2) states: 'The order to discriminate against persons on any ground mentioned in para. (1) is considered discrimination.' It should be noted that the terminology might generate confusion as the wording used in Romanian is 'order', hence implying a hierarchical position, and not 'instruction', which has a wider application. Though the law provides for the prohibition of an order to discriminate,

[118] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 170, file 320/2013 and file 333/2013, 9 April 2013.
[119] Romania, Court of Appeal Bucharest (*Curtea de Apel Bucureşti*), file 3123/2/2013, 9 October 2013.
[120] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 735, 19 February 2015, file 3123/2/2013, 19 February 2015. The summary with the decision of the court is available in Romanian at: http://www.scj.ro/1094/Detaliidosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=200000000304053.

it fails to define this further, so that judicial interpretation is required in order to assess compliance with the definitions in the directives. The prohibition of orders to discriminate is applicable both to individuals and to legal persons, as provided in Article 3 of the Anti-discrimination Law, in spite of specific provisions on the liability of legal persons. In practice, the NCCD and the courts assess the liability of the individual discriminator and of the legal person together.

The members of the Steering Board of the NCCD acknowledge difficulties in investigating cases of alleged orders to discriminate due to the challenges raised by the need to prove the existence of such orders (particularly in regard to access to pubs or clubs when door security guards invoke an instruction from owners or from management). In Decision 180 of 18 February 2008, the NCCD sanctioned an instruction to discriminate leading to denial of access to goods and services to a Roma. The complainant (H.C.) raised a complaint against an announcement posted at the entrance of an internet café stating: 'Beginning with [date] Roma are not allowed in this internet café because we had a lot of problems with them, they are quarrelling and fighting every evening.' The sanction issued both for direct discrimination and for the order to discriminate was a fine of approximately EUR 150 (RON 600).[121]

The Criminal Code, which was adopted in 2009 and entered into force in February 2014, rephrased the definition of incitement to hatred or discrimination in Article 369 by deleting the list of protected grounds and introducing the following wording: 'Inciting the public, using any means, to hatred or discrimination against a category of individuals shall be punishable by no less than six months and no more than three years of imprisonment or by a fine.'[122]

In Romania, instructions do not explicitly constitute a form of discrimination. The use of the word 'order' instead of 'instruction' in Romanian might lead to a restrictive interpretation, limiting the prohibition of discrimination to hierarchical relations. While the NCCD interpretation complies with the meaning of the directives by broad interpretation of the terminology, the courts have yet to determine the understanding of Article 2(2) and its limitations, hence judicial interpretation is still required in order to confirm compliance with EU law.

b) Scope of liability for instructions to discriminate

In Romania, the instructor and the discriminator are both liable. The Anti-discrimination Law does not include specific provisions on the scope of the liability. Liability is individual and in order to find discrimination, the NCCD identifies the agent of discrimination and their responsibility. The case law of the NCCD indicates that employers can be held liable for actions of their employees if there is joint responsibility. The NCCD uses personal liability in determining the degree of responsibility for each party. Employers have not been held liable for actions of third parties. Trade unions or professional associations cannot be held liable for the actions of their members unless the discriminatory conduct represents the policy of the organisation or is carried out from a position of leadership, representing the policies of the entity.

The courts have imposed vicarious liability upon employers for the actions of their employees.[123] A person who discriminates in accordance with an instruction to discriminate would be held liable.

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[121] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 180 of 18 February 2008.

[122] Romania, Law 286/2009 on the Criminal Code, 17 July 2009. Official translation available at: http://www.legislationline.org/documents/section/criminal-codes/country/8.

[123] Romania, Bihor County Tribunal (*Tribunalul Bihor)* Civil Judgement (*Sentinta Civila*) No. 620/L.M./2007, File No.6094/111/2006, *B. R. v. A. V.* [administrator of the Oradea Zoo], *M. I.,* [human resources manager] *Regia Autonomă de Pieţe, Agrement şi Salubritate Oradea* [employer], 1 October 2007.

In its Decision 365 of 14 September 2011 in *NCCD and L Rausch v. S.C. Elaine S.R.L.* (owner of Heaven Club in Timişoara), the NCCD clarifies the conditions for determining the responsibility of a private company for the actions of its contractors (the security guard employed by a security company) and discusses the relationship of subordination between the contracting party and its contractor, by stating the obligation of private companies to include in their internal regulations provisions on equality and non-discrimination and provisions referring to the management of discrimination cases. In response to the petition of the complainant, who was refused entry to a night club due to her disability, the respondent stated, among others, that the security guard who refused entry to Ms Rausch was not an employee of the club but of a security company; the club is no longer working with this security guard; and the complainant had never had direct contact with a direct employee or representative of the club. The NCCD issued four separate administrative fines for two different situations, each violating two distinct articles of the Anti-discrimination Law, finding discrimination in access to services available to the public and discrimination affecting the right to human dignity of the person on the ground of disability. The NCCD sanctioned the company owning the club with fines amounting to a total of EUR 1 250 (RON 5 000), reportedly the highest sanction issued up to that time.[124]

The Civil Code (Law 287/2009) mentions in Article 219 the regime of liability for legal acts. 'Lawful or unlawful acts perpetrated by the bodies of a legal entity create an obligation for the legal entity itself, but only if such acts relate to the powers or with the scope of the responsibilities assigned. (2) Unlawful acts generate both the personal and joint liability of those who perpetrated them, both in relation with the legal entity itself and in relation to third persons.' Article 220 on liability of members of the bodies of the legal entity provides that 'the decision-making body can decide, with the legally required majority, if it will take action against administrators, censors, directors and other persons who acted as members of the bodies of the legal entity, for damages caused by such persons when infringing their duties as assigned.'

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

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

In Romania, the duty to provide reasonable accommodation is not included in the Anti-discrimination Law. The special legislation on the promotion and protection of the rights of persons with disabilities (Law 448/2006) provides for reasonable accommodation in the workplace as a facility for the employee but not as a duty for the employer. Law 448/2006 also mentions in general terms duties to facilitate accessibility to various public and private services and facilities. Law 448/2006 defines reasonable accommodation in the workplace as:

> 'all the changes undertaken by the employer in order to facilitate the exercising of the right to work of the person having a handicap (disability); this entails adjusting the work schedule, buying supporting equipment, devices and technologies related to the disability and other similar measures.'[125]

According to Article 83 of Law 448/2006, reasonable accommodation in the work place is ensured both to persons with disabilities seeking a job and to those already employed, no matter what type of disability they might have. There is no provision for any limitation or

[124] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 365, *NCCD and L Rausch v. S.C. Elaine S.R.L.* [owner of Heaven Club, Timişoara], 14 September 2011.

[125] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 5 (4). An unofficial translation of the law is available at: http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf.

restriction regarding persons entitled to claim reasonable accommodation, or guidance as to how the disability will be assessed and what tests for reasonableness/undue burden are to be applied.

Law 448/2006 provides no sanction to be used where there is failure to comply, but the general anti-discrimination provisions might be applied. Failure to provide reasonable accommodation as required in Article 83 of Law 448/2006 is mentioned among other arguments in a limited number of cases of the NCCD, which read the general prohibition of direct discrimination in conjunction with the legal provision in Article 83 to entail a duty to ensure reasonable accommodation.[126] In a notable 2008 case the NCCD found against the General Directorate for Social Assistance and Child Protection, the Ministry of Labour, Family and Equal Opportunities and the National Authority for Persons with a Handicap for failure to ensure reasonable accommodation to a person with disabilities and for not providing adequate material support for persons with disabilities and their assistants.[127] The case was initiated by H. A., the mother of a visually impaired child, who complained about the lack of software needed for educational purposes and the absence of posts with audio signals at road crossings, and that the amount of money for disability benefits and personal assistant support is insufficient to ensure normal living conditions for two persons. The NCCD emphasised that the defendants have the duty to check for observance of the relevant legal provisions but that they failed to prove that such checks took place. Consequently, the NCCD found that not ensuring provision of reasonable accommodation in the form of appropriate educational software amounts to discrimination, as does any failure to supervise the observance of legal provisions which leads to discriminatory effects. The NCCD issued a recommendation to the National Authority for Persons with a Handicap, without imposing any monetary sanction.

In the specific area of employment, a similar decision would be also issued under the caveat of the new Article 4^1 of the Anti-discrimination Law as amended in 2013, which allows 'the difference of treatment based on one of the criteria provided for in Article 2 … when due to the nature of the occupational activities or of the context in which it takes place, such a characteristic amounts to genuine and determining occupational requirements, under the requirement that the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary'. The new Article 4^1 follows the wording of Article 4 of Directive 2000/78/EC and repeals the former Article 9 of the Anti-discrimination Law. Currently, there is no legal wording to suggest a duty to consider if making a reasonable accommodation would enable a person to comply with the requirements provided in the new Article 4^1.

b) Practice

Existing NCCD and court jurisprudence does not allow assessment of whether, when sanctioning failure to provide reasonable accommodation, the restrictive definition of disability in Law 448/2006 or the more comprehensive, quite general approach to disability used so far by the NCCD would be used. However, the NCCD approach is still in need of crystallisation, as the national equality body has so far been reluctant to clearly identify and consistently sanction failure to ensure reasonable accommodation, given that the legislation on the rights of persons with disabilities mandates other institutions to ensure its implementation.

The wording 'disproportionate burden' is not present in the legislation. There is no legal provision or legal interpretation of what is 'reasonable' and what constitutes a 'disproportionate burden', neither in the practice of the NCCD nor of the National Authority

[126] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision no. 463, file number 210/2009, in petition no. 4918 of 12 May, *Complainant v. Respondent* [former employer], 2 September 2009.

[127] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision no. 596, file no. 441/2008, 13 November 2008.

for Persons with Disabilities (NAPD) (*Autoritatea Naţională pentru Persoanele cu Dizabilități*). In view of the lack of specific legal provisions or consistent jurisprudence, it is impossible to assess if there is any limit on the obligation to provide reasonable accommodation and how such a limit would be defined.

In a 2009 case regarding a person with disabilities who was refused renewal of his labour contract with the justification of a no-hiring policy and a lack of vacant positions with working conditions appropriate for a person with an accentuated degree of disability, the NCCD rejected the arguments of the defendant, mentioning inter alia the duty to provide reasonable accommodation as specified in the law and emphasising that, given that the complainant had worked for a long time in that specific position, it is reasonable to believe that there was no need for further accommodation. The NCCD did not look into the specifics of what measures were required to comply with the duty of ensuring reasonable accommodation, as, due to the prior employment relationship, it operated on the assumption that these requirements were already observed.[128]

Law 448/2006 introduces certain benefits for employers of persons with disabilities, including tax allowances for the costs of adaptation of the workplace and equipment and devices bought to ensure accommodation of persons with disabilities.[129] In addition, Law 448/2006 provides for the duty to provide adequate technical support in the area of education (Article 18), for access to public buildings (Article 63) and for access to transportation services (Article 64).

For example, Article 18 of Law 448/2006 mentions the duty to provide technical equipment, adapt furniture to the needs of pupils with disabilities, ensure special textbooks and software applications. Failure to comply with these obligations is sanctioned with a fine in the range of approximately EUR 750-2 250 (RON 3 000-9 000). The authority responsible for identifying and sanctioning such cases is the NAPD.[130] However, the NAPD has been reorganised and incorporated as a department within the Ministry of Labour as part of changes to institutional policies in response to the financial crisis, including downsizing of social assistance services. Even prior to this, the NAPD was sanctioned by the NCCD for its failure to provide reasonable accommodation and to supervise observance of the legal provisions in this regard.[131]

With few exceptions, the NCCD cases which could be relevant from the perspective of sanctioning failure to secure reasonable accommodation in areas outside employment do not specifically mention the concept of reasonable accommodation. This might be because it was easier for the NCCD to apply the specific provision on denial of access to services or because reasonable accommodation and accessibility are not defined in the Anti-discrimination Law.

c) Definition of disability and non-discrimination protection

There is no definition of disability in the Anti-discrimination Law and the NCCD uses in its cases the legal definitions provided by the special legislation on the rights of persons with disabilities (Law 448/2006 and subsequent legislation). Article 2 of Law 448/2006 provides the legal definition as 'disabled persons shall be those persons who, due to a physical, mental or sensorial affection, do not have the abilities for normally performing the day-to-day activities, requiring protection measures in support of their social recovery, integration

[128] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision no. 77, file no. 260/2008, *Complainant v. ANIF R.A., Sucursala Teritorială Timiş* (Timiş county office), 3 February 2009.

[129] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 84.

[130] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 100.

[131] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision no. 596, file no. 441/2008, 13 November 2008.

and inclusion.'[132] Government Decision 655 on the approval of the national strategy 'A Society without Barriers for Persons with Disabilities' 2016-2020 and the operational plan for the implementation of the strategy from 14 September 2016 defines persons with disabilities more in line with the UNCRPD approach as 'persons with physical, mental, intellectual or sensorial deficiencies which are long lasting, deficiencies which, in interaction with various barriers, might limit full and effective participation of the persons in the society, in equal conditions with others.'[133] When claiming reasonable accommodation the general definition of disability as understood by the NCCD would apply.

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

There is no duty in the Romanian Anti-discrimination Law to provide reasonable accommodation for people with disabilities outside the employment field. However, Law 448/2006 provides for the duty to provide adequate technical support in the area of education (Article 18), for access to public buildings (Article 63) and for access to transportation services (Article 64).

For example, Article 18 of Law 448/2006 mentions the duty to provide technical equipment, adapt furniture to the needs of pupils with disabilities, ensure special textbooks and software applications. Failure to comply with these obligations is sanctioned with a fine in the range of approximately EUR 750-2 250 (RON 3 000-9 000). The authority responsible for identifying and sanctioning such cases is the NAPD.[134] However, the NAPD has been reorganised and incorporated as a department within the Ministry of Labour as part of changes to institutional policies in response to the financial crisis, including downsizing of social assistance services. Even prior to this, the NAPD was sanctioned by the NCCD for its failure to provide reasonable accommodation and to supervise observance of the legal provisions in this regard.

Most of the NCCD cases which could be relevant from the perspective of sanctioning failure to secure reasonable accommodation in areas outside employment do not specifically mention the concept of reasonable accommodation. This might be the case because it was easier for the NCCD to look at the specific provision on denial of access to services or because reasonable accommodation and accessibility are not defined in the Anti-discrimination Law. A notable exception is a 2008 decision in which the NCCD found that the NAPD was responsible for the failure to ensure reasonable accommodation for a person with disabilities in meeting his education demands and for not providing adequate material support for persons with disabilities and their assistants. The NCCD issued a recommendation carrying no pecuniary penalty to the NAPD.[135]

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In Romania, failure to meet the duty of reasonable accommodation is not mentioned as discrimination in the legal provisions but it is sanctioned as such by the NCCD and by the courts. Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap does not include specific sanctions for failure to ensure reasonable

[132] Unofficial translation available at: http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf.

[133] Romania, Government Decision 655 on the approval of the national strategy 'A Society without Barriers for Persons with Disabilities' 2016-2020 and the operational plan for the implementation of the strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități" 2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități" 2016-2020*) 14 September 2016, *Monitorul Oficial*, 737, 22 September 2016.

[134] Romania/Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 100.

[135] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision no. 596, file no. 441/2008, 13 November 2008.

accommodation in the workplace and does not define such failure as discrimination. Nevertheless, NCCD interpretation so far suggests that the failure to ensure reasonable accommodation would be sanctioned as discrimination. The Anti-discrimination Law has so far been applied accordingly (Articles 5-8). However, the new Article 4^1 of the Anti-discrimination Law, as introduced in 2013, allows for justifications in cases of differential treatment in employment relations when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary. There is no jurisprudence from the courts or the national equality body so far, but in theory the exemption in Article 4^1 could be invoked in order to justify failure to secure reasonable accommodation if all the conditions of the test introduced in the new Art. 4^1 are met.[136] Potential sanctions issued by the NCCD after the 2013 amendments to the Anti-discrimination Law are fines in the range of EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual and EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.

The NCCD sanctioned as discrimination and issued an administrative warning against the defendant in its case 255 of 17 September 2007, *M.E.R. v dr. PG and the mayoralty of village V*. The complainant, a dental technician with a hearing impairment complained that her patients and the doctors who worked with her could not reach her office as Doctor PG, who had an office on the same floor, used to lock the doors, thus making access impossible as the complainant could not hear the bells. She requested that the entry into the building be left open during office hours to allow her to meet her clients. In its decision, the NCCD also applied the provisions of Law 448/2006, in particular Article 74, providing for 'the right of the person with disabilities to enjoy all the conditions required for choosing and exercising his or her profession or trade, for getting and maintaining a job, as well as to develop professionally' and for the correlative duty of public authorities to 'a) promote the idea that a person with disabilities who is working constitutes added value to the society and for his or her community; b) promote a work environment open, inclusive and accessible for persons with disabilities.'[137]

In 2015 the Bucharest Court of Appeal quashed in part NCCD Decision 126 of 25 February 2015, which found that no discrimination occurred, and sanctioned the failure of two taxi companies to ensure reasonable accommodation in access to services.[138] The duty of taxi companies to ensure means of transportation for persons using wheelchairs which cannot be packed in the luggage compartment of a car was discussed from the perspective of accessibility, as it clearly introduces the argument that failure to pre-emptively take all measures amounts to discrimination in access to public services. In its Decision 126 of 25 February 2015, the NCCD ruled that the behaviour of the cab driver does not amount to discrimination as the claimants did not specify the need for an adapted car when making the initial call and the cab driver's refusal was justified by the physical impossibility of fitting the wheelchair in the car boot. The claimants challenged the NCCD decision before the Bucharest Court of Appeal, seeking annulment of the NCCD decision. The Court upheld the NCCD decision in regard to the cab driver on the initial facts presented by the claimant but looked at the systemic challenge of accessibility. By extending the scope of the petition, the Court of Appeal found that the refusal of the two taxi companies amounts to discrimination as provided in Article 10 (g) of the Anti-discrimination Law and issued a fine of approximately EUR 2 250 (RON 10 000) to each of the two companies. The Court of Appeal also ordered the two companies to redress the situation of discrimination by owning

[136] The new Art. 4^1 as adopted in 2013 defines occupational requirements as reflected by Art. 4 of Directive 2000/78/EC and abrogated Art. 9, which previously dealt with this topic in a rather unclear manner, as it stated that 'the provisions of Arts. 5-8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse to employ a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this Ordinance, and the measures are objectively justified by a legitimate aim and the methods used are adequate and necessary.'

[137] Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision *M.E.R. v. dr. PG and Mayoralty of V.,* 17 October 2007.

[138] Romania, Bucharest Court of Appeal(*Curtea de Apel București*), Decision 2547, 12 October 2015.

at least one specially adapted car to be used exclusively for persons with disabilities who use electric wheelchairs which cannot be packed. The Court also ordered Bucharest municipality, the General Directorate for Social Assistance and the Agency for Payments and Social Inspection of Bucharest to redress the situation of discrimination by taking all administrative measures provided by the legislation to oblige all companies authorised for taxi services to have at least one vehicle adapted for persons with disabilities who use electric wheelchairs which cannot be packed. The decision is not final and can be challenged before the High Court of Cassation and Justice.

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

In Romania, there is no duty in the Anti-discrimination Law to provide reasonable accommodation in respect of other grounds in the public sector and/or the private sector.

Limited accommodation in respect of religion is provided in Article 134 (1) F of the Labour Code in relation to observance of religious celebrations of employees by granting two days' holiday for two religious celebrations each year, to be taken in accordance with the faith of the employee, subject to the condition that the faith of the employee is recognised as one of the 18 state-recognised religions (*cult*) – a special procedure established by Law 489/2006, the Law on Religious Freedom and the General Status of Religious Denominations.[139]

In addition, in an attempt to accommodate Muslim religious burial rituals, the Parliament adopted Law 75/2010 on Discharge from Hospitals or Morgues of Deceased Muslims.[140] Law 75/2010 adapts the current provisions on hospitalisation and discharge from hospitals and from morgues of deceased persons to Islamic tenets. In order to observe religious prescriptions, Law 75/2010 provides in Article 1 that in the case of a deceased person belonging to and practising the Muslim religion, upon the request of the family, the corpse is discharged within 24 hours of establishment of death, and in accordance with Law 104/2003 regarding the handling of human corpses and removal of organs and tissues from corpses for transplant. The Ministry of Health had 30 days to propose adequate amendments to the Methodological Norms for the Implementation of Law 104/2003 regarding the handling of human corpses and removal of organs and tissues from corpses for transplant, approved in Governmental Decision 451/2004.

g) Accessibility of services, buildings and infrastructure

In Romania, although the Anti-discrimination Law does not require services available to the public, buildings and infrastructure to be designed and built in a way which provides accessibility for persons with disabilities, in Article 10 it sanctions as discrimination the denial of access to services and facilities. The wording of Article 10 can also be interpreted as applicable in cases of de facto denial of access to facilities and services caused by lack of the appropriate infrastructure to ensure accessibility. A 2011 decision of the NCCD, Decision 365 of 14 September 2011, *NCCD and L Rausch v. S.C. Elaine S.R.L.* (owner of the Heaven Club in Timişoara), cited in Section 2.5(b) above, also discusses the obligation of services provided to the public to be accessible for persons with disabilities.

Law 448/2006 on the Promotion and Protection of the Rights of Persons with a Handicap (disability) provides for an obligation to ensure access to public buildings (including private buildings in the ownership of the state) and to local administration facilities, and for the duty to take measures to ensure access (Articles 62-63(3)). The sanction for failing to observe this duty is a fine in the range of EUR 750-2 250 (RON 3 000-9 000), which was

[139] Iordache, R. (2007), 'The New Romanian Law on Religious Denominations and Religious Freedom: High Expectations, Sober Returns', Institut für Rechtsphilosophie, Religions- und Kulturrecht, Rechtswissenschaftliche Fakultät der Universität Wien, November 2007.

[140] Romania, Law 75/2010 on Discharge from Hospitals or Morgues of Deceased Muslims, 6 May 2010.

initially determined by the NAPD[141] and is currently determined by the General Department for Social Inspection (*Direcţia Generală pentru Inspecţie Socială).*

The law also provides for access to transport services. Article 64 of Law 448/2006 provides for an obligation for local public authorities to gradually adapt all public means of transportation (by 31 December 2010) and to adapt all stations for public transportation. The sanction for failing to observe this duty is a fine in the range of EUR 750-2 250 (RON 3 000-9 000). The authority responsible for identifying and sanctioning such cases is the NAPD.[142] The norm was repealed and updated in February 2013 by ministerial order with the aim of securing adaptation of urban buildings to accommodate the requirements of persons with disabilities.[143]

In Romania, national law does not contain a general duty to provide accessibility by anticipation in any field for people with disabilities. However, a 2010 decision of the NCCD suggests the pro-active approach of the institution and its understanding that securing accessibility involves taking measures by anticipation to adapt services to the requirements of persons with disabilities. [144] The complainant (R.V.) was a person with visual impairments for whom the disability assessment commission agreed that he can live independently without requiring a personal assistant. He approached the defendant, a bank, to open a bank account and to have a debit card issued. The bank made opening the account and issuing the card to R.V. conditional either on appointing a proxy or on signing a statement assuming liability for all the consequences of transactions. The NCCD found that discrimination occurred and issued a recommendation for the bank to adequately consider the specificities of its clients and adapt its services to ensure their accessibility, irrespective of the type of disability. The NCCD stated that 'the bank should have considered that it does not, in fact, have to adapt its services because the degree of autonomy of the complainant, the possibility to dispose of his financial resources without a proxy, his own abilities to operate computer programmes and applications on his own computer, which is adapted to his visual impairment. The only measures the bank needed to adapt in this case were to provide the contract and the confidential code in Braille, a measure that is adapted for persons with visual impairments. Such a requirement could not be considered disproportionate or unjustified for the defendant in relation to a person with a handicap of visual nature (terms used by the NCCD). Fulfilling rights for the benefit of a category of people imply not only legal measures, but also practical actions with the aim of ensuring equal opportunities in accessing services.'

Following an ex officio investigation regarding the accessibility of public transportation in the capital cities of all the counties in Romania, in its Decision 251 of 30 April 2014, the NCCD sanctioned 39 mayors of major cities in Romania, as well as the relevant national authority – the National Agency for Payments and Social Inspection.[145] In this decision, the NCCD found that failure to ensure access to public transportation for persons with disabilities amounted to direct discrimination by limiting access to services and that this infringed the right to dignity. Subsequently, the NCCD imposed fines ranging between approximately EUR 227 (RON 1 000) and approximately EUR 454 (RON 2 000) on the 39

[141] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 100.

[142] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 100.

[143] Romania, Order 189/2013 of the Vice-Prime Minister, Minister of Regional Development, updating Rule NP-051/2001 to adapt civil buildings and the urban space around them for the purposes of accommodating persons with a handicap (disabilities), (*Ordin nr.189 din 12 februarie 2013 al viceprim-ministrului, ministrul dezvoltării regionale şi administraţiei publice, pentru aprobarea reglementării tehnice "Normativ privind adaptarea clădirilor civile şi spaţiului urban la nevoile individuale ale persoanelor cu handicap, indicativ NP 051-2012 - Revizuire NP 051/2000*), 12 February 2013.

[144] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 128, *R.V. v. Banca Transilvania and Agentia Grand Constanta*, 6 May 2010.

