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# Country report

## Non-discrimination

Czech Republic  
2019  
including summary



*Justice  
and Consumers*

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# **Country report**

## **Non-discrimination**

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

### **Czech Republic**

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Reporting period 1 January 2018 – 31 December 2018

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\* The author has gratefully built on the reports written until 2017 by the previous expert David Zahumenský.

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## EXECUTIVE SUMMARY

### 1. Introduction

Society in the Czech Republic, a country with a population of 10.5 million, has become increasingly homogenous during its post-war history. In 1945, as part of the settlements following the Second World War, legislation was approved to expatriate most Germans (the largest minority in Czechoslovakia) and Hungarians. The majority of the Czechoslovak Roma and Jewish populations had perished in German concentration camps and many members of the Jewish minority who survived the Holocaust were expatriated as German nationals. The traditional doctrine of 'Czechoslovak national identity', cultivated since the country's independence in 1918, was abandoned by post-war communist governments, when separate Czech and Slovak nationalist trends finally prevailed. The Czechoslovak Federation was established in 1969 and was finally dissolved in 1993 when the separate countries of the Czech Republic and the Slovak Republic were formed.

Furthermore, the legacy of the 40-year communist regime has had a negative effect on the Czech Republic, attributing formalistic and imprecise meanings to justice and the rule of law. One of the tasks of the Czech anti-discrimination legislation is therefore to overcome the narrow and formalised perceptions of equal treatment and protection against discrimination held by public and political bodies.

During the communist regime, a number of measures against the Roma community were introduced. In 1959, a nomadic style of life was prohibited and measures were implemented to disperse Roma people across the Czechoslovak territory in permanent settlements. Roma language and culture was suppressed. Roma people were depicted as unwilling to work and adhere to laws. Today, the introduction of special measures in education and employment to balance disadvantages encountered by the Roma minority is still perceived by the majority of the public as giving 'unjustified advantages' on the ground of ethnic origin.

Securing equal access to mainstream education for Roma children is still problematic. This issue had been previously highlighted by decisions and reports by various Council of Europe and UN bodies, including the European Court of Human Rights in its judgment *D.H. and others v. the Czech Republic* of 2006. In 2014, infringement proceedings were initiated by the European Commission and are still on-going. Case law from the Czech courts, as well as legal opinions given by the Czech Ombudsman (the equality body) show that this issue is still very current.<sup>1</sup> Although legislative measures have been taken to avoid any discrimination against Roma, it appears that the current mindset of Czech society may still lead to segregation of Roma pupils and other undesirable phenomena.

### 2. Main legislation

The Czech Republic has ratified all the instruments for combating discrimination within the two main international human rights systems, the United Nations and the Council of Europe, including the UNESCO Convention against Discrimination in Education, ILO Convention No. 111 and the International Convention on the Elimination of All Forms of Racial Discrimination. The Czech Republic is also a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The national legal system is framed by the Czech Constitution, which refers to the

<sup>1</sup> See e.g. Constitutional Court of the Czech Republic (*Ústavní soud*), no. III. ÚS 1136/13, 12 August 2015 [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/3-1136-13-A.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/3-1136-13-A.pdf). In this judgment, the Constitutional Court did not find discrimination although it clearly referred to the test of indirect discrimination established in case law of ECtHR. The Czech Ombudsman criticised a director's attempt to restrict the number of Roma pupils accepted in the first year of a primary school and found direct discrimination in this case. Public Defender of Rights, Legal opinion No. 5202/2014/VOP, 16 April 2015; <http://eso.ochrance.cz/Nalezene/Edit/2812>.

Charter of Fundamental Rights and Freedoms of the Czech Republic as part of the constitutional provisions.

The Czech Republic first transposed the EU equality directives into its national law in 2009 in the Anti-discrimination Act.

### **3. Main principles and definitions**

Definitions of direct and indirect discrimination, harassment and instructions to discriminate as well as victimisation are included in the Anti-discrimination Act. The legislation provides protection from discrimination of natural persons. Legal persons are not expressly covered by the personal scope of the Anti-discrimination Act. However, they are protected by the anti-discrimination provision in the Charter, as confirmed by the Constitutional Court e.g. when it considered alleged unequal treatment in taxation (concerning consumption taxes).<sup>2</sup>

The Act on service by members of the security services<sup>3</sup> contains definitions of direct and indirect discrimination and harassment.

The Act on service by members of the armed forces<sup>4</sup> contains a definition of harassment, but no definitions of direct and indirect discrimination. Like the Act on service by members of the security services, this act also contains a provision prohibiting instruction to discriminate. Provisions on discrimination by association and multiple discrimination are completely absent from Czech national legislation.

Exemption on grounds of genuine occupational requirements is provided for in the Anti-discrimination Act, the Labour Code and the laws governing state service, service in the armed forces and in the security services. A reasonable accommodation clause for disability discrimination is provided in the Anti-discrimination Act.

There is no legislation expressly prohibiting discrimination based on association with persons with particular characteristics.

### **4. Material scope**

The Czech anti-discrimination provisions implementing the directives cover labour relations, including employment and working conditions, dismissals and pay, membership of and involvement in an organisation of workers or employers. Implementation applies to both the public and private sectors.

They also cover access to employment (job recruitment, re-qualification etc.), on all grounds included in the EU equality directives – sex, race and ethnicity, religion, disability (state of health), age and sexual orientation.<sup>5</sup> The Anti-discrimination Act also covers certain roles in public administration that are subject to special regulation, such as judges, public prosecutors, parliamentary deputies and others. Other areas covered by the Anti-discrimination Act include membership of organisations whose members carry out a

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<sup>2</sup> Constitutional Court (*Ústavní soud*), Brno/Pl. ÚS 3/13, 15 October 2013. <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=81289&pos=1&cnt=1&typ=result>. See also Constitutional Court (*Ústavní soud*), Brno/ IV. ÚS 13/98, 3 September 1998. <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=32337&pos=3&cnt=3&typ=result>.

<sup>3</sup> Czech Republic, Act No. 361/2003, on service by members of the security forces, 23 September 2003, Section 77.

<sup>4</sup> Czech Republic, Act No. 221/1999, on service by members of the armed forces, 14 September 1999, Section 2(3).

<sup>5</sup> In an important case of 2016 concerning sexual orientation, the Constitutional Court asserted that registered partners can adopt children, referring to the European Convention on Human Rights (Art. 8 and 14), Czech Bill of Fundamental Human Rights and a number of decisions of the ECtHR. See: Constitutional Court of the Czech Republic, Pl. ÚS 7/15, 14 June 2016; <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=93271&pos=1&cnt=1&typ=result>.



particular profession, self-employment, vocational training and education at all levels. The Anti-discrimination Act also provides protection on all grounds with respect to access to healthcare, housing, social security, social advantages and access to goods and services.

The Anti-discrimination Act prohibits discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation. The Anti-discrimination Act also covers 'nationality' (in Czech: *národnost*) as a separate ground. In Czech law and language this term is not identical to 'citizenship' (in Czech: *občanství*). The sense of the term is closer to 'national origin' but does not mean exactly the same thing. According to the Czech Constitution, 'nationality' may be freely chosen by the individual. This ground therefore covers both national and ethnic origin, whether this is a status by birth or simply chosen by the individual. Its scope with respect to the grounds covered is enumerative. On 1 January 2018, the Anti-discrimination Act was amended to contain a reference to Regulation (EU) no. 492/2011 meaning that, in situations relating to free movement of workers where the said regulation applies, EU citizenship will also be deemed a discrimination ground.<sup>6</sup>

The Act on service by members of the security forces (police officers, fire fighters, customs officers, prison officers, members of the Security Information Service and officials of the Office for International Contacts and Information) does not provide for disability as a protected ground. The Act on service by members of the armed forces (i.e. soldiers), does not provide for age and disability as protected grounds.

There are ongoing debates whether these exclusions are in compliance with the applicable EU law and international treaties. The Ombudsman has expressed the view that a full exclusion of the discrimination grounds is contrary to the EU law and can also be deemed a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms.

## 5. Enforcing the law

The system of laws provides for civil, criminal and administrative enforcement. There are no serious problems regarding transposition of the equality directives in Czech legislation (the most arguable point being the full exception for discrimination grounds of disability and age for the security and armed forces ). However, there are still some problems in relation to the enforcement of the existing laws.

Where discrimination is alleged, civil actions may be brought under special provisions of the Anti-discrimination Act. The Civil Procedure Code also applies, as does the shift of the burden of proof.<sup>7</sup> Nevertheless, according to the Civil Procedure Code, the shifted burden of proof does not apply in all situations.<sup>8</sup> The Ombudsman recommended that Section 133a (relating to the burden of proof in discrimination cases) be amended in order to apply shifted burden of proof in all discrimination cases,<sup>9</sup> however, the Government did not accept the amendment.

Civil courts reached a decision in 11 discrimination cases in 2018 (it is not clear which grounds are invoked the most).<sup>10</sup> Most of these cases (seven) were related to

<sup>6</sup> Chamber of Deputies (2015), *Sněmovní tisk 688/0* (Press of the Chamber of Deputies No. 668/0); <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=688&CT1=0>.

<sup>7</sup> See Section 133a of the Act No. 99/1963, Civil Procedure Code (*Zákon č. 99/1963 Sb., občanský soudní řád*), 4 December 1963.

<sup>8</sup> For example, it does not apply in cases where a person with disability complains about access to services or education.

<sup>9</sup> Public Defender of Rights (Ombudsman), (2015), *Výroční zpráva o ochraně před diskriminací* (Annual report on protection against discrimination), p. 23; [http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyrocní\\_zpravy/2015-DIS-vyrocní-zprava.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2015-DIS-vyrocní-zprava.pdf).

<sup>10</sup> Czech Republic, Ministry of Justice (2018), *Přehled o pravomocných rozhodnutích soudů v občanskoprávních věcech podle druhů sporů* (Statistics on legally effective decisions of courts in civil cases according to categories of disputes), available at: <http://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html>.

employment.<sup>11</sup> Data about lawsuits filed in 2018 was not yet available at the time of writing this report.

In practice, the number of cases where sanctions have been imposed because of an act of discrimination is limited. The proceedings are slow. Legal assistance is provided in limited circumstances through court-appointed lawyers, the Czech Bar Association and also via a collaboration between the Czech Ombudsman and the NGO, Pro Bono Alliance.<sup>12</sup>

NGOs and similar bodies cannot challenge discrimination before Czech courts either through *actio popularis* or class actions. According to the Ombudsman, better cooperation between NGOs and state institutions should be developed in order to improve access to the justice for victims.<sup>13</sup>

Trade unions can represent their members as parties in proceedings on any matter, with the exception of business or trade disputes. However, these powers are not frequently used.

On situation testing of discrimination, the Czech courts have already accepted in some cases<sup>14</sup> that everyone is authorised to verify whether they can exercise their rights. The claimant usually has the same claims as if the case involved no situation testing. The Supreme Court also confirmed that financial compensation for victims may be provided in such cases (although this approach may not apply in all cases).<sup>15</sup>

In practice, situation testing is used by NGOs in order to prove discrimination in access to employment, services and housing.

Whether the sanctions imposed for discrimination are effective and dissuasive is doubtful. The law leaves it to the court to determine the amount of non-material damages, and the actual amounts awarded by the courts vary widely, with a general tendency to award relatively low amounts. The sums awarded as compensation for discrimination can vary in practice between EUR 200 (CZK 5 000) and EUR 10 000 (CZK 250 000). On the other hand, when claimants lose cases, they may be liable to compensate the defendant for costs, which amount in practice to around EUR 1 000 to EUR 2 000. In an important case against a restaurant owner who displayed in his restaurant premises a statue holding in her hand a baseball bat with the visible inscription 'Go and get the gypsies', the Prague High Court found that the conduct was discriminatory and awarded the claimant financial compensation of EUR 1 000 (CZK 25 000).<sup>16</sup>

According to the Criminal Code, crimes relating to racial discrimination and discrimination on the grounds of religion or belief are to be prosecuted as crimes inciting hatred or violence on the grounds of race or religion or belief. The Criminal Code also makes provision for strict definitions of crimes affecting life, health or personal freedom when motivated by racist or religious hatred. In fact, criminal prosecutions for crimes relating to racial and religious discrimination are quite rare and are usually for serious criminal offences such as racially motivated murder or propagation of neo-Nazism.

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<sup>11</sup> Czech Republic, Ministry of Justice (2018), *Přehled o pravomocných rozhodnutích soudů v občanskoprávních věcech podle druhů sporů* (Statistics on legally effective decisions of courts in civil cases according to categories of disputes), available at: <http://cslav.justice.cz/InfoData/prehledy-statisticky-listu.html>.

<sup>12</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), <http://www.ochrance.cz/en/discrimination/research/>.

<sup>13</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p. 84. <http://www.ochrance.cz/en/discrimination/research/>.

<sup>14</sup> Supreme Court (*Nejvyšší soud*) /30 Cdo 2314/2012, 28 February 2013. [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/BD306CF3DD626402C1257B410032B5CB?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/BD306CF3DD626402C1257B410032B5CB?openDocument&Highlight=0).

<sup>15</sup> Supreme Court (*Nejvyšší soud*) /30 Cdo 2314/2012, 28 February 2013.

<sup>16</sup> High Court in Prague (*Vrchní soud v Praze*), 1 Co 99/2006, 17 February 2014.

Administrative enforcement consists of sanctioning misdemeanours and administrative offences. Relevant administrative procedures provide investigative powers for administrative bodies, such as the Labour Inspectorate or the Czech Trade Inspectorate. Fines will be imposed in cases of discrimination prohibited by the national law. In practice, administrative enforcement may be an easier and more accessible tool for victims of discrimination who decide not to commence a lawsuit; however, there are no statistics available on the number of complaints filed by individuals to administrative bodies.

There has been no notable action in recent years to encourage dialogue with NGOs with a view to promote the principle of equal treatment. Promoting dialogue between social partners with regard to the principle of equal treatment in practices within the workplace is a task that comes under the jurisdiction of the tripartite agreement (bringing together key stakeholders in the labour market: employers, trade unions and the Government) and the Ministry of Labour. However, there have been no further significant developments or opportunities in this respect.

## **6. Equality bodies**

The equality body in the Czech Republic was established with effect from 1 December 2009. The Anti-discrimination Act does not establish a new body but awards the functions required by Article 13 of Directive 2000/43/EC to the Public Defender of Rights (Czech Ombudsman). The Czech Ombudsman also has the remit of the equality body with powers in regard to the full scope of the Anti-discrimination Act.

Within the anti-discrimination legislation, the Ombudsman contributes to combating racism and xenophobia and to the promotion of equal treatment of all persons, irrespective of sex, race, ethnic origin, sexual orientation, age, disability, religion or faith and 'nationality' (in Czech: *národnost*). It can provide independent assistance to victims, conduct research and publish independent reports and make recommendations. The Czech equality body is independent and has a very proactive approach.

In 2018, the Ombudsman registered 342 new complaints of discrimination. Of these complaints, 88 related to employment, 67 related to provision of goods and services, 49 related to housing, 48 related to an area not specified in the Anti-Discrimination Act, and 32 complaints related to education. Most complaints did not refer to any discrimination grounds; 69 complaints referred to race and ethnic origin, 50 complaints related to disability, and 47 complaints related to age. As of 31 December 2018, discrimination was proven in only five cases, (this included one case of direct discrimination and four cases of indirect discrimination).<sup>17</sup>

Current personnel and financial capacities allow the Ombudsman to provide only limited assistance to victims and the time taken by the Ombudsman's team to analyse cases is often rather long. The Czech Ombudsman is not empowered to provide victims with representation before the courts. The Ombudsman can only evaluate whether a case involves discrimination or not, and provide the victim with an opinion as to whether the case is likely to be successful before the Czech courts.

However, since 2012, the Czech Ombudsman has been cooperating with the NGO Pro Bono Alliance (a pro bono alliance), which arranges for free legal assistance to certain claimants, whose cases have been selected by the Ombudsman due to the high likelihood of discrimination having taken place.

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<sup>17</sup> Based on information provided by the Office of the Public Defender of Rights by email on 22 February 2019; the data will be published in the annual report on the protection against discrimination, which is yet to be published.

## 7. Key issues

The main issue regarding the transposition of Racial Equality Directive 2000/43/EC is securing equal access to education for Roma children in practice.

In legislation, it appears that an improvement has been achieved with the amendment to the Schools Act, which provides for better integration of pupils with disabilities (which is often implied for Roma children – arguably often as a misdiagnosis) and those with special educational needs generally, which was accepted in February 2015. Among other things, the amendment establishes a preference for individual rather than group integration.<sup>18</sup> This means that, wherever possible, a pupil should be integrated individually into the mainstream environment with adequate support. The main parts of the amended provisions came into force on 1 September 2016 and since then, the so-called inclusive education was introduced. Several positive improvements were adopted, such as various supporting measures<sup>19</sup> for pupils with special educational needs, a system of financing of those measures and the establishment of a review body in the field of diagnostics. Although some improvements can be seen in practice, it is still difficult to assess whether it has brought adequate safeguards against discrimination of Roma children in access to education.

Notwithstanding the above, the resolution of structural issues does not reside primarily in the area of enforcement and sanctions; rather it is primarily for the political agenda – a matter for political parties in Government to treat as a priority. The root of the problem is not the implementation of legislation, but rather in the lack of systematic Government policy, as well as in the mindset of society. Recent Governments have not paid any real attention to issues of human rights in general, including the discrimination agenda. Effective Government policies to combat the structural roots of discrimination have not been developed.

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<sup>18</sup> A term used in the Czech school system, where 'group integration' means the creation of special study groups or classes in the mainstream school.

<sup>19</sup> Specified by Decree No. 27/2016, on the education of pupils with special educational needs and talented pupils, 28 January 2016; <https://www.zakonyprolidi.cz/cs/2016-27>.

## INTRODUCTION

### The national legal system

Czech law consists of ordinary (statutory) law and constitutional law. The main source of the Czech constitutional law is the Czech Constitution (Act No. 1/1993) and the Charter of Fundamental Rights and Freedoms (Act No. 2/1993, the Charter). The Charter plays a critical role in the protection of individuals against discrimination.

The only body competent to interpret the Charter with binding effect is the Constitutional Court.<sup>20</sup> The Constitutional Court can only deliver such interpretation through a judicial decision.

The Constitutional Court has the jurisdiction to annul laws and other legal enactments if they are in conflict with the Charter, Constitution or constitutional laws.<sup>21</sup> According to the Constitutional Court, it also has a jurisdiction to do so when such laws are in conflict with international treaties on human rights.<sup>22</sup>

If conflict between a law and the constitutional order arises in a lower court, its judge is obliged to refer the case to the Constitutional Court.<sup>23</sup> However, in a case of conflict between Czech law and EU law, even the lower courts must apply EU law as a matter of priority.<sup>24</sup> All ordinary laws are on a lower level of the hierarchy and are equal to each other. Ordinary laws are superior to decrees of the Ministries or Government Resolutions, which can only regulate issues if ordinary laws expressly allow this.

### List of main legislation transposing and implementing the directives

Act No. 2/1993, Charter of Fundamental Rights and Freedoms

Abbreviation: Charter

Latest amendment: Constitutional Act No. 162/1998, in force since 1 January 1999

Grounds covered: sex, race, colour, language, religion or belief, political or other orientation, national or social origin, adherence to national or ethnic minority, property, birth or other status.

Material scope: fundamental rights declared by the Charter

Act No. 198/2009, Anti-discrimination Act

Abbreviation: Anti-discrimination Act

Date of adoption: 23 April 2009

Grounds covered: race, ethnic origin, 'nationality' (*národnost*), sex, sexual orientation, age, disability, religion or belief.

Material scope: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education

Act No. 361/2003, on service by members of the security forces

Abbreviation: Act on service by members of the security forces

Date of adoption: 23 September 2003

Grounds covered: age, race, colour, sex, sexual orientation, religion and belief, political orientation, national origin, 'nationality' (*národnost*), ethnic or social origin, property, birth,

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<sup>20</sup> Czech Republic, Constitution of the Czech Republic, 1 January 1993, Article 89(2): 'Enforceable rulings of the Constitutional Court shall be binding for all agencies and individuals.'

<sup>21</sup> The jurisdiction of the Constitutional Court to annul laws stems from Article 87(1) of the Czech Constitution.

<sup>22</sup> Constitutional Court of the Czech Republic (*Ústavní soud*) No. Pl. ÚS 36/01, 25 June 2002. All case law of the Constitutional Court can be found at: <http://nalus.usoud.cz/Search/Search.aspx>.

<sup>23</sup> According to Article 95(2) of the Czech Constitution.

<sup>24</sup> Constitutional Court of the Czech Republic, No. Pl. ÚS 19/04, 21 February 2006; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-19-04>.

marital and family status<sup>25</sup> or family duties, membership of trade unions and other organisations.

Material scope: public employment

Act No. 262/2006, Labour Code

Abbreviation: Labour Code

Date of adoption: 21 April 2006

Grounds covered: race, ethnic origin, 'nationality', sex, sexual orientation, age, disability, religion or belief.

Material scope: employment relations, labour relations, rights and duties of an employer and an employee

Act No. 435/2004, on employment

Abbreviation: Employment Act

Date of adoption: 13 May 2004

Grounds covered: race, ethnic origin, 'nationality', sex, sexual orientation, age, disability, religion or belief.

Material scope: state employment policy, protection against unemployment

Act No. 561/2004, on preschool, primary, secondary, higher technical and other education

Abbreviation: Schools Act

Date of adoption: 24 September 2004

Grounds covered: race, colour, ethnic origin, 'nationality', sex, sexual orientation, age, disability, religion or belief, language, social origin, property or other status.

Material scope: conditions of preschool, primary, secondary, higher technical and other education

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<sup>25</sup> This would also include same sex families.

## **1 GENERAL LEGAL FRAMEWORK**

### **Constitutional provisions on protection against discrimination and the promotion of equality**

The constitutional law of the Czech Republic includes the following articles dealing with non-discrimination:

Article 3 of the Charter guarantees equality in access to fundamental rights and freedoms and includes an open-ended list, expressly prohibiting discrimination on the grounds of sex, race, colour, language, religion or belief, political or other conviction, national or social origin, membership of a national or ethnic minority, property and birth or other status. The Constitutional Court confirmed that age may fall under the category of 'other status'.<sup>26</sup> Other grounds, such as disability or sexual orientation arguably also fall under 'other status'.

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

The constitutional anti-discrimination provisions are directly applicable, but cannot be enforced against private persons.

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<sup>26</sup> Constitutional Court, judgment no. II. ÚS 1609/08, of 30 April 2009.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the **main legislation** transposing the two EU anti-discrimination directives:

Race, colour, ethnic origin, nationality (*národnost*), sex, sexual orientation, age, disability, religion or belief, EU citizenship.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the directives

With the exception of the definition of disability in Section 5(6) of the Anti-discrimination Act, there are no definitions in the strict sense of any of the grounds.

However, the grounds of unlawful discrimination are interpreted as follows.

##### a) racial and ethnic origin

There is no normative definition of racial or ethnic origin in Czech national law. Czech law does not clearly distinguish between the terms race and ethnic origin. The widely used *Academic Commentary on the Anti-discrimination Act* distinguishes race and ethnicity in the following manner: 'Race refers to physiological signs, whereas ethnicity also involves social signs such as nationality, language, culture, history or religious tradition.'<sup>27</sup> 'Nationality' constitutes a separate discriminatory ground; nationality, as opposed to ethnic origin, depends on the free choice of the individual.<sup>28</sup> However, in connection with discrimination towards Roma people, the discrimination based on ethnic origin is used for reference, although the Constitutional Court employs the terms ethnic or racial discrimination interchangeably.<sup>29</sup> In 2015, the Czech Ombudsman stated that ethnic origin is the ground of discrimination requiring the strongest protection and that the law considers it to be particularly unacceptable. Later in the statement, the Ombudsman continues using both racial and ethnic origin as terms.<sup>30</sup>

The Constitutional Court considers differentiation based on racial or ethnic origin as absolutely prohibited, however, it is doubtful whether in practice that ensures the applicants any specific position before the Constitutional Court.<sup>31</sup> For example, in the case of *D. H. and Others*, the Constitutional Court did not ascertain indirect discrimination of Roma pupils in the field of education. In that case, the Constitutional Court declared that the fact that Roma children represent about 70 % of the pupils in special schools is a fact demonstrated by the statistics and does not present an individual infringement.<sup>32</sup> In 2013, the Constitutional Court did not find indirect discrimination in a similar case concerning access of Roma to education. The Constitutional Court differentiated the individual case from the case of *D.H. and Others* and declared that individual guarantees for the applicant were ensured since he was repeatedly examined during his school attendance.<sup>33</sup>

<sup>27</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 44.

<sup>28</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 59.

<sup>29</sup> Constitutional Court of the Czech Republic, no. I. ÚS 1891/13, 11 August 2015; [http://nalus.usoud.cz/Search/GetText.aspx?sz=1-1891-13\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=1-1891-13_1).

<sup>30</sup> Public Defender of Rights (2015), *Zpráva o nezjištění diskriminace* sp. zn. 788/2015/VOP (Report on discrimination No. 788/2015/VOP), Brno, Veřejný ochránce práv; <http://eso.ochrance.cz/Nalezene/Edit/3302>.

<sup>31</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 49.

<sup>32</sup> Constitutional Court of the Czech Republic, no. I. ÚS 297/99, 20 October 1999; <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=32969&pos=2&cnt=4&typ=result>.

<sup>33</sup> Constitutional Court of the Czech Republic, no. III. ÚS 1136/13, 12 August 2015; <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=89444&pos=1&cnt=1&typ=result>.



It emerges from the *Academic Commentary on the Anti-discrimination Act* that the Constitutional Court gives greater attention in its case law to other criteria of differentiation rather than to racial discrimination, although racial discrimination was classified as a 'traditionally prohibited discrimination ground' in its case law.<sup>34</sup>

Protection against racial discrimination also includes the protection of national minorities. There is no difference between national and ethnic minorities in the Czech legislation. Act No. 273/2001 on the rights of members of national minorities only recognises national minorities, who are

'a community of citizens of the Czech Republic who live on the territory of the present Czech Republic and as a rule differ from other citizens by their common ethnic origin, language, culture and traditions; they represent a minority of citizens and at the same time they show their will to be considered a national minority for the purpose of common efforts to preserve and develop their own identity, language and culture and at the same time express and preserve interests of their community which has been formed during history.'<sup>35</sup>

There are 14 officially recognised national minorities, including Roma, which are represented in the Government Council for National Minorities.

According to Article 9 of the General Data Protection Regulation, ethnic origin belongs to the 'special categories' of personal data, which can be gathered and processed only under very strict conditions (e.g. the consent of the person concerned is required for collecting and processing such data). If any definition were to allow for the identification of the ethnic origin of an individual without such consent, this would lead to a circumvention of the GDPR and the local implementing legislation. There is no special definition for the purposes of the Anti-discrimination Act. The aims of the anti-discrimination legislation are satisfied by anonymous data collection.

In practice, incidents of racial discrimination are widely identified by the media and NGOs. In the past, this was primarily an issue involving the Roma community, which was often presented in the media in a negative context.<sup>36</sup> Since 2015, similar observations could be made with regard to the migration crisis and migrants coming from Arabic countries. In 2015, an analysis prepared by experts from the Masaryk University in Brno<sup>37</sup> showed that even the main Czech TV stations present the situation in a biased way that can create prejudices against refugees and emphasises potential safety risks while neglecting humanitarian aspects as well as the political situation in the home countries of the refugees.

