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Country report

Non-discrimination

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including summary



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Country report

Non-discrimination

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

Romania

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EXECUTIVE SUMMARY

1. Introduction

Although Romania is theoretically a diverse society,¹ the understanding of the principle of equality and non-discrimination in the country is marked by three historical periods. First, Romanian society had to come to terms with the Communist experience of an imposed rhetoric of equality, de facto contradicted by aggressive assimilationist policies in regard to national or ethnic minorities, the refusal to recognise Roma as an ethnic minority, the criminalisation of consensual homosexual activities and the denial of religious freedom. Secondly, Romania had to cope with a transition period, which began in 1989. This was a period of increased awareness of the situation of minorities, magnified by a process of asserting the rights of these groups and the principles of equality and non-discrimination, including the adoption in 2000 of the Anti-discrimination Law. The third period, following accession to the EU in 2007, is one of gradual regression in the protection of human rights and the revival of nationalistic extremist discourse and conduct in relation to vulnerable groups, particularly Roma, LGBT people and religious minorities. This most recent stage of deteriorating human rights and equality standards has been more obvious in electoral years. The increases in the challenges to the idea of equality, NGOs working with vulnerable groups and even the national equality body were accentuated in 2018, in the context of the campaign for a referendum to restrictively amend the definition of family in the Romanian Constitution. Although the referendum failed due to an active boycott leading to a low turn-out, no measures were taken to assess, respond to and tackle the homophobia that continued even after the referendum was declared invalid.

The Romanian Anti-discrimination Law, Governmental Ordinance 137/2000 (GO 137/2000), was adopted in 2000 as delegated legislation and has subsequently been amended. The last three rounds of amendments in 2013 were made in the context of the proceedings before the CJEU in case C-81/12 *ACCEPT v NCCD* (the Becali case).² The 2000 discussions on the two European equality directives influenced the wording of the Romanian law, the provisions of which, in many ways, went beyond the *acquis*. A significant number of the cases before the national equality body – the National Council for Combating Discrimination (NCCD) – mention infringements of the right to dignity, a distinct feature of the law.

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

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

² Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*) (the Anti-discrimination Law), 31 August 2000.

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

Although the LGBTI minority is explicitly protected by the Anti-discrimination Law,⁴ it remains the group most under attack, being the subject of legislative proposals aiming to restrict LGBTI rights and the target of acts of aggression during NGO-organised events. These attacks remain uninvestigated and have attracted no sanctions, suggesting that authorities are liable for 'resultant indifference (which) would be tantamount to official acquiescence to, or even connivance with, hate crimes.'⁵ The Civil Code, in force since 2011, includes a specific prohibition of same-sex partnership and marriage, including the denial of recognition to partnerships and marriages legally registered abroad (even if contracted between foreigners). The aggressive campaigning for the October 2018 referendum led to an increase in the social distance between the general population and LGBTI persons – a November 2018 survey revealed that 74 % of the population do not trust an LGBT person, 59 % would not accept an LGBT person in the family and 52 % would not accept them as a friend, while 32 % would refuse to have an LGBT person as a work colleague.⁶ Transgender persons cannot invoke any legal protection, as the legislation does not provide any clear processes and standards for gender reassignment procedures or for the issuing of identity papers.

Specific programmes and special measures targeting people with disabilities or people living with HIV/AIDS are scarce and still do not cover the wide range of problems encountered. Romania signed the UN Convention on the Rights of Persons with Disabilities in September 2007, but only ratified it in November 2010. No subsequent legislation for harmonisation has been adopted and the mechanism for monitoring the implementation of the CRPD is weak. Romanian legislation still uses the concept of 'handicap', rather than 'person with disability', thus taking a medicalised approach to disability.

The national equality body (NCCD) has contributed to the process of dialogue and consultation with NGOs and social partners but the NCCD itself is under siege and has limited human and material resources. The NCCD is the victim of increased politicisation, due to the appointment process for the members of its steering board. In 2018, the Constitutional Court revoked the mandate of one of the members of the steering board, who was appointed by the Parliament even though she did not meet the legal requirements.⁷

2. Main legislation

The Romanian Constitution guarantees equal treatment of all citizens in Article 4(2), providing for citizenship without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin. Article 16 provides for equality of all citizens before the law and public authorities, without any privilege or discrimination. Article 30(7) prohibits 'any instigation ... to national, racial, class or religious hatred, any incitement to discrimination'.