[145] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 251, ex officio case against 39 mayors and the National Agency for Payments and Social Inspection, 30 April 2014.

mayors and a fine of approximately EUR 1 135 (RON 5 000) on the National Agency for Payments and Social Inspection, which is the entity with the legal obligation to enforce observance of the legal provisions on ensuring access to local transportation for persons with disabilities. The decision was challenged before the Pitești Court of Appeal (*Curtea de Apel Pitești*) and the Alba Court of Appeal (*Curtea de Apel Alba)* by three mayors who were sanctioned by the NCCD. The first, the mayor of Pitești, who was sanctioned with a fine of approximately EUR 227 (RON 1 000), argued that the legal provisions do not establish an obligation to equip all means of public transportation so that they are accessible and that instead, the legal requirement is to ensure the possibility of access to public transportation to persons with disabilities. The second, the mayor of Bistrița, who was sanctioned with a fine of approximately EUR 454 (RON 2 000), challenged the NCCD decision, arguing that, given the mandate of a mayor according to current legislation, he could not be held liable and adding that the interest of his municipality in securing the rights of persons with disabilities is proved by the fact that relevant provisions are included in the procurement documentation and contracts concluded by the public transport service. The third, the mayor of Alba, also argued that the management of the public transportation system had been delegated, hence he was not liable, and that the NCCD decision was taken after the statutory term included in the Law and that, given that 37 of the 77 means of public transportation were accessible, the duty to ensure accessibility was complied with.

Both courts of appeal rejected the arguments invoking the lack of liability of the mayors, indicating that Law 215/2001 on local public administration clearly establishes the mandate of the mayor, including attributions regarding public services provided to citizens. The court dismissed the action of the three mayors, highlighting that eight years after the adoption of the law which creates the legal duty, even the complainants recognise that they met the obligation only in part. The Pitești Court notes that 'for the complainants, observing this obligation does not entail investments, and it is merely an obligation of diligence with regard to negotiating contracts for transportation, and there is already a precedent in other cities'. The court concluded that as long as the mayors did not meet their legal obligation to establish the 'conditions for accessibility, transportation, infrastructure, networks of communication for medical and socio-medical services' as required by Article 9 of Law 448/2006, the sanction applied by the NCCD was lawful, as well as the recommendations it provided for the future. The two courts rejected the petitions of the mayors and upheld the NCCD decision.[146]

h) Accessibility of public documents

The Anti-discrimination Law and Law 448/2006 on the Promotion and Protection of the Rights of Persons with a Handicap (disability) do not include any provision on a duty for public services to provide versions in an accessible format for people with disabilities. Law 448/2006, Article 61 mentions as specific measures to be taken by the authorities 'assurance of access to the public information for disabled persons' as well as 'assurance of authorized interpreters of the mimic and gesture language and of the language specific to deaf-blind persons'. No sanctions are provided for the failure to adopt such specific measures.[147] A draft code of conduct proposed by NGOs in November 2013 mentions the need to ensure participation and transparency by increasing accessibility of public documents but this was not adopted.[148]

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[146] Decisions available from the courts or the NCCD. Information regarding the cases available at http://portal.just.ro/46/SitePages/Dosar.aspx?id_dosar=46000000000035053&id_inst=46.

[147] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006.

[148] Code of conduct for consultation of NGOs by public institutions (*Cod de conduită privind consultarea ONG de către instituții publice*) developed as part of the project '*Model participativ de elaborare a politicii publice nationale privind ONG in Romania'*, *cod SMIS 40543, este derulat in parteneriat de catre AID-ONG si CENTRAS si este cofinanţat din Fondul Social European prin Programul Operaţional Dezvoltarea Capacităţii Administrative 2007-2013 Inovaţie in administratie*, available at: http://www.forum-ong.ro/wp-content/uploads/2013/12/Cod_Conduita_Consultare_ONG.pdf.

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 Romania, there are no residence, citizenship or nationality requirements for protection under the relevant national laws transposing the directives. Article 1(2) of the Anti-discrimination Law guarantees the principle of equality among citizens and provides for the prohibition of discrimination in the same context. A limitation is triggered by the constraints of Article 1(3) of the Romanian Constitution, which guarantees fundamental rights in relation to citizens only. However, the comprehensive definition of discrimination provided in Article 2(1) of the Anti-discrimination Law does not include any residence, citizenship or nationality requirements to qualify for protection, as also proved by the case law of the NCCD.[149]

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

a) Protection against discrimination

In Romania, the personal scope of the Anti-discrimination Law covers natural and legal persons for the purpose of protection against discrimination.

Article 3 of the Anti-discrimination Law specifies that all public and private natural or legal persons have an obligation to observe the principles of Article 1(2). Article 26(2) provides that sanctions can also be enforced against legal persons. Article 26 provides for higher fines for discrimination perpetrated against groups or communities thus: the amount of the fine as modified in 2013 is within the range of approximately EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual, and within the range of EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.[150] Furthermore, Article 26(3) of the Anti-discrimination Law establishes an obligation for 'legal representatives of authorities and public institutions and of the economic agents under investigation, as well as natural persons' to:

- 'provide any document that might help in clarifying the objectives of the investigation;
- provide information and explanations verbally or in writing, in relation to the issue under investigation;
- provide copies of the documents requested;
- provide support and ensure adequate conditions for carrying out the control and help out in view of clarifications.'

The failure to observe these requirements is sanctioned with a fine of RON 200 to RON 1 000 (approximately EUR 50 to EUR 250).

b) Liability for discrimination

In Romania, the personal scope of the Anti-discrimination Law covers natural and legal persons for the purpose of liability for discrimination. Article 3 of the Anti-discrimination

[149] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Case no. 221, *D. v. N. and Şofronea swimming pool*, 21 September 2005, in which the victim of discrimination was an Egyptian national.

[150] Romania, Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013, Art. 26.

Law specifies that the law applies to all public and private natural or legal persons with mandates regarding:

(a) conditions of hiring, criteria and conditions for recruitment, selection and promotion, access to all forms and levels of orientation, training and professional development;
(b) social protection and security;
(c) public services and other services, access to goods and facilities;
(d) educational system;
(e) ensuring freedom of movement;
(f) ensuring public order;
(g) other fields of social life.

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

a) Protection against discrimination

In Romania, the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination according to Article 3 of the Anti-discrimination Law. Article 26 of the Anti-discrimination Law provides for differentiated sanctions depending on whether the victim is a group or an individual.[151]

b) Liability for discrimination

In Romania, the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Romania, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for all the protected grounds. Articles 5-8 of the Romanian Anti-discrimination Law, which prohibit the various aspects of discrimination in employment relations, do not distinguish between the different types of actors (public or private, civilian or military, secular or religious):

> 'Art. 5 – According to the ordinance herein, conditioning the participation of a person in an economic activity or the freely chosen exercise of a profession on grounds of belonging to a race, nationality, ethnic group, religion, social category, on beliefs, gender or sexual orientation, age or on belonging to a disadvantaged group shall constitute a contravention.[152]
>
> Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination in relation to employment and social protection on grounds of race, nationality, ethnic group, religion, social status or belonging to a disadvantaged group, beliefs, age, gender or sexual orientation, excepting the cases provided for by the law, with respect to:
>
> a) initiation, suspension, modification or termination of the employment relationship;
> b) establishing and modifying job-related duties, the place of work or wages;
> c) granting of social rights other than wages;

[151] According to Article 26 of the Anti-Discrimination Law, the amount of the fine as modified in 2013 is within the range of approximately EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual, and within the range of EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.
[152] Unofficial translation.

d) professional training, refresher training, conversion training or promotion;
e) enforcement of disciplinary measures;
f) right to join a trade union and to access to the facilities it ensures;
g) any other conditions related to carrying out a job, in accordance with the law in force.

Art. 7 - (1) In accordance with the ordinance herein, the refusal of any legal or natural person to employ a person on grounds of the applicant's race, nationality, belonging to an ethnic group, religion, or disadvantaged group, social status, beliefs, age, gender or sexual orientation shall constitute a contravention, excepting the cases specified by the law.
(2) If, in any job advertisement or interview, an employer or employer's representative sets conditions for appointment to a position related to an applicant belonging to a race, nationality, ethnic group, religion, or disadvantaged group, or to the social status, age, gender, sexual orientation or beliefs of the applicant, except for the situation provided for under Art. 2 paragraph 9, this shall constitute a contravention.
(3) Natural or legal persons involved in mediating and distributing positions of employment shall ensure equal treatment of all applicants, their free and equal access to opportunities to consult the supply and demand of the labour market, to consult on opportunities to obtain a job or a qualification, and shall refuse to support any discriminatory requirements on the part of employers. All information related to the race, nationality, membership of an ethnic group, religion, gender or sexual orientation of applicants for a job or any other private information shall be confidential.

Art. 8 - Discrimination in regard to social benefits provided to employees committed by employers against their employees on grounds of their belonging to a race, nationality, ethnic group, religion, social category or disadvantaged group, or their age, gender, social status, sexual orientation or beliefs shall constitute a contravention.'

Articles 5-8 of the Anti-discrimination Law fail to mention disability specifically as one of the protected grounds in relation to employment. However, cases of discrimination on grounds of disability have been sanctioned by the NCCD, which applied the general definition of discrimination in Article 2, which also lists disability as a prohibited ground.

The Labour Code, amended and republished in 2011 and in force since May 2011, provides for a specific prohibition of discrimination in relation to employment relations, in Article 5:

1) in employment relations the principle of equal treatment in relation to all employees and employers applies;
2) any direct or indirect discrimination against an employee on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political beliefs, social origin, handicap (disability), family situation or responsibility, membership of or activity in a trade union is prohibited;
3) direct discrimination consists in exclusion, difference, restriction or preference, based on one or more grounds provided for in para (2), which have the purpose or the effect of not granting, limiting or denying the recognition, use or exercise of the rights provided for in the labour legislation;
4) indirect discrimination consists in acts or facts which in appearance are based on other criteria than those provided for in para. (2), but which generate the effects of direct discrimination.[153]

[153] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

Furthermore, Article 59 of the Labour Code prohibits dismissal of employees:

a) on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political beliefs, social origin, handicap (disability), family situation or responsibility, membership or activity in a trade union;
b) for exercising, according to the law, the right to strike and trade-union related rights.[154]

There is no jurisprudence available to indicate whether the labour courts interpret the prohibition of discrimination on grounds of religion strictly as belonging to a state-recognised religious faith or to a religious association duly registered according to Law 489/2006 or in the light of the understanding promoted in the jurisprudence of the European Court of Human Rights, which has also been referred to by the Romanian Constitutional Court in its decisions.[155]

While discrimination is prohibited, the Labour Code does not offer guidance in the case of employees dismissed or sanctioned when they are not available or competent to do their job due to a family situation or disability and no labour law jurisprudence on this issue could be identified.

The Criminal Code, adopted in 2009, which entered into force in February 2014, sanctions under Article 297 (on abuse in the exercise of authority) the action of a civil servant who during the course of work-related duties, limits the exercise of a right of a person or creates a situation of inferiority for that person on grounds of age, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political membership, beliefs, wealth, social origin, age, handicap (disability), non-contagious chronic disease or HIV/AIDS, which is punishable with a term of imprisonment of from two to seven years and exclusion from holding a public position.

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

In Romania, national legislation prohibits discrimination in the following areas: conditions for access to employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors, as described in the directives.

The Anti-discrimination Law prohibits discrimination in relation to employment of any type and on grounds of race, nationality, ethnic group, religion, social status, beliefs, sex or sexual orientation, age and belonging to a disadvantaged group, including in selection criteria, recruitment conditions, treatment during employment relationships and promotion or professional training or other benefits, as well as in terminating employment relationships. Articles 5-8 do not specifically mention self-employment: however, the wording is general enough to allow the NCCD and the courts to interpret the concept of 'work relationship' as including 'self-employment'. Nevertheless, judicial clarification is needed.

Access to employment for migrants is regulated by a strict set of conditions established in the Law on the Status of Foreigners in Romania, adopted in 2002, [156] and

[154] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011, Art. 59.
[155] Romania, Constitutional Court (*Curtea Constituţională*), Decision 72, 18 July 1995.
[156] Romania, Emergency Ordinance no. 194/2002 on the status of foreigners in Romania (*OUG nr. 194/2002, Ordonanța de urgență privind regimul străinilor in România*), 5 June 2008.

Ordinance no. 25/2014 on the employment and transfer of foreigners on Romanian territory of August 2014.[157]

In practice, the NCCD has also applied the Anti-discrimination Law provisions on different treatment in relation to access to the profession and professional development, specifically in the case of resident doctors who graduated in different years. In its decision of 27 July 2006, in the case of *G.T. v. the Ministry of Health*, the NCCD sanctioned as discriminatory Order 1.000/2005 of the Ministry of Health, which established that in the case of graduates of medical schools who graduated in 2005, access to continuing professional studies as resident doctors in the area of general practice can be given on the basis of a request, subject to meeting a minimal set of criteria, while graduates from other years from the same faculties did not have access to the same procedure. The NCCD noted that Order 1.000/2005 established different treatment for graduates of medical schools from different years and this resulted in differences in their enjoyment of the right to professional development.[158]

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by law. This means that following decisions of the Romanian Constitutional Court which declared that the courts are not mandated to repeal legal provisions when deemed as conducive to discrimination (Decisions 818, 819 and 820 of 2008 on *de jure* discrimination) and decisions finding that the mandate of the national equality body is unconstitutional in cases of petitions filed in relation to discrimination triggered or embedded in legislative norms (Decision 997/2008), there is a de facto difference between the public and the private sectors in relation to the justiciability of discrimination in conditions for access to employment. In addition, following this line of jurisprudence, the national equality body (NCCD), faced with legal provisions incompatible with the anti-discrimination principle, does not have a mechanism allowing it to decline to apply that particular legal provision, as provided by the Court of Justice of the European Union (CJEU) in C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.*,[159] while the national courts cannot repeal the discriminatory norm but can raise an exception of unconstitutionality before the Constitutional Court.

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

In Romania, national legislation prohibits discrimination in the following areas: working conditions, including pay and dismissal, for all five grounds protected by the directives and for both private and public employment, as specifically mentioned by the Anti-discrimination Law in Articles 5-8.

The lists of grounds from Articles 5, 6 and 7 would be read as including all grounds protected by Romanian legislation, including disability, which is not specifically mentioned. The NCCD has confirmed this interpretation in its jurisprudence.

3.2.3.1 Occupational pensions constituting part of pay

There are no specific provisions in the Anti-discrimination Law prohibiting discrimination in respect of occupational pensions but the law provides for specific sanctions in cases of discrimination in relation to salary-related rights as well as in relation to granting social rights other than salary-related rights.

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[157] Romania, Ordinance no. 25/2014 on employment and transfer of foreigners on Romanian territory (*Ordonanța nr. 25/2014 privind încadrarea în muncă și detașarea străinilor pe teritoriul României și pentru modificarea și completarea unor acte normative privind regimul străinilor în România),* 26 August 2014.

[158] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision in *G.T. v. the Ministry of Health,* 27 July 2006.

[159] Court of Justice of the European Union (CJEU), C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.*, 19 January 2010.

The Law on the Unitary System of Pensions, replacing Law 19/2000 and adopted on 16 December 2010, maintains the principle of equality in Article 2 d), without including further details on prohibition of discrimination or any sanctions in this regard.[160]

Law 204/2006[161] on Optional Pension Schemes provides in Article 51 that 'all participants and beneficiaries to a private pension scheme have the same rights and obligations and are treated without discrimination … they have the right to equal treatment …' Article 51 (4) provides:

> 'No eligible person can be discriminated against or denied the right to join a pension fund.'

Law 204/2006 does not include any sanction in regard to the prohibition of discrimination in respect of optional pension schemes.

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

In Romania, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or by adult lifelong learning courses.

Though not expressly using the wording of Article 3(1)(b) of Directive 2000/43/EC, the Anti-discrimination Law mentions specific prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work, both in the section on access to work in Article 6 and in the section on access to education in Article 11, which does not distinguish between the different forms, types, stages or levels of education:

> 'Art. 11 (1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.
>
> (2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.
> …
> (4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, by his/her beliefs, age, gender or sexual orientation.
> ...
> (6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute a contravention.'

Though specifically provided for, training is not defined in the law and it is for future judicial interpretation to establish the meaning of the concept.

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[160] Romania, Law 263/2010 on the Unitary System of Pensions, 16 December 2010.
[161] Romania, Law 204/2006 on Optional Pensions Schemes, 22 May 2006.

The lists of grounds in Article 6 and Article 11 would be read as including all grounds protected by Romanian legislation, including disability, although this is not specifically mentioned, given the correlation with Article 2.1 of the Anti-discrimination Law, which includes an open list of protected criteria.

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

In Romania, national legislation prohibits discrimination in the following areas: membership of and involvement in workers' or employers' organisations, as formulated in the directives, for all five grounds protected in the directives and for both private and public employment. Article 6 f) of the Anti-discrimination Law mentions the right to join a trade union and to access to the facilities it ensures.

The lists of grounds in Article 6 should be read as including all grounds protected by Romanian legislation, including disability, which is not specifically mentioned. Further protection was ensured in the 2011 legislation on social dialogue[162] and in the Labour Code, both of which clearly spell out prohibition of dismissal of employees due to their exercise of the right to strike and of their rights related to their trade union activities – Art. 59 b) of the Labour Code.[163]

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

In Romania, national legislation prohibits discrimination in the following area: social protection, including social security and healthcare, as formulated in the Racial Equality Directive. Protection against discrimination in social protection is provided for, both in connection with employment relationships and in general in relation to all grounds. Article 6 of the Anti-discrimination Law prohibiting discrimination mentions:

> c) 'granting of social rights other than the wages;
> ...
> g) any other conditions related to the carry out [sic] of a job, in accordance with the law in force.
>
> Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, ethnic origin, religion, social status or disadvantaged group, age, gender, sexual orientation or beliefs shall constitute a contravention.'

More specific provisions on prohibition of discrimination in social services and health care services are listed in Art. 10 (a) of the Anti-discrimination Law, which states:

> 'Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation:
>
> a) the refusal to ensure legal and administrative public services.

[162] Romania, Law 54 /2003 Trade Unions Law, 24 January 2004, had been abrogated and replaced by Art. 224 of Romania, Law 62/2011 on Social Dialogue, 10 May 2011.

[163] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

b) denying the access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services).
...
h) the refusal to ensure rights and benefits to a person or to a group of persons.'

The lists of grounds in Articles 6, 7 and 8 would be read as including all grounds protected by Romanian legislation, including disability, although this is not specifically mentioned. Judicial interpretation is required to confirm the inclusive approach of the NCCD.[164]

3.2.6.1 Article 3.3 exception (Directive 2000/78)

Romanian legislation does not include any exemptions for payments of any kind made by state schemes or similar, including state social security or social protection schemes, relying on the exception allowed in Article 3(3) of Directive 2000/78/EC.

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

In Romania, national legislation prohibits discrimination in the following area: social advantages as formulated in the Racial Equality Directive. The Anti-discrimination Law prohibits discrimination in granting social advantages in Article 6 and in Article 8, without distinguishing between the different types of benefits and social advantages private or public actors might grant to their employees:

- 'granting of social rights other than the wages;
...
- any other conditions related to the carry out of a job, in accordance with the law in force.

Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, ethnic origin, religion, social status or disadvantaged group, age, gender, sexual orientation or beliefs shall constitute a contravention.'

A general prohibition of discrimination in the context of access to public services of an administrative and legal nature, health and other services, goods and facilities is set out in Article 10(h) of the Anti-discrimination Law thus:

'Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation:

- refusal to grant the rights or benefits to a person or a group of persons.'

Though not specifically mentioned, disability would also be a protected ground in regard to access to services, interpreted under the general concept of 'disadvantaged group' and in light of the general definition of discrimination in Article 2(1), which lists disability as a protected ground.[165] Judicial interpretation is required to confirm this inclusive approach.

In Romania, the lack of definition of social advantages in the Anti-discrimination Law does not raise problems, as suggested by the practice of the NCCD.

[164] Romania, National Council for Combating Discrimination, Decision 94 of 5 February 2014.
[165] Romania, National Council for Combating Discrimination, Decision 94 of 5 February 2014 against Galați Mayor for delays in responding to a request to build a ramp.

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

In Romania, national legislation prohibits discrimination in the following area: education as formulated in the Racial Equality Directive. Article 11 of the Anti-discrimination Law substantiates the prohibition of discrimination in education, at all levels and in all forms, both private and public:

> '(1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.
> (2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.
> (3) Under the ordinance herein, requiring a declaration to prove a person's or group's belonging to an ethnic group as a condition for access to education in their mother tongue shall constitute a contravention. The exception to the rule is the situation when the candidates apply in the secondary and higher education system for places allotted specifically to a certain minority, in which case they must prove their belonging to that minority by means of a document issued by a legally established organisation of the respective minority.
> (4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, by his/her beliefs, age, gender or sexual orientation.
> (5) The provisions under paragraphs (1) and (2) shall not be interpreted as a restriction of the right of education institutions that train religious personnel in view of being employed in worship places to deny the application of a person whose religious status does not meet the requirements established for access to the respective institution.
> (6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute a contravention.'

Not specifically mentioned in Article 11 but also protected are disability and age as well as status of migrant, though judicial interpretation is required to confirm this inclusive approach, which the NCCD has so far adopted.

The requirement in Article 11(3) has been interpreted as a certificate or letter issued by a legally established non-governmental organisation of the respective minority or containing in its by-laws a declaration of interest in working on behalf of a particular minority group.

The Law on the Status of Foreigners in Romania from 2002 provides for the right to access education for foreigners.[166] The Ordinance on the social integration of foreigners also mentions in Article 9 that foreigners granted any form of protection in Romania have equal access to all forms of education similar to Romanian citizens.[167] However, due to the small

[166] Romania, Emergency Ordinance no. 194/2002 on the status of foreigners in Romania (*OUG nr. 194/2002, ordonanta de urgenta privind regimul strainilor in Romania*), 5 June 2008.

[167] Romania, Ordinance no. 44/2004 on the social integration of foreigners who were granted a form of protection or residence status in Romania, and of EU citizens and citizens of the European Economic Area (*Ordonanța nr. 44/2004 privind integrarea socială a străinilor care au dobândit o formă de protecție sau un permis de ședere în România, precum și a cetățenilor UE și a Spațiului Economic European)*, 2004, available at: http://www.mmuncii.ro/pub/imagemanager/images/file/Legislatie/ORDONANTE-DE-GUVERN/OG44-2004.pdf.

number of immigrants, public institutions with a role in education do not feel responsible for designing integration programmes for migrants, leaving immigration mainly as the responsibility of immigration authorities.[168]

The NCCD has applied the provisions of Article 11 in the context of segregation and denial of access to education cases, particularly in regard to Roma children and children and young people living with HIV/AIDS.

In a 2012 case, the NCCD found segregation of Roma children, in the form of assigning them to one class during enrolment and providing a classroom with significantly poorer conditions for Roma pupils, and sanctioned the school with a fine of approximately EUR 460 (RON 2 000) and the school inspectorate with a fine of EUR 460 (RON 2 000). The NCCD also required the school inspectorate to desegregate the school and to monitor the activities of the school. Based on its investigation, the NCCD concluded that 'the system of assignment to class 1B is not transparent and that the criteria for assigning the children to one class or another, even if they seem neutral, have a discriminatory effect in relation to children belonging to a vulnerable category, without being objectively justified by a legitimate scope.' The NCCD refers to ECtHR jurisprudence and continues by highlighting the positive obligation of the school leadership 'to make sure that pupils from a disadvantaged ethnic group are not segregated in one classroom … it is the duty of the educational personnel to assign the children in classes in a proportional manner, without taking into considerations criteria (such as the choice of the parents) which might infringe the rights of the pupils as well as their dignity.'[169]

In a case initiated ex officio following an article in the newspaper *Gândul* under the headline '*La Glina, ţiganii sunt exilaţi în clasele lor*' [In Glina Gypsies are exiled in their own classrooms], the NCCD decided in its case file 22A Bis/2006, that the situation of de facto segregation amounted to direct discrimination under Article 11 of the Anti-discrimination Law and sanctioned Glina school with an administrative warning.[170] In its decision, the NCCD mentioned the ECtHR jurisprudence on Article 14, highlighting that in finding that discrimination occurred it must be established that persons in analogous and comparable situations receive preferential treatment and that this distinction does not have an objective and reasonable justification, citing *Fredin v. Sweden*,[171] *Hoffman v. Austria*,[172] *Spadea and Scalambrino v. Italy*[173] and *Stubbings and others v. U.K.*[174] as well as the jurisprudence of the Romanian Constitutional Court and the relevant standards set out in the UNESCO Convention against Discrimination in Education, ICERD General Recommendation XXVII, Recommendation 4/2000 of the Council of Ministers of the Council of Europe, ECRI Recommendation no. 3. The case file 22A Bis/2006 predated the ECtHR Grand Chamber decision in *D.H. and Others v. Czech Republic* (13 November 2007)[175] and does not reflect the findings of the ECtHR in that case. Similarly, the NCCD found against schools segregating Roma pupils in a series of cases, mainly brought by Romani CRISS, a Roma NGO.[176]

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[168] Alexe, I., Ulrich, L., Stănciugelu, Ș, Mihăiţă, V., Bojincă, M. (2010), *Gestionarea benefică a imigraţiei în România*, Soros Foundation Romania, available at: http://www.fundatia.ro/sites/default/files/ro_106_Gestionarea%20benefica%20a%20imigratiei.pdf, p. 24.

[169] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 559, file 52-2012, 12 December 2012.

[170] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), file 22A Bis/2006, 27 August 2007, Glina segregation case.

[171] ECtHR, *Fredin v. Sweden (1),* 18 February 1991.

[172] ECtHR, *Hoffman v. Austria,* 23 June 1993.

[173] ECtHR, *Spadea and Scalambrino v. Italy,* 28 October 1996.

[174] ECtHR, *Stubbings and others v. U.K,* 22 October 1996.

[175] ECtHR, *D.H. and Others v. Czech Republic*, Grand Chamber decision, 13 November 2007.