Czech jurisprudence and its interpretation by national courts do not use the concept of 'disadvantaged group', nor are specific characteristics linked to such groups acknowledged. The author is not aware of any court decisions providing comprehensive definitions of racial or ethnic origin. For the purpose of research carried out in 2012, the Czech Ombudsman used an approach that considered as Roma those persons (pupils) who were perceived as Roma by third parties, i.e. equality body employees and teachers.<sup>38</sup>

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<sup>34</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 49. However, the commentary does not specify these 'other criteria'.

<sup>35</sup> Czech Republic, Act No. 273/2001 on the rights of members of national minorities (*Zákon č. 273/2001 Sb, o právech příslušníků národnostních menšin a o změně některých zákonů*), 10 July 2001, Section 2(1).

<sup>36</sup> Czech state agency, established by Act No. 231/2001, to monitor whether the law in the area of radio and TV broadcasting is observed and respected.

<sup>37</sup> Masaryk University (2015), Analysis of media coverage of the migrant crisis (*Analýza mediálního pokrytí migrační krize*), available at: <https://www.hatefree.cz/blo/analyzy/1304-analyza-mediálního-pokrytí-uprchlicke-krize>.

<sup>38</sup> Public Defender of Rights (2012), Survey of the Public Defender of Rights into the Ethnic Composition of Pupils of Former Special Schools Final Report (*Výzkum etnického složení žáků bývalých zvláštních škol*),

Concerning criminal sanctioning of racial discrimination, the Criminal Code specifically penalises the foundation of and participation in an organisation promoting racial discrimination or the crime of racially motivated murder.<sup>39</sup>

According to the Czech Ombudsman, in 2016, race and ethnicity discrimination was the third most frequently invoked discrimination ground (69 of 451 complaints).<sup>40</sup>

Recital 17 of Directive 2000/78/EC is not expressly reflected in national anti-discrimination legislation.

b) religion or belief

There is no normative definition of religion or belief in Czech national law. Detailed regulations on churches and religious organisations exist, but their purpose is to regulate the existence of churches and religious organisations as legal entities *sui generis*,<sup>41</sup> rather than to provide detailed regulations for the protection of freedom of belief. Freedom of religion is not limited only to churches and religious organisations listed in the State Register. Act No. 3/2002 on the freedom of belief and the status of churches and religious organisations,<sup>42</sup> declares the right to freedom of thought, conscience and religion. Any religion may still be practised; but they are not all subject to regulation under the Act on the freedom of belief and the status of churches and religious organisations.

A definition that set out what comprises a religion or belief would probably be constitutionally problematic.<sup>43</sup> Constitutional interpretation allows only for a 'negative' definition and characterises religious freedom as

*'forum internum*, which means every individual has the freedom to profess a certain religion and third parties and especially public authorities may not encroach on this freedom. It enjoys so-called *status negativus, resp. libertatis* (G. Jellinek),<sup>44</sup> and as such it is perceived not as a "positive" right, but as a right of a "defensive" character. It is characterised by a line demarcating the individual's free space which public authorities are not permitted to enter'.<sup>45</sup>

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Brno, Public Defender of Rights;

[http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Survey\\_Ethnic\\_Special-schools.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Survey_Ethnic_Special-schools.pdf).

<sup>39</sup> Czech Republic, Act No. 40/2009, Criminal Code (*Zákon č. 40/2009 Sb., trestní zákoník*), 8 January 2009; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=40~2F2009&rpp=15#seznam>.

<sup>40</sup> Public Defender of Rights (2016), *Souhrnná zpráva o činnosti veřejného ochránce práv 2016* (Summarising report on Ombudsman's activities in 2016), Brno, Veřejný ochránce práv, p. 74; [https://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Vyrocní-zprava-2016\\_web.pdf](https://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Vyrocní-zprava-2016_web.pdf).

<sup>41</sup> The status of churches and religious organisations as legal entities *sui generis* is created by their registration with the state. It is up to churches and religious organisations to decide whether to register. Those that do not wish to register can exist and conduct services and other activities, unless they violate the legal order or represent a danger to public safety, restrict personal freedom or violate the rights of others. On registration, churches and religious organisations have, under certain conditions, access to special rights, e.g. the right to teach religion in schools, the right of their priests/ministers to be paid by the state, the right to confidentiality of information with regard to the police and other parts of the official administration etc. The laws set out the requirements for registration. One of the most important requirements is that the proposal for registration must be submitted by three individuals with Czech citizenship and it must include a list of signatures of at least 300 people who support the registration.

<sup>42</sup> Czech Republic, Act No. 3/2002 on the freedom of belief and the status of churches and religious organisations (*Zákon č. 3/2002 Sb., o svobodě náboženského vyznání a postavení církví a náboženských společností*), 27 November 2001.

<sup>43</sup> Article 15(1) of the Czech Charter of Fundamental Rights and Freedoms reads as follows: 'Freedom of thought, conscience and religion is guaranteed. Everybody has the right to change his/her religion or faith or to be without any religious creed.'

<sup>44</sup> Jellinek G. (2011), *System der subjektiven öffentlichen Rechte* (System of Subjective Public Rights), Mohr Siebeck, Tübingen, p. 13.

<sup>45</sup> Constitutional Court of the Czech Republic, Pl. ÚS 6/02, 27 November 2002; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-6-02>.

Freedom of belief should still be protected, but no one can predict or determine what and how individuals will believe and what issues may be important for the expression of such beliefs.

In general, there are few cases of religions discrimination, a fact that goes hand in hand with the secular nature of the country and low number of religious minorities. Notwithstanding that, in 2017, one case was given significant attention in the media and has been the subject of public debate.

The courts heard a case where a Somalian student decided to discontinue her studies at a medical high school in Prague due to a ban on wearing a hijab, based on a provision of the school rules, which prohibited students from wearing any headwear at all. The restriction in the school rules related to all headwear (irrespective of whether it was religious in nature or not) and there was no corresponding ban in respect of other religious symbols. It appears that the school adopted the provision both for reasons of neutrality in terms of religion, as well as for other non-related reasons (e.g. to deter pupils from wearing baseball caps inside the building as it is deemed impolite). The student decided to discontinue her studies for reasons that were purely religious. The case did not have a health aspect.

The Ombudsman previously investigated the matter and reached the conclusion that there had been indirect discrimination on the basis of religion.<sup>46</sup> However, the Municipal Court in Prague (as the appellate court) issued a judgement on 19 September 2017 based on which the school can lawfully remain neutral from the viewpoint of religion, and the students cannot claim any right to manifest their religion on the school premises or during classes. The decision is now being reviewed by the Czech Supreme Court, which is expected to rule on it in 2019.

Czech media and politicians have given great attention to the case; in particular some politicians from right-wing and extremist parties have expressed their disagreement with the conclusions of the Ombudsman, and a number of supporters of the school (including some political figures) attended the court hearings.

#### c) disability

Section 5(6) of the Anti-discrimination Act defines disability as physical, sensory, mental, psychological or other impairment, which restricts or may restrict individuals in their right to equal treatment within the scope of the Anti-discrimination Act. According to the academic interpretation, the term 'mental' relates to intellectual disabilities, while 'psychological' relates to psychosocial disabilities. In other words, the law says that it protects people who face difficulties asserting their right to equal treatment where this difficulty is related to a disability. This disability must be long term, if it is lasting, or must be expected to last, according to medical opinion, for a minimum of one year.

The Czech Ombudsman has previously highlighted that long-term illness is only protected under the current definition of disability in the Anti-discrimination Act if all definition criteria for disability are fulfilled.<sup>47</sup> Although the legislation recognises disability as resulting from the interaction of a person with the environment, a certain type of diagnosis is still required. According to the *Academic Commentary on the Anti-discrimination Act*<sup>48</sup> and the Public Defender of Rights, the Czech Anti-discrimination Act is based on a social model of

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<sup>46</sup> Public Defender of Rights (2017), Report about an investigation in the case of a ban of wearing head covers at a high nursing school, (*Zpráva o šetření ve věci zákazu nošení pokrývek hlavy ve střední zdravotnické škole*), available at: [https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Kauzy/vzdelavani/173-13-DIS-EN.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Kauzy/vzdelavani/173-13-DIS-EN.pdf).

<sup>47</sup> Examples where the Ombudsman confirmed the treatment as disability include kidney stones or HIV (also in its initial stage). See Public Defender of Rights (2015), *Zpráva o zjištění diskriminace*, sp. zn. 5560/2014/VOP (Report on discrimination No. 5560/2014/VOP), Brno, *Veřejný ochránce práv*.

<sup>48</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 109.

disability.<sup>49</sup> Nevertheless, judicial interpretation may still be required to see whether it is in fact in absolute conformity with the concept of the social model of disability used in the Convention on the Rights of Persons with Disabilities and the definition adopted by the CJEU in *Skouboe Werge and Ring*.<sup>50</sup> However, the new amendment to the Schools Act adopted in 2015, the aim of which is to support the integration of children with special needs into mainstream schools, embraces the social model of disability by defining children with special needs through the identification of support measures (i.e. means to overcome the interactional environmental barriers) required to satisfy their educational needs.

On several occasions, the Czech Ombudsman has interpreted the term disability relatively widely. For example, the Ombudsman has concluded that asymptomatic HIV infection—despite its limited influence on an individual's overall state of health, as well as ability to carry out work etc—should be considered as a disability.<sup>51</sup>

Besides the definition provided by the Anti-discrimination Act, a certain overlap of terms can be found in different laws. In general, definitions apply only within the material scope of the specific laws containing them. Although the Anti-discrimination Act relies almost exclusively on the social model of disability, the social security law is still predominantly based on the medical model, considering disabled persons as passive beneficiaries of benefits.<sup>52</sup> For example, the Social Services Act describes disability in Section 3(g) as: 'physical, mental, psychic, sensory or combined disability, which causes or may cause that the person is dependent on the care of someone else.'<sup>53</sup> The legislation governing construction uses the phrase 'persons with limited mobility and orientation',<sup>54</sup> which includes people with disabilities, older people, pregnant women and people accompanying a minor under three years of age or in a pram or pushchair. In contrast, Act No. 329/2011 contains various categories of people with disabilities in order to distinguish their entitlement to special allowances for mobility and for special aid.<sup>55</sup> The specific definition of disability, which is also adopted by the Labour Code, is enshrined in the Employment Act.

Since 2012, the Employment Act no longer contains a definition of discrimination.<sup>56</sup> However, Section 67(2) of the Act on Employment retained a special definition of disability. This definition only applies to the employment of people with disabilities where certain positive measures are in place. This definition of disability relies on an official decision by the social security authorities, granting one of three levels of disability, rather than on the real degree of disability recognised by a specialist. The Employment Act states that persons

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<sup>49</sup> Public Defender of Rights (2015), *Zpráva o zjištění diskriminace*, sp. zn. 159/2011/DIS (Report on discrimination No. 159/2011/DIS), Brno, Veřejný ochránce práv.

<sup>50</sup> European Court of Justice, *Skouboe Werge and Ring*, No. C-335/11 and C-337/11, 11 April 2013; <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2009148>.

<sup>51</sup> Public Defender of Rights (2013), Investigation Report on Dismissal from Service on the Grounds of Diagnosis of an HIV Infection, (*Zpráva o šetření Propuštění ze služebního poměru z důvodu diagnostikování onemocnění virem HIV*), available at: [https://www.ochrance.cz/fileadmin/user\\_upload/ESO/157-2012-DIS-JSK-EN\\_01.pdf](https://www.ochrance.cz/fileadmin/user_upload/ESO/157-2012-DIS-JSK-EN_01.pdf).

<sup>52</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 109.

<sup>53</sup> Czech Republic, Act No. 108/2006 on Social Services (*Zákon o sociálních službách*), 14 March 2006; <http://portal.gov.cz/app/zakony/zakonPar.jsp?page=0&idBiblio=62334&fulltext=&nr=108~2F2006&part=&name=&rpp=15>.

<sup>54</sup> Czech Republic, Decree No. 398/2009, on general barrier-free accessibility requirements (*Vyhláška č. 398/2009, o obecných technických požadavcích zabezpečujících bezbariérové užívání staveb*), 5 November 2009, states that this category includes persons with a physical, visual, hearing or intellectual disability, older people, pregnant women, persons accompanying a child in a pram or pushchair or a child younger than three years of age; <http://portal.gov.cz/app/zakony/zakon.jsp?page=0&fulltext=&nr=398~2F2009&part=&name=&rpp=15>.

<sup>55</sup> Czech Republic, Act No. 329/2011 on providing allowances to people with disabilities. (*Zákon o poskytování dávek osobám se zdravotním postižením*), 13 October 2011; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=329~2F2011&rpp=15#seznam>.

<sup>56</sup> Czech Republic, Act No. 435/2004 on Employment (*Zákon č. 436/2004 Sb., o zaměstnanosti*), 13 May 2004; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=435~2F2004&rpp=15#seznam>.

with disability are natural persons who are recognised by the social security authorities as (a) on the third level ('people having a serious disability'), or (b) on the first or second level of disability, or (c) 'disadvantaged in terms of health'. The concept of someone 'disadvantaged in terms of health' is defined in Section 67(3) of the Employment Act as a

'person, whose capabilities enable him/her to perform permanent employment or other gainful occupation, but his abilities to be or to stay integrated in terms of work, to perform his existing occupation, to apply a gained qualification or to gain a new qualification are considerably limited for the reason of his unfavourable and long-lasting state of health.'

The amended Section 67(4) of the Employment Act determines in more detail the term 'unfavourable and long-standing state of health' as a situation that is going to last longer than one year and that considerably limits person's physical, sensory or mental abilities and therefore has an impact on their employment. It is important to note that a person qualified as 'disadvantaged in terms of health' according to Section 67(2)(c) cannot be a person falling into the scope of (a) or (b) described above. In order to be recognised as a person 'disadvantaged in terms of health' it is necessary to be awarded this status by the district social security administration according to the amendment to Act No. 582/1991<sup>57</sup> An employer employing a person 'disadvantaged in terms of health' is entitled to various allowances according to the Employment Act and such a person can be included in the compulsory percentage of employed people with disabilities according to Section 81 of the Employment Act.

Potentially, the existence of several different legal definitions could cause problems of implementation in situations where individuals are refused reasonable accommodation provided for by Article 3(2) of the Anti-discrimination Act, because they are not officially recognised as having a disability. However, there is no evidence that those problems are actually caused by the existence of several definitions.

Since 1 January 2012, the Employment Act has referred to the Anti-discrimination Act in regard to protection against discrimination, for example on the ground of disability. Nevertheless, in relation to access to employment, it is not sufficiently clear whether and when an individual may be refused reasonable accommodation in recruitment and duration of employment purely because they have not been registered as a person with a disability by the social security authorities. No official data have been published or research conducted to identify whether there are such cases of objective concern.

The Employment Act states that a person with a disability must deliver an expert assessment or an official certificate to prove their disability status (Section 67(5) of the Employment Act). This is an administrative requirement that does not oblige the person with disability to bear any additional burden. The certificate is issued in the course of the registration of a person's disability status for the purpose of the Employment Act and does not involve any costs for the individual concerned.

#### d) age

There is no normative definition of age and no interpretative terms used to define age in national law. There is no sufficient case law to provide more clarity on this topic.

The age of an individual can be determined from any personal documents, including information on an individual's date of birth. No definition of age or of age discrimination exists. In addition, there are no restrictions related to the scope of age as a protected

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<sup>57</sup> Czech Republic, Act No. 582/1991 on the organisation and performance of social security (*Zákon o organizaci a provádění sociálního zabezpečení*), 17 December 1991; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=582~2F1991&rpp=15#seznam>.



ground, nor a minimum (or maximum) age below which the anti-discrimination legislation would not apply.

The number of complaints filed with the Czech Ombudsman regarding age discrimination is slowly growing. Age was the second most frequently claimed ground of discrimination in 2018.<sup>58</sup> The Czech Ombudsman has led several inquiries concerning discrimination on the ground of age, for instance discrimination in the access of people to services, health care or employment (for example, the necessity of an employer to gather documents from open competition in order to rebut the presumption of discrimination, discrimination caused by the removal of an older employee and ensuing employment of someone younger, discrimination by an employment agency by refusing a job applicant after he had given information about his age).<sup>59</sup>

It is argued that the potential of an individual to succeed in the labour market decreases as their age increases. According to statistics, individuals who are at least 50 years old represent more than a third of all the unemployed. This is reflected in the structure of unemployment benefit, in which individuals below 50 years of age can receive such benefit for up to 5 months, individuals between 50 and 55 can receive it for up to 8 months, and individuals older than 55 years can receive it for up to 11 months (Section 43(1) of the Employment Act).

e) sexual orientation

According to Section 2(4) of the Anti-discrimination Act, discrimination for reasons of pregnancy, maternity, paternity or sexual identification is considered as discrimination on the ground of sex. The term 'sexual identification' reflects the development of the jurisprudence of the European Court of Justice in relation to the rights of transsexuals. Nevertheless, there is no normative definition or any distinctive interpretative terms used to define sexual orientation in Czech national law.

Most of the cases of discrimination on grounds of sexual orientation in the Czech Republic relate to discrimination in employment. However, in an important recent case of the Constitutional Court regarding the provisions of the Act on registered partnership<sup>60</sup> that had forbidden the registered partners or one of them from adopting a child, the Court referred to the doctrine explaining that sexual orientation is inborn and an unchangeable state and thus stated that it cannot be the pretext for any discrimination.<sup>61</sup>

In addition to discrimination in employment and family matters, it has been reported that LGBT individuals (and in particular gay and bisexual men who acknowledge having sexual intercourse with other men) are banned from donating blood in most Czech hospitals. This seems to be a widespread practice even though there are no general rules in relation to the issue. Arguably, the measure aims to reduce risks connected with the transmission of HIV and other diseases that are connected with unsafe sexual practices. However, it appears discriminatory that the ban relates to all gay and bisexual men who report sexual intercourse with other men, while heterosexuals are only restricted if they report an unsafe sexual practice. There has not yet been any case in which individuals have challenged this situation.

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<sup>58</sup> Public Defender of Rights (2018), *Výroční zpráva VOP* (Annual report of the Public Defender of Rights), [https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyrocní\\_zpravy/2018-DIS-vyrocní-zprava.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2018-DIS-vyrocní-zprava.pdf).

<sup>59</sup> Public Defender of Rights, Cases: Discrimination based on age, available at:

<http://www.ochrance.cz/en/discrimination/cases/diskriminace-dle-zakazanych-duvodu/cases-age/>.

<sup>60</sup> Czech Republic, Act No. 115/2006 on registered partnership (*Zákon č. 115/2006 Sb., o registrovaném partnerství*), 26 January 2006;

<https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=62343&nr=115~2F2006&rpp=15#local-content>.

<sup>61</sup> Constitutional Court of the Czech Republic, Pl. ÚS 7/15, 14 June 2016;

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=93271&pos=1&cnt=1&typ=result>. See details of the decision in the Section 12.2 below.

### 2.1.2 Multiple discrimination

In the Czech Republic, multiple discrimination is not expressly prohibited in the law. This does not mean that victims of multiple discrimination would not have rights to redress. In practice, they would have to claim discrimination for several reasons, which would not lead to any practical complications (as a single claim can still be raised). The *Academic Commentary on the Anti-discrimination Act* recommends paying specific attention to cases of alleged multiple discrimination, because such discrimination could have a more harmful impact on society and leads to greater infringement of a victim's rights.<sup>62</sup>

In the Czech Republic, there is no case law dealing with multiple discrimination. However, the Czech Ombudsman records cases of multiple discrimination, which are dealt with as any other discrimination cases. In 2018, the Ombudsman received 20 complaints relating to multiple discrimination, with the most frequent combinations being (a) age and disability (4 cases), (b) age and gender (3 cases) and (c) citizenship and nationality (3 cases).<sup>63</sup>

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In the Czech Republic, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

Section 2(5) of the Anti-discrimination Act provides for prohibition of discrimination on the ground of assumed characteristics. This provision protects against discrimination based on subjective attitude, for example refusing to rent a flat to a person assuming that he is a Roma person or a homosexual although this assumption is not correct in reality. This provision is applied in cases of direct discrimination, but is not usually applied in cases of indirect discrimination.<sup>64</sup>

#### b) Discrimination by association

In the Czech Republic, discrimination based on association with persons with particular characteristics, is not expressly prohibited in national law.

The Anti-discrimination Act does not expressly provide for prohibition of discrimination on the ground of association. However, the definition of direct discrimination in Section 2(3) of the Anti-discrimination Act also allows for a broader interpretation, in conformity with EU law, encompassing discrimination based on association with persons with particular characteristics.<sup>65</sup>

As a result, in the view of the author, courts trying a case involving discrimination by association should conclude that victims of such misconduct should have the same rights as victims of discrimination. However, judicial interpretation is needed to reach a clear conclusion.

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<sup>62</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck pp. 133, 137.

<sup>63</sup> Public Defender of Rights (2018), *Výroční zpráva VOP o ochraně před diskriminací* (Annual report of the Public Defender of Rights about protection from discrimination), [https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyrocní\\_zpravy/2018-DIS-vyrocní-zprava.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2018-DIS-vyrocní-zprava.pdf).

<sup>64</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 200.

<sup>65</sup> Public Defender of Rights (2014), *Souhrnná zpráva o činnosti veřejného ochránce práv 2014* (Summarising report on Ombudsman's activities in 2014), Brno, Veřejný ochránce práv; [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Souhrnna-zprava\\_VOP\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf).

The Czech Ombudsman issued a recommendation dating back to 2015 in which it proposed the enactment of an explicit prohibition of discrimination by association.<sup>66</sup> The recommendation has however not yet been followed by the legislator.

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

### a) Prohibition and definition of direct discrimination

In the Czech Republic, direct discrimination is prohibited in national law.

Currently, two definitions of discrimination exist in Czech legislation. The Anti-discrimination Act, Section 2(3), defines discrimination as any 'conduct, including omission, where one person is, has been or would be treated less favourably than another in a comparable situation' (... on specified grounds). In addition, there is a special definition included in Section 77(2) of the Act on the service of members of security forces. For the purpose of this law, direct discrimination is deemed to be any conduct whereby a member (of the security forces) is treated less favourably than another is, has been or would be treated in a comparable situation on specified grounds.<sup>67</sup> Both definitions comply with the definitions given in the directives.<sup>68</sup> Furthermore, the Labour Code explicitly refers to the definition of direct discrimination contained in the Anti-discrimination Act.<sup>69</sup>

### b) Justification for direct discrimination

In Czech terminology, the term 'justified discrimination' does not exist, nor is there any term equivalent to 'lawful' or 'permitted' discrimination. Where there is discrimination, it is always unlawful; if it is justified, it is not discrimination, but lawful differential treatment. This difference is purely a matter of legal terminology. With regard to justification, the anti-discrimination clauses in ordinary laws do not logically permit any justification as regards race.

Section 7(1) of the Anti-discrimination Act states that different treatment on grounds of sex, sexual orientation, age, disability, religion, belief or opinions in social security, health care, education and access to goods and services shall not constitute discrimination, if the difference of treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The said provision provides for differential treatment that is lawful as long as there are objective reasons for such treatment.

The rules on protection of persons with disabilities are in the position of *lex specialis*, therefore special conditions also apply to disability in this respect. However, no specific provision or jurisprudence explains the scope to which differential treatment on the basis of disability is justified and therefore does not amount to unlawful discrimination. The Czech Ombudsman seems to adopt the view that differential treatment based on signs resulting from disability (such as tiredness), where it is not reasonably justified and where reasonable accommodation can be provided, amounts to direct discrimination.<sup>70</sup>

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<sup>66</sup> Public Defender of Rights (2014), *Souhrnná zpráva o činnosti veřejného ochránce práv 2014* (Summarising report on Ombudsman's activities in 2014), Brno, Veřejný ochránce práv; [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Souhrnna-zprava\\_VOP\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf).

<sup>67</sup> Czech Republic, Act No. 361/2003 on the service of members of security forces (*Zákon č. 46/2000 Sb., o služebním poměru bezpečnostních sborů*), 23 September 2003; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=361~2F2003&rpp=15#seznam>.

<sup>68</sup> There is no case law indicating that the term 'one person' in this provision should be interpreted as excluding groups of persons from protection.

<sup>69</sup> See Section 16(2) of the Labour Code.

<sup>70</sup> Public Defender of Rights (2015), *Zpráva o zjištění diskriminace sp. zn. 49/2013/DIS* (Report on discrimination No. 49/2013/DIS), Brno, Veřejný ochránce práv; Public Defender of Rights (2015), *Zpráva o*



It emerges from the case law of the Constitutional Court that the differential treatment can be justified under two conditions: it pursues a legitimate aim and is proportionate (according to the so-called test of direct discrimination).<sup>71</sup> The *Academic Commentary on the Anti-discrimination Act* specifies in four steps how justification of differential treatment should be verified. The four steps, which must be fulfilled cumulatively, consist of identification of the legitimate aim, possibility of reaching this aim, proportionality in comparison with the right to equal treatment and examination of alternative measures.<sup>72</sup> Within the decision-making practice of the courts, the test of direct discrimination was sometimes modified or combined with other tests. Therefore, there is no well-established case law clearly defining criteria for justification of differential treatment.<sup>73</sup>

From that point of view, there appears to be no material discrepancy between the Czech law and the applicable directives.

A decision of the Supreme Court indicates that discriminatory intent is needed both in cases of direct and indirect discrimination.<sup>74</sup> This is, however, contradicted by the Constitutional Court, according to which an explicit intent to discriminate against somebody can hardly be expected and cannot be a condition for proving direct discrimination. According to the Constitutional Court therefore, intent is not necessary for proving direct discrimination.<sup>75</sup> Requiring the proof of intent in cases of indirect discrimination would also clearly be contrary to the case law of the European Court of Human Rights.<sup>76</sup> As a result, further judicial interpretation is needed.

## 2.2.1 Situation testing

### a) Legal framework

In the Czech Republic, situation testing is not clearly permitted in national law.

According to the Czech Constitution, 'Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon them by law.' The Constitution guarantees this right to every individual, in contrast to public persons and bodies, which may only act where the law expressly authorises them to act.<sup>77</sup> Therefore the law does not need to permit situation testing or define it – any private individual may perform situation testing in situations where the law does not expressly prohibit or forbid it. Section 125 of the Civil Procedure Code also states that anything may be introduced as evidence, as long as it can serve as a measure to clarify the material circumstances of the case. The limits are set primarily by Sections 84 to 90 of the Civil Code and relevant provisions of the Data Protection Act.

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*zjištění diskriminace sp. zn. 48/2013/DIS* (Report on discrimination No. 48/2013/DIS), Brno, Veřejný ochránce práv.

<sup>71</sup> See, among others: Constitutional Court of the Czech Republic (*Ústavní soud*), Pl. ÚS 31/13, 10 July 2014; <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=84884&pos=1&cnt=1&typ=result> and Constitutional Court of the Czech Republic (*Ústavní soud*), Pl. ÚS 49/10, 28 January 2014; <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=82406&pos=1&cnt=1&typ=result>.

<sup>72</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 319.

<sup>73</sup> See, for example: Pičová, L. (2014), 'Žonglování Ústavního soudu s diskriminačními testy' (Juggling of the Constitutional Court with the discrimination tests) *Bulletin Centra pro lidská práva a demokratizaci*, no. 7, vol.8/2014, Praha, p. 18.

<sup>74</sup> Supreme Court of the Czech Republic (*Nejvyšší soud*), no. 21 Cdo 4586/2010, 27 March 2012; [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/4ED3DA547D85D55BC1257A4E00687866?openDocument](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/4ED3DA547D85D55BC1257A4E00687866?openDocument).