Romania has signed all major European and international human rights instruments except the Optional Protocol to the European Social Charter. The Constitution asserts that constitutional provisions concerning the rights of citizens must be interpreted and enforced in conformity with the Universal Declaration on Human Rights, the covenants and other treaties to which Romania is a party. Furthermore, Article 20 of the Constitution also

⁴ Government Ordinance 137/2000 specifically mentions sexual orientation as protected ground. Although gender identity and gender expression are not mentioned in the law, the national equality body and the courts would protect trans and intersex persons given the open list of grounds provided for in Article 2.

⁵ ECtHR, *M.C. and A.C. v. Romania* Application no. 12060/12 from 12 April 2016, paragraph 124.

⁶ NCCD, IPP, IRES, (2018) *Attitudes and perceptions of the population survey*. The presentation of the findings is available in Romanian at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Sondaj_de_opinie_NoIn_toHate_2018.pdf. The report discussing findings is available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2019/02/Raport_Proiect_NoIntoHate_2018.pdf.

⁷ Constitutional Court, Decision 434/2018 on the unconstitutionality of the Decision of the Parliament 21/2018 regarding the appointment of a member of the NCCD steering board from 21 June 2018.

provides for the primacy of international regulations where any inconsistencies exist between treaties on fundamental human rights and the national laws, unless the national laws are more favourable. The Constitution however is not self-executing.

In addition to the specific Anti-discrimination Law (GO 137/2000), the Civil Code allows for torts claims for damages (including damages generated by discrimination) and the Criminal Code includes provisions on aggravating circumstances when criminal intention is triggered by any of the grounds protected by anti-discrimination legislation. The ECRIS database (the national application aggregating statistical data introduced by all courts), does not record the number of complaints or decisions on discrimination filed in application of the Anti-discrimination Law.⁸ Consequently, it is impossible to assess the use or the enforcement of these provisions.

The Criminal Code, which entered into force in February 2014, includes protection against incitement to discriminate, hate crimes and abuse with a discriminatory intent in the exercise of an official function. These are, however, norms with limited applicability, as proved by the statistics provided by the Prosecutor General. Since 2017, in the context of amending corruption-related provisions, the governing coalition has been trying to amend the provisions on abuse in an official function.

The Labour Code, as amended in 2011, includes general prohibitions of discrimination in employment. The Law on equal opportunities between women and men (the Equal Opportunities Law) replicates some of the provisions of the Anti-discrimination Law on discrimination in employment but lacks effective remedies and adequate implementation mechanisms.

In 2008 and 2009, the Anti-discrimination Law was reviewed by the Romanian Constitutional Court in a series of cases and its application was partially limited, while the NCCD's role as a quasi-judicial body was confirmed.

3. Main principles and definitions

The Anti-discrimination Law introduces a broad, comprehensive definition of direct discrimination, going beyond the substance and coverage of Directives 43/2000/EC and 78/2000/EC.⁹ The list of protected grounds is very generous and includes grounds outside the five grounds mentioned by the directives. However, the catch-all phrase 'any other criterion' creates the possibility for the courts or for the NCCD to apply the law to a wide list of categories going beyond the mere experience of discrimination and turning the anti-discrimination norm into a wider equality principle - this 'hyperinflation' of grounds has the potential for a negative impact on enforceability.

Since 2006, the Anti-discrimination Law has included a definition of indirect discrimination¹⁰ as well as harassment.¹¹ Harassment is also punished in the Equal Opportunities Law,

⁸ Superior Council of Magistracy (*Consiliul Superior al Magistraturii*), response 5/27805 to a public information request, 17 December 2015.

⁹ Anti-discrimination Law (GO 137/2000) prohibits 'any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, handicap, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.'

¹⁰ Indirect discrimination is defined as 'any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected groups, excepting the cases when these practices, criteria and provisions have an objective justification based on a legitimate purpose and the methods used to reach that purpose are adequate and necessary.'

¹¹ Harassment is defined and punished as 'any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, handicap, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.'

which establishes the framework for equal opportunities in employment,¹² and in the Criminal Code, but none of the definitions fully complies with the definition set out in the directives.