[176] Romani CRISS filed a complaint with the NCCD on 25 January 2007 regarding the differentiated treatment applied to Roma pupils in Dumbrăveni by separating them from the majority pupils in grades 1 to 8 and moving them from the local Theoretical High School to a special school. According to Romani CRISS, over 90 % of the students in the special school are Roma, and they are transferred to special schools because they fail to obtain pass grades in the mainstream school, and not because they have special needs. Roma parents claim that their children fail because they are seated at the back of the classroom, and the teachers

In regard to segregation in education, the Romanian Ministry of Education adopted Order no. 1540/2007 on Banning School Segregation of Roma Children and on Approving the Methodology on Preventing and Eliminating School Segregation of Roma Children. Order no. 1540/2007 is intended to prevent, ban and eliminate segregation, seen as a severe form of discrimination with negative consequences on equal access of children to quality education. It includes sanctions for those who do not observe its provisions.

In 2010, the Ministry of Education issued Notification 28463 regarding Segregation of Roma in Education, which regulates the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the educational system. [177] This Notification is an internal norm intended for school inspectorates, kindergarten and school headmasters, as well as teachers, to specifically deal with the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the educational system. The Notification also includes some measures regarding education in minority languages.

Notification 28463 of 3 March 2010 was triggered by complaints received by the Ministry of Education regarding tendencies to segregate Roma pupils or attempts to interrupt education in minority languages. This notification includes very specific recommendations regarding registration of Roma pupils in the education system, reconfiguration of classes to avoid segregation of Roma pupils, maintenance of education in the mother tongue of pupils or of classes teaching their mother tongue as well as classes on the history and traditions of minorities, maintenance of the positions of school mediators who are engaged to support Roma pupils, mandatory inclusion of all children aged between 6 and 16 years in the educational system, including through alternative forms of education.

Notification 28463/2010 does not mention specific sanctions for non-observance of the recommendations; the Labour Code provisions would, however, be applicable. It mentions that compliance with the requirements of the notification will be monitored on a permanent basis by school inspectors in charge of the educational problems of Roma/minorities, together with the school inspectors responsible for pre-school, primary school and secondary school education. There is no official information regarding the actual monitoring and evaluation of enforcement of the notification.

On 22 December 2016, the Ministry of National Education and Scientific Research issued two orders: Order no. 6158 adopting the action plan on school desegregation, and Framework order no. 6134 for prohibiting school segregation in primary and secondary education, both of which aim to establish public policy regarding segregation in education in Romania in relation to the following criteria listed as protected grounds: ethnic origin, mother tongue, disability and / or special educational needs, socio-economic status of the families, residential environment or educational achievement of the beneficiaries. [178] Despite introducing needed and valuable clarifications, the two standards are still not enforced as no implementation mechanism was adopted.

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do not pay due attention to them. Available at: http://www.romanicriss.org. In a similar case, on 07 February 2007, Romani CRISS filed a complaint with the NCCD reporting on discrimination against Roma children in 3rd, 4th and 6th grades in School no. 17, and 1st, 3rd and 4th grades in School no. 19, both in Craiova, Dolj County. These children are allegedly segregated from majority students because their parents enrol them late. Roma parents state that the teachers physically abuse their children and the educational provision is of poorer quality than that received by the majority students in the same school. The NCCD issued a decision stating that discrimination occurred in these schools, and urging the school to initiate a desegregation process.

177 Romania, Ministry of Education, Research, Youth and Sports, Notification 28463/2010, available at http://www2.edu.ro/index.php/legaldocs/?sort=title&letter=N.

178 Romania, Ministry of National Education and Scientific Research, Order no. 6158 adopting the action plan on school desegregation, and Framework order no. 6134 for prohibiting school segregation in primary and secondary education, 22 December 2016. Available at: http://edu.ro/politici-publice-%C3%AEn-educa%C8%9Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare.

Segregation in education on the ground of ethnic origin is defined in Article 4 of Framework order no. 6134/2016 as:

> 'physical separation of kindergarten children, pre-schoolers or pupils (in primary and secondary education) belonging to an ethnic group in the educational unit / group / classroom/ building / last two rows / other facilities, so that the percentage of the kindergarten children, pre-schoolers or pupils belonging to the ethnic group from the total of the pupils in the educational unit / group / classroom/ building / last two rows / other facilities, is disproportionate when compared to the percentage of the children belonging to that ethnic group in the total population of that specific age in the educational cycle in that specific administrative-territorial unit.'

As an exception from the prohibition of ethnic segregation, Framework order no. 6134 allows for groups, classes, educational units (schools) enrolling 'mostly or only kindergarten children, pre-schoolers or pupils belonging to an ethnic group, with the purpose of teaching in the mother tongue of that group or in a bilingual system.'

Article 6 of Framework order 6234/2016 defines in similar terms segregation on the grounds of disability and/or special educational needs (allowing as an exception the establishment and functioning of special education units and groups or classes in a regular school). Article 7 of the order allows for segregation on the ground of 'a certain level of academic achievement' and Article 8 provides for segregation on the ground of the residential environment of the pupils. The methodology for the implementation of the action plan was not developed and the National Commission for Desegregation and Educational Inclusion, which was supposed to oversee and enforce the standards, was not convened.

The Law on National Education, Law 1/2011, provides in Article 2(4) that the state 'grants equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, for all citizens of Romania, without any form of discrimination'.[179] Thus, the previous prohibition of discrimination regardless of 'race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, belonging to a vulnerable group category as well as any other criterion' mentioned in Article 9 of the previous draft was replaced by a more vague principle of equity defined as absence of discrimination in general in access to education. Only discrimination in tertiary education is expressly prohibited, in Article 118 and in Article 202.

While the previous 1995 Education Law[180] defined segregation in education in Article 5(48) and in Article 8, these definitions were omitted from the current law.[181] In Article 3, the Law on National Education provides as a defining principle 'the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity' as well as the principle

[179] Romania, Law 1/2011 on National Education (*Legea Educației Naționale*), 10 January 2011.

[180] Education Law 84 of 1995, published as amended by Law 151/1999, republished in *Monitorul Oficial*, No. 370/3 August, 1999.

[181] The draft 2009 Education Code, which was declared unconstitutional for procedural flaws, defined segregation in education in Art. 5(48) as 'a serious type of discrimination consisting in physical separation, with or without intention, of minority children and youth from the rest of the children and youth, in groups, classes, buildings, educational institutions and other accommodation facilities used for education, so that the percentage of minority children and youth out of the total of children/youth in that particular educational institution/ classroom/ group is disproportionate when compared to the percentage of minority children and youth of that particular age out of the total population of the same age in that particular administrative-territorial unit (village or city).' The Code added in Art. 8 that 'the organizing, functioning and content of education cannot be structured based on exclusivist, segregationist and discriminatory criteria on grounds of ideology, politics, religion or ethnicity' and in Art. 8(6) specifically prohibited segregation without providing for a specific sanction. 'Organizing the educational process so that to allow teaching of mother tongue and/or other/all courses in mother tongue, as well as similar cases expressly provided in the law, are not considered as segregation.'

of 'ensuring equal opportunities'. Notably, Article 50 provides that 'abusive diagnostic assessment of children based on criteria of race, nationality, ethnicity, language, belonging to a disadvantaged category, or any other criterion, which leads to their inclusion in special education needs groups, shall be punished'. However, there are no specific sanctions included in the law.

a) Pupils with disabilities

In Romania, the general approach to education for pupils with disabilities does raise problems, as the inclusive legal framework is not matched by effective measures to ensure inclusive education of pupils with disabilities. Most of these pupils remain in special educational units and attempts to advocate the principle of normalisation are met with resistance from the authorities and educational personnel. Disabilities activists promoting inclusive education are themselves attacked aggressively.[182]

Education of pupils and students with disabilities is accommodated according to the Law on National Education and the special legislation on the rights of persons with disabilities. Article 15 of Law 448/2006 on special protection for persons with disabilities guarantees the right to education of children with disabilities (without distinguishing between different types or degrees of disability) in the form chosen by the child, or the child's parents or guardians.[183] Article 15(2) guarantees the right to permanent education and continuing education of persons with disabilities.

According to Article 16, education can be accessed in one of the following forms:

a) special educational units;
b) individual integration in regular educational institutions;
c) special groups or classes within regular educational institutions;
d) educational services through visiting teachers;
e) home schooling up to the end of high school studies but not later than the age of 26 years;
f) education in hospital, during hospitalisation;
g) educational alternatives.

The 2011 Law on National Education establishes in Articles 48-56 provisions for special and integrated education. Special education can be organised in special schools and in mainstream schools which integrate special groups or individual students in mainstream groups. As a novelty, Article 50 of the law provides for the following measure. 'Abusive diagnostic assessment of children based on criteria of race, nationality, ethnicity, language, belonging to a disadvantaged category, or any other criterion, which leads to their inclusion in special education needs groups, shall be punished.' However, no specific sanctions are provided.

The Law on National Education fails to address the issue of children dropping out as a result of discrimination and harassment on grounds of disability. While it establishes fines for parents who fail to ensure that their children go to school, it does not include any sanction for harassment which induces children to drop out. In addition, the Law on National

[182] The European Centre for the Rights of Children with Disabilities (*Centrul European pentru Drepturile Copiilor cu Dizabilități,* CEDCD) and its leader came under attack from local media and trade union leaders due to its work on a proposed bill on special education seeking to advocate for a CRPD-compliant reform of the system of education for children with disabilities. Subsequently, a complaint was filed with the NCCD against a journalist, the leader of a trade union of teachers and two teachers in special schools for the statements made by these persons in a series of articles published in a regional newspaper *Evenimentul Regional al Moldovei.* The NCCD dismissed the claim, defining the statements as free speech in its Decision 14 of 14 January 2015, communicated on 22 May 2015.

[183] Romania, Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap, 6 December 2006, Art. 17.

Education does not provide for sanctions for schools or school inspectorates which refuse to create appropriate schooling solutions for children.

Integration and equal opportunities in social life are recognised as critical needs in subsequent legislation. Thus, the Law on the Protection and Promotion of the Rights of the Child establishes an 'obligation for central and local public authorities to initiate projects and provide the funding to develop services targeted to satisfy the needs of children with disabilities in conditions observing their dignity, autonomy and active participation in the life of the community.'[184] There is no subsequent legislation further defining this obligation and the mechanism for its implementation. The case law and the NGO reports indicate that the problem remains with the implementation of the legal framework in order to ensure inclusive education.[185]

Law 272/2004 on the Protection of the Rights of the Child mentions that 'the child with disabilities has the right to education, recuperation, compensation, rehabilitation and integration, adapted to the own possibilities, in view of his or her personality.'[186] Law 272/2004 fails to provide any implementation mechanism which would allow its enforceability or any sanction in case of failure to observe these rights.

In the particular case of children living with HIV/AIDS, their right to education is provided for in Article 3 of Law 584/2002, the framework law for the protection of persons living with HIV/AIDS, which states that 'persons infected with HIV or living with AIDS are entitled to social protection and non-discriminatory treatment in regard of their right to education.'[187] Law 584/2002 does not include any enforcement mechanism or related sanctions.

Though still lacking the methodology allowing its enforcement, Framework order 6234/2016 defines in Article 1(2) an inclusive school as 'a friendly and democratic school, which values the socio-ethnic-cultural diversity, a school in which all children are respected and integrated without discrimination and without exclusion triggered by their ethnic origin, mother tongue, disability and / or special educational needs, socio-economic status of their families, residential environment or educational achievement of the beneficiaries.'[188]

In a 2013 decision, the NCCD sanctioned discrimination perpetrated by a school against a child with Asperger syndrome. Following protests from parents of other children, school officials started to put heavy pressure on the child and his parents to transfer him to a different class.[189] In its decision, the NCCD assessed each of the defences invoked by the defendant, concluding that the justifications were not objective and were not legitimate. Consequently, the NCCD found a violation of Article 2(1) – direct discrimination, Article 11 – discrimination in education, Article 2(5) – harassment and Article 15 – discrimination affecting the right to dignity, of the Anti-discrimination Law and sanctioned the school with a fine of approximately EUR 220 (RON 1 000). The NCCD also recommended that the school inform the parents of other children regarding the decision and in future it should

[184] Romania, Law 272/2004 on the Protection and Promotion of the Rights of the Child, 21 June 2004, Art. 46 4.
[185] European Centre for the Rights of Children with Disabilities, July 2013, report available at: http://www.cedcd.ro/.
[186] Romania, Law 272/2004 on the Protection and Promotion of the Rights of the Child, 21 June 2004, Art. 46 2.
[187] Romania, Law No. 584/2002 on Measures to Prevent the Spread of AIDS in Romania and to Protect Persons Infected with HIV or Suffering from AIDS (*Legea nr. 584/2002 privind masurile de prevenire a raspandirii maladiei SIDA in Romania si de protectie a persoanelor infectate cu HIV sau bolnave de SIDA*), 29 September 2002, Art. 3.
[188] Romania, Ministry of National Education and Scientific Research, Framework order no. 6134 prohibiting school segregation in primary and secondary education, 22 December 2016. Available at: http://edu.ro/politici-publice-%C3%AEn-educa%C8%9Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare.
[189] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 6444, 30 October 2013.

not yield to pressure from other parents regarding exclusion of children with disabilities from classrooms.

In a 2009 decision, the NCCD sanctioned with a fine of EUR 125 (RON 600) the initiative by a teacher to collect signatures with the purpose of excluding a pupil from a class because of disability. This was deemed as discrimination affecting the right to education and in addition to the fine, the NCCD issued a warning and recommended 'initiating courses for the educational personnel of the school on topics such as respect for human rights and the principle of equality to prevent such cases in the future'.[190]

b) Trends and patterns regarding Roma pupils

In Romania, specific patterns exist in education in regard to Roma pupils, such as segregation and poorer quality education for Roma children.

Segregation of Roma pupils remains a problem, as evidenced by research supported by UNICEF in 2011, which found that almost 60 % of Roma children who attend pre-school education go to segregated kindergartens (that is, where over 50 % of the children are Roma), and 11.7 % of Roma children are in all-Roma kindergarten groups. The 2010 study, produced by Agenţia de Dezvoltare Comunitară Împreună for UNICEF, found that more than 70 % of the pupils who drop out from schools are Roma and the causes for their leaving the educational system are poverty, as well as the poor quality of education and the lack of human and material resources in educational institutions.[191]

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

In Romania, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive. Article 10 of the Anti-discrimination Law lists the different types of services and goods. This Law does not distinguish between goods and services available to the public and those which are private. Article 3 of the Anti-discrimination Law specifies that the provisions of the Law apply to natural and legal persons, both public and private, as well as public institutions, including in the field of services in general, and access to goods and services (Article 3 c)).

The 2013 amendments repealed the initial exceptions from the prohibition of discrimination, which departed from the directives. The general prohibition is now provided for without exceptions:

> Art. 10: 'Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation:
>
> refusal to ensure legal and administrative public services;
> denial of access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services);
> …

[190] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 101, 17 February 2009.

[191] Ivasiuc, A, Duminică, G (2010), *O şcoală pentru toţi? Accesul copiilor romi la o educaţie de calitate* [A School for Everybody? Access of Roma children to quality education], Bucharest, Vanemonde. The research used a mixed qualitative and quantitative approach and was carried out in April 2009-May 2010. The report is available at: http://www.agentiaimpreuna.ro/files/O_scoala_pentru_toti.pdf.

refusal to grant a bank credit or to conclude any other kind of contract;
denial of access for a person or a group to services offered by theatres, cinemas, libraries, museums, exhibitions;
denial of access for a person or a group to services offered by shops, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public;
denial of access for a person or a group to services provided for by public transportation companies – plane, ship, train, underground railway, bus, trolleybus, tram, cab, or any other means of transportation;
refusal to grant the rights or benefits to a person or a group of persons.'

Though disability is not specifically listed as a protected ground in Article 10, it should be granted protection based on the general list of protected criteria in Article 2(1) and as being covered by the general term 'disadvantaged group'. Judicial interpretation is required to confirm this inclusive approach already endorsed by the NCCD.

Distinction between goods and services available publicly or privately

In Romania, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

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

In Romania, national legislation prohibits discrimination in the following area: housing as formulated in the Racial Equality Directive. The Anti-discrimination Law covers selling as well as renting a plot of land or a building for housing purposes, as well as illegal forced evictions, internal displacement and deportations on any of the grounds protected. However, the Anti-discrimination Law does not specifically prohibit segregation, as proved by a 2011 NCCD case which attracted a lot of media attention. In condemning the erection of a wall segregating Roma social housing from the rest of the city of Baia Mare, the NCCD had to rely on the prohibition of harassment and on the right to dignity as protected by the Anti-discrimination Law, an interpretation subsequently endorsed by the courts when reviewing the case.[192]

The 2013 amendments to the Anti-discrimination Law repealed the exceptions which infringed the provisions of Directive 2000/43/EC, where such a restriction is objectively justified by a legitimate purpose and the methods used to achieve such a purpose are adequate and necessary.[193] The Anti-discrimination Law currently provides:

'Art. 10: Under the ordinance herein, the following deeds shall constitute a contravention, if the deed does not fall under the incidence of criminal law, when perpetrated against a person or a group on account of their belonging or to the belonging of the management to a race, nationality, ethnic group, religion, social category or disadvantaged group, on account of their beliefs, age, gender or sexual orientation:
...
(c) the refusal to sell or rent a plot of land or building for housing purposes.'

'Art. 12 - (1) Any threats, pressure, constraints, use of force or any other means of assimilation, deportation or colonisation of persons with the purpose to modify the

[192] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 439 in file no. 4A/2011, *ex officio case v. Cătălin Cherecheş*, 15 November 2011.
[193] Romania, Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013.

ethnic, racial or social composition of a region or of a locality shall constitute a contravention.
(2) According to the ordinance herein, any behaviour consisting in forcing a person belonging to a race, nationality, ethnic group or religion, or a community, respectively, to unwillingly leave their residence, deportation or lowering their living standards with a view to determine them to leave their traditional residence shall constitute a contravention. Forcing a group of persons belonging to a minority to leave the area or regions where they live or forcing a group belonging to the majority population to settle in areas or regions inhabited by a population belonging to national minorities shall both represent violations of the ordinance herein.

Art. 13 - (1) Any behaviour aiming to force a person or group of persons to move away from a building or neighbourhood or aiming to chase them away on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.'

The Anti-discrimination Law does not provide explicitly for disability as a protected ground in relation to housing. As the NCCD approach to the list of protected grounds has so far been inclusive, this approach needs to be confirmed through judicial interpretation. Law 448/2006 on the rights of persons with disabilities provides for preferential access to public housing for persons with disabilities in Article 20 and according to Article 20(2), persons certified with a serious disability can receive a supplementary room and pay a minimal rent when granted public housing. However, no data are available to assess the level of implementation of these provisions. In 2009, the Parliament adopted a law providing for exemptions from paying rent for public housing or housing provided by county authorities used by persons with a serious disability.[194]

Article 6 of the Ordinance on the social integration of foreigners notes that foreigners granted a form of state protection can have access to housing under the same terms as Romanian citizens.[195]

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In Romania, there are patterns of housing segregation and discrimination against Roma.

The Housing Law (Law 114/1996) does not mention any prohibition of discrimination in the area of housing.[196] Roma are not expressly mentioned as one of the social groups entitled to social housing provided for in Articles 42-43 of the Housing Law, which is raising concerns of indirect discrimination given the dire situation of the large number of Roma whose housing needs are ignored.[197]

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[194] Romania, Law 359/2009 providing for exemptions for paying rent for public housing or housing provided by county authorities which are used by persons with a serious disability, 20 November 2009.

[195] Romania, Ordinance 44/2004 on the social integration of foreigners who were granted a form of protection or residence status in Romania, and of EU citizens and citizens of the European Economic Area (*Ordonanța nr. 44/2004 privind integrarea socială a străinilor care au dobândit o formă de protecție sau un permis de ședere în România, precum și a cetățenilor UE și a Spațiului Economic European)*, 2004, available on the website of the national authority for immigration at: http://www.mmuncii.ro/pub/imagemanager/images/file/Legislatie/ORDONANTE-DE-GUVERN/OG44-2004.pdf.

[196] Romania, Housing Law, Law. 114/1996, republished, 11 October 1996.

[197] Art. 43 of the Housing Law provides for the beneficiaries as decided by local authorities according to annually established criteria, and in the order of priority as established by the law they can be: persons and families evicted, or who are to be evicted from houses returned to former owners, young people up to 35 years old, young people leaving social protection institutions who have turned 18, people with physical disabilities of degree I and II, 'handicapped' persons, pensioners, war veterans and widows, the beneficiaries of the Law 341/2004 for the recognition of martyr-heroes and fighters who have contributed to the victory of the Romanian revolution from December 1989 as well as of the persons who have sacrificed their life and have suffered as a consequence of the workers' anti-Communist revolt of Brasov 1987 and of

The 2002 National Action Plan on Social Inclusion[198] mentions housing as one of the priority lines and includes Roma as a particularly vulnerable group, without effectively following up in this direction. Roma are not explicitly mentioned as a vulnerable group in the Law for Preventing and Combating Social Marginalisation.[199] In its 2009 report *Risks and Social Inequities in Romania*, the Presidential Commission for the Analysis of Social and Demographic Risks identified the increased vulnerability of Roma in relation to housing, and provided data indicating the dire situation, but there was no policy or legislative follow-up to these findings.[200]

There are no official statistics on racist incidents and discrimination in housing against Roma; the media and NGOs report cases of institutional violence against and assaults on Roma, such as police raids and evictions in Roma communities, without providing them with alternative accommodation. A report prepared by the Centre for Legal Resources in 2009 found that 'the first and only Government driven and funded initiative in the area of housing for the Roma came in 2008 through Government Decision 1237/2008 which provided for the building of a maximum of 300 houses for the Roma.'[201] The report produced an analysis of patterns affecting the right to housing of Roma communities and concluded that, given the lack of clear guarantees against forced evictions and the tedious legal regime applicable to buildings and housing in Romanian legislation, Roma are victims of indirect discrimination.

The high levels of urban private rents and the deficit of social housing, as well as the high cost of public utilities, disproportionately affect Roma and the main cases of discrimination (evictions, demolitions, spatial segregation) are concentrated at the level of Roma communities.

A 2011 report issued by Amnesty International, *Romania: Mind the legal gap: Roma and the right to housing in Romania*, concludes that the Roma minority in Romania lacks legal protection from forced evictions, and that Roma families are often left in sub-standard housing conditions with no chance of redress.[202] The report identifies gaps in protection of the right to housing and highlights that 'remedies available under the existing legislation for evictions are mainly available to tenants or owners and do not adequately cover other groups of people, such as people living on public land.' Further, the report argues that 'the Romanian government has so far failed to introduce an effective system that would hold local authorities accountable for non-compliance with human rights treaties to which Romania is a state party' and concludes that even if the courts or the national equality body should provide Roma with a means of redress, these systems lack the power to hold the Government accountable.

Law 118/1990 (persons who have suffered for political reasons during Communism), and other persons or families which might be entitled to the right to housing.

198 Romania, Government Decision for the approval of the National Plan against Poverty and for Promoting Social Inclusion, 31 July 2002.

199 Romania, Law 116/2002, Law for Preventing and Combating Social Marginalisation, 21 March 2002.

200 Presidential Commission for the Analysis of Social and Demographic Risks (2009), *Riscuri şi inechităţi sociale în România – Risks and social inequities in Romania*, available at: http://www.presidency.ro/?_RID=det&tb=date&id=11426&_PRID.

201 RAXEN National Focal Point (2009), *Thematic Study Housing Conditions of Roma and Travellers*, March 2009, p. 4, available at: http://www.crj.ro/userfiles/editor/files/RAXEN-Roma%20Housing-Romania_en.pdf.

202 Amnesty International (2011), *Romania: Mind the legal gap: Roma and the right to housing in Romania*, London, Amnesty International, 23 June 2011. Report available at: http://www.amnesty.org/en/news-and-updates/report/romania-legal-system-condemning-roma-poor-housing-2011-06-23.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Romania, national legislation provides for an exception for genuine and determining occupational requirements. The 2013 amendments to the Anti-discrimination Law repealed the previous definition of occupational requirements in Article 9 and introduced a new Article 4^1 stating:

> 'The difference in treatment based on a characteristic which is linked to the criteria provided for in Art. 2(1) does not amount to discrimination when, based on the nature of the occupational activities or of the context in which they take place, such a characteristic amounts to a genuine and determining occupational requirement, under the condition that the objective is legitimate and the requirement is proportionate.'

As the grounds covered by the Romanian Anti-discrimination Law are broader than the protected grounds of the two directives, the differences of treatment in cases of determining occupational requirements apply not only for the five grounds mentioned in the directives, but for all protected grounds.

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

In Romania, the national Anti-discrimination Law does not provide for an exception for employers with an ethos based on religion or belief. Lacking relevant jurisprudence developed either by the courts or by the NCCD in application of genuine occupational requirements as exceptions for ethos- or religion-based associations, it is still too early to assess the tests used in analysing the conditions under which these exceptions will be accepted.

Law 489/2006 on Religious Freedom and the General Status of Religious Denominations includes provisions on employment relations within state-recognised religious denominations (*culte*).[203] Law 489/2006 established a three-tier system with traditional religious denominations being granted the status of state-recognised religious denominations (*culte*) under very strict requirements, religious associations (*asociaţii religioase*)[204] and religious groups (*grupuri religioase*) which do not meet the strict criteria established by the law or choose not to register as legal persons.[205] According to Articles 23-26 of Law 489/2006, state-recognised religious denominations have the right to select, appoint, employ and discipline their own employees, a practice already in force in 2000 when the Anti-discrimination Law was adopted. Issues of internal discipline are resolved in accordance with by-laws and internal provisions by the religious courts of each denomination. Theoretically, the legal regime established in this chapter in relation only to religious personnel of recognised denominations could be extended to religious personnel of other entities the ethos of which is based on religion or belief (such as registered religious associations), in accordance with the legal principle that where the reason behind a normative provision is the same, the norm applied should accordingly be the same. There is no reported jurisprudence developed in this field so far.