<sup>75</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), no. Pl. ÚS 37/04, 26 April 2006; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-37-04>.

<sup>76</sup> European Court of Human Rights, *Horváth and Kiss v. Maďarsku*, no. 11146/11, 29 April 2013. European Court of Human Rights. *D.H. and Others v. Czech Republic*, no. 57325/00, 13 November 2007.

<sup>77</sup> Czech Republic, Act No. 1/1993, Constitution of the Czech Republic (*Zákon č. 1/1993 Sb., Ústava České republiky*), 19 December 1992, Article 2(4).

According to the Civil Code (Section 88), the consent of a person to use audio-visual recordings is not needed if the recordings are used to protect the rights or rightful interests of other persons, in cases when they are used for administrative purposes based on law or in cases when somebody publicly uses them in the matter of public interest. Based on that provision, it can be argued that recordings can be used as evidence in civil and administrative proceedings initiated by the victim of discrimination.

b) Practice

In the Czech Republic, situation testing is used in practice.

In practice, situation testing is used by NGOs in order to prove discrimination in access to employment, services and housing, even though in all cases this may not be obvious or expressly acknowledged by the relevant individuals. Most cases of situation testing in the Czech Republic in recent years were carried out in relation to discrimination on the ground of racial or ethnic origin in various fields, including housing, employment, access to goods and services and education.<sup>78</sup>

Testing is often carried out in situations where a Roma person attempts to obtain access to a service, benefit or employment and because they are concerned that they will be refused on discriminatory grounds, agrees to be accompanied by another person or other people.

The aim is to test whether the other person or people will receive the service, benefit or employment while the Roma person is turned away. This testing method has been used effectively to gather evidence of discrimination in a number of cases, with the cooperating testers appearing as witnesses in subsequent court proceedings.<sup>79</sup> Thus testing has been used almost exclusively for litigation purposes, although research has also been carried out where testing was used to obtain statistics on possible discriminatory behaviour by employers (for example, to investigate discriminatory patterns in recruitment).<sup>80</sup>

The Czech equality body is not allowed to use situation testing (as this power is not explicitly mentioned in legislation) and its employees should not be the ones who carry out the testing in practice. However, the Ombudsman cooperates with certain NGOs that use situation testing as one measure to discover and fight discrimination in practice. The Ombudsman has been supportive of this practice.

Even the Czech courts have already accepted in some cases that everyone is authorised to verify whether their rights can be exercised. If an unauthorised infringement of rights occurs, the claims of the testing persons are identical in a situation where discrimination would not be expected. However, it is important that the person participating in the testing who is discriminated against is at the same time a real victim of discrimination, i.e. that the person has a real interest in exercising the right in question; it should not be the case that the person is merely pretending to exercise their rights. In such situations, problems could arise when enforcing rights through the courts. According to the *Academic Commentary on the Anti-discrimination Act*, situation testing should not detract from the importance of discriminatory behaviour. In general, it should be borne in mind that financial compensation in discrimination cases has both a satisfactory function and a preventive

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<sup>78</sup> Testing is carried out as a comparison of the situation of two testers who apply for the same service or job under the same conditions and at the same time. Discrimination is established where, for example, a Roma tester is told that the job is no longer vacant, while the same job is offered immediately afterwards to a Czech tester. Only those testers who could claim to be directly affected by the discrimination established (e.g. as in this case those who were refused services or employment on the ground of their racial or ethnic origin) have standing as claimants before the courts.

<sup>79</sup> For more on testing cases, see: Poradna pro občanství (2006) *Situační testing. Zpráva z průzkumu* (Situation testing. Research report).

<sup>80</sup> For more see the publication: Poradna pro občanství (2006) *Situační testing. Zpráva z průzkumu* (Situation testing. Research report).

function, since it should sanction the discriminator and dissuade others from discriminatory behaviour.<sup>81</sup> This has also been confirmed in some decisions of the Czech courts that emphasised that even during situation testing, the claimant's personal rights may be affected and as a result, awarding monetary compensation may be justified in some cases.<sup>82</sup>

In 2015, the district court in Litoměřice tried a case concerning situation testing in housing. The claimant of Roma origin was refused the advertised flat for lease by the real estate agent because of the alleged disagreement of the proprietor. The district court concluded that the real estate agent committed direct discrimination because the claimant was excluded from a group of applicants because of her Roma origin. The district court ordered the defendant to send the claimant a written apology, but the compensation for non-pecuniary loss was rejected. When evaluating the amount of non-pecuniary damages, the district court held that the claimant's dignity had not been decreased to a considerable extent because she had participated in situation testing as part of her working duties.<sup>83</sup>

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

#### **a) Prohibition and definition of indirect discrimination**

In the Czech Republic, indirect discrimination is prohibited in national law. The prohibition of indirect discrimination is included in Sections 1(3) with 2(2) of the Anti-discrimination Act and in Section 77(2) of the Act on service by members of the security forces.

In current legislation, two definitions of indirect discrimination are provided:

According to Section 3(1) of the Anti-discrimination Act, indirect discrimination means an act or omission where a person is put at a disadvantage compared to other persons on any of the specified grounds on the basis of an apparently neutral provision, criterion or practice.<sup>84</sup>

In addition, there is a special definition included in Section 77(4) of the Act on the service of members of security forces. For the purpose of this law, indirect discrimination is deemed any ostensibly non-discriminatory conduct that discriminates against another member (of the security forces) on the grounds specified in the act.

These definitions conform to the definitions given in the directives.

#### **b) Justification test for indirect discrimination**

According to Section 3(1) of the Anti-discrimination Act, indirect discrimination as specified in the provision will not be taken to occur if such a provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

No definite answer can be given as to what test must be satisfied to justify indirect discrimination, as there is a lack of case law on indirect discrimination in the Czech Republic. Nevertheless, some decisions have indicated that the concept of indirect discrimination is interpreted rather narrowly by the Czech courts.<sup>85</sup>

<sup>81</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, pp. 392, 396.

<sup>82</sup> Prague City Court (*Městský soud v Praze*), no. 34 C 66/2001-42, 7 March 2002, and High Court in Prague (*Vrchní soud v Praze*), no. 1 Co 321/2003-196, 17 August 2003.

<sup>83</sup> District Court in Litoměřice (*Okresní soud v Litoměřicích*), no. 14 C 46/2013/ 14 August 2015.

<sup>84</sup> There is no case law indicating that the term 'one person' in this provision should be interpreted as excluding groups of persons from protection.

<sup>85</sup> Supreme Court of the Czech Republic (*Nejvyšší soud*), no. 21 Cdo 2754/2014, 28 January 2016; [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/F2920E361E6DF0F6C1257F950030ECE?ope](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/F2920E361E6DF0F6C1257F950030ECE?ope)

However, the Supreme Court adjudicated an important case in 2012.<sup>86</sup> The alleged victim of discrimination complained that she was discriminated against on the ground of property because the National Heritage Institute, where she had applied for a job, had sent the invitations for personal interview to the candidates by email less than 24 hours prior to the date of the interview. The Supreme Court confirmed conclusions reached by the lower courts that in this case, as the applicant did not state in the application or other correspondence that she did not possess a personal computer and did not have all-day access to an email service, the defendant had no way of knowing these facts. Therefore, these matters of fact could not serve as grounds for any actions of the defendant and it was also impossible to deduce that the defendant had, by sending the invitation for personal interview by email, pursued any disadvantageous treatment towards the applicant compared to the other applicants for the job. It is therefore not possible to consider as discriminatory any such actions of an employer, whose motive is not any circumstance which the candidate sees as the reason of discrimination, even if – were this known by the employer – it could otherwise objectively be considered as a ground for discrimination. The court made no clear distinction as to whether the case was considered under provisions of direct or indirect discrimination. However, the court indicated that it is necessary for discriminatory intent to be present in cases of both direct and indirect discrimination. It seems clear that the court did not examine whether the action (sending out invitations via email 24 hours before interview) was objectively neutral but had disproportionate effects on persons in an economic situation such as that of the applicant.

In 2015, the Constitutional Court examined the case of an applicant who claimed indirect discrimination on the ground of religion and belief. The applicant, who was a cleric in one of the churches, asserted that the conditions under which his job was terminated were less favourable than those stipulated under the Labour Code. The applicant alleged indirect discrimination as a result of the different job termination conditions to which he was subject as a cleric. The applicant also asked the court to submit a preliminary reference to the CJEU concerning the question whether the employment relationship of a cleric is an employment relationship according to EU legislation, such as Directive No. 2000/78/ES. However, the Constitutional Court declared that the general courts decided in compliance with the CJEU case law and there was no need to submit a preliminary question to the CJEU as demanded by the applicant.<sup>87</sup> In 2015, the Constitutional Court came to the conclusion that the applicant, whose service as a spiritual leader was terminated under conditions that were less favourable than those stipulated by the Labour Code, was not discriminated against since he freely gave up his protection under the Labour Code.<sup>88</sup>

### 2.3.1 Statistical evidence

#### a) Legal framework

In the Czech Republic, there is legislation regulating the collection of personal data. Since 26 May 2018, the topic is exclusively governed by the GDPR, which superseded the previous Data Protection Act. As of 31 December 2018, there is no national law that would apply to this topic.

In the Czech Republic, statistical evidence is not permitted by national law in order to establish indirect discrimination. This is not expressly mentioned by the Civil Procedure

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[nDocument&Highlight=0](#), or Supreme Court of the Czech Republic (*Nejvyšší soud*), no. 21 Cdo 230/2015, 24 March 2016;  
[http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/A18EA2659D293180C1257FC0003BFA5A?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/A18EA2659D293180C1257FC0003BFA5A?openDocument&Highlight=0).

<sup>86</sup> Supreme Court of the Czech Republic (*Nejvyšší soud ČR*), no. 21 Cdo 4586/2010, 27 March 2012;  
[http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/4ED3DA547D85D55BC1257A4E00687866?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/4ED3DA547D85D55BC1257A4E00687866?openDocument&Highlight=0).

<sup>87</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), no. III. ÚS 2860/14, 10 November 2014;  
<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=89328&pos=1&cnt=1&typ=result>.

<sup>88</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), no. III. ÚS 2860/14, 10 November 2014;  
<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=89328&pos=1&cnt=1&typ=result>.

Code, however, based on its principle, any source can be used as evidence unless it is prohibited by the Civil Procedure Code, which is not the case here. However, whether a court considers statistical data as convincing evidence in specific cases is a matter to be assessed on a case-by-case basis.

## b) Practice

In the Czech Republic, statistical evidence is used in practice to establish indirect discrimination.

Although statistical evidence can be used as means of proof, the use of such evidence before the courts in discrimination disputes is not widespread.

Statistical evidence was not accepted as a means to establish indirect discrimination before the Czech courts in the case that resulted in the European Court of Human Rights (ECtHR) judgment *D.H. and Others v. the Czech Republic*.<sup>89</sup> The case is unique in many respects and concerned indirect discrimination against Roma children in special schools for children with intellectual disabilities. It originated in 1996 in Ostrava in the Czech Republic, and after being ruled inadmissible on procedural grounds by the Constitutional Court (1999), the claimants lodged an application with the ECtHR in Strasbourg (2000).

The petitions filed with both the Czech Constitutional Court and the ECtHR in this case alleged that the Czech educational system, due to general conditions within the school system, including ethnically biased intelligence tests, results in discrimination amounting to racial segregation of Roma in education. The petitions were based on a comparison of statistical data from 8 special schools and 69 primary schools in the city of Ostrava (at that time Ostrava had 70 primary schools and 8 special schools), which indicated an over-representation of Roma pupils in special schools. The proportion of the Ostrava Roma school population in special schools outnumbered the proportion of the non-Roma school population in special schools by a ratio of more than 27 to 1. Roma children in Ostrava were more than 27 times more likely to end up in special schools than non-Roma children. The statistics further indicated that, although Roma represented less than 5 % of all students of primary age in Ostrava, they constituted more than 50 % of the special school population. The petitioners also referred to official data quoted by the Czech Government,<sup>90</sup> according to which approximately 75 % of Roma children attend special schools and substantially more than half of all special school students are Roma.<sup>91</sup>

The renowned *D.H. and Others v. the Czech Republic* judgment, delivered by the Grand Chamber of the ECtHR,<sup>92</sup> was perceived by the wider general public throughout the Czech Republic as a totally unexpected and shocking outcome to the Ostrava case. In contrast, Czech civil society organisations contended with satisfaction that the ECtHR had seized an opportunity that was unlikely to be repeated in future.<sup>93</sup> On the basis of persuasive evidence consisting of statistical data, the ECtHR identified the racially discriminatory

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<sup>89</sup> ECtHR, *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007; [http://hudoc.echr.coe.int/eng?i=001-83256#{"itemid":\["001-83256"\]}](http://hudoc.echr.coe.int/eng?i=001-83256#{).

<sup>90</sup> Czech Republic, Resolution No. 279 on draft government policy on the Roma community (*Usnesení vlády o koncepci politiky vlády vůči příslušníkům romské komunity, napomáhající jejich integraci do společnosti*), 7 April 1999, states in Paragraph 5: 'three-quarters of Roma children attend special schools for children with a moderate intellectual impairment and more than 50 % (estimations are that it is about three-quarters) of all special school pupils are Roma'.

<sup>91</sup> The applicants also managed to collect data on statistics of Roma children in special schools from other parts of the Czech Republic, for example, Slaný, Sokolov, Kladno, Vítkov, Ústí nad Labem and Teplice.

<sup>92</sup> ECtHR, *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007; [http://hudoc.echr.coe.int/eng?i=001-83256#{"itemid":\["001-83256"\]}](http://hudoc.echr.coe.int/eng?i=001-83256#{).

<sup>93</sup> See, for example, the commentary on the 2006 ECtHR Senate judgment: Čechová, B. (2007), 'ESLP: umístění dětí romského původu do zvláštních škol' ('ECtHR: Placement of children of Roma origin in special schools'), in Bobek, M., Boučková, P., Kühn, Z. (eds), *Rovnost a diskriminace* (Equality and discrimination).

impact of an apparently neutral practice and for the first time in its history declared indirect racial discrimination as non-justifiable in a democratic society.<sup>94</sup>

At the end of 2012 the Supreme Court heard a case, which was later adjudicated by the Constitutional Court, regarding alleged discrimination based on the ethnic origin of a person in access to education.<sup>95</sup> The complainant was placed in a special school where he later completed his primary education. The Supreme Court dealt in detail with the issue of statistical evidence. The court rejected the arguments presented by the claimant, pointed out recent developments in the case law of the ECtHR, and argued that, according to the ECtHR's decision in the case of *Oršuš and Others v. Croatia*,<sup>96</sup> statistics can be considered prima facie evidence of discrimination only in cases where they prove that the proportion of disadvantaged children in special schools is over 50 %.

In the case of the claimant, the proportion of Roma pupils in special schools was below 50 % and according to the Supreme Court, it was therefore up to the claimant to prove that he was discriminated against by being placed in a special school. The Constitutional Court confirmed the decision of Supreme Court, but criticised the reasoning of its judgement. The Constitutional Court adjudicated<sup>97</sup> that the shifted burden of proof might be based on the test of indirect discrimination formulated by the European Court of Justice. The Constitutional Court declared that even if the statistical evidence presented proved that the practice of placing Roma children in special schools was widespread, it would not prove that it actually happened in the complainant's case. The Constitutional Court argued that the situation of the complainant differed from the case *D. H. and Others*,<sup>98</sup> because of the fact that his intellectual abilities were regularly tested (although testing in 1980s probably did not properly consider the cultural and language differences of Roma pupils). Finally, the Constitutional Court declared that the presumption of indirect discrimination would be disproved by all means.

Employers are allowed to keep records of sensitive data where they can prove the express consent of the person in question, but given this restriction, they prefer not to keep such records at all. According to Section 12(2) of the Employment Act,<sup>99</sup> an employer is prohibited from requesting information regarding nationality (*národnost*), racial or ethnic origin, political orientation, membership of trade unions, religion, belief or conviction, or sexual orientation in the course of recruitment, if it is not necessary for the reasons allowed by the law.<sup>100</sup> Similarly, an employer is prohibited from requesting information that is contrary to ethical principles and personal data that do not serve to fulfil conditions set out by legislation (for example, evidence and reporting for the purposes of social and health insurance or taxation). Employers are required to prove, on request from job applicants, the necessity for the collection of such information.

Health institutions keep information regarding the state of health of individual patients (and therefore data referring indirectly to disability). Such institutions are not allowed to disclose the content of patient records without the consent of the person concerned.<sup>101</sup>

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<sup>94</sup> European Court of Human Rights (ECtHR), *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007, Section 176.

<sup>95</sup> Supreme Court of the Czech Republic (*Nejvyšší soud ČR*), no. 30 Cdo 4277/2010, 13 December 2012.

<sup>96</sup> European Court of Human Rights (ECtHR), *Oršuš and Others v. Croatia*, No. 15766/03, 16 March 2010; [http://hudoc.echr.coe.int/eng?i=001-97689#{"itemid":\["001-97689"\]}](http://hudoc.echr.coe.int/eng?i=001-97689#{).

<sup>97</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), no. III. ÚS 1136/13, 12 August 2015; [http://nalus.usoud.cz/Search/GetText.aspx?sz=3-1136-13\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=3-1136-13_1).

<sup>98</sup> European Court of Human Rights, *D.H. and Others v. Czech Republic*, no. 57325/00, 13 November 2007; <http://hudoc.echr.coe.int/eng?i=001-83256>.

<sup>99</sup> Czech Republic, Act No. 435/2004 on Employment, 13 May 2004.

<sup>100</sup> The Employment Act contains references to substantial occupational requirements and conditions required by legislation for certain occupations.

<sup>101</sup> Czech Republic, Act No. 372/2011 on health services and conditions of their provision (*Zákon č. 372/2011 Sb., o zdravotních službách a podmínkách jejich poskytování*), 6 April 2011; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=372~2F2011&rpp=15#seznam>.



Information on sensitive data is gathered by censuses on a voluntary basis only (which means individuals may choose whether to answer questions on issues regarded as sensitive). Censuses do not therefore provide accurate data on these points.<sup>102</sup> There are no laws and regulations providing for positive measures and therefore there is no data collection for this purpose.

The lack of definition of racial or ethnic origin makes any attempt to collect ethnic data difficult. However, there remains the possibility of collecting such data anonymously. An attempt to define who can be considered as Roma was made in 2012 during the course of research by the Czech Ombudsman. Ethnic data were gathered by means of observations by 'third parties', i.e. equality body employees and teachers. This approach was based on the assumption that discrimination is determined by the neighbourhood's perception of the person and is never based on the person's own choice about their adherence to a specific ethnic minority. Data were gathered simultaneously by the employees of the equality body, who observed children in classrooms, and by class teachers who knew their pupils very well. The collected data were subsequently handled and processed purely as numerical identifiers, with no links to specific persons. The combination of these two approaches was used by the researchers as the prevailing method for the collection of anonymous ethnic data in schools.<sup>103</sup>

In 2009, the Constitutional Court decided that statistical data about dismissals of older employees can lead to evidence of discrimination on the ground of age. Specifically, it stated that such statistics might lead to a reversion of the burden of proof according to Section 133a of the Civil Procedure Code.<sup>104</sup> It can be added that, even though the Ombudsman has no direct power to collect data, the collection of ethnic data in the case of 'special schools' was undertaken on the basis of the Ombudsman's power to carry out research concerning questions related to the problem of discrimination.

## **2.4 Harassment (Article 2(3))**

### a) Prohibition and definition of harassment

In the Czech Republic, harassment is prohibited in national law. The prohibition of harassment in general is provided in Section 1(3) together with Section 2(2) of the Anti-discrimination Act.

In the Czech Republic, harassment explicitly constitutes a form of discrimination.

According to Section 2(2) of the Anti-discrimination Act, harassment and sexual harassment, on the grounds specified in the law, will be considered to be discrimination. According to Section 1(3) of the Anti-discrimination Act, discrimination, including harassment, is prohibited.

Harassment is prohibited in relation to all grounds covered by Section 2(3) of the Anti-discrimination Act and falls within the material scope of Article 1(1). The Anti-discrimination Act contains definitions of both harassment and sexual harassment, which comply with the

<sup>102</sup> The results of the 2001 census, if taken at face value, indicate that the Roma minority is the second smallest minority in the Czech Republic. The number of persons identifying themselves as Roma dropped to 11 746, significantly less than the number recorded by the previous census in 1991 (32 903). See <https://www.czso.cz/csu/czso/domov>. In contrast, other estimates of the Roma population vary between 150 000 and 300 000. See, for example: Kalibová, K. (1999), 'Romové z pohledu statistiky demografie' (Roma people according to the statistics of demography) in *Romové v České republice*, Socioklub, Praha, 1999, p. 10.

<sup>103</sup> Public Defender of Rights (2014), *Souhrnná zpráva o činnosti veřejného ochránce práv 2014* (Summarising report on Ombudsman's activities in 2014), Brno, Veřejný ochránce práv; [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Souhrnna-zprava\\_VOP\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf).

<sup>104</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), no. II. ÚS 1609/08, 30 April 2009; [http://nalus.usoud.cz/Search/GetText.aspx?sz=2-1609-08\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=2-1609-08_1).

definitions of the directives. According to Section 4(1) of the Anti-discrimination Act, harassment means any unwanted conduct associated with the grounds specified in Section 2(3) of the law, (a) taking place with the purpose or effect of diminishing the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment,<sup>105</sup> or (b) which could be legitimately perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

According to the Anti-discrimination Act, the bad intention of the discriminator need not be proved, although intention or impact are significant elements for the courts to take into account. The term 'unwanted conduct' constitutes an objective criterion and therefore, it is essential to decide whether an ordinary person would feel that such behaviour is unwanted. The *Academic Commentary on the Anti-discrimination Act* specifies the means of harassment, such as multiple discriminators, long-standing and one-off harassment, hostile environment and 'quid pro quo' conduct.<sup>106</sup> Sexual harassment means any conduct of a sexual nature under the definition mentioned above (including same-sex sexual harassment).

Harassment is also prohibited by Section 77(2) of Act No. 361/2003 on service by members of the security forces. According to the Section 77(5) of the Act on service by members of the security forces, harassment means conduct that is rightly perceived by another member as unwelcome and the aim or consequence of which leads to a reduction in that person's dignity or creates a hostile or degrading environment. Section 2(3) of Act No. 221/1999 prohibits discrimination and all acts resulting in discrimination, although harassment is not forbidden explicitly.

It appears that the Czech Ombudsman is highly sensitive to the issue of potential harassment and interprets 'harassment' in a broader way when it comes to the significance of the conduct in question. For example, the Ombudsman received a complaint regarding a case of an inappropriate verbal response in a situation where an HIV positive patient complained about services provided to him by a hospital that specialises in providing treatment to HIV positive individuals (Nemocnice Na Bulovce). A nurse who heard the patient's complaint told him that he could use another medical provider if he was not satisfied with the services provided to which the patient answered that that was likely to be impossible as other providers do not accept HIV positive patients. The nurse's subsequent response to the patient was: "That is your problem". The verbal statement was found by the Ombudsman to be harassment.<sup>107</sup>

Neither harassment in general nor racial harassment constitutes a specific criminal offence.

Serious instances of harassment may amount to one of the criminal offences established by the Criminal Code.<sup>108</sup> Crimes of racial hatred or violence, or on the grounds of religion or belief, are part of the group of crimes defined as gravely affecting community relations under Sections 352, 355 and 356 of the Criminal Code. These are crimes of violence against a group or individual; crimes of defamation of a nation, ethnic group, race, belief or conviction; instigation of hatred against a group of persons; and restriction of the rights and liberties of a group or an individual. Furthermore, support and expressions of support for movements organised to suppress the rights and freedoms of others are punishable, in accordance with Sections 403 and 404 of the Criminal Code. Apartheid and racial and other

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<sup>105</sup> There is no case law indicating that the term 'one person' in this provision should be interpreted as excluding groups of persons from protection.

<sup>106</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, pp. 241-247.

<sup>107</sup> HIV community (2017), „To je váš problém!“ Podle Bulovky žádné pochybení ("That's your problem!" According to Bulovka hospital no mistake was made), 16. 1. 2017, available at: <http://www.hiv-komunita.cz/clanky/to-je-vas-problem-podle-bulovky-zadne-pochybeni.html>.

<sup>108</sup> Czech Republic, Act No. 40/2009, Criminal Code (*Zákon č. 40/2009 Sb., trestní zákoník*), 8 January 2009; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0 &nr=40~2F2009&rpp=15#seznam>.



segregation and discrimination against a group are crimes according to Section 402 of the Criminal Code.

In addition, there are strict definitions for crimes that are racially motivated or based on religious hatred or belief. These are considered variations of general categories of crimes. These strict definitions of crimes concern the most violent crimes affecting life and health (Sections 140-167 of the Criminal Code). They include crimes of murder, bodily harm and grievous bodily harm.

In areas not covered by the Anti-discrimination Act or other laws containing a definition of harassment, redress can only be provided on the basis of provisions concerning protection of the personal rights of individuals contained in the Civil Code.<sup>109</sup>

#### b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in the Czech Republic the employer is liable and the employee can be liable, depending on the circumstances of individual cases. In particular, if an employee behaves in a discriminatory manner in the course of his duties, the employer is liable, according to the Labour Code.<sup>110</sup>

According to the Ombudsman, 'an employee, who has a position of authorised representative, is liable for discrimination in the meaning of Section 4(3) of the Anti-discrimination Act, if he had sexually harassed another employee and afterwards he dismissed this person from employment.<sup>111</sup>

Natural or legal persons are liable where damage is caused by activities conducted by persons acting on their behalf. Persons acting on the behalf of a natural or legal person are not themselves liable; however, the natural or legal person may have a right of recourse against such persons. Therefore, liability in all the respects mentioned above is theoretically possible or at least not excluded. It always depends on the facts of the individual case.

## 2.5 Instructions to discriminate (Article 2(4))

#### a) Prohibition of instructions to discriminate

In the Czech Republic, instructions to discriminate are prohibited in national law, namely in Section 2(2) of the Anti-discrimination Act. According to Section 4(4) of the Anti-discrimination Act, the concept is defined as an abuse of authority in the instruction of a subordinate to discriminate against a third person.<sup>112</sup> There is no specific provision on liability of legal persons for such actions. Legal persons are liable for instructions to discriminate under the general liability rules of the Civil Code. Article 4(5) of the Anti-discrimination Act, which is subsidiary to Article 4(4), regulates incitement to discrimination between formally equal subjects, i.e. subjects whose relationship is not hierarchical (for example, a vendor-vendee relationship).<sup>113</sup>

In the Czech Republic, instructions explicitly constitute a form of discrimination.

<sup>109</sup> Czech Republic, Act No. 89/2012, Civil Code (*Zákon č. 89/2012 Sb., občanský zákoník*), 3 February 2012; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=89~2F2012&rpp=15#seznam>.

<sup>110</sup> See Czech Republic, Act No. 262/2006, Labour Code, 21 April 2006, Section 265; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=262~2F2006&rpp=15#seznam>.

<sup>111</sup> Public Defender of Rights (2014), *Souhrnná zpráva VOP za rok 2014* (Summarising report on Ombudsman's activities in 2014), Brno, Veřejný ochránce práv; [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Souhrnna-zprava\\_VOP\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf), p. 85.

<sup>112</sup> There is no case law indicating that the term 'third person' in this provision should be interpreted as excluding groups of persons from protection.