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

The Anti-discrimination Law was amended in 2013 to include a definition of genuine and determining occupational requirements, which still needs interpretation. The Anti-discrimination Law does not mention reasonable accommodation but specifically includes a definition of positive measures. Reasonable accommodation is defined in the legislation on the rights of persons with disabilities as a facility granted to the employee, but not as a duty of the employer.¹³

The concepts set out in the ECRI General Policy Recommendation no. 7 are not articulated in Romanian law, although some of these have been incorporated by the NCCD in its jurisprudence, specifically: segregation in education; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting to discriminate; aiding another to discriminate. Discrimination based on presumption is not expressly prohibited. A 2011 case, which made the headlines in the national media, evidenced the failure to include in the law the prohibition of residential segregation, a form of discrimination that is prevalent in relation to Roma. The NCCD found direct discrimination in such a case and issued a sanction, and the courts upheld the NCCD's decision.¹⁴ There have been no major developments in 2018.

4. Material scope

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

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

¹² Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men, 25 July 2006.

¹³ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006.

¹⁴ High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 640, file 1741/33/2011, 27 September 2013.

5. Enforcing the law

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

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

The NCCD has developed the practice of issuing recommendations carrying no financial or administrative penalties, particularly in cases against public authorities. In doing so, the NCCD invoked the statutory limitations established by the general regime on minor offences. The impact of this practice, however, was to call into question the effectiveness, proportionality and dissuasiveness of the remedies provided in cases of discrimination. The 2013 amendments to the Anti-discrimination Law addressed this challenge, introducing a statutory limitation term of six months for applying a sanction, calculated from the date when the NCCD decision is issued, thus replacing the controversial administrative statutory limitation (an issue that was discussed by the Court of Justice of the European Union (CJEU) in C-81/12).¹⁵ In the 2015 decision of the High Court of Cassation and Justice in the case providing the basis for the referral in C-81/12 (the Becali case), the domestic courts did not address the guidance issued by the CJEU regarding symbolic sanctions and maintained that the mere warning issued by the NCCD when finding discrimination can be considered a dissuasive, proportionate and adequate remedy.¹⁶

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

¹⁵ CJEU, 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275.

¹⁶ High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 2224/2014, 29 May 2015. The High Court stated: 'contrary to the statements of the complainant (ACCEPT), warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction [emphasis used by the Court]. In applying this sanction the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to punish the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society.' The decision also states that 'the High Court also concludes that the complainant association cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (*Legea Contenciosului Administrativ*), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.'

of legal persons who cause significant damage as a result of discriminatory action or who are repeat offenders.

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

The 2013 amendment to the Anti-discrimination Law redefines the burden of proof.¹⁷ The case law of the NCCD interpreted provisions on the burden of proof along the lines of the directives in some cases but not consistently, leaving the onus of proof on the complainants in a number of cases. The ambiguous understanding of the burden of proof by the NCCD and the courts alike is confirmed by the decisions of the Court of Appeal Bucuresti and of the High Court of Cassation and Justice in the case following up on C-81/12. Both courts upheld the NCCD decision, denying the appeal filed by ACCEPT Romania and finding the homophobic and exclusionary statements of George Becali, the person publicly known as the owner of Steaua București Football Club, as not amounting to discrimination in employment on grounds of sexual orientation.¹⁸

NGOs have legal standing and can file cases either on behalf of or in support of victims of discrimination. However, the remedies provided in such cases are limited, as personal damages are required for the courts to order compensation and in *actio popularis* cases the courts are not willing to accept damages.

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

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

6. Equality bodies

Provision for the national equality body, the National Council on Combating Discrimination (NCCD) (*Consiliul Național pentru Combaterea Discriminării*) was made in 2000, in the

¹⁷ The new wording on the burden of proof provides that 'the interested person will present facts based on which it can be presumed that direct or indirect discrimination exists, and the person against whom the complaint was filed has the duty to prove that no infringement of the principle of equal treatment occurred. Before the Steering Board (the courts) any means of proof can be brought, observing the constitutional regime of fundamental rights, including audio and video recordings and statistical data.'

¹⁸ High Court of Cassation and Justice (*Inalta Curte de Casație și Justiție*), Decision 2224/2014, 29 May 2015. The High Court uses the conclusions of the Court of Appeal by stating that 'it was correctly concluded by the first instance that there are no elements which would allow to find that the Football Club initiated any step, of any type, to contract the sportive services of the player I.I.' The High Court follows: 'In reality, the entire procedure had been launched based of purely speculative statements (of Mr. Becali) even if the author of the statement is a person which cannot be dissociated in the public perception from the Football Club Steaua București, from this unique occurrence it cannot be drawn the conclusion that the complainant is laying its account for (bets), particularly given that during the entire procedure the Football Club Steaua București denied any connection with the statements and the lack of basic facts.'