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[203] The 2006 Law on Religious Freedom and the General Status of Religious Denominations recognises the same 18 religions that were recognised prior to its adoption.

[204] Romania, Law 489/2006 on Religious Freedom and the General Status of Religious Denominations (*Legea nr. 489/2006 privind libertatea religioasa si regimul general al cultelor*), 28 December 2007. Art. 40 of Law 489/2006 provides that entities seeking registration as religious associations have to reach a higher threshold than other types of association (at least 300 members exclusively Romanian citizens or residents in Romania while secular not-for-profit associations need at least three members).

[205] Romania, Law 489/2006 on Religious Freedom and the General Status of Religious Denominations (*Legea nr. 489/2006 privind libertatea religioasa si regimul general al cultelor*), 28 December 2007.

– Religious institutions affecting employment in state-funded entities

In Romania, religious institutions are permitted to select people (on the basis of their religion) to employ or to dismiss from a job when that job is in a state entity, or in an entity financed by the state. Law 1/2011 on National Education[206] maintains that religion is a subject for primary and secondary and vocational education in the case of the 18 state-recognised religions, and is guaranteed irrespective of the number of pupils willing to take the subject. In November 2014, the Constitutional Court found that Article 18 of the Law on National Education, establishing the procedure according to which the parents or the legal guardian of a pupil could file a written request so that the pupil would not take the class, was unconstitutional but maintained the constitutionality of religious education classes offered as part of the general curricula.[207]

Only the 18 state-recognised religious denominations can sign partnerships with the Ministry of Education to secure teaching of religious instruction classes as requested by pupils, a mechanism which has been contested in the past. The confessional model of teaching religion has a negative impact on the legal regime applicable to teaching personnel which is de facto in a dual relation of subordination, as it has to observe both internal religious norms and the general provisions on educational personnel.[208]

The 2011 Law on National Education does not include provisions on the right of a state-recognised religious denomination to select, appoint or dismiss teachers of religion. However, the Law on Religious Freedom and the General Status of Religious Denominations provides in Article 32(2)-(4) that state-recognised denominations have wide powers in training, selecting, approving and dismissing the teaching personnel for religion classes as follows:

1) the staff teaching religious instruction in public schools shall be appointed in agreement with the denomination they represent, under the law;
2) where a teacher commits serious violations of a denomination's doctrine or morals, that denomination can withdraw its agreement that the teacher teaches religion, which will lead to termination of that person's employment contract;
3) on request, in a situation where a school cannot provide teachers of religion who are members of the same denomination as the students to be taught, such students can produce evidence of studies in their respective religion, provided by the denomination of which they are members.

The Law on the Status of Educational Personnel, Law 128/1997, in Article 136 provides the conditions for employment of teachers of religion, on the basis of agreements between the Ministry of Education and the 18 state-recognised religions (no other religious denominations).

The wide competency of state-recognised denominations in selecting, approving or dismissing educational personnel teaching religion classes conflicts with the principles established by the Labour Code and by Law 128/1997 on the Status of Educational Personnel and arbitrarily places the educational personnel teaching religion classes in a burdensome situation. So far, neither the NCCD nor the courts have reported any cases of complaints from teachers of religion dismissed from their positions in public schools after not being deemed acceptable due to infringement of doctrinal requirements (e.g.: divorce in the case of Catholic education, single mothers or people living in consensual relations or

[206] Romania, Law 1/2011 on National Education (*Legea Educaţiei Naţionale)*, 10 January 2011.
[207] Romania, Constitutional Court (*Curtea Constituţională*) Decision 669, 12 November 2014. All decisions of the Constitutional Court are available for research by decision number on the search engine of the Court at http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx.
[208] Enache, S. (coord.) (2007), *Promovarea interesului superior al copilului în educaţia religioasă. Monitorizarea educaţiei religioase în şcolile publice din România*, Târgu-Mureş, Editura Pro Europa, available at http://www.proeuropa.ro/norme_si_practici.html#juridic.

homosexuality in the case of Orthodox education, women not willing to wear the hijab in the case of teaching Islam).

Such agreements concluded under domestic law provide for the structure of religious education, including the requirements for teachers of religion. The law allows for religious personnel who have graduated from higher religious education or theology seminaries and have work experience of at least five years in the field to teach religion for primary and secondary education classes; such personnel would be paid by the Ministry of Education as teachers, subject to the requirement to pass an examination, as established by the Law on National Education.

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

In Romania, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). However, the genuine occupational requirements introduced in Article 4^1 replacing the former exceptions allowed by Article 9, repealed in 2013, can be invoked in relation to age and disability requirements for the armed forces, police, prison or emergency services:

> 'The difference in treatment based on a characteristic which is linked to the criteria provided for in Art. 2(1) does not amount to discrimination when, based on the nature of the occupational activities or of the context in which they take place, such a characteristic amounts to a genuine and determining occupational requirement, under the condition that the objective is legitimate and the requirement is proportionate.'

Article 36 of Law 80/1995 on the Status of Military Personnel includes an age limit for those who qualify to become active officers: 'e) active military sub-officers (non-commissioned officers, NCOs), licensed graduates of higher tertiary education with a similar profile to the military units, who are a maximum of 35 years old.'[209]

According to Article 78(4) of Law 448/2006, national defence and public order institutions are exempt from the obligation for all authorities and public institutions and public or private legal persons with at least 50 employees to employ persons with disabilities at a level of at least 4 % of the total number of employees. An absolute exemption such as that introduced by Article 78(4) is unjustified and might be challenged as unconstitutional.

Order 665 of the Ministry of Interior of 28 November 2008, regarding human resources management in the units of the Ministry of Interior, notes as a general condition only that the applicants must be at least 18 years of age and be declared 'able' by a special commission which examines medical, physical and psychological conditions (Article 20). The maximum age for those participating in the application competition for initial police officer training is 42 years and for those applying to participate in professional training for the army it is 28 years (Article 21). The order also provides for height-related criteria with, for example, a minimum height of 1.70 metres for men and 1.65 metres for women (Article 21(d)). Order 665 also specifies that, depending on the specifics of a professional activity, particular recruitment criteria may be established.

Law 360/2002 on the Status of the Police provides in Article 10 that for the entrance examinations in the educational units of the Ministry of Interior or in the case of direct employment of specialists, any person who complies with the general requirements for civil servants and with other specific requirements listed in the law 'has access, irrespective of race, nationality, gender, religion, wealth or social origin'.[210] Specific requirements listed

[209] Romania, Law 80/1995 on the Status of Military Personnel (*Lege privind Statutul cadrelor militare*), 11 July 1995.

[210] Romania, Law 360/2002 on the Status of the Police (*Lege privind Statutul poliţistului*), 6 June 2002.

in Article 10 include being declared 'medically, physically and psychologically able/fit'. Age is not mentioned in the list.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

In Romania, nationality (in the sense of citizenship) is explicitly mentioned as a protected ground in Article 2 of the Anti-discrimination Law. The Anti-discrimination Law establishes the right to freedom from discrimination on grounds of nationality in general, without further defining the concept of 'nationality' or listing exemptions.

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

As the Anti-discrimination Law and the case law do not provide any definition of 'nationality' or 'race or ethnic origin', it is difficult to assess how the NCCD uses these notions. In practice, for its own data-gathering purposes, the NCCD informally categorises under 'ethnic origin' all cases regarding Roma. The NCCD files under 'nationality' cases submitted by any of the 18 national minorities recognised under Romanian legislation as well as by other minorities or foreign citizens. Cases lodged by persons of African or Asian descent, are filed by the NCCD under 'race', thus avoiding potential overlap.

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

a) Benefits for married employees

In Romania, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees who are married. Romanian legislation does not mention any specific provision on the right of employers to provide benefits solely to a certain category of employees (married, with children etc.). The general prohibition in Article 6 and Article 8 of the Anti-discrimination Law would apply:

> 'Art. 6 –According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:
> ...
> c) granting of social rights other than the wages;
> ...
> Art. 8 - Discrimination committed by employers against their employees with regard to the social facilities they grant their employees on account of the employees' belonging to a race, nationality, ethnic origin, religion, social category or disadvantaged group or age, gender, social status, sexual orientation or beliefs shall constitute a contravention.'

b) Benefits for employees with opposite-sex partners

In Romania, there have been no cases in which an employer has provided benefits to those employees with opposite-sex partners and was accused of discrimination. Such a claim of discrimination on grounds of civil status would probably be rejected as there is no legislation allowing same-sex or heterosexual partnerships. Notably, Romanian legislation did not include any legal provision on same-sex marriage or partnership until 2009, so

private employers providing benefits to married employees could invoke the absence of a legal regulation.[211]

The Civil Code, adopted in 2009,[212] which entered into force in 2011, includes in Article 277 an express prohibition of same-sex partnership and marriage, and includes a prohibition of recognition of partnerships and same-sex marriages registered in other countries, even if they were legally registered.[213] The Civil Code also mentions that the legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force. These include Ordinance 30/2006, which provides a definition of partnership for citizens of EU Member States for the purposes of free movement and residence in Romania which defers to the legislation of the country of origin.[214] However, the Civil Code provisions fail to clarify the conflict between the express provisions recognising the marital status of the EU citizens as granted by their countries mentioned in the legislation transposing Directive 2004/38/EC (i.e. Ordinance 30/2006) and the prohibition of recognition of same-sex marriages or partnerships entered into abroad by same-sex couples introduced in the Civil Code.[215] In 2016, a citizens' initiative to amend Article 48 of the Romanian Constitution[216] was allowed by the Constitutional Court[217] and the decision on the constitutional referendum was pending before the Parliament as of May 2018. The proposed amendment defines 'the family' as based on the 'freely entered into union between a man and a woman, the equality between them and the right and the obligation of the parents to ensure the upbringing, education and instruction of children.'[218] While not adding any value to existing legislation, the initiative was described as a preventive strike against the potential recognition of same-sex couples,[219] being conceived as a de facto constitutional ban on same-sex marriages.

Different draft bills on same-sex partnerships have been shelved or rejected by the Parliament with the most recent bill still pending in the Parliament. No case law has been reported on this issue so far.

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

In Romania, there are no specific exceptions provided for in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). However, the genuine occupational requirement allowed by Article 4^1 might be applicable.

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

[211] FRALEX (2012), *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Romania*, http://fra.europa.eu/en/country-report/2012/country-reports-homophobia-and-discrimination-grounds-sexual-orientation-part-1.

[212] Romania, Law 289/2009 on the Civil Code (*Lege 289/2009 privind Codul Civil*), 17 July 2009.

[213] Romania, Law 289/2009 on the Civil Code, 17 July 2009, Art. 277. '[S]ame-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognised in Romania.' Similarly, the Civil Code mentions that same-sex or opposite-sex civil partnerships registered or contracted abroad by Romanian citizens or foreigners are not recognised in Romania.

[214] Romania, Law 500/2006 on amending and approving Ordinance 30/2006, 28 December 2006.

[215] Romania, Law 500/2006 on amending and approving Ordinance 30/2006, 28 December 2006, defines as a partner 'a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved'.

[216] Citizens' initiative published in *Monitorul Oficial*, 883/1, 25 November 2015.

[217] Romania, Constitutional Court Decision 580, 20 July 2016.

[218] Unofficial translation of the proposed constitutional referendum as stated in the citizens' initiative, published in *Monitorul Oficial*, 883/1, 25 November 2015.

[219] Amicus Curiae submitted by ACCEPT Romania to the Constitutional Court, No. 3409, 13 June 2016. Also Amnesty International, the European Commission on Sexual Orientation Law (ECSOL), ILGA-EUROPE (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and the International Commission of Jurists (ICJ), Interveners, No. 6096, 28 June 2016.

4.7.1 Direct discrimination

In Romania, national law does not provide an exception for direct discrimination on the ground of age. However, age discrimination may be justified under Article 4^1 if it corresponds to a determining occupational requirement. The wording of the test is compliant with the test provided by Article 6 of Directive 2000/78/EC, although its interpretation still needs confirmation from the courts.

The provision allowing for difference in treatment in the area of housing and access to services and access to goods, including on the ground of age, under the specific test established in Article 10 was repealed in 2013.[220]

In its Decision no. 42 of 9 January 2008, file 498/2007, in the case *F.K v. Ministerul Educaţiei, Cercetării şi Tineretului* [Ministry of Education]*, Inspectoratul Şcolar Judeţean M.* [M. county school inspectorate], the NCCD noted that the refusal to allow the complainant to participate in a competition for the position of school director because he had less than four years left before reaching the pensionable age amounts to discrimination. The refusal was based on an Order of the Ministry of Education[221] which provided that 'at the date of the competition, candidates should have an age at least four years less than the standard pensionable age'. The NCCD considered that the refusal to allow the complainant to participate in the competition for the position of school director was discriminatory and recommended the Ministry of Education to modify the criteria for competitions for the position of school director.[222]

In a 2006 decision, *I.N. v. Administraţia Naţională a Penitenciarelor* [National Administration of Prisons], the NCCD found that the upper age limit of 35 years established for taking the examination to become a prison officer was discriminatory and recommended to the Ministry of Justice and to the National Administration of Prisons that they modify this requirement, in spite of claims from the authorities that a lower age was required in order to secure 'dynamism, flexibility and optimism'.[223]

a) Justification of direct discrimination on the ground of age

In Romania, it is not possible, generally or in specific circumstances, to justify direct discrimination on the ground of age. Discrimination on the ground of age might be justified according to Art. 4^1 of the Anti-discrimination Law if it qualifies as a determining occupational requirement.

b) Permitted differences of treatment based on age

In Romania, national law does not permit differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC. The Labour Code provides for specific protective measures in relation to employees under 18 years of age, who must have a work programme of no more than six hours/day and 30 hours/week (former Article 109, renumbered as Article 112); cannot work supplementary hours (Article 121, renumbered as Article 124) or during night shifts (Article 125, renumbered as Article 128); must have a lunch break of at least 30 minutes (Article 130, renumbered as Article 133);

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[220] Romania, Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013.

[221] Romania, Order of the Ministry of Education (*Ordinul Ministrului Educaţiei şi Cercetării*) no. 5617, 14 November 2006.

[222] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision no. 42, file 498/2007, *F.K. v. Ministerul Educaţiei, Cercetării şi Tineretului* [Ministry of Education], *Inspectoratul Şcolar Judeţean M.* [M. county school inspectorate], 9 January 2008.

[223] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision I.N. v. *Administraţia Naţională a Penitenciarelor* [National Administration of Penitentiaries], 11 May 2006.

and have a supplementary holiday entitlement of three days (Article 142, renumbered as Article 147 (2)).[224]

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Romania, national law allows occupational pension schemes to fix ages for admission to a scheme or for entitlement to benefits, taking up the possibility provided for in Article 6(2). Law 411/2004 on private pensions makes participation in private pension schemes mandatory for people under 35 years of age.

The special law on pensions, Law 19/2000 on the Public Pension System and Other Social Security Rights,[225] which was in force until the end of December 2010, established the general age for retirement, which has progressively increased to reach the ceiling of 60 years for women and 65 years for men by 2014. This law also established the required number of years of contributions to the pension schemes (at least 30 years' participation for women and 35 years for men). The law established a unified public pension system, integrating the majority of former independent systems; the only system exempted was the military pension system.[226]

Law 19/2000 was replaced by Law 263/2010 on the Unitary System of Pensions, which entered into force in 2011.[227] The initial draft of this law was brought before the Constitutional Court because of its provision in Article 53(1), introducing an equal retirement age for men and women of 65 years. The Constitutional Court upheld the draft in its decision of 6 October 2010 by stating that equalising the retirement age of men and women does not infringe the constitutional provisions on equality and that opposing such equalisation would be tantamount to opposition to an international trend. However, the Romanian President later refused to sign the law and sent it back to the Parliament, stating that he could not agree with the equal retirement age of 65 years for both men and women. The President requested the Parliament to consider introducing a differentiated retirement age of 63 years for women and 65 years for men, due to the socio-economic realities entailing a more difficult situation for women.[228] Consequently, the Parliament adopted the Law on Unitary Pension System on 7 December 2010, including an amendment regarding the differential retirement age for men and women. However, the amendment did not introduce a differential period for contributions, as requested by the opposition parties.

The Constitutional Court was approached once again by a group of parliamentarians who alleged potential discrimination between men and women due to the lack of a differentiated system of contributions to the retirement scheme, leading to lower net pensions for women. On 15 December 2010, the Constitutional Court considered the constitutional complaints and decided to uphold the Law on Unitary Pensions System in its current form, including the differentiated retirement age for women and men, as proposed by the President, without a mechanism addressing the disparate impact of the different contribution periods. The bill was adopted as Law 263/2010 on 16 December 2010 and entered into force on 1 January 2011, with the exception of several provisions which entered into force on 1 January 2012.

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[224] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

[225] Romania, Law 19/2000 Law on the Public Pensions System and Other Social Benefits, 17 March 2000.

[226] Romania, Law 223/2015 on Military Pensions (*Legea nr. 223/2015 privind pensiile militare de stat)*, 1 January 2016.

[227] Romania, Law 263/2010 on the Unitary System of Pensions, 16 December 2010.

[228] Law 19/2000 on the Public Pension System and Other Social Security Rights establishes the general age for retirement. Article 41(2) of Law 19/2000 establishes that 'the standard retirement age is 60 for women and 65 for men, and the standard retirement age will be reached in 13 years from the adoption of the law [by 1 January 2014], by gradually increasing the pensionable age, starting with 57 for women and 62 for men.' Besides the standard retirement age, potential pensioners are required to fulfil a number of years of contribution to the pension schemes (at least 30 years' participation for women and 35 years' for men).

Law 263/2010 introduces some exceptions falling within the scope of Article 6(2) of the Employment Equality Directive, such as military personnel, police officers and public servants working in prisons, national defence, public order and public safety, for whom the standard retirement age is 60 years, for both men and women, with a minimum contribution period of 20 years and a full contribution period of 30 years. Different standard retirement ages are provided for persons who were persecuted for political reasons during the dictatorship established in 1945, and for those deported abroad, persons working for at least 15 years in a first degree radiation zone, personnel working in mining who spent at least 50 % of their working time underground, artists, and civil aviation flight personnel.

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

In Romania, there are special conditions set by law for older or younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection. The Labour Code (*Codul muncii)* provides for specific protective measures in relation to employees under 18 years of age who must have a work programme of no more than six hours/day and 30 hours/week (former Article 109, renumbered as Article 112); cannot work supplementary hours (Article 121, renumbered as Article 124) or during night shifts (Article 125, renumbered as Article 128); must have a lunch break of at least 30 minutes (Article 130, renumbered as Article 133); and have a supplementary holiday entitlement of three days (Article 142, renumbered as Article 147 (2)).[229]

Employers may benefit from fiscal advantages if they hire students during their vacations or recent graduates, according to Law 76/2002.[230] Article 80 of Law 76/2002 provides that employers who hire young graduates for at least 3 years are exempt for 12 months from paying contributions to the public unemployment fund in respect of the graduates they employ, and receive a monthly contribution from the state, which can be the minimum average income or higher, depending on the education of the employee.

According to Article 85 of Law 76/2002, employers hiring unemployed people who are over 45 years of age, or unemployed persons who have caring responsibilities (sole parent) receive similar advantages. The employers are under an obligation to maintain the employment relationship for at least two years.

The Labour Code provides for an exception from the general prohibition against individual fixed-term employment contracts, and allows such contracts in Article 81 d) renumbered as Article 83 e) in the case of a person who is seeking employment and who will reach the standard pensionable age within five years.[231]

4.7.3 Minimum and maximum age requirements

In Romania, there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training. Article 13 of the Labour Code establishes the minimum age for access to employment as 16 years, or 15 years with the approval of the parents or guardians of the person, 'if the health, and professional development are not jeopardised'. Employment of children under 15 years of age is prohibited.[232] Article 13(5) also provides that employment

[229] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.
[230] Romania, Law 76/2002 on the System of Funds for Unemployment and Encouraging Occupation (*Legea șonajului*) 7 February 2002.
[231] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.
[232] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

in difficult, damaging and dangerous conditions (as established in a governmental decision) can only be carried out by persons over 18 years of age.

However, special legislation establishes specific limitations which are not always justified – for example, only persons between 18 and 65 years of age can act as tourist guides, according to Annex 1 of Order 637 of 1 April 2004 on approving the methodological norms for the conditions and criteria for selecting, educating, certifying and utilising tourist guides, issued by the Ministry of Transport, Construction and Tourism. Law 22/1969 on employing treasurers (paying tellers) provides that paying tellers must be at least 21 years of age.[233]

Law 333/2003 on the defence of objectives, goods, values and protection of persons mentions a minimum age of 18 years for persons seeking employment as guards.

4.7.4 Retirement

a) State pension age

Law 19/2000 on the Public Pension System and Other Social Security Rights[234] established the state pension age, at which individuals can begin to collect their state pensions. Article 41(2) of the Law 19/2000 established that 'the standard retirement age is 60 years for women and 65 years for men, and the standard retirement age will be reached in 13 years from the adoption of the law [by 1 January 2014], by gradually increasing the pensionable age, starting with 57 years for women and 62 years for men.' Besides the standard retirement age, potential pensioners were required to fulfil a number of years of contributions to the pension schemes (at least 30 years' participation for women and 35 years for men). The Law on the Unitary System of Pensions, adopted in December 2010, introduced a new retirement age of 63 years for women and 65 years for men.[235] This law has been in force since 1 January 2011.

If an individual wishes to work longer, the pension can be deferred. An individual can collect a pension and continue to work, with effect from 19 October 2014, when Law 134/2014 entered into force, abrogating the relevant provisions of Law 329/2009 on the Restructuring of Some Authorities and Public Institutions, Rationalizing Public Expense, Supporting the Business Environment and Observing the Framework Agreements with the European Commission and the IMF.

The mechanism developed in Law 19/2000 and maintained by Law 263/2010 provides that pensions are calculated based on an announced formula, based on points and taking into account the employee's contribution and the contribution period; one pension point is equal to 45 % of the average gross salary paid in Romania; the pay-as-you-go (PAYG) system became a combined one which includes defined benefits for minimum stage of contribution and specified contribution for the rest.[236]

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[233] Romania, Law 22/1969 on employing treasurers (paying tellers), (*Lege Nr. 22 din 18 noiembrie 1969 privind angajarea gestionarilor, constituirea de garanţii şi răspunderea în legătura cu gestionarea bunurilor organizaţiilor socialiste*), 18 November 1969.

[234] Romania, Law 19/2000 Law on the public pensions system and other social benefits, 17 March 2000.

[235] Romania, Law 263/2010 on the Unitary System of Pensions, 16 December 2010.

[236] The pension is calculated using a points system: the employee receives a maximum of three credit points per full year of earnings at or above the average economy-wide wage. The pension points are calculated as the ratio of the person's monthly gross wages and other compensation to the national average monthly gross wage for that year. The employee's pension is determined by multiplying the pension points with the pension point value, which is laid down in the social security budget law every year. The system aims to ensure a pension of 45 % of the average wage in the year of retirement for an employee with a full working career. By 2015, the full old age pension will be payable to men aged 65 years with 35 years of service and women aged 60 years with 30 years of service. Early retirement of up to 5 years is possible if the full service period has been completed. See OECD Report: Romania, http://www.oecd.org/countries/romania/3.

Persons who reach the standard pensionable age but want to work longer may continue their activities if their employers agree. After retiring, pensioners can work under an individual work contract or under a civil convention (a contract ruled by civil law provisions and not by the Labour Code, which has as its object providing services). In such cases, the employment relationship is no longer regulated by the strict provisions of the Labour Code and it is merely a civil contract having as its object an obligation to undertake a certain activity. In such cases, pensioners could both collect the pension and receive the salary earned for their professional activity, no matter the amount collected.

Persons who retire for medical reasons before reaching the statutory pensionable age cannot work while collecting the pension.

b) Occupational pension schemes

In addition to the public PAYG pension scheme, a mandatory personal accounts system was introduced at the beginning of 2007. A system of voluntary pension schemes also started operating in 2007.

Participation in pension schemes (*pensii private*) has been compulsory for employees since 2007, in accordance with Law 411/2004 on Private (Universal) Pension Schemes. Any worker under the age of 35 years has to become a contributor to a private pension fund. The contributions are optional for active workers between the ages of 36 and 45 years. The retirement age is the same as for the state social security pension, with the law providing for the possibility of requesting retirement five years earlier if the participant has completed the full contribution period. Law 411/2004 and the subsequent amendments do not provide information on whether payments from such occupational pension schemes can be deferred if an individual wishes to work longer after reaching the retirement age, or whether the individual can collect a pension and continue to work.

A voluntary system of contributions is established by Law 204 from 2006 on Optional Pension Schemes,[237] according to which occupational pension schemes are considered facultative / optional pension schemes proposed either by employers or by employers and trade unions. Employees and the self-employed may participate in voluntary schemes. Participation is voluntary for employees. Employees can participate in as many occupational schemes as they wish and cumulate pension rights and benefits. The contributions can be shared between employer and employee in accordance with the scheme regulations or a collective agreement. Employees may at any time change the level of contributions or cease paying contributions altogether, but must notify the employer and the pension scheme administrator. Participants can retire when they reach the age of 60 years (both men and women), subject to the condition of having made contributions for a period of at least 90 months.

c) State-imposed mandatory retirement ages

In Romania, there is a state-imposed mandatory retirement age(s). Law 263/2010 established a new retirement age of 63 years for women and 65 years for men in Article 53 and a mandatory contribution period of 35 years applicable to both men and women.[238] However, there are exceptions to the state-imposed mandatory retirement age, as persons of pensionable age who want to carry on their activities can do so, if their employers agree.