<sup>113</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, pp. 254-255.

b) Scope of liability for instructions to discriminate

In the Czech Republic, the instructor is liable and the discriminator can be liable, depending on the facts of the individual case.

Natural or legal persons are liable where the damage was caused by activities conducted by persons acting on their behalf. Persons acting on behalf of a natural or legal person are not themselves liable under civil law; however, the natural or legal person may have a right of recourse against such persons, provided that they were employed to act on their behalf. They might be also criminally liable. Generally, any person giving instructions to discriminate, which leads to a criminal offence (for example, under Sections 352, 355, 356 or 402 of the Criminal Code), might be found guilty according to Section 24 of the Criminal Code. Section 356 of the Criminal Code creates a specific crime of public incitement to hatred against a group of people or the restriction of their rights. Specifically, support and expressions of support for movements organised to suppress the rights and freedoms of others are punishable, in accordance with Sections 403 and 404 of the Criminal Code.

Therefore, establishing liability in all the respects mentioned above is theoretically possible or at least not excluded. It always depends on the facts of the individual case.

For example, where an employee has been instructed by an employer to discriminate against fellow employees, Czech law theoretically enables the victims of discrimination to take actions against both sides. In practice, the discriminating employee could claim that he/she was instructed by the employer to carry out the discriminatory conduct and that a failure to comply with such instruction could be sanctioned and therefore, he had no other option than to comply with the unlawful request. Depending on the specific circumstances, it is possible that such a defence could be successful and that only the liability of the employer would be confirmed by a court.

Under the Anti-discrimination Act, incitement to discriminate by an instructor who is not in any hierarchical relationship to the discriminator shall also be deemed discrimination. As the discriminator will usually have full discretion to refuse such incitement, it is likely that both the instructor and the discriminator will be deemed liable in such case.

## **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 the Czech Republic, the duty to provide reasonable accommodation is included in the law. It is defined.

According to the Section 3(2) of the Anti-discrimination Act, indirect discrimination on grounds of disability shall also mean 'refusal or failure to take appropriate measures to enable a person with a disability to have access to a certain employment, working activities, career progression or other promotion, to use employment advice, or participate in other vocational training, or to use services available to the public, unless such a measure represents an unreasonable burden'.<sup>114</sup> The legislation goes beyond European Directive 2000/78 since it declares that failure to provide reasonable accommodation for a person with a disability is a form of indirect discrimination.<sup>115</sup> Unlike the directive, the Anti-discrimination Act does not give an illustrative list of reasonable accommodation. The law covers access to services as well as all relevant aspects of employment.

<sup>114</sup> Czech Republic, Act No. 198/2009, Anti-discrimination Act (*Anti-diskriminační zákon*), 23 April 2008; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=198~2F2009&rpp=15#seznam>.

<sup>115</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 219.

## b) Practice and case law

The law sets out the general basis for the evaluation of what might be regarded as a 'disproportionate burden' in the context of the duty to provide 'reasonable' accommodation. According to the Section 3(3) of the Anti-discrimination Act, particular attention should be paid to:

- the extent to which the measure would accommodate the needs of the person with disability;
- the financial and other costs which would be incurred in taking the measure and any disruption to the natural or legal person's activities;
- the availability of financial or other assistance for taking the measure;
- the adequacy of alternative provision or arrangements to accommodate the needs of the person with disability.

According to the *Academic Commentary on the Anti-discrimination Act*, other factors might be relevant in practice, such as any health and security risks for the person for whom the reasonable accommodation should be provided, but also risks for other persons. This should be considered in any event and the list in the Section 3(3) might be interpreted as being non-exhaustive.<sup>116</sup>

The duty to provide reasonable accommodation is also imposed on employers acting within the scope of the Act on Employment and the Labour Code. According to Section 103(5) of the Labour Code, employers are obliged at their own cost to secure for people with disabilities the necessary workplace accommodation, labour conditions, protected workshops and workplaces, special training and guidance. These obligations on employers exist independently alongside the anti-discrimination protection of the Anti-discrimination Act.

According to prevailing interpretation, protection should be awarded to all individuals with disabilities, regardless of whether they are registered as persons with disabilities by the social security authorities. However, such individuals need to prove their status by disclosing the particulars of their state of health that give rise to their classification as individuals with disabilities.

In 2016, the Ombudsman examined the case of an employee who wanted to work from home (as a reasonable accommodation), since she wanted to take care of her disabled son. The Ombudsman found no discrimination since only her son (the person with disability) was entitled to reasonable accommodation.<sup>117</sup>

There are no available statistics regarding the practice of employers with regard to this duty. It should be noted that the general awareness of the right to reasonable accommodation is very low, and many individuals with disabilities do not claim any accommodation simply because they are not aware of such a right.

## c) Definition of disability and non-discrimination protection

There are no differences in the definition of disability regarding eligibility to claim a reasonable accommodation and entitlement to claim protection from discrimination.

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

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<sup>116</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 230.

<sup>117</sup> Public Defender of Rights (2015), *Zpráva o šetření sp. zn. 48/2013/DIS* (Report on inquiry No. 48/2013/DIS), Brno, Veřejný ochránce práv; <http://eso.ochrance.cz/Nalezene/Edit/3692>.

In the Czech Republic, failure to meet the duty of reasonable accommodation counts as discrimination.

The failure to meet the duty of reasonable accommodation is deemed to be indirect discrimination on the ground of disability, according to Section 3(2) of the Anti-discrimination Act. Potential sanctions are the same as for other actions in discrimination cases. General rules concerning administrative procedures, covering both misdemeanours and administrative offences, apply. Relevant administrative procedures provide investigative powers for administrative bodies and inspectorates, as established within the scope of specific laws. These administrative bodies, such as labour inspectorates or trade inspectorates, are empowered to impose sanctions for prohibited activities and violations of obligations. According to Section 10 of the Anti-discrimination Act, the victim can also bring a general anti-discrimination civil action. The Civil Procedure Code and the shift of the burden of proof apply.

There is no duty of reasonable accommodation if the specific measure to be taken represents an unreasonable burden e.g. for the employer. However, the concept of 'unreasonable burden' has not been further developed by the Czech courts.

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

In the Czech Republic, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field.

The same concept of reasonable accommodation applies not only in the area of employment and labour relations, including counselling or vocational training but also to services provided to the public. This term is interpreted as services provided to an undefined group of persons, such as advertising, notice boards of premises, housing and services provided by mobile operators, restaurant operators, hairdressers and so on. Furthermore, transport services might also fall under the scope of Section 3(2). According to the *Academic Commentary on the Anti-discrimination Act*, it would not be systematic if the duty to provide reasonable accommodation did not cover healthcare and education. However, the Anti-discrimination Act does not recognise healthcare and education as services provided to the public and in this respect, judicial interpretation is needed. Provisions concerning reasonable accommodation do not relate to the access to goods.<sup>118</sup>

The duty to provide reasonable accommodation in the area of services provided to the public has been interpreted in a wider sense by the Czech Ombudsman, to also cover access to public parking places or to higher education.

Legislation does not define the term 'unreasonable burden', but it states that when deciding which specific measure represents an unreasonable burden, it is necessary to weigh the benefit for the person with disability against the financial costs, along with the availability of finances and other means of realising the measure and the availability of alternative measures that could satisfy the needs of the disabled person. A measure that the subject is obliged to adopt according to a specific law is not considered to be an unreasonable burden. However, judicial interpretation is needed to conclude whether it also applies in other areas such as social protection.<sup>119</sup>

In September 2016, an 'inclusive system', i.e. a project of inclusion of pupils with disabilities or special needs, was launched by the Czech Ministry of Education. Under the project, many pupils were transferred out of special schools for the disabled and have since

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<sup>118</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, pp. 227-229.

<sup>119</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, pp. 231-233.

been integrated into mainstream schools, following the same curriculum as other pupils. A detailed analysis of the topic can be found in section 3.2.8.a below. The project has been criticised from different angles, in particular with regard to the alleged impact on the education of pupils without disabilities as well as the alleged overloading of teachers who are now responsible for classes consisting of students with very different abilities. As a compensatory measure, the Ministry of Education expanded the ranks of special teaching assistants by creating approximately 3 600 new positions (as of 2017), and vastly improving the funding of tools and aids needed by pupils with special needs (such tools and aids can be claimed by the pupils where required). Although the public seems to be more against the idea of inclusion than in previous years (in 2013, 65 % of people were in favour of it; in 2016, 60 % of citizens were against it) due to negative media coverage,<sup>120</sup> the project appears to be successful as it improves the individualisation of education and increases the potential of pupils with disabilities or special needs.

In August 2017, an amendment to Decree No. 27/2016, on the education of pupils with specific requirements was adopted. The amendment reduces the administrative burden on schools, as some procedures seemed to be unnecessary. Furthermore, the amendment increased the maximum number of pupils in a group (from four to six pupils) that may be provided with a subsidiary pedagogical intervention.<sup>121</sup>

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

In the Czech Republic, there is no legal duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

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<sup>120</sup> Čápková, H. (2017) 'Nechali jsme kázat bludy proti inkluzi' (We let them preach delusions about the inclusive system), - Interview, available at: <https://www.respekt.cz/spolecnost/nechali-jsme-protiinkluzivni-lobby-kazat-bludy>.

<sup>121</sup> Czech Ministry of Education, Youth and Sports (2017), Decree no. 27/2016 Sb. as subsequently amended 1 September 2017 (Vyhláška č. 27/2016 Sb. ve znění účinném od 1. 9. 2017), available at: <http://www.msmt.cz/dokumenty-3/vyhlaska-c-27-2016-sb-o-vzdelavani-zaku-se-specialnimi-1?lang=1>.

### **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 the Czech Republic, the following residence/citizenship/nationality requirements are applied for protection under the relevant national laws transposing the directives.

Anti-discrimination provisions apply to every natural person, irrespective of nationality, citizenship or residence status,<sup>122</sup> as specified in Section 1(3) of the Anti-discrimination Act. According to Section 20 of the amended Schools Act, effective from 1 January 2008,<sup>123</sup> equal access to education is guaranteed to every Czech citizen, EU national and any lawfully residing third-country national. In respect of primary education, the law guarantees its provision irrespective of the legality of a third-country national's residence in the Czech Republic.

According to Section 1(2) of the Anti-discrimination Act, the law does not apply to legal regulations in respect of the conditions of entry and stay of third-country nationals and stateless persons in the territory of the Czech Republic. Such provision would, however, not cover relatives of EU citizens who enjoy rights under the EU regulations on freedom of movement.

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

###### a) Protection against discrimination

In the Czech Republic, the personal scope of the Anti-discrimination Act (Section 1(3)) covers natural persons for the purpose of protection against discrimination. Legal persons are not expressly covered by the personal scope of the Anti-discrimination Act, although they are protected by the anti-discrimination provisions of Article 1 (general differential treatment) and Article 3(1) (differential treatment in access to rights) of the Charter.

###### b) Liability for discrimination

In the Czech Republic, the personal scope of the Anti-discrimination Act (Section 1(3)) covers natural and legal persons for the purpose of liability for discrimination. There is no difference between natural and legal persons with regard to liability for discrimination, nor liability for damage/non-material injury caused by persons who act on instructions from a superior.

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

###### a) Protection against discrimination

In the Czech Republic, the personal scope of national law covers private and public sectors, including public bodies, for the purpose of protection against discrimination. This is implied by the wording of Section 1(3) of the Anti-discrimination Act.

There are no specific provisions stating whether particular laws would apply only to public bodies. Generally, laws (such as the Anti-discrimination Act) apply to both public and

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<sup>122</sup> As a result, protection against discrimination potentially also applies in the case of migrant workers who are present in the Czech Republic without the necessary permits.

<sup>123</sup> Czech Republic, Amendment to the Schools Act, Act No. 343/2007 (*Zákon č. 343/2007 Sb., kterým se mění zákon č. 561/2004 Sb. a některé další zákony*), 27 November 2007; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=343~2F2007&rpp=15#seznam>.

private bodies. The application of some laws can be restricted to certain types of public bodies (such as municipalities, state authorities, police etc). In such cases, this is stated in the law itself.

#### b) Liability for discrimination

In the Czech Republic, the personal scope of the Anti-discrimination Act covers private and public sectors, including public bodies, for the purpose of liability for discrimination. The national provisions comply with the directives.

### **3.2 Material scope**

#### **3.2.1 Employment, self-employment and occupation**

In the Czech Republic, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, military service and holding statutory office, for the five grounds.

According to Sections 1(1), 5(3) and 5(4) of the Anti-discrimination Act, Czech legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, military service, holding statutory office, for the five grounds. Section 5(3) of the Anti-discrimination Act imposes on employers an obligation to ensure equal treatment according to Section 5(2). It follows from Section 5(2) that protection measures against discrimination must be adopted and that those measures must be effective. Nevertheless, it is not clear how an employer should ensure equal treatment in entrepreneurship or self-employment. Furthermore, it is not clear from the Section 5(2) what measures an employer should adopt. The nature of such measure might be interpreted in relation to Sections 7(2) and 7(3), which specify positive measures.<sup>124</sup>

The performance of public service in the security and armed forces is regulated by separate laws, which also contain anti-discrimination provisions. The scope of these provisions is different. This is described in detail in section 4.3 below.

#### **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 the Czech Republic, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both private and public sectors, as described in the directives. These are specified in Section 1(1) together with Sections 5(3) and 5(4) of the Anti-discrimination Act.

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

In the Czech Republic, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment (Section 1(1)(c) with Section 1(3) of the Anti-discrimination Act).

No pay gap reporting is currently provided for under Czech law.

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<sup>124</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 269.

### **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 the Czech Republic, national legislation prohibits discrimination in: vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities (Section 1(1)(a), Section 1(1)(i) and Section 1(3) of the Anti-discrimination Act).

### **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 the Czech Republic, 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 and for both private and public employment (Section 1(1)(d) and Section 1(1)(e) of the Anti-discrimination Act).

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

In the Czech Republic, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive (Section 1(1)(f) of the Anti-discrimination Act). In addition to race or ethnicity, the grounds of age, disability, religion, belief and sexual orientation are also covered by the legislation.

a) Article 3.3 exception (Directive 2000/78)

Czech legislation does not rely on the exception in Article 3.3 of the Employment Equality Directive.

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

In the Czech Republic, national legislation prohibits discrimination in: social advantages as formulated in the Racial Equality Directive (Section 1(1)(g) of the Anti-discrimination Act). In addition to race or ethnicity, the grounds of age, disability, religion, belief and sexual orientation are also covered by the legislation.

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

In the Czech Republic, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive (Section 1(1)(i) of the Anti-discrimination Act). Age, disability, religion, belief and sexual orientation are also covered by the legislation (in addition to race or ethnicity).

The Schools Act contains a general anti-discrimination clause,<sup>125</sup> forbidding discrimination against EU and Czech citizens. According to Section 2(1), education must be based on the principles of equal access of all citizens of the Czech Republic or nationals of any other EU Member State to education without any discrimination based on any ground such as race, colour, sex, language, belief or religion, nationality, ethnic or social origin, property, kith or kin, or the health condition or any other status of a citizen. The law makes no reference to discrimination on the basis of sexual orientation (or, for example, sexual orientation of parents). The non-discrimination provisions of the Anti-discrimination Act therefore apply to its material scope. The Anti-discrimination Act prohibits discrimination in access to

<sup>125</sup> Czech Republic, Act No. 561/2004, Schools Act, 24 September 2004.



education and provision of education. In addition to race or ethnicity, the grounds of age, disability, religion, belief and sexual orientation are also covered by the legislation.

b) Pupils with disabilities

In the Czech Republic, the general approach to education for pupils with disabilities does raise problems.

In 2015, the amendment to the Schools Act, Act No. 82/2015<sup>126</sup> was adopted based on the *Strategy for Education in 2020*, in which equal access to education for all children is a top priority. It brought fundamental changes concerning the inclusive education of pupils with disabilities with effect from 1 September 2016.<sup>127</sup> Pupils with disabilities are thus no longer characterised by type of diagnosis, but by the degree of support required in their education, determined by a medical approach, and therefore focused on the child's needs, setting out specific intervention processes and practical assistance within teaching. In many of its provisions, the Schools Act replaces the phrase 'pupils with disability' with the phrase 'pupils mentioned in Section 16(9) of the Schools Act' (described later on). This provides a much broader definition of a pupil with special needs as a person who needs to be provided with supporting measures in order to realise their educational abilities and exercise their rights on an equal basis.

The supporting measures are defined as necessary adjustments in education corresponding to the state of health, cultural environment or other life conditions of a person. From September 2016, Section 16(2) provides a list of these supporting measures:

- Counselling help in a school or special counselling centre;
- Adjustments in the organisation, content, evaluation, forms and methods of education (including teaching of subjects of special pedagogic care or extending the length of secondary or higher education);
- Adjustments to the conditions of education and the conclusion of education;
- Compensation tools, special textbooks or special educational tools, communication systems for deaf and deaf-blind pupils, Braille and the supporting communication systems;
- Adjustments in the expected results of education according to the education programmes;
- Education according to the individual educational plan;
- Engaging a teaching assistant;
- Engaging another teacher, interpreter of sign language, rewriter for deaf people;
- Providing education in the areas specifically technically arranged.

With effect from 1 September 2016, specific supporting measures must be ensured for the education of people who cannot perceive speech through the sense of hearing (education in a communication system of deaf and deaf-blind people, teaching of written Czech language using the methods of teaching foreign language parallel with education in sign language). Education of people with alternative ways of communicating must be provided through a communication system that reflects the needs of such people.

Section 16(9) of the Schools Act, which came into effect in September 2016, allows the possibility of the subsidiary placement of a person with mental, physical, visual or hearing disability, serious speech defect, serious development disorder, learning or behaviour disability, multiple disabilities or autism, into the special school, class department or study groups, but only if the support measures in a mainstream school would not be sufficient to ensure the educational needs of the pupil. A written request by a pupil or their statutory representative, the recommendation of the school consulting centre and compliance with

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<sup>126</sup> Czech Republic, Act No. 82/2015 amending Act No. 561/2004, the Schools Act (*Zákon č. 82/2016 Sb., kterým se mění zákon č. 561/2004 Sb., školský zákon*), 19 March 2015.

<sup>127</sup> The amendment to the Schools Act is explained in more detail in section 3.2.8(b), below.

the best interest of the pupil is needed for a pupil's placement in a special school. However, if the statutory representative of a pupil with special educational needs defined in Section 16(9) of the Schools Act decides that s/he wants his/her child to be educated in a mainstream school in line with a recommendation made by a special counselling centre, the school will be obliged to provide the child with maximum support in the form of a broad range of support measures that include assistance of other expert staff including a teacher's assistant, adjustment of the organisation and methods of instruction and/or provision of necessary assistive devices. The children also have the right to obtain secondary education textbooks free of charge according to Section 27(5) of the amended Schools Act.

From September 2016, according to Section 28 of the Schools Act, school registers have a duty to gather information concerning supporting measures provided to a pupil and the conclusions of recommendations of the special counselling centres.

New Section 19 of the Schools Act provides that the Ministry of Education, Youth and Sports will specify the new support measures and system of education of children with special educational needs by a decree. In September 2016, Decree No. 27/2016 came into effect, which sets out an overview of support measures, including individual educational plans for pupils with special needs, the duties of a teaching assistant, the support measures for pupils using special communication systems, interpreters of sign language, rewriters for deaf people, the procedure for providing support measures and the organisation of the education of pupils with a need for support measures etc. Decree No. 27/2016 fully replaced Decree No. 73/2005 and partly represents *lex specialis* in relation to Decree No. 72/2005. The supporting measures are categorised into five degrees (specified in Decree No. 27/2016)<sup>128</sup> according to their organisational, educational and financial character. The measures of the second up to the fifth degree can be applied only with the recommendation of the special counselling centre and with the assent of the parent or of an adult pupil. The measures of the first degree can be decided by the school itself and can be specified in a teaching support plan created by teachers concerned about the pupil. Problems may arise because of different interpretations, for example, of what might constitute the 'best interest of a child'.

In its effort to implement inclusive education as smoothly as possible, the Ministry of Education, Youth and Sports has come up with an information package containing concise methodological and explanatory texts related to inclusive education and changes in the organisation of the education of pupils with special educational needs as of 1 September 2016.<sup>129</sup> In March 2016, a new Framework Educational Programme for Basic Education, which created conditions for ensuing equal access to educational content for all pupils, came into effect. In accordance with a recommendation by the school counselling facility, the school creates an individual educational plan containing support for pupils with a mild intellectual disability. Since the former Framework for Basic Education of pupils with mild intellectual disabilities was abolished, necessary changes in the organisation of education of pupils with mild intellectual disabilities are needed, due to the transfer from various systems of education.<sup>130</sup>

Since September 2016, the pedagogical and psychological counselling division of the National Institute for Education has started to perform the tasks of a review body in the field of diagnostics. The establishment of the review body, its staffing and planned budget were approved by the Ministry of Education, Youth and Sports in June 2016. A pupil or

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<sup>128</sup> Czech Republic, Decree No. 27/2016, on the education of pupils with special educational needs and talented pupils, 28 January 2016; <https://www.zakonyprolidi.cz/cs/2016-27>.

<sup>129</sup> Ministry of Education, Youth and Sports (2016), *Informace ke společnému vzdělávání* (Information on inclusive education); <http://www.msmt.cz/vzdelavani/spolecne-vzdelavani-1>.

<sup>130</sup> Committee of Ministers (2016), *Complementary Report on the execution of the judgment in D. H. and Others*, 6 September 2016; <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a89f0>.

his/her statutory representative (or the Czech School Inspectorate or the child protection authority) now have the ability to approach the National Institute for Education with a request to review a report and make a recommendation regarding the education of a particular pupil with special educational needs.

According to the amended Section 16(11) of the Schools Act, upon the engagement of a teaching assistant, a school can claim an increase in finance provided from the state budget with the consent of a regional office or Ministry. In 2015, the Czech Ombudsman criticised the lack of teaching assistants for financial reasons, given that parents of pupils with special educational needs often had to co-finance the services of such assistants (mainly because the regional office had not provided sufficient finance to the school). The Ombudsman stated that this causes not only indirect discrimination according to Section 3(2) of the Anti-discrimination Act, but is also a violation of the right to education protected by Article 33(2) of the Czech Charter of Fundamental Rights and Freedoms. The Czech Ombudsman therefore recommended a reform of regional financing of education in order to secure a more systematic distribution of resources.

The amendment to the Schools Act introduces an important control mechanism to address concerns about arbitrary conflicts of interest and decisions taken by special pedagogical centres (*speciálně pedagogická centra*) – SPCs.<sup>131</sup> The SPCs provide pedagogical, psychological and other help to clients with disabilities (complex diagnoses, individual and group work with pupils and so on). The amendment establishes in Section 16b the right of a pupil and a school to appeal to an independent central authority<sup>132</sup> against a decision taken by the SPC. This central authority is empowered to review the evaluation of the educational needs of the child and if necessary, to change the decision of the SPC. The amended Section 16a defines the function of special counselling centres, which provide consulting help on request by a pupil or their statutory representative. These centres issue reports and recommendations, which are necessary for the implementation of certain supporting measures.

The SPCs can choose from variety of up-to-date tests measuring intelligence, however, those tests cannot be the sole basis for determining special education needs. New tests of adaptive skills (social and practical skills) have been developed. Efforts to develop the test of adaptive skills and to intensify the application of dynamic diagnostics in practice continue.<sup>133</sup>

The SPCs make suggestions to the schools where pupils in need of assistance study. The Czech School Inspectorate found that more than 80 % of schools follow these suggestions entirely.<sup>134</sup>

Further methodological support might be provided within a project concerned with quality inclusion counselling development (focused on raising the level of counselling and unifying the practice of SPCs), which is being implemented in 2016-2019.

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<sup>131</sup> Czech Republic, Decree No. 73/2005, on the education of children with special educational needs (*Vyhláška č. 73/2005, Ministerstva školství, mládeže a tělovýchovy*), 9 February 2005; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=73~2F2005&rpp=15#seznam>; Czech Republic, Decree No. 72/2005, on providing consulting services in schools and school advisory institutions (*Vyhláška č. 72/2005, Ministerstva školství, mládeže a tělovýchovy*), 9 February 2005; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=72~2F2005&rpp=15#seznam>.

<sup>132</sup> Pedagogical and Psychological Counselling Division of the National Institute for Education.

<sup>133</sup> Committee of Ministers (2016), *Complementary Report on the execution of the judgment in D. H. and Others*, 6 September 2016; <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806a89f0>.

<sup>134</sup> Czech School Inspectorate (2018), *Quality and efficiency of education and educational system in the school year 2017/2018 (Kvalita a efektivita vzdělávání a vzdělávací soustavy ve školním roce 2017/2018)*; [https://www.csicr.cz/cz/Dokumenty/Vyrocní-zpravy/KVALITA-A-EFEKTIVITA-VZDELAVANI-A-VZDELAVACI-S-\(1\)](https://www.csicr.cz/cz/Dokumenty/Vyrocní-zpravy/KVALITA-A-EFEKTIVITA-VZDELAVANI-A-VZDELAVACI-S-(1)).

An objective criticism has arisen concerning the lack of familiarisation and training of teachers. However, various training courses for teachers, special teaching centres, school psychologists and special teachers have been organised under an initiative of the ministry. Continuous education of preschool, primary and secondary school teachers is taking place from February 2016 until December 2018. Special information courses, workshops and conferences have also been organised for headteachers, teachers and parents. In 2016, the ministry established an expert team for inclusive education, which should independently contribute to a broad debate related to inclusive education and its economic and legal aspects. Moreover, the ministry has issued a methodology providing an academic commentary on the supporting measures, the working methods of special teachers, frequently asked questions and so on. Such collective education was a no. 1 priority for the ministry for 2016 and its website provides various documents, such as a timetable of implementation of collective education, a guide for headteachers, lists of information and education activities and so on.<sup>135</sup> However, there is specific criticism from the schools about the fact that the ministry's support is not sufficient and that schools encounter various difficulties while implementing the inclusive education measures.<sup>136</sup>

Nevertheless, the National Institute for Education offers on its websites various materials and studies on inclusive education. It also provides email and telephone advice related to supporting measures or diagnostics. The ministry's main partner is the National Institute for Further Education, which organises courses for teachers in order to offer them further education.<sup>137</sup>

As a result of the amendment to the Schools Act (Act No. 82/2015), from September 2016, 'practical' schools must change their status to become a mainstream school or a mainstream school with a class or group of pupils with disabilities that are specified in Section 16(9),<sup>138</sup> or a school intended for pupils with disabilities according to Section 16(9). If the establishing entity of a practical school decides that the practical school will continue to educate in a class under Section 16(9), the headmaster is obliged to ensure compliance with this provision as regards to keeping the current pupils and admission of such new pupils to these schools.

In August 2017 an amendment to Decree No. 27/2016, on the education of pupils with special needs, was adopted. The amendment reduces the administrative burden, as some procedures seemed to be unnecessary. This meant a complicated plan for supplementary pedagogical assistance was to be done in fewer cases, which led to a 21 % increase in applications for supplementary measures for disadvantaged pupils.<sup>139</sup> Furthermore, the amendment increased the maximum number of pupils in a group (from four to six pupils) that may be provided with a subsidiary pedagogical intervention.<sup>140</sup> Another amendment came into force in 2018 and, among other changes, pedagogical assistants were classified into lower salary grades.<sup>141</sup>

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<sup>135</sup> Ministry of Education, Youth and Sports, *Priorita č. 1 – společné vzdělávání* (Priority No. 1 – collective education); <http://www.msmt.cz/vzdelavani/spolecne-vzdelavani-1?lang=1>.