Anti-discrimination Law, but the NCCD was effectively established in the autumn of 2002. The NCCD started opening regional offices in 2007 and it currently has two such offices.

The NCCD is an autonomous public authority under the control of the Parliament, whose independence is established in the Anti-discrimination Law. The appointment of its steering board members by the six relevant parliamentary committees, as a guarantee of its institutional independence, proved in practice to be a hindrance, as politicisation of the nomination process led to the paralysis of the NCCD between the summer of 2009 and April 2010. The appointments made in April 2010 were criticised by NGOs and by independent candidates for failing to observe the legal requirements and for the politicisation of the process, seriously hampering the professionalism of the NCCD. Calls against the politicisation of the institution also came from inside the NCCD itself, including from its president. Three new appointments in 2012 were met with mixed reactions, as two candidates were political appointees with limited relevant experience, although the third was a well-established anti-discrimination expert, whose mandate was renewed on the basis of his expertise and in spite of his lack of any political affiliation. NGOs contested the procedures for appointing six new members of the steering board in 2015 as not observing the legal requirements, privileging candidates supported by political parties and lacking transparency. In 2018, the Constitutional Court finally revoked the mandate of one of the members of the steering board, as her appointment did not respect the legal requirement in Article 23 of the Anti-discrimination Law that a minimum of two-thirds of the board's members must be law graduates (four of the nine members did not have a legal background).¹⁹

The mandate of the NCCD encompasses: providing support for victims of discrimination through independent assistance; preventing discrimination through awareness raising and conducting studies and research; compilation of relevant data; independent surveys and independent reports; mediating between parties; investigating and sanctioning discrimination; and initiating legislative bills to ensure harmonisation of legal provisions with the equality principle. In practice, the main function of the NCCD is as a quasi-judicial body, which can find that certain acts amount to discrimination and can subsequently issue administrative sanctions (warnings or fines). The mandate of the NCCD was extended in 2017 by Law 106/2017; Article 4 provided for the monitoring of the rights of EU citizens exercising their freedom of movement in Romania and acting as national focal point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.²⁰

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

7. Key issues

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

¹⁹ Constitutional Court, Decision 434/2018 on the unconstitutionality of the Decision of the Parliament 21/2018 regarding the appointment of a member of the NCCD steering board from 21 June 2018.

²⁰ Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*), 22.05.2017.

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

2. The NCCD and the courts cannot find against and sanction discrimination in cases of discriminatory norms (*de jure* discrimination)

The limitation of the Anti-discrimination Law by the Romanian Constitutional Court in a series of decisions issued in 2008 and 2009, which restricted both the mandate of the NCCD²¹ and of the civil courts on discrimination generated by legislative provisions,²² created a gap in the effective protection against discrimination. The NCCD does not have constitutional standing to bring cases before the Constitutional Court when identifying discriminatory norms and the Ombudsman has repeatedly failed to act in such cases.

3. Legal concepts still needing clarification and interpretation

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

The concept of reasonable accommodation for persons with disabilities is not included in the Romanian Anti-discrimination Law and is currently defined only in the special legislation on the promotion and protection of the rights of persons with disabilities as a facility in the workplace for the employee, but without any provision for penalties for employers who fail to ensure reasonable accommodation.

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

4. Institutional limitations of the national equality body

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

The appointment of NCCD steering board members by the Parliament, as a guarantee of institutional independence, has in practice proved to be an obstacle. No new appointment was made following the revocation by the Constitutional Court of one member in July 2018. Politicisation of the steering board is visible in several areas: controversial decisions in cases involving politicians; demise of effective remedies in favour of recommendations lacking any legal power; limited quality of legal reasoning; and a decrease in the number of decisions of the NCCD upheld by the courts after being appealed.

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

²¹ Constitutional Court (*Curtea Constituțională*), Decision 997, 7 September 2008, finding Art. 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions to be unconstitutional.

²² Constitutional Court, Decisions 818, 819 and 820, 3 July 2008. The Constitutional Court concluded that the dispositions of Art. 1(2)(e) and of Art. 27 of the Anti-discrimination Law (GO 137/2000) are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

5. Lack of equality data

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

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

Romanian legal provisions go beyond the minimum requirements of the directives and provide protection for 'the right to dignity' in combating discrimination. This increased the effectiveness of the anti-discrimination mechanism and helped to increase the visibility of the NCCD. The 'right to dignity' has been invoked in cases where the legal provisions were not sufficient, as was the case in regard to the dividing wall segregating the Roma community in Baia Mare.²³ However, in relation to the right to dignity, a worrying practice is being developed by the NCCD and by the courts, in which they require claimants to produce evidence of the defendants' intention to discriminate.