The Labour Code establishes the possibility in Article 61(e), renumbered as Article 56(c), for an employer to ask for termination of the employment relationship when an employee reaches the standard pensionable age and has contributed for the required number of years

[237] Romania, Law 204/2006 on Optional Pensions Schemes, 22 May 2006.
[238] Romania, Law 263/2010 on the Unitary System of Pensions, 16 December 2010.

to the state contribution schemes, even if the employee does not file a request for retirement.

The law does not specify whether the opposition of the employee to retirement has any effect. In practice, if the legal conditions are met, the request of the employer is followed by termination of the contract.

Special laws provide for limitations in certain sectors, such as education. For example, Article 128 of Law 128/1997 on the Status of Educational Personnel establishes that non-graduate teaching personnel who prove extraordinary professional competence can retain their tenure for up to three years after reaching the retirement age, with the approval of the council of teachers of the relevant educational unit. Academics who have a Ph.D. degree can continue their activity until they are 65 years of age. In the case of persons with exceptional professional competence, upon request the faculty senate can approve continuation of their work annually until they are 70 years of age (Article 129). Article 289 of Law 1/2011 on National Education provides that teaching and research personnel retire at 65 years of age.

Law 95/2006 regarding the reform in the health system provides in Article 385 that medical doctors retire at 65 years of age, irrespective of gender; upon request, medical doctors who are members of the Romanian Academy can continue their medical activity until they are 70 years of age. Nurses, midwives and medical support staff retire at 65 years of age, irrespective of gender, in accordance with Article 22 of Emergency Ordinance 144/2008.

Judges, prosecutors, and assistant judges of the High Court, as well as the specialist legal personnel of the Ministry of Justice, Public Ministry, Superior Council of Magistracy, National Institute of Criminology, National Institute of Forensics and the National Institute of Magistracy can be maintained in their position after they reach the legal retirement age until they are 70 years of age. Magistrates can choose to stay in office until they are 65 years of age; after this age, an annual opinion from the Superior Council of Magistracy is needed, in accordance with Art. 83 of Law 303/2004 on the Statute of Judges and Prosecutors.

Emergency Ordinance 221/2004 regarding pensions and other social insurance-related rights for lawyers mentions in Article 8 that the standard retirement age for lawyers is 60 years for women and 65 years for men.

The National Collective Agreement for 2007-2010, signed in accordance with Article 10 of Law 130/1996 on Collective Labour Agreements,[239] provided in Article 24 that, for certain sectors (difficult working conditions, dangerous, toxic or degrading conditions), employees could benefit from reductions of the pensionable age, in accordance with special laws and special collective contracts concluded at the level of each sector of the economy. Both the National Collective Agreement and Law 130/1996 have been abrogated and replaced by Law 62/2011 on Social Dialogue, which does not include provisions in this regard.[240]

d) Retirement ages imposed by employers

In Romania, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. The National Collective Agreement for 2007-2010[241] allowed for reductions of the pensionable age in certain sectors (taking into consideration difficult working conditions, dangerous, toxic or degrading conditions), in accordance with special

[239] The National Collective Agreement for 2007-2010, signed in accordance with Art. 10 of Law 130/1996, 29 January 2007.
[240] Romania, Law 62/2011 on Social Dialogue, 10 May 2011.
[241] The National Collective Agreement for 2007-2010, signed in accordance with Art. 10 of Law 130/1996, 29 January 2007.

laws and special collective contracts concluded at the level of each sector. However, this provision has been abrogated and replaced by Law 62/2011 on Social Dialogue which does not include provisions in this regard.[242]

The standard pensionable age cannot be increased, as Article 38 of the Labour Code provides that 'employees cannot give up the rights recognised by law. Any transaction having as its purpose the renunciation of rights provided for employees in the law is null and void'.

If discriminatory retirement ages were to be established as a result of collective bargaining or individual contracts, the NCCD would sanction these as discriminatory treatment. An analogy can be drawn with the NCCD decision in the case *Uniunea Sindicatelor Libere din Învăţământul Preuniversitar* [the Undergraduate Education Trade Union] *v. Ministerul Educaţiei şi Cercetării* [the Ministry of Education] of 16 April 2007, file no. 78/2007, in which the NCCD issued sanctions due to the fact that teaching and auxiliary educational personnel received a minimum gross salary lower than the minimum gross salary provided at national level in the National Collective Agreement for 2007-2010. The NCCD recommended the Ministry of Labour, Social Solidarity and Family to make relevant changes to ensure that the minimum gross salary – as a social protection measure – is the same for all categories of employees.[243]

e) Employment rights applicable to all workers irrespective of age

The Anti-discrimination Law does not include any specific provisions on different treatment in relation to protection against dismissal on grounds of age. The Labour Code protection against dismissal applies to all workers irrespective of age, including persons who have reached pensionable age and choose to continue working with the approval of the employer. According to Article 61 e) renumbered as Article 56(c), if an employee reaches the standard pensionable age and has contributed for the required number of years to the state contribution schemes, the employer can ask for termination of the employment relationship, even if the employee has not filed a request for retirement or opposes termination of the employment relationship.

The National Collective Agreement for 2007-2010 provided for an exemption in the case of reduction of personnel.[244] The 2011 Law on Social Dialogue abrogated the National Collective Agreement without including similar replacement provisions.

f) Compliance of national law with CJEU case law

Although the Anti-discrimination Law does not include similar wording to Article 6(1) of Directive 2000/78, in limited conditions the genuine occupational requirements clause provided for in Art. 4^1 of the Anti-discrimination Law can be interpreted as allowing the option to derogate from the principle of prohibiting discrimination on grounds of age in respect of measures justified by legitimate social policy objectives specific to the

[242] Romania, Law 62/2011 on Social Dialogue (*Legea dialogului social)*, 10 May 2011.

[243] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision on file no. 78/2007, *Uniunea Sindicatelor Libere din Învăţământul Preuniversitar* [Undergraduate Education Trade Union] *v. Ministerul Educaţiei şi Cercetării* [Ministry of Education], 16 April 2007.

[244] Reduction of personnel on grounds of efficiency as provided for in the National Collective Agreement involved funding made available from budgetary sources other than regular retirement schemes. According to Art. 81 of the National Collective Agreement, after decreasing vacant positions, personnel reductions will be carried out under the following priority scheme, in descending order of priority:
individual work contracts of those having two or more positions as well as of those collecting both a pension and a salary;
individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement but who did not request to be retired;
individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement, upon their request.

occupation in question, in conformity with the jurisprudence of the Court of Justice of the European Union (CJEU), such as C-488/05 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, 2009.[245]

The provisions on compulsory retirement in Article 53 of the Law on the Unitary System of Pensions are problematic, mainly from the perspective of the gender dimension, given that the same period of contribution is required for men and women although the retirement age is different and the work experiences of the two groups might be significantly different.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Romania, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. However, Article 81 of the National Collective Agreement 2007-2010 introduced the concept of pensionable age, to the extent that 'after the filling of vacancies, selection for redundancies is to be carried out in the following descending order of priority:

1. individual work contracts of those having two or more positions as well as of those collecting both a pension and a salary;
2. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement but who have not applied to retire;
3. individual work contracts of those who fulfil the standard requirements of age and period of contribution for retirement, upon their request.

These differentiations were not maintained by the 2011 Law on Social Dialogue, which abrogated the National Collective Agreement.[246] Subsequent legislation will show if these principles are maintained. More recent collective agreements change the order of priority – for example, in Article 172 on collective redundancies, the National Collective Agreement on Automobile Constructions for 2016-2017 lists first, persons of pensionable age and secondly, persons who have an additional job or who draw pension as well as salary.[247]

b) Age taken into account for redundancy compensation

In Romania, national law does not provide for age to be taken into account in establishing redundancy compensation.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Romania, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In Romania, the only exception to the prohibition of discrimination (on any ground) provided in national law is freedom of expression and the right to access to information, specifically mentioned in Article 2(8) of the Anti-discrimination Law, which states that its

[245] Court of Justice of the European Union (CJEU), C-488/05, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, 2009.
[246] Romania, Law 62/2011 on Social Dialogue, 10 May 2011.
[247] Romania, Collective Agreement no.1 for machine constructors and steel constructions 2016-2017, 22 December 2015.

provisions cannot be interpreted so as to limit these rights. Guidelines on balancing freedom of expression and the right not to be discriminated against are absent, the case law of the NCCD and of the courts is not coherent and there are reported cases in which misinterpretation of this exception led to harassment not being penalised.

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

a) Scope for positive action measures

In Romania, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation as well as all other protected grounds is permitted in national law. Article 2(9) of the Anti-discrimination Law defines positive action as an exemption from the prohibition against discrimination, stated as:

> 'Measures taken by public authorities or by legal entities under private law in favour of a person, a group of persons or a community, aiming to ensure their natural development and the effective achievement of their right to equal opportunities as opposed to other persons, groups of persons or communities, as well as positive measures aiming to protect disadvantaged groups, shall not be regarded as discrimination under the ordinance herein.'

Since 2007, positive action measures have come under attack from extreme-right groups, such as *Noua Dreaptă* [New Right],[248] which filed petitions with the NCCD, all of which were rejected. In a particular case of the NCCD, Decision 433 of 05 November 2007, file number 448/2007, *C.E v. C.*, where the denial of access to special measures in relation to a Roma student had been questioned, the NCCD cited the jurisprudence of the Court of Justice of the European Union on the principle of equality, which prohibits different treatment for comparable situations, with the exception of cases where such treatment has an objective justification. The NCCD stated that 'the measures adopted by the Romanian authorities, in particular the Ministry of Education, in relation to Roma pupils had the purpose of ensuring equality of opportunities, resulting in the implementation of affirmative measures. Such affirmative measures, by their own nature, had as their purpose progressive equalisation of the situation of Roma children from the perspective of opportunities in education, in order to bring them into a position similar or analogous with the situation of other pupils. The Ministry of Education prepared specific procedures in order to implement such measures.'[249]

In its assessment of an alleged case of positive action, the NCCD stated that 'employment of persons belonging to minority communities implies an affirmative measure in relation to that particular community. Such a measure can be maintained only until the objectives are reached and not afterwards. When the percentage of employees from a community in a particular institution corresponds with the percentage of the respective community in the area of its location, affirmative measures cannot be maintained because they would in themselves create a situation of inequality.'[250]

b) Main positive action measures in place on national level

Besides the definition of positive action measures in the Anti-discrimination Law, specific legislation introduced affirmative measures in relation to particular groups: Roma, children and youth, particularly children and young people living with HIV/AIDS, persons with

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[248] Noua Dreaptă (New Right) is a non-governmental organisation registered in Romania. It acknowledges its descent from the interwar Romanian fascist movement called Legionari, whose head – Corneliu Zelea Codreanu – was executed by the Romanian authorities in 1938. See more information on the organisation's website http://www.nouadreapta.ro.

[249] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision no. 433, file number 448/2007, *C.E v. C*, 5 November 2007. The complainant complained that her son was not accepted for a special place for Roma students in the institution of his choice, as the application filed for her son under a particular procedure was set aside by his teachers and replaced with a fake application on his behalf. The NCCD found that the complainant did not observe the special requirements in filing the application to qualify for special places for Roma students and decided that discrimination took place as alleged by the complainant.

[250] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision no. 43, file number 353/2007, *A.M. v. Direcţia Generală a Finanţelor Publice a judeţului Harghita* [Harghita county Public Finances General Inspectorate] 9 January 2008.

disabilities, single parents, unemployed, socially vulnerable or senior citizens. No positive action measures have been introduced in relation to religious minorities or migrants. The very low percentage of migrants in the general population is in itself an obstacle for positive action, as there is no public pressure in that regard.

Article 78(2) of Law 448/2006 on the Protection and Promotion of the Rights of Persons with a Handicap introduced the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to employ persons with disabilities at a level of at least 4 % of the total number of employees. However, there are no official data available regarding the number of persons employed following this provision or the number of employers complying with the requirement. Employers which fail to employ persons with disabilities in accordance with the law can choose between:

a. monthly payment of an amount representing 50 % of the minimum average salary for each position they were supposed to make available for a person with disabilities but failed to;
b. to use products and services from authorised protected units on the basis of a partnership, in the quantum of the amount owed to the state budget.

However, funds collected in this way are not earmarked for activities in this area but are included within the general state budget.

There are different categories of disability recognised under the Romanian law[251] and persons with disabilities were entitled to various affirmative measures as provided by Law 448/2006. However, the list of benefits has been significantly reduced due to the downsizing of social services in response to the economic crisis:

- pupils with disabilities receive free meals and accommodation in boarding schools - Article 16 (7);
- students with profound and severe disabilities receive upon request a reduction of 50 % for meals and accommodation in school canteens and student dormitories – Article 16(8);
- persons with disabilities have priority in being assigned public housing - Article 20;
- persons with a profound or severe disability have free transportation on all means of urban public transportation; this benefit also applies to assistants of persons with a serious disability, assistants of children with severe disability, assistants of persons with severe hearing and mental disabilities, based on a social inquiry conducted by a social assistant from the local mayor's office, personal assistants of persons with a serious disability and professional assistants of persons with a serious or severe disability – Article 23;
- persons with a disability who own cars adapted to their disability are exempt from paying charges for using the national roads – Article 28;
- adults with a disability receive a monthly indemnity as well as a monthly personal complementary budget, irrespective of personal income; the amounts depend on the category of disability - Art. 58(4) (see Section 2.4.6. h);
- any person with a disability who wants to be integrated into the workforce has access to free evaluation and professional counselling, no matter what their age, or the type or category of disability the person has – Art. 72.

The Housing Law, Law 114/1996, provides for access to social housing for families with a low income, young people below 35 years of age, young people leaving social protection institutions who are over 18 years of age, persons with disabilities, retired persons,

[251] Romanian legislation provides for different categories of disability: 1) profound (*grav)*, 2) severe (*accentuat)*, 3) moderate (*mediu)*, 4) mild (*ușor)*, according to Article 86 of the Law 448/2006. The medical-psycho-social criteria for deciding the category of disability are established in joint orders of the Ministry of Public Health and of the Ministry of Labour, Family and Equal Opportunities at the recommendation of the National Authority for Persons with Disabilities.

veterans and widows of war veterans.[252] Roma are not expressly mentioned as one of the social groups entitled to social housing listed in Articles 42-43 of the Housing Law.[253]

In an ex officio investigation against the institution of Mayor of Bucharest (*Instituția Primarului București*) and the General Council of Bucharest Municipality (*Consiliul General al Municipiului București*) the NCCD concluded that their social housing criteria were discriminatory. The investigation was based on the fact that the criteria for social housing provided 4 points for persons with disabilities, compared to 10 points for persons with higher education and 15 points to veterans and war widows, revolutionaries and former political detainees, leading to de facto exclusion of persons with disabilities. The NCCD decision 349 of 4 May 2016 issued a sanction and a fine of EUR 2 500 (RON 10 000) against the institution of Mayor of Bucharest (*Instituția Primarului București*) as well imposing a duty to publish the decision in the media. The NCCD also recommended that the defendant revise the relevant documentation and stated that it will monitor the defendant for six months.[254]

In the particular case of Roma, the National Strategy for Improving the Situation of Roma, which expired in 2010,[255] provided in rather general terms for obligations to establish positive measures. There is no comprehensive analysis of the implementation of the National Strategy for Improving the Situation of Roma. Many of these provisions were defined as merely declarative intentions, lacking follow-up implementation measures, with the outstanding exception of the area of education, where quotas are established every year for most universities and for high schools.

Though no assessments or interim reports had been prepared, the Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (Roma Inclusion Strategy), adopted in December 2011, remains extremely wide in its scope and rather sparse in effective enforcement mechanisms.[256] The policies proposed are mostly underdeveloped and backward-looking, proposing superficial measures which have been criticised by civil society groups.[257] The Roma Inclusion Strategy 2012-2020 lacks the specificity needed in order to be a clear policy framework, the actions and the responsibilities established are rather vague and the budgetary consequences are merely cursorily mentioned, without the inclusion of specific

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[252] Romania, Housing Law, Law. 114/1996 republished, 11 October 1996.

[253] Art. 43 of the Housing Law provides for the beneficiaries as decided by local authorities in accordance with annually established criteria, and in the order of priority as established by the law they can be: persons and families evicted, or who are to be evicted from houses returned to former owners, young people up to 35 years old, young people coming from social protection institutions who have turned 18, people with physical disabilities of degree I and II, 'handicapped' persons, pensioners, war veterans and widows, the beneficiaries of the Law 341/2004 for the recognition of martyr-heroes and fighters who have contributed to the victory of the Romanian revolution of December 1989 as well as of the persons who have sacrificed their life and have suffered as a consequence of the workers' anti-Communist revolt of Brasov in 1987 and of Law 118/1990 (persons who have suffered for political reasons during Communism), and other persons or families which might be entitled to the right to housing.

[254] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), decision 349 of 4 May 2016.

[255] Romania, Government Decision 522/2006 on modification and adjustment of the Government Decision 430/2001 regarding the Romanian Government's Strategy on the Improvement of the Roma Situation, (19.04.2006), available at: http://legislatie.just.ro/Public/DetaliiDocument/71147.

[256] Romania, Governmental Decision 1221 on approving the Strategy of the Romanian Government on the Inclusion of Romanian Citizens Belonging to the Roma Minority for the period 2012-2020 (*Hotărârea de Guvern pentru aprobarea Strategiei Guvernului Romaniei de incluziune a cetățenilor români aparținând minorității romilor pentru perioada 2012-2020*), 14 December 2011, available at: http://www.anr.gov.ro/docs/MO6bis.pdf.

[257] Some of these criticisms can be found here: Centre for Legal Resources (2011), 'The Centre for Legal Resources draws the attention upon the discriminatory provisions from the Draft Strategy of the Romanian Government for the Inclusion of the Romanian citizens belonging to the Roma minority (2011-2020)', 27 October 2011 and Proposals for amendment of the Draft Strategy of the Romanian Government for the Inclusion of Romanian Citizens Belonging to the Roma Minority, (*Propuneri de revizuire a proiectului strategiei Guvernului României de incluziune a cetăţenilor români aparţinând minorităţii romilor*), signed by 21 entities, most of them Roma NGOs but also including representatives of UN bodies in Romania, available at: http://www.romanicriss.org/PDF/Comentarii_Strategie_ONG-uri_FINAL%281%29.pdf.

financial considerations. (The action plans developed for some of the priority areas include annual budgets for each action, others do not).

The 2012-2020 Roma Strategy also retains measures included in the previous Roma Inclusion Strategy such as:

- affirmative action regarding the employment of Roma in central and local administration;
- designing and implementing special programmes for training and professional retraining for Roma;
- adopting legislative measures to support Roma with the purpose of ensuring facilities in the field of education for Roma and from the perspective of promoting Roma in administration of educational institutions;
- reducing Roma unemployment rates and combating discrimination in employment by establishing facilities for employers employing Roma;
- establishing facilities and financed places for young Roma who want to undertake graduate education.

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 Romania, the following procedures exist for enforcing the principle of equal treatment under the Anti-discrimination Law: judicial before civil courts, administrative before the national equality body (NCCD) and alternative dispute resolution such as mediation as a possibility before both the courts and the NCCD. In specific fields, such as employment or education, the relevant authorities might receive and investigate complaints of discrimination in the particular field, though the NCCD reports that in practice these entities usually redirect complainants to the equality body.

The Romanian anti-discrimination system provides for a mixed system of fora: contraventional (administrative), civil and criminal. In cases of an alleged act of discrimination, the victim of discrimination or any interested person can choose between filing a complaint with the NCCD, and/or filing a civil complaint for civil damages with the courts of law, unless the act is criminal and the Criminal Code provisions apply. Both before the NCCD and the courts, the parties can reach a friendly agreement at any time in the proceedings.

In a November 2009 decision, the Constitutional Court clearly stated that the NCCD is not an extraordinary court and confirmed the constitutionality of the mandate of the national equality body as an administrative-jurisdictional entity. The Court noted that the NCCD is not a mandatory forum and that victims may choose between the two fora (courts and NCCD) to enforce their rights.[258] The possibility of dual, even simultaneous fora as an exception to the principle of *electa una via non datur recursus ad alteram* was argued by the High Court of Justice and Cassation, which emphasised that using one of the fora, the NCCD (in the case concerned, an administrative complaint before the NCCD under Article 20 was followed by an administrative appeal challenging its decision), does not have any impact on the admissibility of a petition filed before the civil court under Article 27.[259]

The fact that the two fora (NCCD and civil court) are not mutually exclusive and the complainant can choose to use only one or to use both simultaneously creates problems in practice for the parties, the NCCD and the judiciary. In addition, the action before the NCCD does not have a suspensive effect in regard to the prescription of the administrative or civil action. The complaint with the NCCD might result in an administrative sanction (administrative warning or fine), while the civil case, judged under general torts provisions, results in civil damages payable to the victim of discrimination, re-establishing the status quo ante, the situation as it was before the act of discrimination occurred, or nullifying the situation established as a result of the discrimination, in accordance with civil law provisions on torts. Following the 2013 amendments to the Anti-discrimination Law, both the NCCD and the courts can oblige the perpetrator to publish a brief summary of the decision in the media.

In a series of decisions issued in 2008, the Romanian Constitutional Court (*Curtea Constituțională*) limited the mandates of both the NCCD[260] and the civil courts in relation to discrimination generated by legislative norms.[261] Subsequently, protection against

[258] Romania, Constitutional Court (*Curtea Constituţională*) Decision 1470, 10 November 2009.
[259] Romania, High Court of Justice and Cassation (*Înalta Curte de Casație și Justiție*) Decision 5211, 7 December 2012, available in Romanian at: http://www.scj.ro/.
[260] Romania, Constitutional Court (*Curtea Constituţională*), Decision 997, 7 October 2008, finding that Article 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.
[261] Romania, Constitutional Court (*Curtea Constituţională*), Decisions 818, 819, 820, 3 July 2008. The Constitutional Court concluded that the dispositions of Article 1(2)e and of Article 27 of the Anti-

discrimination in cases where the discrimination is triggered by legislative norms (laws or ordinances) is limited and depends on the willingness of the Ombudsman to bring a case before the Constitutional Court – the only institution able to declare discriminatory norms unconstitutional. In cases where a legal provision is incompatible with the anti-discrimination principle, thus falling outside the scope of European Union law, the national equality body (NCCD), when faced with such provisions, does not have a mechanism allowing it to decline to apply that particular legal provision, as provided by the Court of Justice of the European Union (CJEU) in C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. K.G.*[262]

b) Barriers and other deterrents faced by litigants seeking redress

While there is no need for a lawyer when bringing a claim before the NCCD, before the courts it is preferable for claimants to instruct a lawyer or be represented by an NGO. A deterrent to seeking redress is the informal practice developed by the NCCD of sanctioning cases of discrimination with an administrative warning or with a recommendation, neither of which carry any financial penalty.

Another deterrent is the limited publicity given to the decisions in discrimination cases: the NCCD does not publish its decisions and only several old decisions are available on its website. It is only since the 2013 amendments that the NCCD and the courts have been able to order a defendant to publish a summary of the decision concerned. The courts publish information regarding their decisions but the reasoning of the decision is available only to the parties to the case and only after considerable delay. Furthermore, neither the few search engines which compile jurisprudence, nor ECRIS, the database used by the courts, include the provisions of the Anti-discrimination Law as a search category.

Individuals bringing cases before the courts might be discouraged by the prohibitive costs of legal services and by the length of judicial proceedings.

c) Number of discrimination cases brought to justice

In Romania, there are no available statistics on the number of cases related to discrimination brought to justice. There is no information provided by the Ministry of Justice or the Superior Council of Magistracy on statistical data regarding the cases related to discrimination brought to justice, as ECRIS does not currently record relevant items in regard to use of the Anti-discrimination Law. In its annual reports, the NCCD provides information regarding the number of petitions received and decisions issued each year, including the number of decisions issued by the NCCD and subsequently challenged before the courts; it also includes information regarding the number of cases in which, on the basis of Article 27 of the Anti-discrimination Law, the civil courts asked the national equality body to join the proceedings as an expert. For example, the 2016 annual report mentions the participation of the NCCD in 750 cases (out of which 365 are new cases filed in 2016). Although it does not provide information on the resolution of these civil cases, the report mentions that 183 civil complaints had been admitted and 316 rejected by the courts.[263] For 2017, the NCCD reports participation in 723 civil cases on moral damages and 712 cases filed under other claims (work conflicts). The report also mentions that 714 civil complaints had been admitted and 870 were rejected by the courts.[264]

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discrimination Law are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Available at: http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx.

[262] Court of Justice of the European Union (CJEU), C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. K.G.*, 19 January 2010.

[263] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016,* (2016 annual report), available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.

[264] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017,* (2017 annual report).

d) Registration of discrimination cases by national courts

In Romania, discrimination cases are not registered as such by the national courts.[265] Only the NCCD registers cases by ground and field and makes the data available to the public each year in its activity report.

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

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

In Romania, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination. Article 28 of the Romanian Anti-discrimination Law defines two different types of legal standing before the NCCD and the courts for NGOs with an interest in combating discrimination:

> '(1) Human rights non-governmental organisations can appear in court as parties in cases involving discriminations pertaining to their field of activity and which prejudice a community or a group of persons.
> (2) The organisations provided in the above paragraph can also appear in court as parties in cases involving discrimination that prejudice a person, if the latter delegates the organisation to that effect.'