<sup>136</sup> See, for example: *Učitelské profesní sdružení* (Professional association of teachers); <http://kantor8.webnode.cz/otevreny-dopis-ministryni-skolstvi/>.

<sup>137</sup> National Institute for Further Education (*Národní institut pro další vzdělávání*); <http://www.nidv.cz/cs/>.

<sup>138</sup> The provision allows only pupils with intellectual, physical, visual, hearing disabilities, severe speech disorders or severe developmental disorders, to be placed in a special school, class or department.

<sup>139</sup> Czech School Inspectorate (2018), *Quality and efficiency of education and educational system in the school year 2017/2018 (Kvalita a efektivita vzdělávání a vzdělávací soustavy ve školním roce 2017/2018)*; <https://www.csicr.cz/cz/Dokumenty/Vyrocní-zpravy/KVALITA-A-EFEKTIVITA-VZDELAVANI-A-VZDELAVACI-S-1>.

<sup>140</sup> Czech Ministry of Education, Youth and Sports (2017), Decree no. 27/2016 as subsequently amended 1 September 2017 (*Vyhláška č. 27/2016 Sb. ve znění účinném od 1. 9. 2017*), available at: <http://www.msmt.cz/dokumenty-3/vyhlaska-c-27-2016-sb-o-vzdelavani-zaku-se-specialnimi-1?lang=1>.

<sup>141</sup> Czech Ministry of Education, Youth and Sports (2017), Decree no. 27/2016 as subsequently amended 1 January 2018 (*Vyhláška č. 27/2016 Sb. ve znění účinném od 1. 1. 2018*), available at: <http://www.msmt.cz/dokumenty-3/vyhlaska-c-27-2016-sb-o-vzdelavani-zaku-se-specialnimi-2>.

During the enactment process, the Ombudsman raised the concern that the process of evaluation of the suitable form of education for a pupil is too long and may take more than 10 months. This concern has not been acted upon.

Although more than two years have passed since the new rules were introduced, there is currently very little public debate about the evaluation of the new rules and their results. It appears that the changes in the education system have helped to create an environment where more of the pupils participate in mainstream education and obtain individual support needed to succeed (e.g. pedagogical assistants). Notwithstanding that, it seems that there is still some resistance in practice against the new approach and that the change of law has not always been followed by a change of practice. Also, limited capacities of some schools and budgetary restrictions seem to present an issue, and there have been cases where parents had to contribute to salary costs of pedagogical assistants as the school could not fully fund them. In a first decision from March 2018, this was confirmed to represent direct discrimination.<sup>142</sup> Nevertheless, limited funds may remain an issue in near future, as the estimate of the costs of support measures does not include all students with special educational needs.

An amendment to Decree No. 27/2016 is expected in 2019. As a result of the insufficient public debate, it is not entirely clear whether there will be more substantial changes to the system. Some politicians still show a rather reserved stance towards the new rules.

#### c) Trends and patterns regarding Roma pupils

In the Czech Republic, there are specific patterns in education regarding Roma pupils, such as segregation. Such segregation has been declared as discrimination in relation to their right to education in the famous ECtHR judgment in *D.H. and Others v. the Czech Republic* back in 2006.<sup>143</sup> Since the decision was issued, numerous measures have been taken by the Government to remedy this (including also the 2016 changes to the Schools Act, described in the previous section). Notwithstanding this, two issues still remain apparent even 12 years after the ECtHR judgment: (i) higher prevalence of Roma pupils in classes for pupils with special needs / schools for pupils with disabilities, and (ii) accumulation of Roma children in schools or classes where they form a majority of pupils and are thus segregated.

According to the data of the Ministry of Education, Youth and Sports, there are 77 elementary schools in the Czech Republic where more than half the pupils are Roma. These schools provide education to more than 25 % of all Roma pupils in the Czech Republic. In a further 59 elementary schools, Roma pupils represent more than one third of pupils.<sup>144</sup>

In 2018, the Ombudsman issued a recommendation in which it provided a detailed analysis of the current situation and concluded that such segregation has the following consequences:

- Decrease in the likelihood of reaching higher degrees of education;
- Strengthening social exclusion and increasing social tension between groups of people;
- Increasing the difficulty of pedagogical work and creating a risk of overloading teachers;
- Exodus of pupils of majority ethnicity and teachers from some schools;
- Decreased economic activity of graduates of segregated schools;
- Increase of the costs for the segregated school;

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<sup>142</sup> Municipal Court in Prague (2018), decision No. 29 Co 466/2017, dated 15 March 2018.

<sup>143</sup> ECtHR, *D.H. and Others v. Czech Republic*, No. 57325/00, 13 November 2007.

<sup>144</sup> Ministry of Education, Youth and Sports (2017), *Zpráva ze zjišťování kvalifikovaných odhadů počtu romských žáků v základních školách ve školním roce 2017/18* (Report on determining qualified estimates of numbers of Roma pupils in elementary schools during the school years 2017/18).

- In summary, substantial loss in GDP of the Czech Republic.<sup>145</sup>

In May 2014, the Government adopted the Strategy for Roma Integration to 2020,<sup>146</sup> according to which the Czech Republic should eliminate differences in education between the majority population and Roma people. Securing access for Roma pupils to education of a good quality represents one of the goals of the strategy.

An important document issued by the Ministry of Education was the new action plan for inclusive education for the period 2016-2018, which determines collective education priorities, strategies and deadlines for specific measures. An evaluation of the action plan, as well as a new action plan for the period 2019-2022, is expected to be issued in 2019.<sup>147</sup>

Because of the persistent problem of segregation of Roma children in schools with reduced curricula rather than mainstream schools, the Czech Republic has been criticised repeatedly by international institutions. For example, infringement proceedings against the Czech Republic were initiated by the European Commission on 25 September 2014 for the alleged failure to secure equal access to education for Roma children. The proceedings call into question the Czech Republic's compliance with the Racial Equality Directive (2000/43/EC), Articles 2(2)(a), 2(2)(b), 2(3), 3(1)(g), which prohibit discrimination in access to education on the grounds of race or ethnicity.

Since 2015, the Committee of Ministers of the Council of Europe<sup>148</sup> expressed concern that the percentage of Roma pupils in classes or groups for children with 'mild intellectual disabilities' remains disproportionate and urged the authorities to ensure the necessary support to pupils entering or transferred to mainstream education. Furthermore, in its submission to the Committee of Ministers in 2018, Open Society Foundation stated that nearly 30 % of pupils with mild mental disability are of Roma origin, although only 3.6 % of all pupils are Roma.<sup>149</sup>

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

In the Czech Republic, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive.

According to Section 1(1)(j), the Anti-discrimination Act applies to 'access to goods and services, including housing, to the extent that they are offered to the public, or in their supply'. In addition to race or ethnicity, the grounds of age, disability, religion, belief and sexual orientation are also covered by the legislation.

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<sup>145</sup> Public Defender of Rights (2018), *Doporučení veřejné ochránkyně práv ke společnému vzdělávání romských a neromských dětí* (Suggestions of the Public Defender of Rights in the field of joint education of Roma and non-Roma children) – official journal, available at: [https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Inclusive\\_Education\\_of\\_Roma\\_and\\_non-Roma\\_Children\\_EN.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Inclusive_Education_of_Roma_and_non-Roma_Children_EN.pdf).

<sup>146</sup> Czech Republic, *Strategy for Roma Integration to 2020 (Strategie romské integrace do roku 2020)*, May 2014.

<sup>147</sup> The Ministry of Education, Youth and Sports (2016), *'Akční plan inkluzivního vzdělávání pro období 2016-2018'* (Action Plan on inclusive education for the period 2016-2018); [http://www.vzdelavani2020.cz/images\\_obsah/dokumenty/apiv\\_2016\\_2018.pdf](http://www.vzdelavani2020.cz/images_obsah/dokumenty/apiv_2016_2018.pdf).

<sup>148</sup> Council of Europe (2015), *1222 DH meeting of the Ministers' Deputies*, March 2015; [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c5200](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5200).

<sup>149</sup> Open Society Fund (2018), Rule 9 Submission to the Committee of Ministers; [https://osf.cz/wp-content/uploads/2018/06/DH\\_Rule\\_no\\_9\\_submission\\_-\\_2018-Nadace\\_OSF\\_OSJI.pdf](https://osf.cz/wp-content/uploads/2018/06/DH_Rule_no_9_submission_-_2018-Nadace_OSF_OSJI.pdf). The OSF refers to data acquired from the communication from the Czech Republic concerning the case of *D.H. and others v. the Czech Republic* of 15 February 2018.

a) Distinction between goods and services available publicly or privately

In the Czech Republic, national law distinguishes 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).

The Act on consumer protection contains a general clause prohibiting discrimination against consumers on any ground in the area of the provision of goods and services. In this respect discrimination means any differentiation between consumers that cannot be justified by legitimate reasons. The law applies only if the supply of goods and services is related to business activities. In all other respects, the Anti-discrimination Act applies. The wording of the Anti-discrimination Act shows that the application of the prohibition of discrimination is limited to the sale of goods and provision of services carried out in public and targeted at the public. The provisions of the Anti-discrimination Act do not apply to goods and services offered or provided on a private basis (e.g. offering goods to members of a private association).

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

In the Czech Republic, national legislation prohibits discrimination in following area: housing as formulated in the Racial Equality Directive.

The Anti-discrimination Act applies to the material scope of 'housing' defined within the wider scope of services provided and offered to the public, as specified in Section 1(1)(j); such a term would be interpreted to cover social housing as well. In addition to race or ethnicity, the grounds of age, disability, religion, belief and sexual orientation are covered by the legislation.

a) Trends and patterns regarding housing segregation for Roma

In the Czech Republic, there are patterns of housing segregation and discrimination against Roma.

The law does not contain any specific prohibition of segregation in housing. Czech cases of discrimination in housing with regard to Roma have been concerned with housing of a lower standard rented by private owners, of a type most suited to the provision of temporary or short-term shelter accommodation. Such housing is usually provided on the basis of contracts to provide 'accommodation' only, instead of full tenancy agreements. These accommodation contracts also provide lower levels of legal security for the person occupying the accommodation than tenancy agreements do. However, Roma encounter discrimination both from other tenants and from private providers of housing. This leads to Roma being concentrated in segregated areas, where certain issues related to low stability or security of tenure arise. On the other hand, this can also be attributed to the total lack of social housing programmes in the municipalities. In respect to municipal housing, there is very little chance that any citizen, regardless of ethnicity, would be provided access to social housing under more profitable conditions, as the availability of such housing is too low. This is because new municipal flats are not being built and applicants often have to wait for previous residents to leave.

Another important topic affecting the Roma community and their housing segregation is the recent development regarding social benefits provided for accommodation. Czech law defines two main benefits for housing purposes: a housing contribution (*příspěvek na bydlení*) provided on the basis of Act No. 117/1995 on state social support, and a supplementary housing contribution (*doplatek na bydlení*) provided on the basis of Act No. 111/2006 on help in material need.



The provision of the latter allowance has been affected by an amendment to the Act on help in material need with effect from 1 June 2017 (Act No. 98/2017). Under the new rules, individuals cannot claim supplementary housing contribution if the apartment or accommodation they use is located in an area with an increased incidence of socially undesirable phenomena, declared as such by a decree issued by an authorised municipality office (i.e. some municipal authorities who have the competence to also decide in matters of smaller municipalities in their surroundings) upon request of the municipality in question, following a consultation with certain bodies (the police, child protection agencies etc.). Reasons to issue such decree may include an increased occurrence of acts against public order, acts having adverse effects on children or similar undesirable phenomena.

The new rule was introduced based on a proposal by an individual member of Parliament. It was argued that the supplementary housing contribution is often misused by speculators (owners of various lodging houses) located in certain areas who provide housing under very unsatisfactory conditions for high prices to those who would not be able to find more appropriate housing. It was also argued that the new rule provides municipalities with a measure to avoid the segregation of people in need and the establishment of neighbourhoods with a high occurrence of negative social patterns that may represent a safety risk and can be replicated by other inhabitants.

In practice, many municipalities have exercised this option. In some cases, it was even proposed that a whole city (Kladno) would be declared as an area with an increased incidence of socially undesirable phenomena. Given that the consequence of the new rules is forfeiture of the right to supplementary housing contribution, individuals who were unable to fund their housing without the contribution had no other option than to leave their place of residence.

The law has been subject to strong opposition by some NGOs as well as some left-wing politicians. It is argued that the new rules do not combat any of the undesirable phenomena but merely enable some municipalities to take advantage of the situation by transferring individuals in need to another location. In addition, the new rules disadvantage those who need the support of the state in order to have reasonable housing. In December 2017, a group of members of the Czech Senate filed an application to the Czech Constitutional Court, claiming annulment of the provisions due to their conflict with the Constitution, in particular the principles of equality, right of movement and residence and the unconditionality of human rights. The decision is expected in 2019.

## **4 EXCEPTIONS**

### **4.1 Genuine and determining occupational requirements (Article 4)**

In the Czech Republic, national legislation provides for an exception for genuine and determining occupational requirements.

Genuine and determining occupational requirements are defined in Section 6(3) of the Anti-discrimination Act, as well as in Section 16(3) of the Labour Code. The Anti-discrimination Act prescribes that differential treatment can be justified if there is a factual reason based on the nature of the work or activity.

According to the Anti-discrimination Act an exception is possible if it is based on 'substantive grounds consisting in the nature of the performed work or activities and the requirements made are appropriate to that nature'. Differential treatment does not constitute discrimination where, by reason of the nature of the labour activities or context in which they are to be carried out, it follows that such a ground constitutes a genuine and determining occupational requirement, provided that the objective for such exception is legitimate and the requirement is proportionate. No case law is available in this regard.

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

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

Section 6(4) of the Anti-discrimination Act contains an exception applicable to 'dependent work in churches or religious organisations, where from the character of such work or the circumstances in which it is carried out, it follows that a person's religion, belief or opinions constitutes a genuine and determining, justified and legitimate occupational requirement with respect to the ethos of the church or religious organisation'. Judicial clarification is needed as to whether this exception could also cover other grounds (e.g. sexual orientation); the likelihood that a court would confirm any unequal treatment not based on religion, belief or opinions as not discriminatory seems low.

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

In the Czech Republic, national legislation provides for an exception for the armed forces in relation to age and disability discrimination (Article 3(4), Directive 2000/78/EC).

Section 77(2) of Act No. 361/2003 on service by members of the security forces does not provide for disability as a protected ground.<sup>150</sup> Age is provided as a ground for discrimination in this legislation. Section 2(3) of Act No. 221/1999 on service by members of the armed forces, governing service by members of the armed forces and security forces (fire fighters, customs officers, prison officers, the Security Information Service, officials of the Office for International Contacts and Information, police officers and soldiers) does not provide for age and disability as protected grounds.<sup>151</sup>

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<sup>150</sup> Protected grounds are sexual orientation, gender, language, belief or religion, political or other opinions, membership in trade unions and other associations, property, origin, race, skin colour, nationality, ethnic or social origin, age, pregnancy and maternity, marital and family status, obligations towards the family.

<sup>151</sup> Protected grounds are race, skin colour, gender, sexual orientation, belief and religion, nationality, ethnic or social origin, property, origin, marital and family status, obligations towards family, maternity, pregnancy or breastfeeding.

The Czech Ombudsman has challenged the compliance of the aforementioned acts with Directive 2000/78/EC.<sup>152</sup> The Ombudsman expressed the view that where the EU law enables Member States to stipulate a certain exception from the right to equal treatment, the Member State must define the extent of such exception. A full exclusion of the rule of equal treatment as such cannot be deemed a lawful exception. In the view of the Ombudsman, this also completely negates the requirement of prohibition of discrimination on the basis of disability with regard to all matters concerning all forms of employment, in the sense of Article 27(1)(a) of the UN Convention, and can also be deemed a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The above opinion was raised with regard to the case of an HIV positive police officer who was, in accordance with the Czech bylaws regulating the necessary health requirement for public service, dismissed from the police service due to his HIV status despite his claim that (a) his infection was asymptomatic, i.e. without consequences upon his health state, and (b) the nature of his work (chief assistant at the Unit for Protection of Constitutional Officials) did not represent any transmission risk.

Despite the fact that dismissal had formally occurred in accordance with the legal regulation, the Ombudsman concluded that it constituted discrimination. The complainant subsequently filed a lawsuit against the state (represented by the Ministry of the Interior), claiming that he has been discriminated against, and seeking compensation of approximately EUR 20 000 (CZK 500 000). The Czech Supreme Court has, however, ruled that civil courts (to which the complainant filed his lawsuit) are not competent to try discrimination cases of police officers; based on the court view, the correct approach would be to claim discrimination towards the Police President and, if the claim is not satisfied, challenge a decision of the Police President in front of an administrative court.<sup>153</sup> The complainant filed a constitutional complaint, but it was refused by the Constitutional Court.<sup>154</sup> It is not yet known whether the complainant took any further steps to assert his rights.

#### **4.4 Nationality discrimination (Article 3(2))**

##### a) Discrimination on the ground of nationality

In the Czech Republic, national law includes exceptions relating to difference of treatment based on nationality.

Anti-discrimination provisions apply to every natural person, irrespective of nationality, citizenship or residence status. However, according to Section 1(2) of the Anti-discrimination Act, the law does not apply to legal regulations in respect of the conditions of entry and stay of third-country nationals and stateless persons in the territory of the Czech Republic. According to the Schools Act, equal access to education is guaranteed to every Czech citizen, EU national and any lawfully residing foreigner. In respect of primary education, the law guarantees its provision irrespective of the legality of a foreigner's residence in the Czech Republic.<sup>155</sup>

In the Czech Republic, nationality (as in citizenship) is not explicitly mentioned as a protected ground in the national Anti-discrimination Act.

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<sup>152</sup> Public Defender of Rights (2013), 'Investigation Report: Dismissal from Service on the Grounds of Diagnosis of an HIV Infection', (*Zpráva o šetření Propuštění ze služebního poměru z důvodu diagnostikování nemocnění virem HIV*), available at: [https://www.ochrance.cz/fileadmin/user\\_upload/ESO/157-2012-DIS-JSK-EN\\_01.pdf](https://www.ochrance.cz/fileadmin/user_upload/ESO/157-2012-DIS-JSK-EN_01.pdf).

<sup>153</sup> Supreme Court, No. 21 Cdo 2550/2018, 15 August 2018 [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/145915E82404BE71C125833100477F40?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/145915E82404BE71C125833100477F40?openDocument&Highlight=0).

<sup>154</sup> Constitutional Court, No. III. ÚS 3915/18, 27 December 2018, <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=105040&pos=1&cnt=1&typ=result>.

<sup>155</sup> Czech Republic, Amendment to the Schools Act No. 343/2007, Section 20.

Section 2(3) of the Anti-discrimination Act provides for sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, and 'nationality' (*národnost*) as protected grounds. This term 'nationality' (*národnost*) is not identical to 'citizenship' (*občanství*). According to prevailing interpretation, the term 'nationality' (*národnost*) means a person's membership of a particular nation as a historically established community of people characterised by common historical development, specific culture, common language, or relation to a particular territory etc. However, no clear judicial interpretation exists. In fact, the Czech Ombudsman has previously mentioned alleged discrimination based on citizenship, e.g. against citizens of other EU Member States in access to municipal housing.<sup>156</sup>

On 1 January 2018, the Anti-discrimination Act was amended to contain a reference to Regulation (EU) no. 492/2011. In situations relating to the free movement of workers where the said regulation applies, EU citizenship is also deemed a discrimination ground.<sup>157</sup>

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

The Anti-discrimination Act applies to discrimination on the ground of nationality (*národnost*). This term is not identical to 'citizenship' (*občanství*). In cases of indirect discrimination, there could be significant overlap between the grounds of nationality and racial or ethnic origin.

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

a) Benefits for married employees

In the Czech Republic, it is uncertain whether it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees who are married.

The Czech labour law is silent as to whether it would be lawful to provide benefits only to those employees who are married.

As a general rule, employers are allowed to provide any benefits and set any conditions they find appropriate as long as they comply with the applicable legal regulations, including equal treatment and anti-discrimination rules.

In that respect, it could be argued that although it may appear justified to provide additional benefits to employees with children, there are no reasons why married employees should be treated more preferably by employers. As a result, it could be argued that benefits provided only to married employees are discriminatory but there has been little public debate around this and judicial clarification is needed.

For example, if a public transport company provides a family travel discount to its employees, the discount includes parents, their children and their wife or husband. In the case of an unmarried same-sex couple raising one partner's child, the discount will only be extended to the child and the same would happen in the case of an unmarried opposite-sex couple. Marriage and registered partnership are not comparable legal concepts in the Czech Republic, as both family law and other special laws distinguish between marriage and registered partnership. However, discrimination against registered partnerships might be found in the tax law, social security law, medical insurance etc. This is one of the reasons why NGOs supporting the LGBT community have recently started promoting the idea of

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<sup>156</sup> Public Defender of Rights (Ombudsman) (2010), 'Žadatelé o obecní byty jsou posuzováni podle diskriminačních kritérií', (Assessment criteria for applicants to municipal housing); <http://www.ochrance.cz/aktualne/tiskove-zpravy-2010/zadatele-o-obecni-byty-jsou-posuzovani-podle-diskriminacnich-kriterii/>.

<sup>157</sup> Chamber of Deputies (2015), *Sněmovní tisk 688/0* (Press of the Chamber of Deputies No. 668/0); <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=688&CT1=0>.

introducing a right to marry (rather than enter into a registered partnership) for same-sex couples.

Given that there is currently no case law on the topic, judicial clarification of the approach outlined above would be needed.

b) Benefits for employees with opposite-sex partners

In the Czech Republic, it constitutes unlawful discrimination in national law if an employer provides benefits only to those employees with opposite-sex partners.

In the view of the author, the distribution of benefits only to opposite-sex partners may be contrary to Section 2(3) of the Anti-discrimination Act, as it could constitute direct discrimination on the ground of sexual orientation. Such benefit terms, however, seem to be extremely rare in practice.

No case law is available concerning this issue.

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

In the Czech Republic, there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC).

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

##### **4.7.1 Direct discrimination**

In the Czech Republic, national law provides an exception for direct discrimination on age.

The exceptions related to the ground of age in regard to access to employment and occupation are identified in Section 6(1) of the Anti-discrimination Act. This section allows for two exceptions linked to age only. The first allows for differential treatment on the ground of age where the law sets a condition of minimum age, professional experience or period of employment. In order to qualify for the exception, the condition must be essential for proper exercise of the employment or occupation or for access to certain rights and obligations connected with the employment or occupation. 'Essentiality' of a minimum age must be interpreted in the sense of Article 6(1) of the Directive 2000/78.

The second exception allows for differential treatment where the requirement for vocational training necessary for the proper performance of occupational duties is disproportionate in comparison to the date at which the person applying for the job reaches pensionable age. The aim of this provision is to prevent unreasonable costs of measures that an employer must provide in order to enable the performance of a job (for example specialised training that takes longer than the period until retirement). An additional exception is related to age and sex and allows for differential treatment in regard to different pensionable ages for men and women. This exception does not apply to social security provisions for workers.

Apart from the specific exceptions provided for in Section 6 of the Anti-discrimination Act, general justification for differences of treatment on the ground of age is applicable on the basis of Section 7(1), if the difference of treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This provision goes beyond Directive 2000/78 and applies to less favourable as well as more favourable treatment (positive measures). There are no judicial cases on it yet.

a) Justification of direct discrimination on the ground of age

In the Czech Republic, national law provides for justifications for direct discrimination on the ground of age.

Besides identifying specific exceptions on the ground of age, national law permits differences of treatment based on age in many other respects. These include in the first place, age requirements for certain professions, established by specific laws. The general test for lawful differential treatment applied by the Constitutional Court, given in 1995, was broad in character: 'It is for the state to lay down conditions under which one group of persons is given more advantages than are enjoyed by others on the precondition that this occurs in the public interest and for public benefit ...'<sup>158</sup> The test of the Czech Constitutional Court corresponds more closely to the position taken by the CJEU in C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*,<sup>159</sup> than to the test applied by the CJEU in C-144/04, *Mangold v. Helm*.<sup>160</sup> The Anti-discrimination Act provides for a justification test which is along the lines of Article 6 of the Employment Equality Directive 2000/78/EC but there is no case law related to it yet.<sup>161</sup>

b) Permitted differences of treatment based on age

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

Section 6 of the Anti-discrimination Act allows differences of treatment based on age for the proper performance of or access to specific rights and duties in employment or occupation and to the difference in pensionable age for men and women.

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

In the Czech Republic, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

1. Directly fixed conditions of age:

- minimum age requirements for employment/self-employment;
- minimum and maximum age limits set for certain professions.

2. Indirectly fixed conditions of age:

- conditions of pay depending on years of experience;
- minimum age requirements set indirectly for professions requiring a certain level of education and a minimum period of training;
- age requirements set indirectly for professions requiring specialist skills.

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<sup>158</sup> Constitutional Court of the Czech Republic, No. Pl. ÚS 9/95, decision of 28 February 1996. The case was related to provisions of an amendment to the Act on service by members of the armed forces that omitted certain periods when calculating serving soldiers' entitlements to some occupational benefits; this act is no longer valid. A group of MPs called for the repeal of this law, with regard to the right to fair remuneration for work in accordance with to Article 28 of the Charter. The Constitutional Court upheld the law and rejected the complaint.

<sup>159</sup> European Court of Justice, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05, 16 October 2007; <http://curia.europa.eu/juris/document/document.jsf?text=&docid=70359&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=299971>.

<sup>160</sup> European Court of Justice, *Mangold v. Helm*, C-144/04, 22 November 2005; <http://curia.europa.eu/juris/document/document.jsf?text=&docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=299971>.

<sup>161</sup> See, for example, Constitutional Court of the Czech Republic, No. Pl. ÚS 31/13 (162/2014), decision of 10 July 2014; [http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-31-13\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-31-13_1).

These requirements are, in theory, justified by the state's interest in the responsible performance of certain important occupations and its interest in public safety. Because these requirements are laid down in special laws, there are two possible ways of challenging these conditions or requirements in the ordinary courts, as follows.

First, there is the possibility of challenging their conformity with the Constitution. Secondly, there is the possibility of invoking the direct or indirect effect of EU legislation and having the ordinary law set aside because of the primacy of EU law. This would be the case when the legislation or its interpretation contradicts EU legislation.

In more than one of its later judgments, the Constitutional Court asserted that arbitrariness should also be avoided, thus acknowledging that stricter tests are applied by other bodies: '... in repeatedly expressed opinions of the UN Committee for Human Rights, inequality is admitted (...) only on the precondition of non-arbitrariness, that is, that the inequality is based on reasonable and objective criteria'.<sup>162</sup> However, it seems that the opinion of the UN Committee did not fully change the opinion of the Constitutional Court.

'It is for the state to decide whether one group of people will be provided with more advantages than another in the interest of ensuring the functions of the state. The state shall not proceed in a completely arbitrary manner; the law can only award benefit to one group and at the same time place disproportionate duties on others with reference to public values.'<sup>163</sup>

In the Czech constitutional system, there is relatively restricted, but gradually increasing space for the judiciary to consider whether or not the limits set by national legislation meet the constitutional justification criteria or standards required by EU legislation.<sup>164</sup>

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

In the Czech Republic, there are special conditions set by law for younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

Special conditions for younger workers are discussed below (see section 4.7.3). However, it is difficult to decide whether their purpose is to promote vocational integration. Instead, they seem to be in place to protect the healthy development of children and young people under 15 years of age.