7. Freedom of expression used as a justification in cases of discriminatory speech

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

8. Failure to adopt a national strategy for equality

Based on an external assessment of the NCCD's 2007-2013 national strategy, which was commissioned by the NCCD with the support of the Council of Europe, and also based on regional and national debates and roundtables, in December 2015, the NCCD prepared a new draft strategy, which was intended to be a national equality strategy, rather than just an institutional strategy. The draft was submitted for public debate and Government coordination. At the time of the writing, the draft strategy has still not been finalised.

²³ National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*), Decision No. 439, file no. 4A/2011, *ex officio v. Cherecheș*, 15 November 2011.

INTRODUCTION

The national legal system

The Romanian Constitution provides for equality and non-discrimination in broad terms as general principles applicable to all citizens, irrespective of 'race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin'.²⁴ These provisions are implemented in practice by specific anti-discrimination legislation adopted in August 2000 through delegated legislation, Government Ordinance 137/2000 – hereafter generally referred to as the Anti-discrimination Law.²⁵ Government Ordinance 137/2000 was amended in 2002, 2003, 2004, 2006 and three times in 2013. The Anti-discrimination Law introduces a mixed system of remedies, both civil and administrative (minor offences), which can be pursued separately or simultaneously.

The Anti-discrimination Law provides for the establishment of the National Council for Combating Discrimination (NCCD) (Consiliul Național pentru Combaterea Discriminării), which has a broad quasi-judicial and promotional mandate.²⁶ The Anti-discrimination Law can be also enforced by civil courts if the complainant seeks only civil remedies under general torts procedures. A decision of the NCCD is not required in such cases but might help in making a claim for damages under general torts provisions. The courts have an obligation to communicate with the NCCD in discrimination cases and invite it in as an expert. Civil complaints on the basis of the Anti-discrimination Law are exempt from court fees, and the locus standi and burden of proof are prescribed by law.

The grounds of unlawful discrimination as well as the material scope of the protection of the Romanian Anti-discrimination Law go beyond the requirements of the directives. The list of protected grounds is an open list modelled after Article 14 of the ECHR. In addition, the prohibition of discrimination on all grounds applies to employment as well as education, access to services and goods, including health services or public services and housing. The law includes a distinct feature, the right to dignity, which is often used as a catch-all concept. However, the scope of application of the Anti-discrimination Law was substantially diminished after 2008, following a series of decisions by the Romanian Constitutional Court (RCC) (Curtea Constituțională), which limited both the mandate of the NCCD,²⁷ and of the civil courts in relation to cases of discrimination generated by legislative provisions.²⁸ Following these RCC decisions, the NCCD refrained from issuing decisions in cases of potential de jure discrimination, invoking its lack of competence. However, the courts started to issue decisions obliging the NCCD to assess such cases and make a finding on whether discrimination took place.²⁹ This practice is not uniform so far.

²⁴ See section 1 of this report for more detail.

²⁵ Ordinance 137/2000 was adopted by the Government based on a constitutional procedure that allows the Parliament to delegate limited legislative powers to the Government during the parliamentary recess in accordance with Articles 114 and 107 (1) and (3) of the Constitution. The ordinances (statutory orders) must be submitted to the Parliament for approval, though in the interval between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and generate legal consequences.

²⁶ Romanian National Council for Combating Discrimination (NCCD) (Consiliul Național pentru Combaterea Discriminării). The official website of the institution is available at: <http://www.cncd.org.ro>.

²⁷ Romanian Constitutional Court (Curtea Constituțională), Decision 997 of 7 October 2008, concluding that the interpretation of Art. 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to identifying and punishing discrimination triggered by legislative provisions, is unconstitutional.

²⁸ Constitutional Court, Decisions 818, 819 and 820 of 3 July 2008. In these three decisions, the Constitutional Court concluded that the dispositions of Art. 1(2) e) and of Art. 27 of the Anti-discrimination Law are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Anti-discrimination Law but asserted that the enforcement of the law by some courts is unconstitutional, due to the fact that during its application, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus 'creating legal norms or substituting them with other norms of their choice.'

²⁹ For example: High Court of Justice and Cassation (Inalta Curte de Casație și Justiție) Decision 5060/2013 of 18 April 2013, available at: <http://legeaz.net/spete-contencios-inalta-curte-icci-2013/decizia-5060-2013>.