When a petition regarding the unconstitutionality of the provision granting legal standing to NGOs was brought before the Romanian Constitutional Court, in Decision 285 of 1 July 2004, the CCR rejected the argument of the petitioners, who claimed that recognising legal standing for NGOs led to 'a situation of inequity and discrimination for the parties which did not put themselves under the protection of an NGO of this kind'.[266] In practice, NGOs working on behalf of various vulnerable groups extensively use the legal possibilityof filing a petition before the NCCD.

Article 37 of the Civil Procedure Code, which entered into force on 1 February 2013, provides that 'in the cases and conditions specifically provided for by the law, complaints can be filed or defences can be submitted by persons, organisations, institutions or authorities which, without justifying a personal interest, act for the defence of rights and legitimate interests of persons who find themselves in special situations or, as necessary, with the purpose of protecting a group or a general interest.'[267]

b) Engaging in support of victims of discrimination

In Romania, associations/organisations/trade unions are entitled to act in support of victims of discrimination. Besides being able to initiate proceedings in nome proprio as provided by Article 28(1) of the Anti-discrimination Law in cases involving discrimination pertaining to their field of activity and which prejudice a community or a group of persons, NGOs can also support victims of discrimination and act on their behalf, as provided by Article 28(2) subject to the condition of obtaining a mandate from the victims.

When they have an interest in making a particular legal argument, NGOs can ask the courts to join already pending procedures as interested parties under ordinary civil procedure provisions. Similarly, not mentioned specifically by the law but accepted in the practice of the NCCD, associations may be allowed to submit amicus curiae briefs in support of a

[265] The Superior Council of Magistracy (*Consiliul Superior al Magistraturii),* response 5/27805 to public information request, 17 December 2015.
[266] Romania, Constitutional Court (*Curtea Constituțională*), Decision 285, 1 July 2004.
[267] Romania, Law 134/2010 Civil Procedure Code, 1 July 2010.

complainant. The internal procedures of the NCCD mention the possibility of amicus curiae from NGOs with expertise in a particular field.[268]

c) Actio popularis

In Romania, 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). According to Article 28(2) of the Anti-discrimination Law, associations with protection of human rights as their mandate can file complaints on their own behalf, both with the NCCD and with the courts, when the target of discrimination is a group or a community. The same rules of procedure apply, the only additional requirement being that the NGOs must provide their by-laws in order to show that their declared associational objective is protecting human rights or combating discrimination.

There are no specific provisions regarding remedies sought or special rules, including on the burden of proof. However, the remedies that can be obtained are limited, given that a direct, personal and actual interest and effective damages (harm suffered, material damages) must be proved before the civil courts. As NGOs have difficulties in providing evidence regarding quantifiable damages before the courts, the NCCD remains the main available forum for such cases. The remedies provided for by the courts might be different, however, as proof of direct and effective damage incurred needs to be provided under torts provisions. In a 2006 case, *D.Z. v. Distrigaz Sud*, the complainant – an employee of an NGO working in the field of LGBT rights who was harassed because of his association with the NGO – sought civil damages and asked the court to order the defendant to take institutional measures to preclude discriminatory behaviour in the future, to include in its internal norms a specific prohibition of discrimination on all grounds and to train its employees on anti-discrimination provisions. The court defined 'interest' in conjunction with 'the practical gain obtained' and stated that 'interest must exist, be personal, real and actual and legal.' The court also discussed the issue of systemic remedies, such as institutional measures on combating discrimination and diversity management policies, or the training requested by the complainant as a possible remedy, and decided not to grant such remedies. It considered that there was no 'actual interest' for the complainant in being granted such general remedies, given that by the time of the decision the defendant had already adopted internal regulations, including non-discriminatory provisions.[269]

In 2015, when proceedings in the dispute *ACCEPT v. NCCD* reopened before the national courts, it became apparent that there are significant limitations to the understanding of the NCCD and of the courts of the standing of NGOs and of their 'interest'. In its final decision in the proceedings reopened after the CJEU decision in case C-81/12,[270] the High Court of Cassation and Justice concludes that 'the complainant association (ACCEPT) cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (*Legea Contenciosului Administrativ*), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.'[271]

d) Class action

[268] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Order approving the internal procedure in resolving petitions, 11 April 2008.

[269] Romania, Court of first instance No. 4, Bucharest (*Judecătoria sectorului 4 Bucureşti*), Decision 4222, file no. 710/4/2006, 10 August 2007.

[270] Court of Justice of the European Union (CJEU), C-81/12, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013. Request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (Romania), judgment of 25.04.2013, available at: http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12.

[271] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: http://www.equalitylaw.eu/country/romania.

In Romania, national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. Class actions are not allowed under civil procedure in Romanian law nor are they specifically mentioned by the Anti-discrimination Law. However, in the case of the NCCD, aggregate claims by more than one individual victim arising from the same event would be annexed to one file both before the NCCD and the courts. If NGOs represent more than one victim, as provided by Article 28, declarations issued by each individual victim must be included. The procedures and remedies remain the same.

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

In Romania, national law requires or permits a shift of the burden of proof from the complainant to the respondent. The 2013 amendments to the Anti-discrimination Law further clarified the language in Article 20 and Article 27, stating that:

> 'The interested person will present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred. Before the Steering Board (the courts) any means of proof can be brought, observing the constitutional regime of fundamental rights, including audio and video recordings and statistical data.'

While the NCCD's interpretation of this provision complies with the directives in most cases, judicial interpretation has varied and some courts have interpreted this as placing an unreasonable burden on the victim, in contradiction of the substantive provisions of the directives. However, not even the case law of the NCCD is fully compliant with the acquis. In practice, prior to the 2013 amendments the seemingly innocuous terminological difference led to a great number of cases in which the NCCD ruled that there was not enough evidence submitted by the defendant to prove existence of discrimination. The understanding of the burden of proof as entailing a preliminary obligation of the complainant to provide all facts indicating that discrimination occurred (as opposed to allowing a presumption that it did), coupled with the failure of the NCCD to engage proactively in investigations (as mandated by Article 19 c of the Anti-discrimination Law as amended and consolidated in 2006), led to decisions of the NCCD in which it concluded that no discrimination occurred, while the same case, tried before a court of law had the opposite result, and discrimination was found and damages were awarded accordingly.

In the case *M.D. v. Palatul National al Copiilor*, Decision no. 256 of 17 September 2007 in file no. 380/2007, regarding the complaint of M.D. against the institution, which refused to hire him as teacher on grounds of his being certified as having a severe disability,[272] the NCCD applied the shift in the burden of proof and noted that the complainant as an interested person proved that he was rejected for employment and that he had the competence required for the position, while the defendant failed to prove that the refusal to employ the complainant did not amount to discrimination according to Article 20 (6), and sanctioned the employer, through its legal representative, with an administrative fine of EUR 100 (RON 400).[273]

In a 2009 decision,[274] the NCCD extensively discussed the theoretical aspects of the burden of proof, referring to previous leading cases in which the NCCD stated that 'the defined procedure for the shift in the burden of proof is more nuanced than the wording would

[272] There are four different categories of disability, depending on the gravity of the impairment: 1) profound (*grav)*, 2) severe (*accentuat)*, 3) moderate (*mediu)*, 4) mild (*ușor)*, according to Article 86 of the Law 448/2006.

[273] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), *M.D. v. Palatul National al Copiilor*, Decision no. 256, file no. 380/2007, 17 September 2007.

[274] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 77, 3 February 2009.

suggest and, in practice, the principle implies dividing the onus of the evidence and a transfer to the defendant of those elements related to him/her, in relation to the facts of the case.'[275] The NCCD added that 'it cannot be interpreted that this is an absolute exemption from the procedural rules of *onus probandi incubit actori*, reversing the burden of proof completely, as the very legal provision from Article 20 (6) specifies the duties of the parties by sharing the burden of proof between the complainant and the defendant.'

In spite of the very detailed guidance offered by the Court of Justice of the European Union in C-81/12 (the *ACCEPT* case), the interpretation proposed by the NCCD and endorsed by the Court of Appeal and by the High Court of Cassation and Justice in 2015 reflects a rather limited approach to the burden of proof.[276] The High Court uses the conclusions of the Court of Appeal in the reasoning 'it was correctly concluded by the first instance (Bucharest Court of Appeal) that there are no elements which would allow us to find that the Football Club initiated any step, of any type, to contract the sportive services of the player I.I.' The reasoning of the High Court underlines that: 'In reality, the entire procedure had been launched based on purely speculative statements (by Mr. Becali) … even if the author of the statement is a person which cannot be dissociated in the public perception from the Football Club Steaua București, from this unique occurrence it cannot be drawn the conclusion that the complainant is laying its account for (bets), particularly given that during the entire procedure the Football Club Steaua București denied any connection with the statements and the lack of basic facts.' In its decision, which is final, the High Court decided that there are no elements suggesting that the Football Club Steaua București is liable for discrimination in employment on grounds of sexual orientation. This judicial interpretation creates the risk that discriminatory statements will not be taken into account and potential cases of discriminatory statements will not be effectively sanctioned, contrary to the CJEU guidance.

The Labour Code, as modified and consolidated by Law 40/2011, mentions the regime of the burden of proof in employment-related disputes in Articles 272-273 (unofficial translation).[277]

> 'Art. 272 [burden of proof]
> The burden of proof in the labour disputes is on the employer, which shall submit the evidence for its defence by the first day of appearance.
> Art. 273 [administration of evidence]
> The evidence shall be administered under the emergency procedure, and the court shall have the right to reject the right to submit evidence to the party groundlessly delaying its administration.'

The new provision in the Labour Code introduces an automatic shift in the burden of proof in cases of discrimination in employment relationships, with an obligation for the employer to submit the evidence before the first hearings. The provision seems to be in compliance with the phrasing of the burden of proof in the directives. No relevant case law allowing assessment of implementation has so far been reported.

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

In Romania, there are legal measures for protection against victimisation which have been actively used both before the courts and before the NCCD. Article 2 (7) of the Anti-discrimination Law defines as victimisation 'any adverse treatment triggered by a complaint

[275] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 180, *Romani CRISS v. C.P.T.*, 17 July 2007.
[276] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: http://www.equalitylaw.eu/country/romania.
[277] Romania, Law 40/2011 for amending and completing Law 53.2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011. Unofficial translation available at: http://www.codulmuncii.ro/en/title-12/page-1.

in general or by a case lodged with the courts of law regarding the infringement of the principle of equal treatment and non-discrimination'. Protection against victimisation is not limited by Romanian law to the complainant but also extends to the witnesses. As the law does not distinguish, victimisation is prohibited not only in relation to complaints filed with the NCCD but also in relation to those filed with any other public or private institution (labour inspectorate, consumer protection office etc.). No provision regarding the burden of proof in cases of victimisation is included in the law.

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

When it finds that discrimination has occurred, the NCCD can issue administrative sanctions: administrative warnings and fines. A negative aspect of NCCD practice is that when the perpetrators are central or local governmental agencies or public actors, the NCCD has informally developed the practice of sanctioning them with administrative warnings or of issuing recommendations carrying no financial penalties. The NCCD explains this approach as exercising a pro-active mandate in preventing discrimination. However, issuing recommendations when finding that discrimination occurred dilutes the meaning of effective remedies in cases of discrimination and increasingly the courts of law, faced with appeals against such decisions, decide to return the files to the NCCD with instructions to issue an adequate remedy if discrimination is found.

The amount of the fines varies. Prior to the March 2013 amendments, where the victim was only one person, the amount of the fine was within the range of EUR 100-1 000 (RON 400-4 000); where the victims were a group or a community, the fine was within the range of EUR 150-2 000 (RON 600-8 000).

Following the 2013 amendments, where the victim is an individual, the amount of the fine is within the range of EUR 250-7 500 (RON 1 000-30 000); where the victims are a group or a community, the fine is within the range of EUR 500-25 000 (RON 2 000-100 000).

In probably the most visible discrimination case in Romania, *ACCEPT v. NCCD* (referred to as the Becali case), both the Bucharest Court of Appeal and the High Court of Cassation and Justice decided that 'there are no elements suggesting that the Football Club Steaua București is liable for discrimination in employment on grounds of sexual orientation.' When discussing the warning applied to Mr Becali as a sanction in first instance, which was challenged by the complainant as not being 'dissuasive, proportionate and adequate enough for a case of discrimination', the High Court stated that: 'contrary to the statements of the complainant, warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction [court's italics]. In applying this sanction the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society.'[278] This statement contradicts the very specific guidance offered by the Court of Justice of the European Union when discussing this case, which states that: 'In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.'[279]

[278] Romania, High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: http://www.equalitylaw.eu/country/romania.

[279] Court of Justice of the European Union (CJEU), C-81/12, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, 25 April 2013. Request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel

In the case of a civil complaint for damages, the complainant can request pecuniary and moral damages and other types of sanctions (withdrawal or suspension of licence for private entities providing services). The courts of law can decide that the public authorities shall withdraw or suspend the authorisation to operate of legal persons who cause significant damages as a result of discriminatory action or who repeatedly infringe the provisions of the anti-discrimination legislation as provided in Article 27 of the Anti-discrimination Law. This provision is not supported by reported jurisprudence. Both the NCCD and the courts can oblige the defendant to publish their decisions in the media.[280]

In work-related disputes brought before the labour courts (sections within the civil courts specialising in labour law), the complainants can also request moral damages, including on grounds of discrimination. The Labour Code was amended in 2007 to include 'moral liability', a specific obligation on the employer to pay both moral and material damages to the employee, to compensate the employee for loss, injury or any harm suffered during employment, or in connection with work activities.[281]

b) Ceiling and amount of compensation

Compensation can be awarded solely by the courts of law. There are no ceilings established for the amount of compensation awarded in a civil case for damages on grounds of discrimination, but the courts are rather reluctant to award moral damages as a result of a long legal tradition prior to 1989 of describing moral damages as unjust enrichment. A trend of awarding higher moral damages in cases of discrimination became apparent in 2010, when the Craiova Court of Appeal increased the damages awarded in a case of discrimination in education of a Roma pupil to EUR 10 000.[282] Subsequent cases have confirmed EUR 10 000 as the ceiling.

c) Assessment of the sanctions

The NCCD has informally developed a practice of adopting recommendations initially carrying no pecuniary damages when the perpetrators are central governmental agencies or public actors such as politicians (e.g. where discrimination is triggered by a government minister's orders or the internal regulations of central public administration) or when the conditions established by the law are not fully met (for example, prior to 2013, in many cases, due to the statute of limitations, no administrative sanction could be applied – as was the case in the situation leading to the CJEU decision in C-81/12).[283]

As the law does not specifically mention recommendations as remedies, the NCCD argues that they fall under its preventive mandate and are future-oriented, while NGOs criticise this practice, arguing that recommendations fail to provide effective remedies for cases of discrimination, contrary to Article 17 of Directive 2000/78/EC and Article 15 of Directive 2000/43/EC.

The practice of the NCCD reflects a growing interest in issuing both recommendations and fines and in increasing the amount of the fines. In 2012, out of the 113 cases where it found discrimination, the NCCD made recommendations carrying no financial penalty in 55 cases, issued 58 administrative warnings (also carrying no financial penalty), and imposed

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București (Romania), judgment of 25.04.2013, available at: http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12.

[280] Romania, Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013.

[281] Romania, Law 237/2007 amending the Labour Code, 12 July 2007.

[282] Romania, Craiova Court of Appeal (*Curtea de Apel Craiova*), Judicial decision, File 8011/101/2009 Curtea de Apel Craiova, 19 May 2010.

[283] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 260, *ACCEPT v. the Ministry of Health*, 29 August 2007.

administrative fines in 35 cases.[284] The fines ranged from approximately EUR 90 to EUR 1 800 (RON 400 to RON 8 000) in a total amount of approximately EUR 26 500 (RON 114 000).[285]

The NCCD's 2013 annual report shows that 110 fines, 48 recommendations and 34 warnings were issued; most fines (48) were in the amount of approximately EUR 227 (RON 1 000), and the total amount for all fines imposed was approximately EUR 60 863 (RON 267 800).[286] The 2014 annual report notes the highest fine ever imposed by the NCCD, of approximately EUR 14 500 (RON 64 000), which was issued in one decision as an aggregation of 32 fines. In 2014, the NCCD issued 114 fines in all, with a total amount of approximately EUR 55 000 (RON 221 800), 46 warnings, 45 recommendations, and 12 publications of NCCD decisions; it carried out 10 monitoring exercises.[287] In 2015, out of 752 petitions received, discrimination was found in 102 cases, for which the NCCD issued 63 fines in a total of approximately EUR 44 000 (RON 200 000),[288] 68 warnings with no financial penalty and 30 recommendations. The NCCD ordered the perpetrators to publish the NCCD decision in 26 cases and it also started one monitoring exercise.

In 2016, out of the 842 petitions received, the NCCD found that discrimination occurred in 112 cases. It issued 111 fines amounting to an unprecedented total of approximately EUR 152 800 (RON 687 000), 53 warnings, 44 recommendations, started eight monitoring exercises and ordered 63 perpetrators to publish a summary of the NCCD decision.[289]

In 2017, the NCCD found discrimination in 117 cases (a similar number to 2016). According to its 2017 annual report, the NCCD issued 65 fines, 51 warnings, 47 recommendations, 3 decisions to continue monitoring the situation and in 40 cases the perpetrators were ordered to publish summaries of the NCCD decision in the media. The highest fine applied in a case in 2017 was of EUR 14 000 (RON 50 000). The 65 fines issued in 2017 amounted to approximately EUR 44 000 (RON 239 000), which amounts to about a third of the amount of fines issued in 2016.[290]

The practice of alleging that mere recommendations or warnings not supported by a fine represent an effective, proportionate and dissuasive remedy is contrary to the directives, based on the interpretation offered by the CJEU in C-81/12. The NCCD is increasingly applying fines and increasing their amount. For example in 2016, in one single decision against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors, a monitoring exercise started by the NCCD ex officio based on prior decisions from 2014 and 2015 on the failure of local authorities to ensure conditions for local transportation for persons with mobility disabilities, the NCCD ordered cumulative fines to a total of EUR 69 000 (RON 314 000), which is higher than the total amount of all fines issued in 2015.[291]

Although Article 19 d) of the Anti-discrimination Law mentions monitoring of acts of discrimination among the functions of the NCCD, in practice there is no mechanism which

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[284] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2013), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2012* (2012 annual report).

[285] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2013), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2012* (2012 annual report).

[286] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2014), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2013* (2013 annual report).

[287] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2015), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2014* (2014 annual report).

[288] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).

[289] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2017 annual report). Available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.

[290] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017,* (2017 annual report).

[291] Romania, National Council for Combating Discrimination, Decision 357 of 11 May 2016.

would allow adequate monitoring of compliance with the decisions issued by the NCCD, and the NCCD is less active in relation to this part of its mandate. In practice, monitoring of enforcement of sanctions or recommendations depends on the interest taken by the member of the NCCD Steering Board responsible for each file. When requested to provide information on this issue, the NCCD replied that after issuing a decision on an administrative fine, both the NCCD and the courts of law communicate the decision to local public fiscal authorities.

A notable monitoring exercise was developed by the NCCD based on its decision 251 of 30 April 2014 in which the NCCD assessed the accessibility of public transportation for persons with mobility disabilities in all municipalities.[292] This decision was monitored in 2015[293] and in 2016.[294] The 2016 decision ordering fines against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors to a total of EUR 69 000 (RON 314 000) is the highest cumulative fine ever ordered by the NCCD.

In theory, the person fined by the NCCD or by the courts has a duty to send proof of paying the fine (copy of the receipt). However, there is no information available as to whether such communication ever occurs and whether the NCCD compiles this type of information.[295]

The lack of consistent and adequate monitoring of enforcement of the sanctions issued by the NCCD detracts from the effectiveness and dissuasive and educational impact such sanctions are supposed to have.

There is no clear picture and no assessment of the sanctions issued by courts in cases of discrimination. Given the limited number of cases publicly available, it can be concluded that the courts established a ceiling for moral damages of a maximum of EUR 10 000 – this was awarded in a limited number of cases. Pecuniary damages need to be proved based on the regular civil procedure on torts.

[292] Romania, National Council for Combating Discrimination, Decision 251 of 30 April 2014.
[293] Romania, National Council for Combating Discrimination, Decision 271 of 10 June 2015.
[294] Romania, National Council for Combating Discrimination, Decision 357 of 11 May 2016.
[295] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Official communication no. 6082, 22 April 2008, and communication sent on 25 February 2009 as a response to request for information no. 1216 of 30 January 2009.

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

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

The National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării,* NCCD) is the Romanian specialised national equality body mandated to monitor and combat all forms of discrimination. The current mandate of the NCCD goes beyond the required powers established by Article 13 of Directive 2000/43/EC. The institution is an all-grounds equality body with administrative-jurisdictional powers and its decisions are binding. The Romanian Anti-discrimination Law provides for an open list of grounds.

The NCCD was established in 2002, two years after the adoption of the Anti-discrimination Law. Since September 2006, the NCCD has been an autonomous public authority under the control of the Parliament. The NCCD is independent in carrying out its mandate, which includes:

> Art. 18 (1) The Council is responsible for enforcing and controlling the observance of the provisions of this law, in its line of work, as well as for harmonising the provisions from normative or administrative act infringing the principle of non-discrimination.
>
> (2) The Council develops and enforces public policies in the field of anti-discrimination. With this purpose, the Council will consult with public authorities, non-governmental organisations, trade unions and other legal entities with a mission in protecting human rights or with a legitimate interest in combating discrimination.
>
> Art. 19 With the purpose of combating discrimination, the Council will exercise its mandate in the following areas:
>
> a) preventing cases of discrimination;
> b) mediating in cases of discrimination;
> c) investigating, finding and sanctioning cases of discrimination;
> d) monitoring cases of discrimination;
> e) providing specialised assistance to victims of discrimination.
>
> (2) The Council exercises its mandate upon request from an individual or a legal person or ex officio.'

The NCCD is governed by a Steering Board of nine members, ranked as secretaries of state, and is managed by a President elected by the members of the Steering Board (Article 22). The Steering Board is a collegial body, responsible for enforcing the legal mandate of the NCCD (Article 23). The members of the Steering Board are proposed and appointed in a joint session of the Parliament by the two chambers of the Parliament (Article 23 (2)) with the requirement that at least two-thirds of the members are law graduates. The March 2015 appointments have been criticised for failing to observe the legal procedures, lacking transparency and introducing additional hearings to privilege a politically-supported candidate as well as for being in violation of Article 23, as currently four of the nine members do not have the required legal background.[296]

Different departments within the NCCD handle investigation, mediation and assistance for victims as well as raising awareness. The NCCD is a quasi-judicial body featuring both tribunal and promotional type attributes. The Steering Board of the NCCD is responsible

[296] See *Romania - Parliament appoints 6 new members in the national equality body amid controversies* available at: http://www.equalitylaw.eu/country/romania.

for assessing petitions and issuing decisions under the misdemeanour procedure of the Anti-discrimination Law. Its decisions can be challenged in administrative courts.

In 2008, the Romanian Constitutional Court, when asked to review the constitutionality of the NCCD, found that

> 'the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Art. 124 on administration of justice and Art. 126 (5) prohibiting the establishment of extraordinary courts of law.'[297]

In a 2009 case, the Constitutional Court reaffirmed the role of the national equality body as an autonomous specialized public administrative body with a mandate in combating discrimination.[298]

Other public institutions with mandates to protect the rights of specific groups, such as people with disabilities (National Authority for Persons with Disabilities), women (National Agency for Equal Opportunities), and children (National Authority for the Protection of the Rights of Children) do not have any role in addressing discrimination based on these specific grounds and have all been subsumed as departments within the Ministry of Labour following institutional restructuring in 2010-2011 caused by financial constraints.[299] The institution of the Ombudsman (*Avocatul Poporului*), while entrusted by law with a general mandate covering equality and protection against discrimination, and having a significantly larger budget than the NCCD, including 14 territorial offices, does not report any significant activities in support of vulnerable groups.[300]

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

The political elite does not necessarily favour the NCCD given previous and continuing experiences of politicians being sanctioned for discriminatory speech. The appointment procedure usually follows a political algorithm of distribution of the positions of members of the NCCD Steering Board, based on political support. This system of appointment, as well as the fact that the appointments often do not observe the legal requirements, has been criticised by NGOs for triggering the politicisation of the institution. However, some members of the Steering Board are indeed experts and work to maintain and foster the independence and expertise of the NCCD.

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[297] Romania, Constitutional Court (*Curtea Constituţională*), Decision 1096, 15 October 2008. The court maintained the constitutionality of Articles 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body. Available at http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true (20.02.2009).

[298] Romania, Constitutional Court (*Curtea Constituţională*), Decision 444, 31 March 2009. A petitioner who challenged a decision of the NCCD before the Court of Appeal used this opportunity to take his challenge to the Constitutional Court. He based his complaint on Art.20 alin.(1) and (2) on international treaties and human rights, Art.75 alin.(1), (4) and (5) on the legislative procedures in adopting legislation, Art.117 alin.(3) on establishment of autonomous administrative authorities, Art.140 alin.(1 on the Court of Audit), and Art.126 alin.(5) on the prohibition to establish extraordinary courts of law and the conditions for establishing specialized courts, maintaining that the national equality body is an extraordinary court established by means of delegated legislation and that the fact that the Ministry of Finances issues an advisory opinion on the budget of the NCCD infringes the independence of this institution as a pre-requirement for a quasi-judicial body. The Constitutional Court found that the complaint against Art. 2 is not a constitutional challenge but merely a complaint as to the interpretation of the law; that the challenge against Art. 16 is ill-founded and also ill-founded is the complaint against Art.20 alin.(8), (9) and (10). Consequently, the Constitutional Court rejected the objection on the constitutionality of the provisions of the Anti-discrimination Law regarding the quasi-judicial mandate of the national equality body.