Special protection is provided for parents of children under 10 years of age, in order to enable them to organise their caring responsibilities around their economic activity (support when caring for a family member). The law also makes provision for caring for another family member whose state of health means it is necessary for somebody to care for them. The carer is entitled to sickness benefits, which are regarded as a salary substitute. However, the amounts provided are quite small.

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<sup>162</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), No. Pl. ÚS 33/96, decision of 4 June 1997; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-33-96>.

<sup>163</sup> Constitutional Court of the Czech Republic (*Ústavní soud*), No. Pl. ÚS 33/96, 4 June 1997. As a result of an amendment to the Act on higher education, permanent employment contracts of teachers in higher education institutions were changed to contracts terminating on 30 September 1994. A group of MPs called for the amendment to be revoked, on the basis of the Charter and international agreements, for example ILO Discrimination (Employment and Occupation) Convention No. 111. The Constitutional Court upheld the constitutional conformity of the law and rejected the complaint.

<sup>164</sup> Decisions of the Constitutional Court of the Czech Republic (*Ústavní soud*), No. II.ÚS 1174/09, 13 January 2010, <http://nalus.usoud.cz/Search/GetText.aspx?sz=2-1174-09>; No. Pl. ÚS 53/04, 16 October 2007; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-53-04>; <http://nalus.usoud.cz/Search/GetText.aspx?sz=Pl-42-04>.



In practice, this protection usually applies only to dependent employment, not to self-employment.<sup>165</sup> There are no special conditions for the protection of older workers.

### **4.7.3 Minimum and maximum age requirements**

In the Czech Republic, there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

#### **Directly fixed conditions for age**

##### Minimum age requirements for employment/self-employment

The Labour Code sets a general minimum of 15 years of age for persons entering into contracts of employment (together with the requirement that the person must have finished their mandatory elementary school attendance before commencing work).<sup>166</sup> Work by children younger than 15 years of age is forbidden, except for artistic, cultural, advertising or sporting activities regulated by conditions established by the Employment Act. Such activity must be proportionate to the child's age, not dangerous, must not endanger their education, school attendance or presence in educational programmes and must not be harmful to their healthy physical, psychological or moral development. Such activity may be carried out by the child only on the basis of permission issued by employment offices and up to a maximum limit, as defined by the law.

The age threshold differs for specific professions, with the minimum age often set at 18 years and usually dependent on some material condition for performing a specific type of work. Certain types of employment are prohibited for workers under the age of 18 years. The general minimum age for self-employment is 18 years, but in specific cases it can differ in accordance with special requirements for various types of self-employment, for example, the training or qualifications necessary for certain activities to be carried out properly. Since 2014, according to the new Civil Code, it is possible to become self-employed from the age of 16 in certain exceptional cases. Minors might be recognised as having legal capacity if their ability to make their living is proved and they have the consent of their legal representatives.<sup>167</sup>

Employees younger than 18 years of age have a set length of working day and certain working conditions under the Labour Code: it prohibits night work and work exceeding normal working hours for workers under the age of 18 years; in certain circumstances it requires employers to secure medical examinations of employees under 18 years of age; and it also restricts overtime.

In some cases, there are minimum age requirements to guarantee some experience necessary to perform certain jobs or functions. The minimum age for judges is 30 years. The minimum age for the functions of the Czech Ombudsman and his or her deputy and for judges of the Constitutional Court is 40 years. The same minimum age applies for members of the Senate. The minimum age for eligibility to be elected as a member of the Chamber of Deputies is 21 years.

##### Maximum age limits set for certain professions

There are maximum age limits for some professions. Czech law typically states a mandatory retirement age for certain professions, and upon reaching the mandatory retirement age, individuals may no longer request access to employment at the relevant

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<sup>165</sup> Czech Republic, Act No. 187/2006 on sickness insurance.

<sup>166</sup> In the Czech Republic, compulsory education is for nine years, but the maximum age by which this requirement must be complied with is 17 years.

<sup>167</sup> See Czech Republic, Act No. 89/2012, Civil Code, 3 February 2012, Section 37.

position. Cases where mandatory retirement age is imposed are described in section 4.7.4(c) below.

### **Indirectly fixed conditions of age**

#### Conditions of pay dependent on years of experience

The Labour Code governs the pay of state employees, employees of state organisations and local government. Pay is determined according to set categories and minimum pay rates, for which employees qualify in accordance with a combination of criteria relating to qualifications and years of experience.

#### Minimum age requirements set indirectly for professions requiring a certain level of education and a minimum period of training

Indirect minimum age requirements are common for professions and occupations governed by special laws, for instance occupations that require a specific type of education and additional periods of training. Such requirements apply to medical doctors, judges, lawyers, prosecutors and many other professions. A minimum age requirement is indirectly imposed by the years necessary to complete the required education and training.

#### Age requirements set indirectly for professions requiring specialist skills

These requirements are indirectly derived from the skills required to perform the profession. For instance, in order to perform their professional duties, different types of services, such as the fire service, prison service or army, require certain occupational skills determined by specific laws and requiring certain physical and psychological health conditions. These laws usually do not include age as a protected ground of discrimination (see section 2.1 above).

### **4.7.4 Retirement**

#### a) State pension age

In the Czech Republic, there is no state pension age at which individuals must begin to collect their state pensions. The minimum pension age for individuals born after 1971 is 65; for individuals born in or before 1971, the minimum pension age depends on a number of criteria (year of birth, gender, and, for women, the number of children they have).

If an individual wishes to work longer, the pension can be deferred.

An individual can collect a pension and still work.

#### b) Occupational pension schemes

In the Czech Republic, there are no mandatory occupational pension schemes or employer-funded pension arrangements. However, employers can contribute to their employees' private pension or life-insurance contributions, which are the subject of contracts between individual employees and private pension funds.

Usually, the age when people can begin to receive payments from private pension is 65.

If an individual wishes to work longer, payments from such occupational pension schemes can be deferred.

An individual can collect a pension and still work.

c) State imposed mandatory retirement ages

In the Czech Republic, there are state-imposed mandatory retirement ages only for certain specific professions. This includes those for judges and public prosecutors, whose office is terminated *ex lege* at the end of the year in which they reach 70 years of age. The service of state employees ceases on 31 December of the year in which the member reaches the age of 70 years.<sup>168</sup> Similarly, the service of a member of the security forces (for example the Police of the Czech Republic, Fire Rescue Brigade, Prison Service) ceases on 31 December of the year in which the member reaches the age of 65 years.<sup>169</sup>

d) Retirement ages imposed by employers

In the Czech Republic, national law does not permit 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.

National law does not contain any specific provision in this respect.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age. Exceptions from this rule, as provided for certain specific professions, are mentioned above.

f) Compliance of national law with CJEU case law

In the Czech Republic, national legislation is in line with the CJEU case law on age in relation to compulsory retirement.

In the Czech Republic, there is no compulsory retirement age (except for certain professions mentioned above) and the national legislation is generally compliant with the CJEU case law.

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the Czech Republic, national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

The Czech Labour Code does not define any selection criteria for redundancy and leaves it up to the employer to determine such criteria. In some of its case law,<sup>170</sup> the Supreme Court has not accepted arguments of claimants that such criteria were discriminatory (however, in those cases the alleged discrimination did not relate to any of the discrimination grounds mentioned in the Anti-discrimination Act; in the first case, the claimant was claiming discrimination of university professors and associate professors against other members of the team with lower academic qualifications; in the second case, the claimant was claiming discrimination due to opinions expressed by the father of the claimant). Notwithstanding that, it is clear that a potential breach of equal treatment rules consisting in discrimination for some of the discrimination grounds is a valid reason to

<sup>168</sup> Czech Republic, Act No. 234/2014 on state service (*Zákon č. 234/2014 Sb., o státní službě*), 1 October 2014; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=234~2F2014&rpp=15#seznam>.

<sup>169</sup> Czech Republic, Act No. 361/2003 on service of members of security forces, 23 September 2003; <https://portal.gov.cz/app/zakony/zakon.jsp?page=0&nr=361~2F2003&rpp=15#seznam>.

<sup>170</sup> Judgment of the Supreme Court, file no. 21 Cdo 4574/2010, 28 February 2012, and Judgment of the Supreme Court, file no. 21 Cdo 2536/2011, 15 August 2012.

challenge redundancy. If an employer chose to select an individual to be made redundant on the basis of his/her age, the employee could claim unfair dismissal.

In practice, older employees can theoretically be impacted by redundancies in cases where the selection criteria relate to some elements of performance (e.g. flexibility, ability to learn new methods of work, speed of response etc.) where some older employees may be perceived as weaker than younger employees, or to salary level, given that senior workers may receive higher salaries. If the employer proves that the selection criteria was not age but some of the aforementioned considerations, it is unlikely that an employee could successfully take an action against the dismissal if the employer proves that the selection criteria were reasonable and the evaluation of such criteria was fair.

The Ombudsman ascertained discrimination in a case where two court employees were dismissed for redundancy. The employer decided to dismiss employees who were receiving a retirement pension. The employer also justified the selection of employees to be dismissed by preferring the mothers of minors because, according to the employer, these would have a lesser chance of finding another job. The Ombudsman declared that an employer cannot justify dismissals of older employees on the ground of a preference for mothers of minors while selecting workers for redundancy.<sup>171</sup>

#### b) Age taken into account for redundancy compensation

In the Czech Republic, national law provides for compensation for redundancy (severance pay). Such compensation is not affected by the age of the worker but is dependant on the seniority of employees.

The minimum amounts of severance pay are determined as follows:

- one average monthly earnings for employees with less than one year of service;
- two average monthly earnings for employees with more than one year but less than two years of service;
- three average monthly earnings for employees with more than one year but less than two years of service.

A higher severance pay can be stipulated in a collective agreement, internal policy or individual agreement. Higher amounts may also apply in case of some specific methods of distribution of working hours (known as an account of working hours).

As the statutory severance pay stops increasing after two years of service, there is little room to argue that age can have an important impact on the level of the redundancy compensation.

In 2017, the Czech Supreme Court issued a ruling regarding unequal treatment of people who receive old age pensions with regard to severance payments.<sup>172</sup> The claimant challenged the validity of a provision of the collective bargaining agreement that was in place at her employer's business. Under the provision, in the event of redundancy, the right to an additional severance payment on top of the statutory level was forfeited in the case of employees who were in receipt of the old age pension.

The Supreme Court reviewed the case and concluded that there are no justifying arguments for such unequal treatment and rendered the provision of the collective bargaining agreement invalid due to the conflict with the ban on discrimination.

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<sup>171</sup> Public Defender of Rights (2016), *Zpráva o šetření, sp. zn. 8024/2014/VOP* (Report on inquiry No. 8024/2014/VOP), Brno, Veřejný ochránce práv; <http://eso.ochrance.cz/Nalezene/Edit/3710>.

<sup>172</sup> Supreme Court, No. 21 Cdo 5763/2015, 18 January 2017, [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/57FAF5FF6117C51AC12580EB004C8E48?openDocument](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/57FAF5FF6117C51AC12580EB004C8E48?openDocument).

In subsequent proceedings before lower courts, the claimant should be awarded the additional severance payment to the amount set out in the collective bargaining agreement.

**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 the Czech Republic, 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 the Czech Republic, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

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

### a) Scope for positive action measures

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

Sections 7(2) and 7(3) of the Anti-discrimination Act provide for positive measures (i.e. positive action). The law allows for positive measures to be implemented within the whole material and personal scope of the law, including all grounds covered by the EU directives. The law forbids positive measures introducing rules of automatic preference.

It is worth highlighting that positive action is employed less in the Czech Republic than in some other European countries.<sup>173</sup>

### b) Quotas in employment for people with disabilities

In the Czech Republic, national law provides for a quota for people with disabilities in employment.

Under Section 67(2) of the Employment Act, companies with more than 25 employees must apply one or a combination of three measures:<sup>174</sup>

- Employ a certain percentage of employees with disability – i.e. individuals who are acknowledged as such by the social security authority (4 % of all employees).
- Commission goods or working programmes from employers who employ more than 50 % employees with disability working in specially established protected workplaces or from people with disability who are self-employed.
- Provide payments to the state budget for an employee with disability who should have been employed but was not. The amount of the payment for one person with disability who should have been employed is calculated as 2.5 multiple of an average month salary and is paid on a yearly basis.<sup>175</sup> This payment becomes a part of general state income and is not earmarked for any specific purpose. For example, there is no requirement to use these payments to develop programmes to assist people with disabilities.

The state pays allowances to employers whose staff comprise more than 50 % employees with disability.<sup>176</sup> The allowances provided constitute 75 % of the average wage in the Czech Republic in the preceding year for a person classified as having a full disability. For a person classified as having a partial disability or being disadvantaged on health grounds, the allowances constitute a 0.33 multiple of the average wage. Moreover, the state contributes to the establishment of protected workplaces for people with disability, which serves to arrange the necessary equipment. There is a condition that this protected workplace must be occupied for at least three years.

The quota system has been criticised for its lack of effectiveness by organisations for people with disabilities. Criticism has focused on the preference of employers for making payments to the Government. This may also be caused by the fact that there are no rules on automatic preference for individuals with disabilities.

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<sup>173</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 323.

<sup>174</sup> Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 81(2).

<sup>175</sup> Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 82(1).

<sup>176</sup> Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 78.

## 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

#### Civil judicial procedures (tort claim)

Section 10 of the Anti-discrimination Act introduced the possibility of a general anti-discrimination civil action. Victims of discrimination have the right to demand that 'discrimination be stopped, and that redress and satisfaction be given. Only when this would be unsatisfactory, in particular where the dignity of the person and their respect in society was considerably affected, do victims also have the right to claim monetary compensation'.<sup>177</sup> In addition, victims of discrimination can bring an action in accordance with special provisions of the Employment Act.<sup>178</sup> Section 133a of the Civil Procedure Code<sup>179</sup> and the shift of the burden of proof apply in both cases. The procedure is binding for the parties. There are no different procedures for employment in the private and public sectors.

According to a recent judgment of the Czech Supreme court, discrimination claims may also be filed following the death of the discriminated person by its close persons (such as close relatives) if they feel personally affected by the discrimination.<sup>180</sup>

#### Criminal judicial procedures

The Criminal Code sets penalties for crimes relating to racial discrimination and discrimination on the grounds of religion or belief.<sup>181</sup>

The Criminal Code covers only the most serious incidents, such as those involving racial hatred or violence, and acts motivated by hatred, violence on grounds of religion or belief or propagation of neo-Nazism. Crimes of racial hatred or violence or on the grounds of religion or belief are part of a group defined as crimes that gravely affect community relations, under Sections 352, 355 and 356 of the Criminal Code. These are crimes of violence against a group or an individual as a member of that group; crimes of defamation of a nation, ethnic group, race, belief or conviction; instigation of hatred against a group of persons and restriction of the rights and liberties of a group or an individual as a member of that group. Furthermore, support and expressions of support for movements aiming to suppress the rights and freedoms of others are punishable according to Sections 402 and 403 of the Criminal Code. The procedure is binding. There are no different procedures for employment in the private and public sectors.

#### Administrative judicial procedures

The Code of Administrative Court Procedure regulates judicial review of administrative decisions.<sup>182</sup> Besides other things the court reviews the decisions of administrative bodies, which have identified as discriminatory certain practices of petitioners. The procedure is

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<sup>177</sup> This is the exact formulation of the law, but in court practice, monetary compensation for discrimination is rarely awarded.

<sup>178</sup> See Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 4(10).

<sup>179</sup> Czech Republic, Act No. 99/1963, Civil Procedure Code, 4 December 1963.

<sup>180</sup> Supreme Court of the Czech Republic (*Nejvyšší soud*), no. 30 Cdo 2260/2017, 13 December 2017; [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/97BBF6819C18E0CFC12582550041967C?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/97BBF6819C18E0CFC12582550041967C?openDocument&Highlight=0).

<sup>181</sup> Czech Republic, Criminal Code (*Trestní zákoník*), 1 January 2010.

<sup>182</sup> Czech Republic, Act No. 150/2002, Code of Administrative Court Procedure (*Soudní řád správní*), 1 January 2003.



binding for the parties. There are no different procedures for employment in the private and public sectors.

### Administrative procedures

According to the Ombudsman's research of the period 2010-2014, victims of discrimination turned to administrative bodies more frequently than to courts, a situation that is probably caused by a number of barriers to access to the courts such as court fees, length of judicial proceedings etc. Administrative procedures cover both misdemeanours and administrative offences. Relevant administrative procedures provide investigative powers for administrative bodies and inspectorates, as established within the scope of specific laws. They are empowered to impose sanctions for prohibited activities and violations of obligations. However, they may not award compensation for damage to a victim of discrimination who has taken their particular claim to court pursuant to Section 10 of the Anti-discrimination Act.

The administrative bodies generally act *ex officio* and usually require no fee associated with accepting the complaint. Every administrative body has a duty to inform the complainant on its action regarding the claim and therefore, the complainant has free access to exclusive and necessary information.<sup>183</sup>

The duty to protect people from discrimination has been placed upon several administrative bodies in the Czech Republic – the National Labour Inspectorate, local labour inspectorates, the Czech Trade Inspectorate, the Czech School Inspectorate, supervising bodies in advertising and TV and radio broadcast, the Czech Telecommunications Office, the Energy Regulatory Office and the Czech National Bank. Those administrative bodies may impose sanctions, but they may also lead preventive actions. However, the Ombudsman stated that only a limited number of officers have sufficient legal qualification to deal with discrimination cases submitted to administrative bodies.

Those administrative bodies are generally competent to investigate misdemeanours and administrative offences involving discrimination and to impose sanctions. However, administrative bodies and inspectorates established in fields other than employment and trade inspection, which fall within the scope of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC), do not have administrative procedures to protect against discrimination in most cases. This is mainly due to the lack of material provisions in specific laws (see for example the Act on Czech agriculture and food inspection).<sup>184</sup>

Where the powers of other specialised inspectorates or administrative bodies do not apply, local government authorities (through their misdemeanour commissions) are vested with the power to investigate acts of discrimination.

The same situation exists in regard to professional self-governing organisations established to supervise specific occupations (e.g. the Czech Bar Association, the Union of Judges, the Czech Medical Chamber and many others).

### National Labour Inspectorate and Local Labour Inspectorates

In theory, natural or legal persons or employers who violate the Employment Act or the provisions of the Labour Code on discrimination may be fined up to EUR 40 000

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<sup>183</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p.109; <http://www.ochrance.cz/en/discrimination/research/>.

<sup>184</sup> Czech Republic, Act No. 188/2002 on Czech agriculture and food inspection (*Zákon č. 188/2002 Sb., o Státní zemědělské a potravinářské inspekci*), 20 March 2002.

(CZK 1 million).<sup>185</sup> In practice, however, the sanctions imposed are much lower. The procedure is binding for the parties.

The Employment Act defines the duties of employment offices<sup>186</sup> and the Administrative Code<sup>187</sup> governs their procedures. Procedures can be initiated by a complainant or on an employment office's own initiative. In the event that a complaint is initiated, the complainant is not an actual party in the administrative procedure. Penalties imposed by labour inspectorate bodies become income for the state budget. As part of the inspection, inspectoral authorities may enter the workplace, interview the employees and impose measures to remove the deficiencies identified through the inspection.

### Czech School Inspectorate

The Czech School Inspectorate is the national body responsible for ensuring schools comply with national legislation. It also monitors discrimination in the education system. The Education Act contains an open list of discrimination grounds because of a term 'other status'.<sup>188</sup> Every year, the Czech School Inspectorate issues an annual report, which includes discrimination cases. According to the 2018 report, in the school year 2017/2018, 20 complaints regarding discrimination were filed, 5 of which were evaluated as justified. No detailed data about the cases have been published.<sup>189</sup>

### Czech Trade Inspectorate

Monitoring of discrimination with regard to access to goods and services is governed by the Act on consumer protection, which refers to the powers of the Czech Trade Inspectorate (CTI), which is subordinate to the Ministry of Industry and Trade. Under the Act on the Czech Trade Inspectorate, the CTI is authorised to inspect legal and natural persons who sell or supply goods and services. The Czech Trade Inspectorate carries out supervisory activity in the sphere of goods and services in a situation where no special supervisory body exists. The law presupposes that investigations and sanctions must always be linked to findings by the CTI inspectors and does not allow administrative proceedings to be launched in response to petitions filed and evidence produced by other legal or natural persons. Although the CTI is required to collaborate with civil associations and use in its work complaints, information and petitions from private citizens, it can only initiate administrative proceedings after an inspection has been conducted. Evidence produced by consumers can only serve as a reason to carry out an inspection. The procedure is binding for the parties. The Czech Trade Inspectorate may impose a fine up to EUR 120 000 (CZK 3 million) for violating the prohibition of discrimination.<sup>190</sup> According to the Czech Trade Inspectorate, in 2018, discrimination was found in 12 cases. Two cases, for example, related to different prices of products / services based on the residency of the client.<sup>191</sup>

### Misdemeanour commissions in municipal offices

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<sup>185</sup> See Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Sections 139 and 140.

<sup>186</sup> See Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 7.

<sup>187</sup> Czech Republic, Act No. 500/2004, Administrative Code (*Správní řád*), 1 January 2006.

<sup>188</sup> Polák, P. (2015), 'Monitoring činnosti správních orgánů' (Monitoring the work of administrative bodies), paper given at a conference organised by the Public Defender of Rights (Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti), 1 July 2015;

[http://spolecne.ochrance.cz/fileadmin/user\\_upload/projekt\\_ESF/Konference\\_diskriminace/Monitoring\\_cinno sti\\_spravnich\\_organu\\_1\\_07\\_2015.pdf](http://spolecne.ochrance.cz/fileadmin/user_upload/projekt_ESF/Konference_diskriminace/Monitoring_cinno sti_spravnich_organu_1_07_2015.pdf). It is not clear what is included in 'other status' in 2010-2014.

<sup>189</sup> Czech School Inspectorate (2018), *Výroční zpráva za školní rok 2017/2018* (Annual Report for 2017-2018), p. 245;

[https://www.csicr.cz/Csicr/media/Prilohy/Obr%C3%A1zky%20ke%20%C4%8DI%C3%A1nk%C5%AFm/2018/Vyrocní-zprava-COI-2017-2018\\_final-verze.pdf](https://www.csicr.cz/Csicr/media/Prilohy/Obr%C3%A1zky%20ke%20%C4%8DI%C3%A1nk%C5%AFm/2018/Vyrocní-zprava-COI-2017-2018_final-verze.pdf).

<sup>190</sup> Czech Republic, Act No. 634/1992 on the protection of consumers (*Zákon č. 634/1992 Sb., o ochraně spotřebitele*), 16 December 1992, Section 24(14)(c).

<sup>191</sup> Czech Trade Inspectorate (2018), *Výroční zpráva COI za rok 2018* (Annual report for 2018), p. 22; [https://www.coi.cz/wp-content/uploads/2019/04/web\\_COI\\_vyrocní\\_zprava\\_2018.pdf](https://www.coi.cz/wp-content/uploads/2019/04/web_COI_vyrocní_zprava_2018.pdf).

Only natural persons can be subject to misdemeanour procedures. The material scope of misdemeanours is covered by special procedures under the Misdemeanours Act. Acts of discrimination can be sanctioned in accordance with the provisions on misdemeanours against community relations.<sup>192</sup> According to the law, it is an offence to restrict or to deny the assertion of rights by members of a national minority or to cause harm to a person because of their membership of a national minority, their ethnicity, race, colour, sex, sexual orientation, language, belief or religion. As with administrative proceedings, the complainant is not a party in this procedure (the one exception is where material damage to their property was caused by the misdemeanour). The procedure is binding for the parties.

b) Barriers and other deterrents faced by litigants seeking redress

The Czech Ombudsman constantly criticises the barriers that remain in enforcing the Anti-discrimination Act, such as difficulties in establishing elements of proof, inaccessibility of good legal advice and length of proceedings.<sup>193</sup>

However, it appears that the issue may be wider. The level of awareness of anti-discrimination rules may be different in different layers of society. Those who are most affected by the discrimination may be the least aware of the rights they enjoy and the applicable processes, which makes them even more vulnerable. In respect of some discrimination grounds (e.g. disability, sexual orientation), victims may be prevented from raising an action against discrimination due to a fear of negative publicity about the case and a public disclosure of their status, which can sometimes lead to stigmatisation. There do not seem to be any actions to remedy this.

From the view of a claimant, court proceedings may seem financially onerous and very long. The length of proceedings is relatively unpredictable: although some cases are handled by a court within a few months, some discrimination proceedings have lasted many years, which leads to significant costs and frustration for the claimant.

Following a recommendation of the Czech Ombudsman,<sup>194</sup> the amount of court fees for filing discrimination complaints was decreased from EUR 80 (CZK 2 000) to EUR 40 (1 000) as of 30 September 2017. The fee may be increased if the claim also contains an award of monetary compensation: for claims not exceeding EUR 8 000 (CZK 200 000), a fee of EUR 80 (CZK 2 000) is payable). In excess of the amount of EUR 8 000, the court fee will be increased by 1 % of the amount exceeding EUR 8 000. The measure does not seem to have led to an increase in discrimination disputes. This is mainly due to the fact that the court fee is usually just a fraction of costs of legal proceedings, with the major expense being the fees of the lawyer representing the claimant, and the lump sum reimbursement of the lawyer of the defendant in case the claimant loses the case.

In 2015, the Ombudsman produced a report identifying the main obstacles for victims of discrimination in accessing justice – psychological barriers, lack of information, prioritising other solutions (e.g. the Ombudsman, in-house counsel), fear of failure and the consequences, difficulty of court proceedings, and unwillingness to invest the energy in filing a complaint. Furthermore, the Ombudsman has recommended the following actions:

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<sup>192</sup> See Czech Republic, Act No. 200/1990, on misdemeanours (*Zákon o přestupcích*), 17 May 1990, Section 49.

<sup>193</sup> Public Defender of Rights (Ombudsman) (2014), *Souhrnná zpráva o činnosti veřejného ochránce práv 2014* (Summarising report on Ombudsman's activities in 2014), Brno, Veřejný ochránce práv, p. 79; [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Souhrnna-zprava\\_VOP\\_2014.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf).

<sup>194</sup> Office of the Public Defender of Rights (2012), *Annual Report on the Activities of the Public Defender of Rights in 2012*, p. 18, available at: [http://www.ochrance.cz/fileadmin/user\\_upload/zpravy\\_pro\\_poslaneckou\\_snemovnu/Reports/Annual\\_2012.pdf](http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/Annual_2012.pdf).

- organise targeted awareness campaigns in the areas where attempts at discrimination can be predicted;
- spread information about the most appropriate places for someone to contact if they face discrimination;
- create beneficial conditions for the operation of NGOs that provide free advice;
- deepen the education of judges, lawyers, inspectors, officers, teachers, social workers and police officers;
- refine the wording of Section 10 of the Anti-discrimination Act in order to easily award monetary compensation;
- provide equal protection in court to all victims of discrimination;
- modify the court fee for filing anti-discrimination lawsuits so that it does not contain the percentage share of the sum of the claimed monetary compensation for non-pecuniary damage and decrease the court fee to EUR 40 (CZK 1 000);
- incorporate *actio popularis* into Czech law;
- refine and enhance the database of court decisions by the Ministry of Justice of the Czech Republic, etc.<sup>195</sup>

Given that most of the actions have not been implemented, the report remains relevant.

The Ombudsman also stressed that the costs of litigation dissuade victims from filing anti-discrimination cases, because courts often do not award costs of the proceedings to either party. An average cost of proceedings is approximately EUR 1 470 (CZK 36 794) and the highest awarded costs reached approximately EUR 5 700 (CZK 142 877).<sup>196</sup> According to the Ombudsman's research, underreporting of discrimination mainly concerns woman, senior citizens, Roma people, third-country nationals and members of sexual minorities.<sup>197</sup>

The previous Government made an attempt to simplify the enforcement of anti-discrimination rules by proposing to grant the Ombudsman the competence to file a lawsuit in certain discrimination matters (as detailed in section 6.2(c) below). However, the proposal was finally withdrawn by the Government in 2017.

It is possible to bring a case whether or not the employment relationship concerned has been terminated. Procedural time limits for litigation are only rarely set. One exception relevant in this context is that of an action for unlawful dismissal, which must be submitted within two months of the date of dismissal.

#### c) Number of discrimination cases brought to justice

In the Czech Republic, there are available statistics on the number of cases related to discrimination brought to justice. At the moment, however, only the statistics on the number of decided cases in 2018 are available.

#### d) Registration of discrimination cases by national courts

In the Czech Republic, discrimination decisions are registered as such by national courts.

Decisions on discrimination cases are registered by national courts as a special type of proceedings. They are not differentiated by ground; only labour disputes where discrimination based on sex is claimed and disputes concerning termination of labour

<sup>195</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), pp. 50-58; <http://www.ochrance.cz/en/discrimination/research/>.

<sup>196</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p.135; <http://www.ochrance.cz/en/discrimination/research/>.

<sup>197</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p.80; <http://www.ochrance.cz/en/discrimination/research/>.

relations where discrimination based on sex is claimed, are monitored separately. The data are gathered by the Ministry of Justice and published on its website.<sup>198</sup>

Civil courts reached a decision in 11 discrimination cases in 2018.<sup>199</sup> Most of these cases (7) were related to employment.<sup>200</sup>

## **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 the Czech Republic, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.

According to Section 11 of the Anti-discrimination Act, associations can provide legal assistance to victims of discrimination, and submit motions to administrative bodies responsible for monitoring lawful conduct of natural and legal persons in different areas. However, this provision does not constitute any special right of these associations to represent victims of discrimination. The associations can also seek payment from clients for providing the legal assistance. According to Section 26(3) of the Civil Procedure Code, in matters regarding discrimination on grounds of gender, racial or ethnic origin, religion, conviction, disability, age or sexual orientation, a party to proceedings can be represented by a legal entity that according to its articles of incorporation focuses on protection against discrimination within its activities. In this respect, the term legal entity should be understood, in compliance with the directives, in a broad sense. Therefore, any non-profit organisation with a legitimate aim to promote equal treatment, can represent the victims.<sup>201</sup> The organisation can only represent the victim as a chosen representative, based on the power of representation. These associations or other organisations have no legal duty to act on behalf of victims. Similar legislation also applies to other types of procedures. According to an older recommendation of the Ombudsman, better cooperation between NGOs and state institutions should be developed in order to improve victims' access to justice; the recommendation does not seem to have been fully followed as yet.<sup>202</sup>

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

In the Czech Republic, associations/organisations/trade unions are not entitled to act in support of victims of discrimination in joining court proceedings as a party. Such support is currently limited to counselling and representation in legal proceedings.

It is possible for associations/organisations/trade unions to submit amicus curiae briefs. Such a course of action is, however, not expressly provided for in national laws and courts do not have an obligation to take such briefs into account.

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<sup>198</sup> Czech Republic, Ministry of Justice (2018), *Přehled o pravomocných rozhodnutích soudů v občanskoprávních věcech podle druhů sporů* (Statistics on legally effective decisions of courts in civil cases according to categories of disputes), available at: <http://cslav.justice.cz/InfoData/prehledy-statisticky-listu.html>.

<sup>199</sup> Czech Republic, Ministry of Justice (2018), *Přehled o pravomocných rozhodnutích soudů v občanskoprávních věcech podle druhů sporů* (Statistics on legally effective decisions of courts in civil cases according to categories of disputes), available at: <http://cslav.justice.cz/InfoData/prehledy-statisticky-listu.html>.

<sup>200</sup> Czech Republic, Ministry of Justice (2018), *Přehled o pravomocných rozhodnutích soudů v občanskoprávních věcech podle druhů sporů* (Statistics on legally effective decisions of courts in civil cases according to categories of disputes), available at: <http://cslav.justice.cz/InfoData/prehledy-statisticky-listu.html>.

<sup>201</sup> Boučková, P., Havelková, B., Koldinská, K., Kühn, Z., Kühnová, E., Whelanová, M. (2016), *Antidiskriminační zákon Komentář* (Commentary on the Anti-discrimination Act), Praha, C. H. Beck, p. 411.

<sup>202</sup> Public Defender of Rights (Ombudsman), (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p.84; <http://www.ochrance.cz/en/discrimination/research/>.

c) Actio popularis

In the Czech Republic, national law does not allow associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

*Actio popularis* is not permitted in respect of discrimination claims in the Czech Republic. However, in its 2013 annual report, the Czech Ombudsman recommended that the legislation be amended so that in discrimination cases NGOs could bring *actio popularis* complaints to courts. National legislation permits *actio popularis* in the consumer and environmental fields.

On 3 September 2014, the Czech Government submitted a draft bill to amend the Act on the Public Defender of Rights to include such a competence. In the end, the bill was not approved (as detailed in section 7(g) below.)

As a result, the competence of the Ombudsman is limited to the assistance provided to victims of discrimination, described above. In addition, the Ombudsman established cooperation with certain law firms that – with assistance of an NGO, Pro Bono Alliance – offer free legal assistance (including representation in court disputes) to some victims of discrimination.

d) Class action

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

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

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

A shift of the burden of proof in discrimination cases is required by Section 133a of the Civil Procedure Code. According to this provision, the defendant must prove that there was no breach of the principle of equal treatment if the claimant states before the court facts from which it may be inferred that there has been direct or indirect discrimination:

- on grounds of sex, racial or ethnic origin, religion, faith, belief, disability, age or sexual orientation in employment or access to employment, profession, business or self-employment, including access to these, membership of clubs and other organisations of workers or employers, membership and activities in professional chambers;
- on the basis of racial or ethnic origin in the provision of health and social care, access to education and training, access to public procurement, access to housing, membership of associations and interest in the sale of goods in a shop or service;
- or based on sex in access to goods and services.

Nevertheless, according to the Section 133a of the Civil Procedure Code, the shifted burden of proof does not apply in all situations (for example, it does not apply where a person with disability complains about access to services or education). Therefore, the Ombudsman recommended the amendment of Section 133a in order to apply shifted burden of proof in all discrimination cases.<sup>203</sup> However, the Government did not accept the recommendation.

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<sup>203</sup> Public Defender of Rights (Ombudsman) (2015), *Výroční zpráva o ochraně před diskriminací* (Annual report on protection against discrimination), p. 23; [http://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyrocní\\_zpravy/2015-DIS-vyrocní-zprava.pdf](http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyrocní_zpravy/2015-DIS-vyrocní-zprava.pdf).



The shift of the burden of proof is only applicable to civil procedures. In a case from 2015, the Constitutional Court criticised lower courts for not applying the shift in the burden of proof, although the complainant had claimed discrimination on the ground of sex regarding his dismissal from employment. This is evidence of a more general problem with the application of the shift of the burden of proof before the Czech courts. Moreover, the Ombudsman reproached the lower courts because documents presented by the complainant were not sufficiently evaluated and the statement of the Ombudsman (which had made the criticism that the Labour Inspectorate had not ascertained the alleged discrimination well) was ignored.<sup>204</sup>

According to case law of the Constitutional Court,<sup>205</sup> in order for the shift of the burden of proof to happen, the claimant must (a) claim and prove that he/she was disadvantaged or treated in an unusual way, and (b) claim (but not necessarily prove) that such disadvantage or unusual treatment occurred as a result of some of the discrimination grounds. Where it is not entirely clear that the relevant discrimination ground is present in the claimant's situation (e.g. the claimant is a person with disability), this must also be proved by the claimant. If these conditions are fulfilled, the burden of proof transfers and the defendant is obliged to prove that the disadvantage or unusual treatment was based on other, non-discriminatory reasons.

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

In the Czech Republic, there are legal measures of protection against victimisation.

Section 4(3) of the Anti-discrimination Act, on victimisation, applies to the whole scope of the law and to all grounds. The reversal of the burden of proof, as stipulated by the Civil Procedure Code, also applies to victimisation. Victimisation also concerns people other than those who were victims of discrimination. Section 4(3) provides broader protection than the directive, since it covers all the grounds stipulated in the Anti-discrimination Act.

#### **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

##### Administrative sanctions according to specific laws and the Act on misdemeanours

In theory, administrative sanctions of up to EUR 40 000 (CZK 1 million) can be imposed in the area of access to employment and labour law. The Czech Trade Inspectorate may impose a fine up to EUR 120 000 (CZK 3 million).

However, the amounts actually imposed are much lower and the number of cases concerning discrimination where a sanction is imposed is very limited. In some cases, administrative sanctions cannot be considered as dissuasive, effective and proportionate. However, according to an earlier study, in cases involving discriminatory job advertisements, the Czech Employment Inspectorate imposed an average fine of EUR 954 (CZK 23 850) and the highest sum reached EUR 10 000 (CZK 250 000). The Czech Trade Inspectorate mostly deals with double pricing, where an average fine reaches EUR 1 750 (CZK 43 750). According to the Ombudsman's research, the administrative bodies particularly penalised discriminatory activities that were sufficiently supported by documentary evidence or personal testimony.<sup>206</sup>

<sup>204</sup> Constitutional Court of the Czech Republic, No. III. ÚS 880/15, 8 October 2015; [http://nalus.usoud.cz/Search/GetText.aspx?sz=3-880-15\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=3-880-15_1).

<sup>205</sup> Constitutional Court of the Czech Republic, No. III. ÚS 880/15, 8 October 2015; [http://nalus.usoud.cz/Search/GetText.aspx?sz=3-880-15\\_1](http://nalus.usoud.cz/Search/GetText.aspx?sz=3-880-15_1).

<sup>206</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti); <http://www.ochrance.cz/en/discrimination/research/>, p. 137.



In 2016, the Ombudsman found direct discrimination of Roma persons who used situation testing and were refused a flat by two real estate agents. The applicant turned to the Czech Trade Inspectorate, which imposed on both agencies a fine of EUR 1 000 (CZK 25 000). The Ombudsman declared the procedure of the Czech Trade Inspectorate correct and said that the applicants could be also entitled to just satisfaction through judicial proceedings.<sup>207</sup>

### Criminal sanctions according to the Criminal Code

In criminal proceedings, courts can impose the following penalties: imprisonment, community work, loss of honorary titles and awards, loss of military rank, bans on certain activities, property confiscation, financial penalties, forfeiture of items, expulsion from the Czech Republic for a determinate or indeterminate period (which would result in deportation) and a ban on residence.<sup>208</sup>

In cases concerning criminal acts related to ethnic or religious violence and hatred, punishments primarily consist of imprisonment. In less severe cases, the courts will impose community work. In practice, criminal prosecutions for crimes relating to racial and religious discrimination are quite rare and are usually for serious criminal offences such as racially motivated murder or propagation of neo-Nazism. Where discrimination occurs, the investigative bodies usually conclude that the act committed is not so dangerous to society as to be regarded as a crime and consequently refer these incidents to misdemeanour commissions for administrative investigation.<sup>209</sup>

In criminal proceedings, compensation can be awarded by the court to the victims of a criminal act. In recent years, the jurisprudence of the criminal courts tends to award somewhat higher compensation, especially where the harm suffered by the victim involves the death of a close relative, serious damage to health or mutilation.

### Civil sanctions (claims for pecuniary damages and non-pecuniary damages)

While pecuniary damages can generally be claimed by individuals who suffer material loss due to unlawful acts or any other violation of a duty established by law or a contract, non-pecuniary damages can only be claimed where this is expressly permitted by law. In cases where non-pecuniary damages are caused by acts of discrimination, the Employment Act, the Civil Code (in provisions concerning protection of personal rights) and the Anti-discrimination Act allow for non-pecuniary damages to be claimed. Reinstatement, *restitutio in integrum*, apologies and injunctive relief can all be claimed under certain circumstances. The amount of non-pecuniary damages awarded in such procedures is determined by the court, which takes into account the seriousness of the damage and the circumstances of each case.<sup>210</sup>

The court can award non-pecuniary damages up to the amount requested by the claimant, but can also award a lower amount. The amounts vary considerably – courts have awarded claimants in discrimination cases amounts ranging from EUR 200 (CZK 5 000) (as awarded in 2004 by the Olomouc High Court in a case of racial discrimination in housing) to EUR 10 000 (CZK 250 000) in cases relating to racial discrimination in employment, services or housing.

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<sup>207</sup> Public Defender of Rights (Ombudsman) (2016), *Zpráva o šetření č. 6780/2014/VOP* (Report on inquiry no. 6780/2014/VOP), 19 January 2016; <http://eso.ochrance.cz/Nalezene/Edit/3922>.

<sup>208</sup> See Czech Republic, Act No. 40/2009, Criminal Code, 8 January 2009, Section 27.

<sup>209</sup> Office of the Public Defender of Rights (2014), *Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti* (Discrimination in the Czech Republic: victims of discrimination and barriers in access to justice), p. 40. Available at: [https://www.ochrance.cz/fileadmin/user\\_upload/ESO/CZ\\_Diskriminace\\_v\\_CR\\_vyzkum\\_01.pdf](https://www.ochrance.cz/fileadmin/user_upload/ESO/CZ_Diskriminace_v_CR_vyzkum_01.pdf).

<sup>210</sup> See Czech Republic, Act No. 89/2012, Civil Code, 3 February 2012, Section 13(3), and Czech Republic, Act No. 435/2004 on Employment, 13 May 2004, Section 4(11).

b) Ceiling and amount of compensation

Amounts of compensation awarded by the courts to compensate private individuals are not, as a principle, limited by a ceiling.

There is no official information concerning amounts of compensation to refer to.

According to the Ombudsman's research on discrimination cases in 2010-2014 (the conclusions of which seem to be still relevant as there are no similarly detailed data available for the following period), the highest litigated monetary compensation claimed for non-pecuniary damage was EUR 60 000 (CZK 1 500 000), and the highest litigated sum awarded was EUR 37 037 (CZK 1 000 000) for discrimination in employment. The average amount of monetary compensation for non-pecuniary damage claimed was EUR 10 480 (CZK 261 944). However, the vast majority of claims to award monetary compensation for non-pecuniary damage were dismissed (21 cases); the court actually awarded monetary compensation for non-pecuniary damage in only one case, for the sum of EUR 2 040 (CZK 51 000). As a result, the Ombudsman repeatedly criticised the provision of Section 10 of the Anti-discrimination Act, which indicates that compensation for non-pecuniary damage has a supportive character.<sup>211</sup>

c) Assessment of the sanctions

It is true that some compensation amounts awarded by the courts have been extremely low. However, the number of cases where compensation was awarded is still limited and it is thus difficult to evaluate whether the sanctions awarded by the civil courts are effective, proportionate and dissuasive.

The lowest compensation paid, as far as the author is aware, was in a case of racial discrimination in housing, which was effectively proved. The case concerned a Roma woman who enquired about housing available for rent. While her application was refused, with an explanation that there were no flats available for rent in the building, a Czech couple making the same enquiry several minutes later were shown a flat in the same building and told that they could move in immediately.

The Regional Court in Ostrava awarded the claimant EUR 400 (CZK 10 000), the defendant appealed and the court of second instance lowered the amount to half the original award (EUR 200 / CZK 5 000).<sup>212</sup> However, in the case of a restaurant owner who displayed in his restaurant premises a statue of an ancient Greek goddess holding in her hand a baseball bat with the visible inscription 'Go and get the gypsies', the Prague High Court in the repeated proceedings awarded the claimant compensation of EUR 1 000 (CZK 25 000).<sup>213</sup>

On the other hand, amounts paid as compensation to victims of discrimination are rising. The new Civil Code, in force from 1 January 2014, created an expectation for an increase of the amounts. However, such an increase has not yet been seen in discrimination cases.

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<sup>211</sup> Public Defender of Rights (Ombudsman) (2015), *Discrimination in the Czech Republic: Victims of Discrimination and Obstacles Hindering their Access to Justice* (Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti), p. 135; <http://www.ochrance.cz/en/discrimination/research/>.

<sup>212</sup> Regional Court Ostrava (*Krajský soud v Ostravě*), No. 23 C 110/2003; High Court in Olomouc (*Vrchní soud v Olomouci*), No. 1 Co 99/2004.

<sup>213</sup> Prague High Court (*Vrchní soud v Praze*), no. 1 Co 203/2013-136, 17 February 2014.

## **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 Czech Anti-Discrimination Act (Act No. 198/2009) assigns the role of anti-discrimination body to the Public Defender of Rights (the Czech Ombudsman). The Czech Ombudsman has responsibility for all grounds covered by the equality directives, and will provide support to individuals when filing discrimination complaints, conduct research and publish reports and recommendations.

- b) Political, economic and social context for the designated body

The Ombudsman is elected by the Chamber of Deputies of the Czech Parliament for a period of six years and is responsible to the Chamber. Candidates are proposed by the President and the Senate of the Czech Republic (each has the right to propose two candidates from which the Chamber of Deputies will select one successful candidate).

The Czech Ombudsman may not be a member of a political party or a political movement.

Currently, Anna Šabatová stands in the position of Ombudsman, and Stanislav Křeček stands in the position of Deputy Ombudsman.

The office of the Ombudsman is funded from the state budget, with its own independent budget allocation. The budget is determined as an annual fixed budget.

The Ombudsman actively participates in public debates but measures proposed by the Ombudsman often have limited political support.

- c) Institutional architecture

The Czech Ombudsman has several mandates defined in the relevant law.

In addition to its non-discrimination responsibilities, the Ombudsman must act in relation to the following matters:

- unlawful acts by the state administration, acts of the state administration that are contrary to the rules of the democratic state governed by the rule of law and proper administration, as well as inactivity of the state administration (public Ombudsman);
- regular visits to places where persons restricted in their freedom by public authority, or as a result of their dependence on care provided, with the objective of strengthening the protection of these persons against torture, or cruel, inhuman and degrading treatment, or punishment and other forms of ill-treatment;
- monitoring detention of foreign nationals and the execution of administrative expulsion, transfer or transit of detained foreign nationals and of the punishment of expulsion imposed on foreign nationals placed in banishment custody or serving prison sentences;
- supervision of observation of international treaties regarding rights of individuals with disabilities (including, but not limited to the Convention on the Rights of Persons with Disabilities – the CRPD);
- competence in the field of free movement of citizens of the EU/EEA and their family members.

In addition, from 1 January 2018, the Ombudsman is also competent to carry out the following activities in relation to workers from other EU countries:

- (a) providing methodological assistance to citizens of the European Union when initiating proceedings on the grounds of discrimination;
- (b) carrying out surveys and analysis of the exercise of the right of free movement of citizens of the European Union;
- (c) publishing reports and recommendations on questions relating to the exercise of the rights of EU citizens;
- (d) publishing up-to-date information on the rights of the citizens of the European Union in Czech and at least one other official language of the European Union;
- (e) ensuring the exchange of available information with relevant national, international and international bodies.

Another bill - also in effect from 1 January 2018 – introduced a new obligation for the Ombudsman to monitor the execution of international treaties relating to the rights of individuals with disabilities. The Ombudsman will thus serve as the national CRPD monitoring mechanism. For this purpose, the Ombudsman will:

- (a) promote the fulfilment of the rights of people with disabilities and propose measures to protect them;
- (b) carry out research;
- (c) publish reports and issue recommendations on questions relating to the fulfilment of rights of people with disabilities;
- (d) and ensure the exchange of available information with relevant national and international bodies.

This step is in accordance with the concluding observations of the UN Committee on the Rights of Persons with Disabilities of 10 April 2015 in which the committee recommended that the Ombudsman adopt the role of the independent monitoring mechanism.

Accordingly, the Ombudsman established a council, consisting mainly of representatives of NGOs protecting individuals with disabilities. The purpose of the council is to advise the Ombudsman when it acts as the monitoring body. In 2018, the first three meetings of the CRPD council took place.

Further, the Ombudsman has the power to file an application for the annulment of regulatory acts (legislation other than laws, e.g. regulations of the Government or ministries) with the Constitutional Court if there is a conflict with the constitutional law. Furthermore, on the invitation of the Constitutional Court, the Ombudsman can be an intervener in proceedings regarding constitutional complaints. This competence has repeatedly been exercised by the Ombudsman. For example, on 28 February 2018, the Ombudsman entered the proceedings regarding the annulment of provisions of the Act on assistance in material need. The Ombudsman also has a role of *amicus curiae* in cases that they have examined prior to the court proceedings, although their opinions are not binding for the court. The Ombudsman can be a guardian, usually of children, in proceedings before the Constitutional Court. Furthermore, if the Ombudsman proves serious public interest, they can file an action to a court against an administrative body.

The Ombudsman does not have any other competence relating to human rights and is not obliged to carry out UN reporting (besides the CRPD reporting stated above).

The office of the Ombudsman has a separate department for non-discrimination matters within the legal division of the office. This department is responsible for all legal matters relating to equality and non-discrimination. It consists of a head and 10 other lawyers, which represents approximately 7 % of the total headcount of the office. There is no information available regarding the budget dedicated to the equality mandate.

The Czech Ombudsman is clearly active in the field of non-discrimination. This can be evidenced by several opinions and recommendations published in this area, as well as a number of cases where the Ombudsman has taken action.

d) Status of the designated body/bodies – general independence

i) Status of the body

The Czech Ombudsman represents a legal body that is entirely separate from other administrative bodies and possesses a separate legal personality.

Both the Ombudsman and the Deputy Ombudsman are elected by the Chamber of Deputies of the Czech Parliament for a period of six years. Candidates are proposed by the President and the Senate of the Czech Republic.

The Czech Ombudsman has the power to freely recruit and manage their staff (except for the Deputy Ombudsman), and is authorised to carry out all rights and responsibilities of an employer towards all staff with the exception of the Deputy Ombudsman, who can be recalled only as described below.

The Czech Ombudsman is responsible to the Chamber of Deputies of the Czech Parliament. The Ombudsman is obliged to submit an annual report on their activity by 31 March of the following year to the Chamber, following which the report will be published. In addition, the Ombudsman must inform the Chamber about their office's activities every three months.

ii) Independence of the body

The Czech Ombudsman and the Deputy Ombudsman can only be recalled from their positions by the Chamber in a situation where they have carried out activities that are not compatible with the position of the Czech Ombudsman, or if they were found to be a member of a political party or political movement. They can only be criminally prosecuted with the prior consent of the Chamber; where such consent is withheld, any prosecution must be suspended until the end of the term of the Ombudsman.

The Czech Ombudsman is fully independent as per Section 5 of the Act on the Public Defender of Rights and cannot receive any binding instructions from any other state authorities. The law does not provide for any process to recall the Ombudsman (or the Deputy Ombudsman) from their position as a result of the way in which they manage the office, a lack of activity or political disagreement with their approach. Public authorities, including criminal authorities, are only entitled to inspect or remove the Ombudsman's files with the consent of a court, and with the consent of the Ombudsman or the Head of the Chamber of Deputies.

In practice, the Ombudsman has a high level of independence. The Ombudsman has sufficient room to determine the scope of the office's activities and objectives and there seem to be no strong political pressures in respect of the way in which the Ombudsman acts.

e) Grounds covered by the designated body/bodies

The Ombudsman deals with the following grounds in relation to non-discrimination: sex, race, ethnic origin, sexual orientation, age, disability, religion, belief or other conviction, nationality and EU citizenship.

The non-discrimination department consists of 11 lawyers. Some of the lawyers act as subject matter experts for certain grounds and/or areas of material scope. According to the law, the Ombudsman is obliged to pay sufficient attention to all of the grounds. There is no evidence to show that the Ombudsman would pay greater attention to some grounds while neglecting others. The attention paid to some of the grounds can be influenced by the number of cases received for each of the grounds (as detailed below). Furthermore, the Ombudsman sometimes announces initiatives to raise public discussion about some of the grounds (for example, in 2018, age discrimination was announced as an area of interest for the upcoming year with events being organised and documents being produced in relation to that topic).

f) Competences of the designated body/bodies – and their independent exercise

i) Independent assistance to victims

In the Czech Republic, the designated body does have the competence to provide independent assistance to victims. Such assistance usually includes an analysis of the case, including obtaining an opinion of the other party, and advice whether – according to the legal opinion of the Ombudsman – discrimination has happened and what measures the victim can take. In addition, the office of the Ombudsman can provide the victim with guidance on how to enforce their rights and could refer the victim to cooperating lawyers specialising in the area of discrimination.

ii) Independent surveys and reports

In the Czech Republic, the designated body does have the competence to conduct independent surveys and publish independent reports. Within this competence, the Ombudsman may freely determine the scope of the survey, gather and analyse all necessary data and issue a report summarising the findings. In practice, this competence is used less frequently than the competence to issue recommendations.

iii) Recommendations

In the Czech Republic, the designated body does have the competence to issue independent recommendations on discrimination issues. Such recommendations are usually issued in situations where, according to the knowledge of the Ombudsman (based on research by the non-discrimination team, complaints received, interactions with other stakeholders etc.), there is either an issue with unclear interpretation of non-discrimination law, or there is widespread incorrect interpretation. In such cases, the Ombudsman usually issues a recommendation on how the law should be interpreted.

In 2018, the Ombudsman issued a number of recommendations. The most important was probably a recommendation on joint education of Roma and non-Roma pupils.<sup>214</sup> The Ombudsman's Office conducted a research survey to identify the problems of schools that have a higher percentage of Roma pupils in classes with pupils of non-Romani backgrounds. Based on its findings, the Ombudsman issued a report in December summarising ten major recommendations in this area. These include: more inclusive preschool

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<sup>214</sup> Public Defender of Rights (2018), *Doporučení veřejné ochránkyně práv ke společnému vzdělávání romských a neromských dětí* (Suggestions of the Public Defender of Rights in the field of joint education of Roma and non-Roma children) – official journal, available at: [https://www.ochrance.cz/fileadmin/user\\_upload/DISKRIMINACE/Vyzkum/Inclusive\\_Education\\_of\\_Roma\\_and\\_non-Roma\\_Children\\_EN.pdf](https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Inclusive_Education_of_Roma_and_non-Roma_Children_EN.pdf).

education, appropriate setting up of school districts, financial assistance to less-favored families, etc.

Finally, the paper presents a proposal for a plan of better inclusion of Roma pupils. According to this plan, municipalities should monitor their educational facilities (especially the Roma/non-Roma ratio) and, according to the findings, they would address other parties responsible for racial inclusion. Based on the findings, the schools are recommended to organise informal meetings of Roma and non-Roma pupils during breaks, etc.

The Ombudsman further provided an update to a prior recommendation on equal access to preschool education, in which it provided clear rules according to which decisions should be made about the admission of certain pupils in case of insufficient capacity of the preschool.<sup>215</sup> The Ombudsman stated that children of five years and over have the right to preferred access due to provisions of the Schools Act. Other criteria that are deemed lawful by the Ombudsman include age, presence of a sibling in the same school, employment status of parents, social status of the family or sharing an alternative pedagogical approach.