[299] Romania, Governmental Decision No. 728/2010.

[300] Ombuds (*Avocatul Poporului*), *Raport anual de activitate* (Annual activity report for 2016) available at: http://avp.ro/index.php?option=com_content&view=article&id=50&Itemid=174&lang=ro-ro.

The budget approved by the Parliament is assessed by the representatives of the institution as acceptable, although the human resources approved are not sufficient and the office is highly inadequate. The institutional budget decreased during the financial crisis. In the last three years the NCCD budget has started to increase gradually, partly due to the engagement of the institution in different projects with international funding. Compared to other public bodies, for example the Ombuds institution, the NCCD budget is disproportionally low.

Attempts to adopt amendments to GO 137/2000 in order to dilute the legal standards of protection or to limit the institutional mandate are periodically submitted by parliamentarians who have been subject to sanction by the NCCD. Such retaliatory amendments are usually rejected by the parliamentary committees and the plenum of the Parliament.

The national equality body features in surveys on population attitudes as one of the most-known state institutions. This visibility and brand recognition is caused by the large number of cases involving politicians. Although there is no evidence that the popular debate is either supportive or hostile to equality and diversity in general and of the NCCD specific mandate in particular, the number of groups asking for a limitation of the mandate of the national equality body or for its abolishment is increasing.

c) Institutional architecture

The NCCD was established as a national equality body with a mandate targeting all forms of discrimination and covering an open list of grounds. The institution was highly involved in reporting before the UN (UPR, CERD, HRC). Beginning with 2017, the mandate of the NCCD was defined in Article 4 of Law 106/2017 so as to include monitoring of the rights of EU citizens exercising their freedom of movement in Romania and as a national focal point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.[301]

The visibility and prestige of the NCCD increased exponentially from 2006 onwards due to the way in which the NCCD understood and carried out its mandate to raise awareness and due to cases widely discussed in the media.[302] The NCCD issued exemplary decisions against important politicians (e g. President Traian Băsescu, former Prime Minister Călin Popescu Tăriceanu, former Minister of Foreign Affairs Adrian Cioroianu, former Minister of Foreign Affairs Theodor Baconschi, head of the România Mare party Corneliu Vadim Tudor, former Prime Minister Victor Ponta and former Prime Minister Mihai Tudose) and in a number of sensitive cases (the display of religious symbols in classrooms in public education, blood safety in regard to LGBT donors, discriminatory statements made by journalists or politicians, segregation in education of Roma children or children and young people living with HIV/AIDS, discriminatory incidents during football games).

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

i) Status of the body

[301] Romania, Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in the EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.05.2017).

[302] Gallup Organization Romania (2008), *Percepții și atitudini ale populației României față de fenomenul de discriminare* (Perceptions and Attitudes towards Discrimination), Bucharest, National Council for Combating Discrimination, available at http://www.crj.ro/userfiles/phphqFQ72.pdf. See also National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring (*Directia Relatii Internationale, Integrare Europeană, Politici Afirmative, Studii si Monitorizare*), 'Analiza de imagine a Consiliului Naţional pentru Combaterea Discriminării pentru primul semestru al lui 2006', available on request from the NCCD.

The NCCD is an equality body featuring both tribunal-type and promotional-type elements as a specialised body mandated to deal with all forms of discrimination on every ground, including race or ethnic origin, nationality, religion (including religious or non-religious belief), disability, age, sexual orientation or gender. Since September 2006, the NCCD has been an autonomous public authority under the control of the Parliament.

Its Steering Board is comprised of nine members elected by the Parliament. Any Romanian citizen can be appointed as a member of the Steering Board under the following conditions:

1) has full legal capacity;
2) graduated from university education with a diploma (*licenţa*);
3) does not have a criminal record and has a good reputation;
4) his/her activity in the field of protecting human rights and combating discrimination is well known;
5) did not collaborate with the Communist political police;
6) did not collaborate with the secret service.

Article 24 of the Anti-discrimination Law establishes the procedures for the appointment of the members of the Steering Board. The process is supposed to start 60 days before the positions are vacated.[303] The permanent bureaux of the Parliament publish information on proposals for candidates on their websites and send the proposals to six specialised parliamentary committees to organise hearings in a joint session. The law provides for a period of 10 days from the date of publication of this information when anybody can register written objections in relation to the candidates. After hearing the candidates, the special parliamentary committees issue a joint opinion, which is presented to the parliamentary chambers convened in a joint session. Candidates are approved by a majority of votes of the deputies and senators present. The mandate of the members is for a period of five years and is renewable (Article 25). Although designed to secure the independence of the institution, this appointment procedure has often been criticised for leading to its politicisation, given the use of the political algorithm in the selection of the candidates.

The President of the NCCD is elected by the Steering Board and is in charge of recruiting and managing the staff of the institution.

In terms of accountability, the NCCD presents its annual activity report to the two chambers of the Parliament for deliberation and approval, in accordance with Article 22(2) of the Anti-discrimination Law.

The total figures for the budget vary in different official responses and reports and the amounts are approximate. The budget of the NCCD in 2002, its first year of operation, was initially less than EUR 200 000 (ROL 223 000). The budget gradually increased until it reached a peak of EUR 1.7 million (RON 6 303 000) in 2008, when a significant decline began. The NCCD budget in the following years varied: approximately EUR 1 084 000 (RON 4 554 000) in 2009. The allocated budget for 2010 was approximately EUR 980 000 (RON 4 118 000).[304] The budget allocated for 2012 was approximately EUR 996 744

[303] Romania, Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013.

[304] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2011), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2010* (2010 annual report), available at: http://www.cncd.org.ro/rapoarte.

(RON 4 286 000) with an execution of 94.14 % of the amount.[305] The budget allocated for 2013 was approximately EUR 1 025 000 (RON 4 510 000) with an actual execution of 97.41 % (approximately EUR 998 409).[306] The 2014 NCCD annual report mentions a budgetary allocation of approximately EUR 1 800 000 (RON 8 055 000) and an annual execution of 72 %. In 2015 the NCCD had an allocated budget of approximately EUR 3 011 000 (RON 13 720 000) and an annual executed budget of approximately EUR 2 528 000 (RON 11 518 000).[307] The 2016 annual budgetary allocation was EUR 1 175 380 (RON 5 318 000) and the executed budget was EUR 1 105 000 (RON 4 999 000), with a total budget including external funds of EUR 1 242 000 (RON 5 621 000).[308] The NCCD 2017 annual report states that the annual budgetary allocation was approximately EUR 1.3 million (RON 5 856 000), which is a slight increase compared to 2016. The executed budget in 2017 was of approximately EUR 1.205 million (RON 5 424 000).[309]

The annual report for 2013, released in 2014, mentions that the staff of the NCCD occupied a total of 89 posts, 69 of which were budgeted for, and by the end of the year only 63 of these posts were occupied.[310] In 2014 that changed so that 65 posts were occupied.[311] In 2015 the NCCD should have had 89 staff positions but only 70 were budgeted for and only 62 were actually occupied.[312] In 2016, for the same institutional structure, only 70 positions were budgeted for out of the 89 posts envisaged and only 63 positions were actually occupied.[313] The structure for 2017 remained unchanged with 89 positions needed, only 70 budgeted and only 67 employees actually hired.[314]

ii) Independence of the body

The NCCD is independent in carrying out its mandate as GO 137/2000 specifically provides:

> 'Art. 17 In exercising its mandate, the NCCD carries out its activity independently, without being hindered or influenced by other institutions or public authorities.'

Following irregularities in the selection procedures and controversial appointments in 2007, 2010, 2012, 2015 and 2017, the NCCD was criticised by NGOs active in the field for being politicised at the expense of the independence and professionalism of the institution.

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[305] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2013), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2012* (annual report 2012).
[306] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2014), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2013* (2013 annual report).
[307] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).
[308] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.
[309] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).
[310] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2014), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2013* (2013 annual report).
[311] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2015), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2014* (2014 annual report).
[312] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).
[313] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.
[314] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

e) Grounds covered by the designated body

The Romanian equality body (NCCD) deals with all grounds provided for in Article 2 of the Anti-discrimination Law: race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion.

The NCCD can deal with cases regarding migrants, although this is not a priority for the national equality body and the number of complaints received from migrants is extremely limited. A 2014 study carried out by the Foundation for an Open Society based on interviews concluded that migrants do not feel discriminated against but that if such situations occurred, they would not know what avenues for redress are available.[315] The few cases of discrimination that have been identified were in relation to Moldovan citizens (one case in 2013 and another in 2014).

There are no priorities in the level of attention given to particular grounds, although in its awareness-raising work, the NCCD appears to emphasise the grounds that seem to be more vulnerable, based on the number of petitions received and the statistical analysis of the surveys carried out each year regarding attitudes and perceptions of the population.

f) Competences of the designated body– and its independent and effective exercise

i) Independent assistance to victims

- Independence

  In Romania, the NCCD has the competence to provide independent assistance to victims according to Article 19(1)(e) of GO 137/2000.

  Assistance to potential victims interested in filing a complaint is provided by a specialised department within the NCCD. The civil servants working in this department interact with those seeking help when planning to file a complaint before the NCCD. Investigation and review of the complaints is done by other departments and the deliberations and sanctioning by the Steering Board.

  No independent assistance is provided to victims of discrimination interested in pursuing the alternative route of filing torts claims before the civil courts rather than with the NCCD. Instead, under the Anti-discrimination Law, the courts are obliged to invite the NCCD as an expert/ intervening party in all these cases.

- Effectiveness

  There is no official assessment of the effectiveness of assistance provided to victims of discrimination.

- Resources

  Although no official assessment of the effectiveness or resources for this activity is available, both NCCD members and NGOs mention that the institution is not able to send its representatives for all the cases in which it is invited because it lacks the human and material resources.

[315] Voicu, O., Bucur, A., Cojocariu, V., Lăzărescu, L., Matei, M., Tarnovschi, D. (2014), *Barometrul integrării imigranților*, Bucharest, Fundația pentru o societate deschisă (Foundation for an Open Society) and Asociația Română pentru Promovarea Sănătății (Association for the Promotion of Health), available at www.fundatia.ro/sites/default/files/BII%202014_final.pdf, p. 47.

No specific information is available assessing the level and quality of resources, staff and financial resources available for independent assistance provided to the victims at the level of the national equality body.

ii) Independent surveys and reports

- Independence

  In Romania, the national equality body has the competence to conduct independent surveys and publish independent reports according to Article 2(1)(i) and (j) of Governmental Decision 1194/2001.[316] Depending on the resources available, almost every year, the NCCD produces surveys on perceptions and attitudes of the population regarding discrimination. The NCCD is independent in choosing topics or methodologies for the reports and surveys.

  An annual activity report is published by the NCCD and presented to the Parliament according to Article 22(2) of GO 137/2000.

- Effectiveness

  No assessment of the effectiveness of reports and surveys produced by the NCCD is available.

- Resources

  No information regarding the level of resources allocated to producing reports and surveys is available.

iii) Independent recommendations

- Independence

  In Romania, the national equality body has the competence to issue independent recommendations on discrimination issues as part of its mandate of preventing discrimination provided for in Article 19(1)(a) of GO 137/2000. The extensive issuing of recommendations, instead of financial sanctions in cases of discrimination involving public authorities has often been criticised by NGOs as eroding the overall effectiveness of the mechanism and the adequate, proportionate and dissuasive character of the remedies. The NCCD explains this approach as exercising a proactive prevention function. However, in contrast to general recommendations, issuing recommendations in relation to specific cases, when finding that discrimination has occurred dilutes the meaning of effective remedies in cases of discrimination and increasingly, the courts of law when faced with appeals against such decisions, have decided to return the files to the NCCD with instructions to issue an adequate remedy if discrimination is found.

  When issuing recommendations, the NCCD acts independently.

- Effectiveness

[316] Romania, Governmental Decision 1194/2001 on the organisation and functioning of the NCCD, 12 December 2001.

There is no assessment of the effectiveness or the impact of the recommendations issued by the NCCD.

- Resources

  No information on the resources allocated for this function of the NCCD is available.

iv) Other competences

The mandate of the NCCD as defined by Article 19 of GO 137/2000 and further detailed by Article 2 of Governmental Decision 1194/2001 includes preventing discrimination on all grounds via awareness-raising and education campaigns, mediating between the parties concerned, investigating and issuing sanctions against discrimination, including ex officio, monitoring discrimination, as well as initiating drafts to ensure the harmonisation of legal provisions with the equality principle.[317] All these competences are exercised independently. The annual reports of the NCCD do not specify the allocation of resources for each function.

v) Positive duties

Although positive measures are defined in the Anti-discrimination Law, no specific positive duties are provided in GO 137/2000 in relation to promoting equality and preventing discrimination. Governmental Decision 1194/2001 provides that the NCCD may propose positive measures or special measures for specific vulnerable groups but, so far in practice, the NCCD has not taken such action.[318]

Positive duties in relation to employment or education are provided for in the legislation regarding the rights of persons with disabilities. The NCCD has no particular competence in monitoring or sanctioning any failure to observe these duties.

vi) Further competences/activities

In 2017 the mandate of the NCCD was extended to cover monitoring of the rights of EU citizens exercising their freedom of movement in Romania based on Article 4 of Law 106/2017. The law defined NCCD as the national focal point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.[319]

g) Legal standing of the designated body/bodies

In Romania, the equality body does not have legal standing to bring discrimination complaints (on behalf of identified victim(s) or otherwise) before civil courts in legal cases concerning discrimination. According to Article 19(2) and Article 21 of the Anti-

[317] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2007), *Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013)* (National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013)).

[318] Romania, Governmental Decision 1194/2001 on the organisation and functioning of the NCCD, 12 December 2001.

[319] Romania, Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in the EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.05.2017).

discrimination Law, the NCCD can exercise its mandate upon request from an individual or a legal person or ex officio within its own procedure.

Following the 2006 changes in the Anti-discrimination Law, the NCCD must be subpoenaed as an intervening party/expert in all cases on grounds of the Anti-discrimination Law filed directly with the civil courts. This competence to provide informed opinions to the courts, which can be seen as an amicus curiae duty set out in imperative terms in Article 27(3) of the Anti-discrimination Law, has positive aspects in informing and educating judges and ensuring uniformity in discrimination cases. However, it has also contributed to a further strain on the already limited resources of the NCCD and generated a serious backlog, as the NCCD has not only had to deal with complaints received in nome proprio within its own procedures, but also to issue opinions in all civil cases filed before the courts.

In exercising the duty to provide independent opinions in civil cases that have been filed based on GO 137/2000, the NCCD took the opportunity to advocate in support of the principle of equality and non-discrimination in ground-breaking cases before the Constitutional Court and the Court of Justice of the European Union.[320]

A 2008 decision of the Constitutional Court, in which the Court declared unconstitutional the power of the NCCD to find that a legislative provision triggered discrimination and to suspend it, raised the subsequent question of the ability of the NCCD to intervene in such cases. As the NCCD cannot currently bring a case before the Constitutional Court, the mandate of the NCCD might only be extended to include legal standing by legislative amendments. The possibility of automatically bringing before the Constitutional Court cases of discrimination triggered by laws or ordinances is currently provided, in accordance with Article 146 d) of the Constitution, to the Ombudsman (*Avocatul Poporului*).

h) Quasi-judicial competences

In Romania, the NCCD is a quasi-judicial institution. The 2006 amendments to the Anti-discrimination Law incorporated enhanced guarantees of independence by specifically stating that the NCCD is an autonomous public authority under the control of the Parliament which maintains its independence in carrying out its mandate.

The NCCD is a specialised body and its role as a quasi-judicial institution was recognised by the Romanian Constitutional Court in its Decision 1096 of 15 October 2008, in which it ruled in favour of the NCCD.[321] The Constitutional Court repeatedly affirmed the legality of the NCCD and its status of special administrative jurisdiction, an optional forum in addressing cases of discrimination, and confirmed that proceedings before the NCCD as provided by Article 21(4) are constitutional. The Court found that the NCCD is an administrative body with a jurisdictional mandate, which features the elements of independence required for administrative-judicial activities and which observes the provisions of Articles 124 and 126(5) of the Constitution on the prohibition of establishing extraordinary tribunals.

Victims of discrimination or NGOs can choose between filing a complaint with the NCCD or with the courts. A procedure before the NCCD does not have a suspensive effect as to the time limit to file a complaint before the civil courts.

Decisions of the NCCD impose administrative sanctions (fines or warnings) that can be appealed before the courts of law under administrative law provisions. In the absence of a mechanism for monitoring compliance with NCCD decisions, it is impossible to assess the impact of these decisions. In particular cases the NCCD established an internal informal

[320] Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Consiliul Naţional pentru Combaterea Discriminării, (Request for a preliminary ruling from the Curtea Constituţională a României (Constitutional Court, Romania)).

[321] Romania, Constitutional Court, Decision 1096 of 15 October 2008.

mechanism of monitoring the implementation of its recommendations and revisited the defendants as a follow-up measure. For example, in 2016, the NCCD started an ex officio monitoring exercise based on prior decisions from 2014 and 2015 on the failure of local authorities to ensure conditions for local transportation for persons with mobility disabilities and, in one single decision against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors, the NCCD ordered cumulative fines to a total of EUR 69 000 (RON 314 000), which is higher than the total amount of all fines issued in 2015.[322]

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

In Romania, the NCCD registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public in its annual activity reports and are broken down by protected ground and the fields in which the alleged act of discrimination took place. For example for 2016, out of the 842 petitions, the largest number submitted was on the ground of belonging to a social category (314) and the smallest numbers were on grounds of race (3) and HIV status (4). Also relevant is the number of petitions on grounds of religion (7), language (25), age (31), nationality (30), sexual orientation (8), disability (83) and ethnicity (81). As for the fields in which the petitions were filed: 357 petitions were about access to employment, 180 were about access to public services, 46 on access to education, 149 on the right to dignity, 10 on housing and 22 on access to public spaces.[323]

The situation was similar in 2017: out of the 652 petitions received, the largest number were petitions on the ground of belonging to a social category (114) and the smallest numbers were on grounds of race (2) and HIV status (8). Also relevant is the number of petitions on grounds of religion (18), language (12), age (31), nationality (64), sexual orientation (17), disability (74), ethnicity (53). As for the fields, the NCCD 2017 annual report mentions that 273 petitions were about access to employment, 154 were about access to public services, 144 were on personal dignity, 51 were on access to education, 6 were on housing and 27 were on access to public spaces.[324]

The 2016 report also provides information regarding the cases in which the NCCD decisions had been challenged before the courts according to Article 20 (9-10) of the Governmental Ordinance 137/2000. In 2016, the NCCD had to defend its decisions before the administrative courts in 351 cases and in 236 cases the courts decided in favour of the NCCD, with 281 cases still pending; the NCCD report claims a judicial success rate of 86 %.[325] In 2017, the NCCD had to defend its decisions when challenged in 423 cases out of which the courts decided in 130 cases in favour of the NCCD, against the NCCD in 35 cases, with 365 cases still pending. The success rate in 2017 indicated by the *Annual Report for 2017* is of 80 %.[326]

The NCCD annual report for 2011 mentions for the first time the number of cases before the civil courts in which the institution was called as an expert as required in Article 27 of the Anti-discrimination Law, referring to a total of 916 cases. The same report states that in 2011 the civil courts found discrimination in 678 cases (the total number of such decisions in cases before both courts of first instance and courts of appeal) and rejected

[322] Romania, National Council for Combating Discrimination, Decision 357 of 11 May 2016.
[323] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.
[324] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).
[325] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.
[326] National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

768 cases (this number reflects both cases filed directly before the courts and cases decided by the NCCD subsequently challenged before the courts for review).[327] In 2012, the NCCD was present as expert in 556 cases initiated directly before the civil courts.[328] In 2014, the NCCD was present as expert specialised body in 526 new cases.[329] In 2015, the NCCD was called to participate in 680 civil cases[330] and 750 cases in 2016, out of which 365 were new cases.[331] In its annual report, the NCCD states that, in 2017 its presence as an expert in court cases was required in 723 civil cases on moral damages and 712 cases filed under other claims (work conflicts).[332]

j) Planning

The NCCD produced a National Plan on Combating Discrimination for 2002-2006.[333] This plan included a presentation about the institution, its governing principles, its target audience and the general objectives and measures to be taken. No assessment of the 2002-2006 plan is available and no other plan was adopted after it expired.

The National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013) (*Strategia Naţională de Implementare a Măsurilor de Prevenire şi Combatere a Discriminării* (2007-2013)) published in October 2007, set out the main principles, priorities and areas of intervention for the NCCD for 2007-2013.

In December 2015, a new draft strategy, which was intended to be a national equality strategy, rather than just an institutional strategy, was developed by the NCCD and submitted for public debate and government coordination. As of May 2018, the draft strategy has not been finalised. In the previous cycle of strategic planning no annual work plans were made public. An external assessment of the NCCD's 2007-2013 national strategy was commissioned by the NCCD with the support of the Council of Europe as part of the preparatory work and debates leading to the adoption of the new strategy. The key finding of this assessment was that:

> 'the Strategy did not foresee an adequate coordination mechanism with key actors expected to be involved in the implementation nor an adequate financial system. Therefore, although the NCCD was the body responsible of ensuring its implementation, most of the priorities and objectives that required the participation of other institutions have partially or not been met.'[334]

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[327] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2012), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2011* (2011 annual report).

[328] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2013), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2012* (2012 annual report).

[329] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2015), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2014* (2014 annual report).

[330] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).

[331] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report) available in English at http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016.

[332] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

[333] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2002), *Planul Național de Combatere a Discriminării, 2002-2006* (National Plan on Combating Discrimination), available at: http://www.policy.hu/flora/Prez_CNCD.htm.

[334] Fresno, J.M. and Chahin, A. (2015), *External Assessment of the National Strategy for Implementing Measures on Preventing and Combating Discrimination for the Period 2007-2013: Predefined Project "Children and Youth at Risk and Local and Regional Initiatives to Reduce National Inequalities and to Promote Social Inclusion" - "Strengthening anti-discriminatory measures at national level through large participation of professionals and civil society"* available at: http://nediscriminare.ro/uploads_ro/310/113/assessment_equality_strategy_romania_vf.pdf.

The delays in adopting the new strategy indicate the lack of a clear planning mechanism at an institutional level. The external assessment conducted for the Council of Europe in 2015 emphasises the fact that

> 'the lack of annual action plans or other regular mechanisms to set specific objective targets and actions and the lack of a specific monitoring and evaluation system does not allow us to evaluate the results, achievements and impact…'.[335]

Annual activity reports are published by the NCCD and presented to the Parliament. The NCCD also prioritises its resources to conduct annual surveys on the perceptions and attitudes of the population.

k) Stakeholder engagement

The NCCD engages constantly with all governmental and non-governmental stakeholders relevant to the implementation of its mandate. Civil society associations representing different vulnerable groups have the potential to form partnerships or develop joint projects with the NCCD. In practice, this leads the NCCD to carry out multiple common projects and joint interventions with the Centre for Legal Resources, the Institute for Public Policies, ACCEPT, ADIS Association etc. This potential and openness on the part of the NCCD also extends to service provider networks and organisations and trade unions, although information regarding such collaboration is scarce.

The NCCD also has collaboration protocols with professional groups and key bodies, such as the National Institute for Magistracy (*Institutul National al Magistraturii)* and with the Police Inspectorate, which has led to periodic training sessions for these professional groups.

Although the openness of the NCCD to establish partnerships and work together with other governmental or non-governmental bodies in projects that come under its mandate is clear and constant, the lack of a strategy detailing the priority lines and the lack of annual plans to implement those priorities leads to a dilution of the efficiency of the NCCD's interventions.

l) Accessibility

The NCCD does not have an easily accessible and publicly visible office in Bucharest. It has two local offices in Buzău and Târgu Mureș, which also conduct outreach activities in the respective local areas.

The NCCD does not have formal procedures in place to identify and respond to the access needs of specific complainants, such as people with disabilities, people with caring responsibilities, people speaking different languages or people with literacy issues, but the institution has developed informal mechanisms to respond to the specific needs of these groups.

NCCD staff have identified the limited accessibility of the NCCD in terms of physical access to its premises and electronic access to its webpage as one of the major institutional challenges. Although this can be explained by the lack of resources, the lack of an adequate office for the institution also indicates the lack of political will in fully equipping the NCCD with the basic tools to implement its mandate smoothly.

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[335] Fresno, J.M. and Chahin, A. (2015), *External Assessment of the National Strategy for Implementing Measures on Preventing and Combating Discrimination for the Period 2007-2013: Predefined Project "Children and Youth at Risk and Local and Regional Initiatives to Reduce National Inequalities and to Promote Social Inclusion" - "Strengthening anti-discriminatory measures at national level through large participation of professionals and civil society"* available at: http://nediscriminare.ro/uploads_ro/310/113/assessment_equality_strategy_romania_vf.pdf.

m) Roma and Travellers

The National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013) (*Strategia Naţională de Implementare a Măsurilor de Prevenire şi Combatere a Discriminării* (2007-2013)) published in October 2007, sets out the main principles, priorities and areas of intervention of the NCCD for 2007-2013, and mentioned Roma-related objectives without making Roma-related themes a priority of the NCCD's work.[336]

The official position of the NCCD in relation to Roma is that 'from the NCCD statistics it is clear that Roma are the most frequent victims of discrimination in all areas of social life: access to education (cases of segregation), equality in the labour market (refusal to employ Roma), access to services and public places (refusal to provide certain services, to allow access to public places such as clubs, pubs, restaurants, internet cafes), right to dignity (public statements, hostile and degrading media articles).' Consequently, the NCCD launched campaigns for combating racism and offered special training for relevant categories such as civil servants, teachers, policemen, magistrates as well as persons who can provide support to the victims of discrimination.[337]

[336] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2007), *National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013)* (Strategia natională de implementare a măsurilor de prevenire şi combatere a discriminării (2007-2013)).

[337] NCCD official position communicated on 8 May 2008.

8 IMPLEMENTATION ISSUES

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

In spite of a serious lack of human, financial and material resources and lack of solid institutional support from the political sphere or from the Government, the visibility of the NCCD increased significantly after 2006 due to the way in which the NCCD understood and carried out its mandate to raise awareness.[338] The NCCD carried out national awareness-raising campaigns, organised cultural events, summer schools, courses and training, round tables discussing public policies and affirmative measures targeting children, students, teachers, civil servants, policemen, gendarmes, judges, lawyers, NGO representatives, medical doctors and medical personnel.[339]

The NCCD works closely with NGOs representing various vulnerable groups, carries out joint projects and consults with major NGOs in developing its programmes in relevant areas. Increasingly, however, NGOs have criticised its failure to engage in dialogue on amending the Anti-discrimination Law in 2013 or participate in assessment of the NCCD 2007-2013 National Strategy and the subsequent development of a new strategy going beyond 2014. Criticisms have also been made regarding the failure to adopt a new national strategy for equality.

Governmental institutions do not have the promotion of dialogue with social partners to give effect to the principle of equal treatment within the workplace as an objective. Codes of practice, codes of conduct, measures to ensure workforce monitoring and diversity management are not common in the Romanian context and the NCCD has so far not assumed an active role in promoting these themes.

The National Agency for Roma is appointed to address Roma issues at national level. The impact of projects carried out with European funds, including the ESF, was not assessed.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

As the principle of equality is clearly guaranteed in the Constitution, any contrary provisions would be unconstitutional and illegal under the Anti-discrimination Law as lex specialis.

The constitutional provisions and the framework established by the Anti-discrimination Law prevail in relation to any clauses included in contracts or collective agreements, internal rules of procedure or rules governing the independent occupations and professions.

b) Rules contrary to the principle of equality

Following the decisions of the Romanian Constitutional Court which limited both the mandate of the NCCD[340] and that of the civil courts in relation to discrimination generated

[338] Gallup Organisation Romania (2008), *Percepții și atitudini ale populației României față de fenomenul de discriminare* (Perceptions and Attitudes towards Discrimination), Bucharest, National Council for Combating Discrimination, available at http://www.crj.ro/userfiles/phphqFQ72.pdf. See also Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring (*Directia Relatii Internationale, Integrare Europeană, Politici Afirmative, Studii si Monitorizare*), *Analiza de imagine a Consiliului Naţional pentru Combaterea Discriminării pentru primul semestru al lui 2006*, available on request from the NCCD.

[339] Response from the NCCD, 4 March 2009. See also NCCD annual reports for 2006, 2007, 2008, 2009 and 2010.

[340] Romania, Constitutional Court (*Curtea Constituțională*), Decision 997, 7 October 2008, finding that Article 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

by legislative norms,[341] only the Constitutional Court may review discriminatory norms containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specifically mentioned categories (courts of law during proceedings or the Ombudsman), the Romanian legal framework currently has a de facto gap in protection against *de jure* discrimination provisions which fall outside the scope of the EU acquis on anti-discrimination. No list of norms contrary to the principle of equality is compiled.

In the past, the NCCD found that particular norms were contrary to the principle of equality and issued recommendations to the relevant authorities that they amend the legislation, but without any adequate follow-up. Among relevant cases which were reported in the media:

- Two cases regarding restrictions applied to homosexual men in relation to donating blood. The measures proposed by the Ministry of Health (permanent exclusion of gay men from donating blood) were considered both inadequate and unnecessary, but as the initial decisions and recommendations were not observed, a second petition was necessary and the issue was tabled even after a second decision.[342] The latest decision of the NCCD is still not being complied with.
- NCCD Decision No. 323 of 21 November 2006 issued a recommendation to the Ministry of Education that it draft a set of regulations to ensure the exercise of the right to education in equal conditions for all pupils; observe the right of parents and guardians to ensure the religious education of their children as they choose; observe the secular character of the state and the autonomy of religious denominations; ensure freedom of religion and beliefs for all children equally; and allow for the display of religious symbols only during religious instruction classes or in places devoted to religious education. The decision was partially appealed and the NCCD recommendations were upheld by the Court of Appeal. Nevertheless, on 11 June 2008, the High Court of Cassation and Justice accepted the final appeal submitted by the Ministry of Education and a coalition of religious associations and quashed the decision of the Court of Appeal. As the initial appeal regarded only some parts of Decision 323, the decision of the High Court of Cassation and Justice makes void only the relevant recommendations and the Ministry of Education is still supposed to enforce the remaining recommendations. However, the Ministry refuses to do so, invoking the High Court decision.
- The NCCD position regarding the three-tier recognition system for religious denominations established by the Law on Religious Freedom and the General Status of Religions, which was deemed as discriminating against smaller or more recent religious minorities.[343]

In its decision of 14 March 2006 in file 9165/22.12.2005, the NCCD found that the provisions of Article 30 1 C) of Law 248/2005 regarding the free movement of Romanian citizens abroad discriminates on grounds of marital status against the parents of minors whose parents are divorced in relation to the right of a parent granted custody of a child to remove the child from Romanian territory without the consent of the other parent. After finding that the legal provision leads to discrimination, the NCCD recommended to the Ministry of Interior that it take the measures necessary to remedy this. The legal provision was not amended and there was no follow-up.[344]

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[341] Romania, Constitutional Court (*Curtea Constituţională*), Decision 818, 3 July 2008.

[342] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) Decision 337, *ACCEPT v. the Ministry of Health for the National Institute of Haematology,* 21 November 2005, and Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision 260, *ACCEPT v. the Ministry of Health*, 29 August 2007. A second case was necessary because the Ministry of Health did not comply with the recommendation of the NCCD in its first decision.

[343] Romania, Law 489/200 on Religious Freedom and the General Status of Religions, 8 January 2007.

[344] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision, *RR petition against Law 248/2005*, 14 March 2006.

9 COORDINATION AT NATIONAL LEVEL

By law, the NCCD is responsible for all matters in regard to anti-discrimination in Romania. However, conflicts of competence have occurred, with the courts deciding against the NCCD in cases regarding discriminatory language used in the media, thus the National Audiovisual Council (*Consiliul Naţional al Audiovizualului*) is competent to decide whether an advertising clip or statements during a TV show are discriminatory or not and to impose appropriate sanctions in accordance with the Audio-visual Law, which is considered lex specialis in relation to the Anti-discrimination Law.[345] Governmental Decision 1194/2001 on the organisation and functioning of the NCCD provides in Article 2 for its mandate, and includes in paragraph L) 'collaboration with similar entities, non-governmental human rights organisations from other countries as well as international organisations in the field'.[346]

Emergency Ordinance 83/2012, adopted in December 2012 and aimed at amending the legislation on equal opportunities to bring it in line with European standards, introduces further confusion in its Article 23, as it creates overlapping competences with the NCCD when it mandates the Ministry of Labour, Family and Social Protection to:

a) receive complaints regarding infringement of legal provisions on the principle of equal opportunities and treatment between women and men and of non-discrimination on the ground of sex, by individuals, legal entities, public and private institutions, and convey them to the institutions responsible for resolving them and for applying sanctions and ensuring counselling for victims under legal requirements;
b) prepare reports, studies, analyses and make prognoses regarding enforcement of the principle of equality of opportunities and treatment between women and men in all fields of activity;
c) ensure exchange of information with the European bodies in the field of equal opportunities between men and women.[347]

In spite of the confusion, the Ministry does not replace the NCCD as equality body, as it has a duty to transfer complaints to the NCCD. The same Emergency Ordinance 83/2012 introduces different definitions of discrimination, indirect discrimination, harassment, the burden of proof and different ranges for the fines applicable in cases of discrimination on grounds of gender, though it mentions the NCCD as the responsible entity in Article 46.

Notably, the NCCD was bypassed when choosing a national implementation body for various programmes: for example in the case of the Year 2007 – European Year of Equal Opportunities for All programme, the Government arbitrarily decided in favour of the National Agency for Equal Opportunities (NAEO), in spite of prior preparatory work and a draft strategy prepared by the NCCD together with NGOs working in support for vulnerable groups.[348] In addition, when appointing the national implementation body for the Year 2008 – European Year of Intercultural Dialogue programme, the Government decided in favour of a newly created unit within the Ministry of Culture and Religious Denominations.[349]

However, in July 2010 the NAEO was abolished due to budgetary cuts[350] and some of its competences were transferred to a newly created department within the Ministry of Labour,

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[345] Romania, Bucharest Court of Appeal (*Curtea de Apel București, Secția a VIII Contencios Administrativ și Fiscal*), File 34845/2/2005, 18 January 2006.
[346] Romania, Governmental Decision 1194/2001 on organisation and functioning of the NCCD, 12 December 2001.
[347] Romania, Emergency Ordinance EO 83/2012 on modifying Law 202/2002 on equal opportunities and treatment between women and men, 13 December 2012.
[348] The decision was taken at a government meeting on the 6 September 2006. See the complete documentation available at: http://www.mmuncii.ro/j33/index.php/ro/.
[349] Information available at: http://www.dialog2008.ro/home.
[350] Romania, Governmental Emergency Ordinance 68/2010, 1 July 2010, Art. 2 (1).

Family and Social Protection – the Department for Equal Opportunities between Women and Men (DEOWM) (*Direcţia Egalitate de Şanse între Femei şi Bărbaţi*), which has limited competences.[351]

The NCCD produced a National Plan on Combating Discrimination 2002-2006.[352] This plan included a presentation about the institution, its governing principles, its target audience and the general objectives and measures to be taken. No assessment of the 2002-2006 plan is available and no other plan was adopted after it expired. An external assessment of the NCCD 2007-2013 National Strategy was commissioned by the NCCD with the support of the Council of Europe as part of the preparatory work and debates leading to the adoption of a new strategy. A draft was prepared in 2015, but progress on adopting the draft was slow and it is due to be adopted in 2018.

In 2016, the Parliament adopted Law 8 on the establishment of the mechanisms provided by the Convention on the Rights of Persons with Disabilities from 18 January 2016 (*Legea nr. 8 din 18 ianuarie 2016 privind înfiinţarea mecanismelor prevăzute de Convenţia privind drepturile persoanelor cu dizabilităţi*),[353] which aims to establish the monitoring mechanism under Article 33(2) of the UNCRPD. A President for the Monitoring Council was appointed in April 2016[354] but in July she filed a request to leave the post, invoking obstacles in the communication with Government representatives, performing work for three months without remuneration, the lack of appropriate headquarters and difficulties in identifying accessible headquarters and the lack of specialist staff for the finalisation of administrative papers necessary for the legal establishment of the Monitoring Council.[355] There are no reports on the effectiveness of the Monitoring Council or suggesting any coordination with the NCCD so far.

[351] Romania, Governmental Decision No. 728/2010.

[352] National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*) (2002), *Planul Național de Combatere a Discriminării, 2002-2006* (National Plan on Combating Discrimination), available at: http://www.policy.hu/flora/Prez_CNCD.htm.

[353] Romania, Law no. 8 on the establishment of the mechanisms provided by the Convention on the Rights of Persons with Disabilities (*Legea nr. 8 din 18 ianuarie 2016 privind înfiinţarea mecanismelor prevăzute de Convenţia privind drepturile persoanelor cu dizabilităţi*), 18 January 2016.

[354] Romania, Senate, Decision no. 66 of 25 April 2016 on the appointment of the President and Vice-President of the Monitoring Council for the implementation of the Convention on the Rights of Persons with Disabilities (*Hotărârea nr. 66 din 25 aprilie 2016 privind numirea preşedintelui şi a vicepreşedintelui Consiliului de monitorizare a implementării Convenţiei privind drepturile persoanelor cu dizabilităţi*), 25 April 2016.

[355] Elena Georgiana Pascu, Resignation request files with the Romanian Senate, registered with no. I1760, 18 July 2016, available at: www.crj.ro/wp-content/uploads/2016/07/Cerere-de-eliberare-din-functie-CM.pdf.

10 CURRENT BEST PRACTICES

At national level there are no assessments of governmental policies or initiatives that could be qualified as promising or best practices.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

a) The limitation of the Anti-discrimination Law by the Romanian Constitutional Court in a series of decisions issued in 2008 and 2009 which limited both the mandate of the NCCD [356] and that of the civil courts in relation to discrimination generated by legislative provisions, [357] created a gap in the effective protection against discrimination. As the Constitution provides for limited standing and specific conditions for constitutional review and the Constitutional Court is the only entity able to assess and decide when a legal provision conflicts with the equality principle enshrined in the Constitution, the mandate of the NCCD should be adequately amended to include the potential for the national equality body to automatically bring before the Constitutional Court cases of *de jure* discrimination, which is currently only provided, in accordance with Article 146 d) of the Constitution, to the Ombudsman (*Avocatul Poporului*). Otherwise, the national equality body (NCCD), faced with a legal provision falling outside the scope of European Union law which is incompatible with the constitutional anti-discrimination principle does not have a mechanism, as indicated by the Court of Justice of the European Union (CJEU) in C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.*, allowing it to decline to apply that particular legal provision.

b) None of the definitions of harassment from the various relevant norms (Anti-discrimination Law, Equal Opportunities Law, Criminal Code) are in full compliance with the definition of harassment set out in Article 2 (3) of the directives, as the Romanian provisions fail to sanction as harassment unwanted conduct with the purpose of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and sanction only harassment having the effect of violating the dignity of a person.

c) The use of the word 'order' instead of 'instruction' in Romanian might lead to a restrictive interpretation of the instruction to discriminate, limiting the prohibition to hierarchical relations. While the NCCD interpretation complies with the meaning of the directives, interpreting the terminology extensively, the courts have still to determine the understanding of Article 2(2) and its limitations.

d) The concept of reasonable accommodation for persons with disabilities is not included in the Romanian Anti-discrimination Law but is currently defined in the special legislation on the promotion and protection of the rights of persons with disabilities but without provision for any sanction. The jurisprudence of the NCCD and of the courts is not unitary. Although the UN Convention for the Rights of Persons with Disabilities has been signed and ratified by Romania, the official translation includes major errors on key concepts, such as 'legal capacity,' which was translated as 'legal assistance' and there have been no attempts to further harmonise the legislation with the Convention.

e) Though mentioned by the Anti-discrimination Law, the NCCD has not so far developed an operational mechanism to monitor infringements of the legislation or to continuously monitor compliance with its decisions, hence it is difficult to assess the effectiveness of its mandate and the effective, proportional and dissuasive character of the sanctions issued.

f) In spite of the adoption by the Ministry of Education of three different sets of regulations regarding desegregation in education, the failure to follow up and to

[356] Romania, Constitutional Court (*Curtea Constituţională*), Decision 997, 7 September 2008, which found that Art. 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

[357] Romania, Constitutional Court (*Curtea Constituţională*), Decisions 818, 819 and 820, 3 July 2008. The Constitutional Court has concluded that the dispositions of Art. 1(2) e) and of Art. 27 of the Anti-discrimination Law (Governmental Ordinance 137/2000) are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms where they consider that such norms are discriminatory.

establish a functional implementation mechanism has led to further cases of segregation being reported.

g) The NCCD practice of not issuing an administrative fine and only sanctioning cases of discrimination with administrative warnings or recommendations in some of its cases erodes the effective, proportionate and dissuasive character of the remedies. Warnings do not carry financial penalties.

h) The institutional paralysis of the NCCD between the summer of 2009 and April 2010, caused by the failure of the Parliament to appoint new members to the Steering Board of the NCCD due to a political standstill, and the protests from NGOs following nomination of six new members in April 2010 and in April 2015, some of whom lacked the qualifications to comply with the legal criterion of relevant expertise, indicates that the appointment of NCCD Steering Board members by the Parliament, as a guarantee of its institutional independence, has proved in practice to be a hindrance. The trend towards politicisation of the institution was confirmed by two new political appointments in 2012 and only one reappointment of an independent expert, by criticisms voiced even from within the NCCD and by the six appointments in 2015, all in favour of candidates supported by the parliamentary groups. No independent candidate was appointed in 2015. The politicisation of the Steering Board was visible in several areas: controversial decisions in cases involving politicians; the demise of effective remedies in favour of recommendations lacking any legal power; the quality of legal reasoning; and the number of NCCD decisions upheld by the courts after being appealed.

i) An Emergency Ordinance adopted in December 2012, amending the Law on Equal Opportunities, introduced different definitions of discrimination on grounds of gender, creating different legal regimes and generating confusion.

11.2 Other issues of concern

Disability, age and sexual orientation are not established as protected grounds in Article 16 of the Romanian Constitution. Notably, disability is not specifically mentioned as a protected ground in the special clauses in the Anti-discrimination Law defining prohibition of discrimination in employment (Articles 5-8), access to public services – social protection, advantages, goods and services, housing (Article 10), education (Article 11), forced displacement (Article 13), access to public places (Article 14). This is an omission in the law which is, however, rectified in practice by the NCCD and by the courts by interpreting these articles in conjunction with the general definitions of discrimination including the full list of protected grounds in Article 2.

Romanian anti-discrimination legislation applies to an open-ended list of criteria of protection going beyond those provided by the directives and the scope of the Anti-discrimination Law is applicable to areas beyond those set out in the directives. The open list of protected grounds also gives rise to some disadvantages, as the ever-expanding and tailored list of criteria deemed as being in need of protection turns the anti-discrimination principle into a general equality and fairness principle.

The fact that Romanian legal provisions go beyond the minimum requirements of the directives and, most importantly, place emphasis on 'the right to dignity' in combating discrimination, increases the effectiveness of the anti-discrimination mechanisms and helps to increase the visibility of the NCCD and awareness of the provisions of the Anti-discrimination Law. The 'right to dignity' has been invoked in cases where the legal provisions were not fully sufficient, as was the case in regard to the dividing wall segregating the Roma community in Baia Mare.[358] However, in relation to the right to dignity, a worrying practice is being developed by the NCCD and by the courts, requiring claimants to produce evidence that defendants actually had an intention to discriminate.

[358] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), Decision No. 439, file no. 4A/2011, *ex officio v. Chereches*, 15 November 2011.

The NCCD practice in attempting to find a balance between protection of the principle of equality and non-discrimination and freedom of expression is not coherent, and contradictory results are often reached in similar cases. The Anti-discrimination Law provides in Article 2(8) that its provisions cannot be interpreted so as to limit freedom of expression, freedom of opinion and the right to information. However, although the NCCD usually invokes the case law of the ECtHR in understanding the limitations of freedom of expression, the practice of the NCCD and of the courts is not consistent and many discriminatory statements, in particular those made by politicians, continued not to attract sanctions and are not recognised as an abuse of rights.

The budget of the NCCD is not stable enough to allow the consolidation and development of the institution. The annual budgetary allocations are limited and only the institutional efforts to attract external funding allow the institution to carry out certain activities.[359]

[359] See Chapter 7(d).

12 LATEST DEVELOPMENTS IN 2017

No important developments took place in 2017. The work on finalising the new strategy for equality due in 2016 was stalled.

12.1 Legislative amendments

No relevant legislative amendments are reported in 2017.

12.2 Case law

Name of the court: Târgu Mureș Court of Appeal
Date of decision: 17 March 2017
Name of the parties: Reghin Municipality, NCCD, ERRC
Reference number: Târgu Mureș Court of Appeal decision 30/2017 from 17 March 2017
Address of the webpage: -
Brief summary: In 2016, the National Council for Combating Discrimination initiated an ex officio investigation against several mayors and county councils by assessing the criteria for social housing. The NCCD found that the criteria established by local councils giving access to social housing de facto limits the access of categories of vulnerable people who actually need it. The NCCD noted that the local administration did not meet its own duties under the burden of proof by failing to provide a justification for the differential criteria that awarded points proportional to the level of education. In relation to the particular case of Reghin municipality, the NCCD found that the points awarded for the level of education were not proportionate with the goal to be achieved and that it caused the exclusion of persons with a low level of education, which led to indirect discrimination against Roma. The mechanism proposed was of granting 1 point for persons who graduated primary school, 2 points for professional school, 3 points for those with high school studies and 5 points to those with higher education. Consequently, the NCCD fined the municipality approximately EUR 400 (RON 2 000) and imposed an obligation to publish a brief summary of the decision on its website.[360]

Reghin municipality challenged the NCCD decision before Târgu Mureș Court of Appeal, which announced the reasoning of its decision in January 2018.[361] In its appeal against the NCCD decision, Reghin municipality argued that using 'level of education' as a priority criterion in access to social housing does not amount to indirect discrimination against Roma. On the contrary, the municipality claimed that a combination of the three criteria used (level of income, number of children and level of education) read together amounted to an affirmative measure. Reghin municipality stated that the criterion 'level of education' pursued the purpose of 'stimulating social inclusion and professional inclusion.' Furthermore, it argued that deciding on the priority criteria for social housing falls in 'the margin of appreciation and the discretionary powers' of the local authorities.

Târgu Mureș Court of Appeal took into consideration statistical data provided by the NCCD showing that more than 50 % of the Roma population did not graduate, compared to Romanians or Hungarians (15 %) as well as statistical data on the living conditions of Roma families – more than 50 % live in spaces of less than 4 sqm per person, as compared to 10 % in the case of other ethnic groups.

While rejecting the request for referral to the Court of Justice of the European Union, the Court of Appeal concluded that the 'criterion level of education limits access to social housing for persons with a lower level of education.' The court highlighted that 'based on the statistical data of the Romanian census regarding the level of education of the different ethnic communities, granting an increasing number of points proportionally with the higher

[360] Romania, National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării*), decision No 511, 20 July 2016.
[361] Romania, Târgu Mureș Court of Appeal, decision No 30/2017, 17 March 2017.

level of education leads to negative consequences in relation to the Roma community, amounting to indirect discrimination.' The court concluded that although prioritising higher levels of education is useful for other types of public housing as this might encourage education, in the case of social housing, such a criterion is not objectively justified.

Reghin municipality appealed the decision before the High Court of Cassation and Justice. No date has been decided for the hearings.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: **Romania**
Date: **1 January 2018**

Title of legislation (including amending legislation)	Title of the law: Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination Abbreviation: GO 137/2000 Date of adoption: 31.08.2000 Entry into force:30.10.2000 Latest amendments: 25.06.2013 Web link: http ://cncd.org.ro/?language=en Grounds protected: race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion.
	Civil/administrative
	Material scope: employment access to goods or services (including housing and health), social protection, social advantages, education, right to dignity
	Principal content: Prohibition of direct, indirect and multiple discrimination, harassment, instruction to discriminate and victimisation. Establishing the specialised body, the National Council on Combating Discrimination
Title of legislation (including amending legislation)	Title of the law: Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men Abbreviation: Law 340/2006 Date of adoption: 25.07.2006 Latest amendments; 4.12.2012 Entry into force: 1.04.2002 Web link: - Grounds covered: gender
	Administrative
	Material scope: Employment relations, access to goods and services
	Principal content: Prohibition of direct, indirect discrimination in the context of equal opportunities between women and men and of sexual harassment. Establishing a body mandated to develop equal opportunities policies, the National Agency for Equal Opportunities Between Men and Women.
Title of legislation (including amending legislation)	Title of the law: Law on the protection and promotion of the rights of persons with a handicap Abbreviation: Law 448/2006 Date of adoption: 06.12.2006 Latest amendments; 1.11.2012 Entry into force: 1.01.2008 Web link: - Grounds covered: disability
	Administrative
	Material scope: Any field
	Principal content: Rights and duties of persons with disabilities. Obligations in relation to the accommodation of the needs of persons with disabilities. Establishing the National Authority for the Persons with a Handicap.
Title of legislation	Title of the law: Labour Code Abbreviation: Labour Code Date of adoption: 24.01.2003

(including amending legislation)	Latest amendments; 24.10.2012 Entry into force: 1.03.2003 Web link: - Grounds covered: gender, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union membership or activity
	Administrative
	Material scope: Employment
	Principal content: direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: **Romania**
Date: **1 January 2018**

Instrument	**Date of signature (if not signed please indicate) Day/month/year**	**Date of ratification (if not ratified please indicate) Day/month/year**	**Derogations / reservations relevant to equality and non-discrimination**	**Right of individual petition accepted?**	**Can this instrument be directly relied upon in domestic courts by individuals?**
European Convention on Human Rights (ECHR)	7.10.1993	20.06.1994	No.	Yes.	Slow process of recognition of the relevant case law of the ECHR by the courts and legal profession.
Protocol 12, ECHR	4.11.2000	17.07.2006	No.	N/A	Not relevant
Revised European Social Charter	14.05.1997	07.05.1999	No.	Ratified collective complaints protocol? No.	Not relevant
International Covenant on Civil and Political Rights	27.06.1968	9.12.1974	Yes.	Yes. No interstate complaints (art.41)	Not relevant
Framework Convention for the Protection of National Minorities	01.02.1995	11.05.1995	No.	N/A	Not relevant
International Covenant on Economic, Social and Cultural Rights	27.06.1968	9.12.1974	Yes.	N/A	Not relevant
Convention on the Elimination of All Forms of Racial	N/A	15.09.1970	Yes.	Yes.	Not relevant

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Discrimination					
Convention on the Elimination of Discrimination Against Women	4.09.1980	07.01.1982	No.	N/A	Not relevant
ILO Convention No. 111 on Discrimination	N/A	11.05.1973	No.	N/A	Not relevant
Convention on the Rights of the Child	26.01.1990	28.09.1990	No.	N/A	Not relevant
Convention on the Rights of Persons with Disabilities	26.09.2007	11.11.2010	No.	N/A	Not relevant

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