Other recommendations of the Ombudsman include a recommendation on an amendment relating to provision of monetary compensation for discrimination, and a recommendation on Czech law exams for pupils with a different mother language.<sup>216</sup>

iv) Other competences

Under the law, the only other competence, not mentioned above, is to exchange available information with competent European bodies. Other activities of the Ombudsman not regulated by the law include issuing publications, and the promotion and support of good practice and so on. These activities are exercised in an independent manner, and the comments above would fully apply here.

g) Legal standing of the designated body/bodies

In the Czech Republic, the designated body, i.e. the Czech Ombudsman, does not have legal standing to:

- bring discrimination complaints (on behalf of identified victims) to court;
- bring discrimination complaints (on behalf of non-identified victims) to court;
- bring discrimination complaints ex officio to court;
- intervene in legal cases concerning discrimination, such as *amicus curiae* (except for proceedings in front of the Constitutional Court).

There have been ongoing discussions regarding the extension of the powers of the Ombudsman to cover judicial proceedings in discrimination cases. Since 2013, the Ombudsman has been requesting that the legislation is amended to allow it to bring complaints before the courts in cases of discrimination. On 3 September 2014, the Czech Government submitted a draft bill to amend the Act on the Public Defender of Rights to

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<sup>215</sup> Public Defender of Rights (2018), *Doporučení veřejné ochránkyně práv k rovnému přístupu k předškolnímu vzdělávání* (Suggestions of the Public Defender of Rights in the field of equal access to preschool education) – official journal, available at: [https://ochrance.cz/fileadmin/user\\_upload/ESO/25-2017-DIS-JMK\\_Doporučení\\_k\\_rovnému\\_přístupu\\_k\\_předškolnímu\\_vzdělávání.pdf](https://ochrance.cz/fileadmin/user_upload/ESO/25-2017-DIS-JMK_Doporučení_k_rovnému_přístupu_k_předškolnímu_vzdělávání.pdf).

<sup>216</sup> Public Defender of Rights (2018), *Doporučení veřejné ochránkyně práv Poslanecké sněmovně* (Suggestions of the Public Defender for the Lower Chamber of the Parliament), not publicly available.



include such a competence.<sup>217</sup> According to the bill, the Ombudsman would be authorised to file a lawsuit in discrimination matters involving a larger or undefined number of victims, or in cases with increased public interest. The draft bill was subject to harsh criticism from some quarters and after numerous discussions and delays in the enactment process, the bill was finally withdrawn by the Government on 3 February 2017.

The draft bill was opposed by representatives of extremist parties in particular (such as the Úsvit party, which refused to support the draft bill, referring to opinions given by the current ombudsman in cases involving discrimination due to Islamic religion) but also by some right-wing parties who claimed that the proposed right of the Ombudsman as a representative of the state to file an *actio popularis* against private entities, such as employers, was unreasonable.

As a result, the competence of the Ombudsman is limited to the assistance provided to victims of discrimination, described above. In addition, the Ombudsman established cooperation with certain law firms that – with assistance of the NGO, Pro Bono Aliance – offer free legal assistance (including representation in court disputes) to some victims of discrimination.

The Ombudsman is not expressly provided with a right to intervene in legal cases concerning discrimination, with one exception. In the Constitutional Court, in cases where the Ombudsman has previously been involved, the court may request the Ombudsman to provide an opinion. Such an opinion is not binding for the court although it may help the court understand the wider context of the case and obtain an opinion regarding the application of non-discrimination rules.

#### h) Quasi-judicial competences

In the Czech Republic, the body is not a quasi-judicial institution. The Ombudsman does not have the power to issue any decisions that would be binding upon parties, or even impose sanctions. The Ombudsman's competence is limited to investigating complaints and issuing non-binding recommendations. As a result, the Ombudsman does not consider itself as a quasi-judicial body (although this may be subject to discussion).

#### i) Registration by the body/bodies of complaints and decisions

In the Czech Republic, the body does register the number of inquiries received, complaints of discrimination made, and decisions.

These data are available to the public.

In 2018, the Ombudsman registered 342 new complaints of discrimination. Out of these complaints, 88 complaints related to employment, 67 complaints related to provision of goods and services, 49 complaints related to housing, 48 complaints related to other areas not specified in the Anti-Discrimination Act, and 32 complaints related to education. Most complaints did not refer to any discrimination grounds; 69 complaints referred to race and ethnic origin, 50 complaints related to disability, and 47 complaints related to age. As of 31 December 2018, discrimination could be proven in only five cases (this included one case of direct discrimination and four cases of indirect discrimination).<sup>218</sup>

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<sup>217</sup> Chamber of Deputies (2016), *Sněmovní tisk 379/0* (Press of the Chamber of Deputies No. 379/0); <http://www.psp.cz/sqw/historie.sqw?o=7&t=379>.

<sup>218</sup> Based on information provided by the Office of the Public Defender of Rights by email on 22 February 2019; the data will be published in the annual report on the protection against discrimination, which is yet to be published.

j) Stakeholder engagement

In the Czech Republic, the designated body does engage with stakeholders as part of implementing its mandate. This mainly includes NGOs, public bodies and local government entities. There are also seminars taking place aimed at dissemination of know-how among legal practitioners and business/employer/service provider networks and organisations and trade unions or employee associations.

k) Roma and Travellers

The Czech Ombudsman is not entitled or even required to treat any vulnerable group as a priority issue, nor does the Anti-discrimination Act require this. It is obliged to focus on all discrimination grounds. However, given the current landscape in the Czech Republic, the Czech Ombudsman seems to be aware that the Roma community is one of the main groups that is potentially endangered by discrimination. Such increased attention can be documented by a higher number of recommendations of the Ombudsman relating to discrimination against Roma (see section 7(f)(iii) above).

There are no Travellers in the Czech Republic.

## 8 IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Ombudsman carries out continuous activity to disseminate information about legal protection against discrimination. This includes seminars for professionals, flyers and recommendations for the wider public, information published on the website, annual reports, and events etc.

In 2018, the Ombudsman paid increased attention to age discrimination. In particular, it issued a flyer explaining to people their rights if they are targeted by age discrimination; the flyer was disseminated among a large number of organisations. The Ombudsman also issued a press release and a report regarding the common issue of collective labour agreements containing provisions that are unprofitable for employees who have reached retirement age and are thus discriminatory.<sup>219</sup>

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

The Ombudsman actively partners with NGOs. There are regular roundtables to facilitate discussion and the exchange of experience between the Ombudsman and representatives of selected NGOs. The Ombudsman seems to take the comments coming from the NGOs into account when determining its priorities and activities.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

Promoting dialogue between social partners with regard to the principle of equal treatment in practices within the workplace is a task that comes under the competence of the tripartite agreement (bringing together stakeholders in the labour market: employers, trade unions and the Government) and the Ministry of Labour. However, there have been no further significant developments or opportunities in this respect.

- d) Addressing the situation of Roma and Travellers

The Government Council for Roma Minority Affairs is a permanent advisory body of the Government of the Czech Republic on issues related to Roma integration. The Agency for Social Inclusion is a body established by the Government to address Roma issues in socially excluded communities. Specific tasks are performed by the Government Council for Human Rights, the Governmental Council for Equality of Women and Men and the Governmental Council for National Minorities.

The main actions of the Government include educational activities targeting young people and professional groups such as the police, members of the armed forces, judges and state prosecutors. Educational activities for professional groups typically include training and seminars on racially motivated crimes.

There are no Travellers in the Czech Republic.

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<sup>219</sup> Public Defender of Rights (2018), *Kolektivní smlouvy diskriminují pracující z důvodu věku* (Workers are discriminated based on age in collective labour agreements) – press release, available at: <https://www.ochrance.cz/aktualne/tiskove-zpravy-2018/kolektivni-smlouvy-diskriminuji-pracujici-z-duvodu-veku/>.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### a) Mechanisms

Full compliance of contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers' associations or employers' associations with equal treatment principles is primarily ensured by the wide Anti-Discrimination Act and the rules *lex specialis derogat legi generali* and *lex posteriori derogat legi priori*.

### b) Rules contrary to the principle of equality

As discussed in section 4.3 above, the Czech Ombudsman has expressed concerns about the compliance of Act No. 361/2003 on service by members of the security and Act No. 221/1999 on service by members of the armed forces with Directive 2000/78/EC. These acts provide for a complete exclusion of some discrimination grounds (age and/or disability) from the equal treatment principle within the public service relations regulated by such acts. There appears to be no justification for such a broad exception, and the Ombudsman has found a breach of the UN Convention on the Rights of Persons with Disabilities and the Convention for the Protection of Human Rights and Fundamental Freedoms.

Notwithstanding legislative amendments from 2016 aimed at improving the situation, it seems that Roma pupils and pupils with disabilities still face segregation and unequal treatment in access to education. Although positive changes can be seen in practice (see section 3.2.8 above), it does not appear that it has brought adequate safeguards against on-going discrimination against Roma children and children with disabilities in access to education. The situation should be observed for a longer period in order to examine whether the application of the inclusive system has brought any significant improvement. It also appears that changes in legislation may not be able to fully resolve issue without a corresponding shift in the mindset of stakeholders.

## 9 COORDINATION AT NATIONAL LEVEL

Coordination of issues regarding anti-discrimination on all the grounds covered by this report is divided mainly between:

- The Public Defender of Rights (Ombudsman)<sup>220</sup> - Anti-discrimination Act in general
- The Government Council for National Minorities<sup>221</sup> - advisory, initiative and co-ordinating body of the Government

The Government Council for National Minorities is concerned with matters of policy towards national minorities and their members. The Council consists of the members of ministries, the Office of the President of the Czech Republic, the Office of Public Defender of Rights, the Government Commissioner for Human Rights and one or two representatives of 14 national minorities in the Czech Republic.

- The Government Council for Roma Minority Affairs<sup>222</sup> – initiative and advisory body of the Government

The Government Council for Roma Minority Affairs assists on a systematic basis in the integration of Roma community. The Council supports cooperation of ministries and provides groundwork documents for the creation and application of Government policy in relation to Roma communities.

- The Ministry of Labour and Social Affairs<sup>223</sup> - employment and labour relations, social benefits

The Ministry of Labour and Social Affairs is an authority of the state administration for social and labour relations, safety of labour, employment and retraining, collective bargaining, wages and other remuneration for work, pension security, health insurance, sickness benefits, social care, working conditions of women and young people, legal protection in maternity, family and child care, care for citizens with special assistance requirements and other wage and social policies.

- The Ministry of the Interior<sup>224</sup> - service by members of the security forces

The Ministry of the Interior is a central authority of the state administration for internal affairs, in particular for public order and other matters relating to internal security within its defined scope of competence, including: supervision of road traffic protection; first names and surnames; registers of births, marriages and deaths; nationality; identity cards; residence reporting; register of inhabitants and personal identification numbers; the right of association and the right of assembly; registration of organisations with international links; public collections; maintaining archives; firearms and ammunition; fire protection; travel documents; granting residence to foreign nationals and refugee status; the territorial structure of the state, national borders, their surveying, maintenance and documentation; state symbols; state, economic and service secrets.

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<sup>220</sup> For further information see: [www.ochrance.cz/](http://www.ochrance.cz/).

<sup>221</sup> For further information see: <http://www.vlada.cz/en/pracovni-a-poradni-organy-vlady/rnm/historie-a-soucinnost-rady-en-16666/>.

<sup>222</sup> For further information see: <http://www.vlada.cz/en/ppov/zalezitosti-romske-komunity/the-council-for-roma-community-affairs--50634/>.

<sup>223</sup> For further information see: <http://www.mpsv.cz/en/>.

<sup>224</sup> For further information see: <http://www.mvcr.cz/mvcren/>.

- The Ministry of Defence<sup>225</sup> - service by members of the armed forces

The Ministry of Defence is a central authority of the state administration for ensuring the defence of the Czech Republic; it controls the armed forces of the Czech Republic and administers military training areas. As an authority for ensuring the nation's defence, it contributes to the formation of a strategy for the military defence policy of the country, prepares concepts for operations planning of the state territory's defence, and suggests necessary defence arrangements to the Government, to the Defence Council of the Czech Republic, and to the President of the Czech Republic. In addition to other duties related to the defence of the country it calls up citizens of the Czech Republic for military service. It organises co-ordination with the armed forces of other countries within the framework of European security structures.

- The Ministry of Health – health services<sup>226</sup>

The Ministry of Health is a central authority of the state administration for: healthcare; public health protection; health research activities; directly controlled health facilities; handling drugs, preparations, and other agents; search, protection and use of natural health resources, natural spas and mineral water resources, medicaments and technical equipment for prevention, diagnostics and treatment of people; health insurance; and the health information system. The Czech Spa Inspectorate is also part of the Ministry of Health. The Inspectorate of Narcotic Drugs and Psychotropic Substances is also an organisational part of the Ministry of Health.

- The Ministry of Justice<sup>227</sup> – state administration of courts and public prosecutors' offices

The Ministry of Justice is a central authority of the state administration for courts and public prosecutors' offices. The Ministry of Justice issues legal judgments concerning credit and guarantee agreements to which the Czech Republic is a party. The Ministry of Justice is the central authority of the state administration for the prison system; the Prison Service of the Czech Republic is subordinated to the ministry. The Ministry of Justice acts for the Czech Republic in the course of complaints settlement concerning breaches of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. The ministry fulfils tasks connected with the legislative activities of the Government.

Since December 2017, following the abolition of the position of the Minister for Human Rights, Equal Opportunities and Legislation, the Ministry of Justice is also responsible for human rights, and the Minister of Justice chairs the Government Legislative Council.

- The Ministry for Regional Development – housing<sup>228</sup>

The ministry was established and started its activities on 1 November 1996. Its activities are focused on the following areas: regional policy including regional business support; housing policy; housing and business accommodation development; territorial planning; housing-related legislation; investment policy; tourism.

- The Ministry of Education – education<sup>229</sup>

The Ministry of Education, Youth and Sports is a central authority of the state administration for preschool facilities, school facilities, elementary schools, secondary

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<sup>225</sup> For further information see: <http://www.army.cz/en/>.

<sup>226</sup> For further information see: <http://www.mzcr.cz/En/>.

<sup>227</sup> For further information see: <http://portal.justice.cz/>.

<sup>228</sup> For further information see: <http://www.mmr.cz/ministerstvo>.

<sup>229</sup> For further information see: <http://www.msmt.cz/index.php?lang=2>.

schools and universities, for science policy, research and development including international cooperation in this sphere, for science degrees, for state policy related to children, youth, sports, tourism and sport representation.

There is no general anti-racism or anti-discrimination national action plan.



## **10 CURRENT BEST PRACTICES**

- Free legal help to victims of discrimination

In 2012 the Czech Ombudsman established cooperation with the NGO Pro Bono Alliance (a pro bono alliance), which arranges free legal assistance to certain victims of discrimination, who have been very probably discriminated according to the Czech Ombudsman. Special assistance is provided on the basis of a contract between a complainant (client) and a cooperating law firm or lawyer involved in a pro bono clearing-house served by Pro Bono Alliance. Since 2012, Pro Bono Alliance has arranged legal representation in more than 15 discrimination cases from the Ombudsman. These are all cases where the Ombudsman found discrimination.

According to Section 21b of Act No. 349/1999 on the Public Defender of Rights, the Ombudsman only has the authority to help victims of discrimination and their legal representatives in the phase of filing the law suit against discrimination and therefore, after the lawsuit has already been filed with the court, the Ombudsman should not have direct contact with or influence over it. However, it is quite common for the Ombudsman to file third-party interventions where possible, such as at the proceedings before the Constitutional Court.

- Situation testing

The Czech Ombudsman is not allowed to use situation testing and its employees should not be the ones who carry out such testing in practice. However, the Ombudsman cooperates with certain NGOs that use situation testing as one of the measures available to discover and fight discrimination in practice. The Ombudsman has been supportive of this practice.

- Promoting non-discrimination among Roma

In 2018, the Ombudsman made a number of efforts to make the Roma community better aware of their rights in the area of non-discrimination.

It arranged for a translation of the Anti-Discrimination Act in the Roma language and disseminated it among Roma NGOs.

It created a flyer describing true stories of three Roma individuals who succeeded in a complaint against discrimination and shared it with a wide audience.

It also created a flyer describing what hate speech is and which legal measures can be used against it. Although this initiative does not only target Roma, members of the Roma community may be affected by hate speech and may find the information beneficial.

## 11 SENSITIVE OR CONTROVERSIAL ISSUES

### 11.1 Potential breaches of the directives (if any)

The main issue regarding transposition of the Racial Equality Directive 2000/43/EC is securing equal access in practice to education for Roma children.<sup>230</sup> Despite the significant development that has occurred since the judgment in *D. H. and Others*, in the amendment of the Schools Act No. 82/2015, the segregation of Roma children in education is still an issue. Such segregation takes the form both of placing Roma children into schools/classes for pupils with special needs, as well as in mainstream basic schools where classes for Roma children may be formed in areas where Roma communities are concentrated. Although the legislation has been changed, discriminatory practices may still be seen.

Another potential point of non-compliance with EU law might be found in relation to the wording of Section 10 of the Anti-discrimination Act, which states that victims of discrimination can be awarded monetary compensation for non-pecuniary damage as a subsidiary remedy. Specifically, Section 10 of the Anti-discrimination Act provides that should none of the forms of redress appear adequate, the victim of discrimination also has the right to monetary compensation for non-pecuniary damage. Although the monetary compensation for non-pecuniary damage should be awarded alongside another form of redress, in the Czech Republic, it inherently represents a subsidiary remedy.<sup>231</sup> As a result, this provision might be in violation of Article 15 of Directive 2000/43/EC – stating that payment of compensation to the victim must be effective, proportionate and dissuasive – as well as of Article 17 of Directive 2000/73/EC and Article 8d of Directive 1002/73/EC.

There is no legislation expressly prohibiting discrimination based on association with persons with particular characteristics. Judicial interpretation is needed to reach a clear conclusion as to whether discrimination based on association is prohibited by Czech legislation.

There are almost no existing activities to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 of Directive 2000/43/EC and Article 13 of Directive 2000/78/EC).

As discussed in section 4.3 above, the Czech Ombudsman has also expressed concerns about the compliance of Act No. 361/2003 on service by members of the security forces and Act No. 221/1999 on service by members of the armed forces with Directive 2000/78/EC. These acts provide for a complete exclusion of some discrimination grounds (age and/or disability) from the equal treatment principle within the public service relations regulated by such acts. There appears to be no justification for such a broad exception, and the Ombudsman has found a breach of the UN Convention on the Rights of Persons with Disabilities and the Convention for the Protection of Human Rights and Fundamental Freedoms.

### 11.2 Other issues of concern

There are still only a limited number of discrimination cases brought before Czech courts. Bringing a case to court is widely considered by the public as the last resort. People prefer to solve their problems by alternative means, because they have insufficient trust in the justice system as well as for other social and legal reasons discussed above.

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<sup>230</sup> The Ombudsman uses the term 'segregation'; however, this term is not defined by Czech legislation.

<sup>231</sup> Public Defender of Rights (Ombudsman) (2015), *Diskriminace v ČR: Oběť diskriminace a její překážky v přístupu ke spravedlnosti* (Discrimination in the Czech Republic: Victims of discrimination and obstacles to the access to justice), pp. 99-100.

The resolution of structural issues does not reside primarily in the area of enforcement and sanctions, rather it is primarily an issue for the political agenda – a matter for political parties in government to treat as a priority. The root of the problem is not in the area of the implementation of legislation, but rather in the lack of systematic Government policy. Recent Governments have not paid much attention to issues of human rights in general, including the discrimination agenda. Effective Government policies to combat the structural roots of discrimination have not been developed.

Notably, as a result of the 'migration crisis', popular debates have been affected by an increase in populist and nationalist voices who are calling for a less open and tolerant society. Although their primary interest lies in topics such as accepting refugees from Islamic countries and the manifestation of Islamic religion in public and so on, they may have an impact on the overall atmosphere in society in relation to anti-discrimination initiatives. Currently, such populist and nationalist opinions are supported by the country's President, Miloš Zeman, who won an election in January 2018, and the party SPD (Freedom and Direct Democracy –*Svoboda a přímá demokracie*) which received more than 10 % of the vote in the last parliamentary elections in October 2017 and represents the third strongest party in the Lower Chamber of the Czech Parliament.

The rise of islamophobia may have diverse consequences on the existence of Romaphobia in the society. On the one hand, one could argue that discussions relating to Islam distract attention from Roma issues and can lead to a decrease in Romaphobia, but on the other hand, the author fears that the rise of islamophobia is just one sign of an overall rise of hatred in the society, and the position of the Roma community can also be affected adversely.

These tendencies have not yet had any impact on the legislation of the country, and it appears unlikely that any legislation changes will happen in near future. However, the general approach of the society towards minorities and the perception of anti-discrimination issues may be affected.

## 12 LATEST DEVELOPMENTS IN 2018

### 12.1 Legislative amendments

There have been no legislative amendments in 2018.

### 12.2 Case law

**Name of the court:** Supreme Court of the Czech Republic

**Date of decision:** 13 December 2017 (the decision was published in January 2018)

**Name of the parties:** not publicly known

**Reference number:** 30 Cdo 2260/2017

**Address of the webpage:**

[http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/97BBF6819C18E0CFC12582550041967C?openDocument&Highlight=0,null,diskriminace](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/97BBF6819C18E0CFC12582550041967C?openDocument&Highlight=0,null,diskriminace)

**Brief summary:** In a case decided by the Czech courts, parents of a deceased patient (a child) raised a discrimination claim against the hospital in which the patient died. Allegedly, the hospital refused for economic reasons to provide treatment to the patient which could have saved her life, claiming that due to her state of health, even if the imminent risk of death could have been avoided, a sufficient quality of her life would never be reinstated. According to the claimants, this represented discrimination on the basis of the patient's disability. On that basis, the claimants raised a claim for monetary compensation of the discrimination.

The case has opened the question whether a discrimination claim can be raised by a person other than the victim of discrimination (such as their relatives). Such a question was already addressed by Czech high courts in case of other immaterial damages, but not directly with regard to discrimination claims.

The Supreme Court has confirmed that this option is possible. However, the court remained rather vague about the conditions that must be fulfilled for such a claim to be successful. It appears that the right to redress would only be available to individuals who are close relatives or closely emotionally attached to the victims of discrimination (not e.g. to NGOs defending the rights of victims of discrimination). The options to file a discrimination claim will need to be evaluated on case-by-case basis.

**Name of the court:** Constitutional Court of the Czech Republic

**Date of decision:** 27 December 2018

**Name of the parties:** Max Blanck vs. Czech Republic / Ministry of the Interior

**Reference number:** III. ÚS 3915/2018

**Address of the webpage:**

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=105040&pos=1&cnt=1&typ=result>

**Brief summary:** Czech Constitutional Court confirmed previous ruling of the Czech Supreme Court (decision No. 21 Cdo 2550/2018 dated 15 August 2018) according to which members of security forces who carry out public service may not claim discrimination in front of civil courts. Instead, the competent body to decide on discrimination claims for police officers is the Police President, and his/her decision may be challenged in front of administrative courts.

**Name of the court:** District Court in Ostrava

**Date of decision:** 8 March 2018

**Name of the parties:** not publicly known

**Reference number:** 85 C 20/2016

**Address of the webpage:** not available

**Brief summary:** The claimant claimed age discrimination in employment. She claimed she was subject to unfair treatment by her employer (a university), consisting e.g. in selective controls of compliance with working time rules, omitting to assign the employee a medical

examination, creating a hostile environment, and inappropriate verbal comments. The court granted the complainant compensation of CZK 50 000 (approximately EUR 2 000).

**Name of the court:** Municipal court in Prague

**Date of decision:** 15 March 2018

**Name of the parties:** not publicly known

**Reference number:** 29 Co 466/2017

**Address of the webpage:** not available

**Brief summary:** The claimant claimed disability discrimination in the area of education. The claimant was a disabled student with special education requirements. It was recommended that she attend a regular school but take advantage of individual support by an assistant teacher. As there were no public funds available for the salary costs of the assistant teacher, the parents of the claimant had to contribute to those costs. The claimant sued the state for compensation of the contribution. The court ruled that a requirement for a student to cover part of the salary costs of an assistant teacher represents direct disability discrimination, and it awarded full compensation of the costs.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country:** Czech Republic  
**Date:** 31 December 2018

<p><b>Title of the law: Act No. 2/1993, Charter of fundamental rights and freedoms</b> Abbreviation: Charter Date of adoption: 16 December 1992 Latest amendments: Act No. 162/1998 Entry into force: 1 January 1993 Web link: <a href="http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf">http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf</a> Grounds covered: sex, race, colour, language, religion or belief, political or other orientation, national or social origin, adherence to national or ethnic minority, property, birth or other status. Constitutional law Material scope: Fundamental rights declared by the Charter Principal content: Fundamental rights declared by the Charter</p>
<p><b>Title of the law: Act No. 198/2009, Anti-discrimination Act</b> Abbreviation: Anti-discrimination Act Date of adoption: 23 April 2009 Entry into force: 1 September 2009/1 December 2009 Latest amendments: Act No. 365/2017 Web link: <a href="https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/pravni_predpis_y/Anti-discrimination-Act.pdf">https://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/pravni_predpis_y/Anti-discrimination-Act.pdf</a> Grounds covered: race, colour, ethnic origin, 'nationality' (<i>národnost</i>), sex, sexual orientation, age, disability, religion or belief. Civil, administrative law Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social advantages, education. Principal content: Prohibition of direct and indirect discrimination, reasonable accommodation, harassment, instruction to discriminate, creation of a specialised body.</p>
<p><b>Title of the Law: Act No. 361/2003 on service by members of the security forces</b> Date of adoption: 23 September 2003 Latest amendments: Act No. 235/2018 Entry into force: 1 January 2007 Web link: <a href="https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=55966&amp;nr=361~2F2003&amp;rpp=15#local-content">https://portal.gov.cz/app/zakony/zakonPar.jsp?idBiblio=55966&amp;nr=361~2F2003&amp;rpp=15#local-content</a> Grounds covered: age, race, colour, sex, sexual orientation, religion and belief, political orientation, national origin, 'nationality' (<i>národnost</i>), ethnic or social origin, property, birth, marital and family status or family duties, membership of trade unions and other organisations. Labour law Material scope: Public employment. Principal content: Prohibition of direct and indirect discrimination</p>

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

**Country: Czech Republic**  
**Date: 31 December 2018**

<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	21 February 1991	18 March 1992	No	Yes	Yes
Protocol 12, ECHR	4 November 2000	No	No	No	No
Revised European Social Charter	4 November 2000	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	7 October 1968	23 December 1975	No	Yes	Yes
Framework Convention for the Protection of National Minorities	28 April 1995	18 December 1997	No	No	Theoretically, yes, but it contains obligations of result which, in the author's opinion, are formulated in such a way as to exclude direct applicability.
International Covenant on Economic, Social and Cultural Rights	7 October 1968	23 December 1975	No	No	Theoretically, yes, but it contains obligations of result which, in the author's opinion, are formulated in such a way as to exclude direct applicability.



<b>Instrument</b>	<b>Date of signature</b>	<b>Date of ratification</b>	<b>Derogations / reservations relevant to equality and non-discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Elimination of All Forms of Racial Discrimination	7 March 1966	29 December 1966	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	17 July 1980	16 February 1982	No	Yes	Yes
ILO Convention No. 111 on Discrimination	25 June 1958	21 January 1964	No	No	Yes
Convention on the Rights of the Child	30 September 1990	7 January 1991	No	No	Theoretically, yes, but it contains obligations of result which, in the author's opinion, are formulated in such a way as to exclude direct applicability.

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