In 2008, the Romanian Constitutional Court (RCC) seized the opportunity to clarify the legal status of the NCCD as a tribunal-type equality authority in a case challenging the constitutionality of Articles 16-25 of the Anti-discrimination Law, which establish the mandate of the NCCD. The RCC affirmed that

'the NCCD is an administrative authority with jurisdictional mandate, which enjoys the independence required in order to carry out administrative-jurisdictional activities and complies with the constitutional provisions from Art. 124 of the Constitution on administration of justice and Art. 126(5) prohibiting the establishment of extraordinary courts of law.'³⁰

In a similar case in 2009, the RCC reaffirmed the role of the national equality body as an autonomous specialised public administrative body with a mandate to combat discrimination. The RCC clarified the role of the NCCD as an administrative body that has a mandate to interpret and apply the Anti-discrimination Law, and which enjoys the independence entailed by an administrative-jurisdictional activity.³¹

In 2013, the Court of Justice of the European Union (CJEU) had the opportunity to respond to a request for a preliminary ruling under Article 267 of the TFEU in *C-81/12 ACCEPT v. Consiliul Național pentru Combaterea Discriminării* (NCCD), clarifying the understanding of the burden of proof in the context of prohibition of discrimination on the ground of sexual orientation in relation to public statements made by a person who presented himself and was perceived by the general public as playing a leading role in a professional football club and who ruled out the recruitment of a footballer who was rumoured to be homosexual. The judgment discussed the issue of the effectiveness, proportionality and dissuasiveness of sanctions in cases of discrimination and the enforcement of statutory limitations specific to the general minor offences regime in cases of discrimination.³² In spite of the clear ruling of the CJEU, the Bucharest Court of Appeal ignored the guidance provided in C-81/12 and rejected the appeal of ACCEPT as unfounded, deciding to uphold the decision of the NCCD.³³ The decision was challenged by ACCEPT before the High Court of Cassation and Justice (Înalta Curte de Casație și Justiție), which also upheld the NCCD decision in a final decision issued on 29 May 2015. The reasoning of the High Court mentioned the comprehensive guidance of the CJEU only to underline that even the Luxembourg court, in its preliminary ruling, recognised that the competence for assessing the facts belongs exclusively to the national court. There was no analysis or incorporation of the substantive guidance provided by the CJEU.³⁴

³⁰ Constitutional Court, Decision 1096, 15 October 2008. The Court maintained the constitutionality of Arts. 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body.

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

³² Court of Justice of the European Union (CJEU), judgment of 25 April 2013, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275, available at: <http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12>.

³³ Bucharest Court of Appeal (*Curtea de Apel București*), file 12562/2/2010, civil sentence 4180, 23 December 2013. The Court of Appeal rejected the arguments of the complainant that the conflict should be defined as discrimination in employment and defined the exclusionary statements of Mr Becali as an exercise of free speech.

³⁴ High Court of Cassation and Justice, Decision 224 in file 12562/2/2010, 29 May 2015. See 01-RO- ND-2016-ICCJ Becali available at: <http://www.equalitylaw.eu/country/romania>.

The Anti-discrimination Law is enforceable nationwide and is complemented by relevant provisions found in ground-specific legislation, such as legislation regarding the rights of people with disabilities (defined by Romanian legislation as 'persons with handicap')³⁵ or in legislation regulating particular areas such as the Criminal Code,³⁶ and the Labour Code.³⁷ Where there are conflicting provisions in different relevant pieces of legislation, the Anti-discrimination Law would prevail as *lex specialis*.

Romania has signed and ratified most relevant international human rights documents except the Optional Protocol to the European Social Charter. Although they are not directly applicable in the national legal order, international human rights standards prevail if they are in conflict with domestic legislation. Although the UN Convention on the Rights of Persons with Disabilities was ratified, the special legislation has not yet been harmonised and the official Romanian translation includes major errors in relation to key concepts. Furthermore, the monitoring mechanism that has been established is weak.

List of main legislation transposing and implementing the directives

Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (the Anti-discrimination Law)³⁸ was adopted on 31 August 2000 and covers race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, age, 'handicap', non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion.³⁹ Its material scope covers employment relationships without differentiating between the types of actors (public or private, civilian or military, secular or religious),⁴⁰ access to public services, administrative and legal services, access to health services,⁴¹ access to education,⁴² freedom of movement, housing,⁴³ as well as protection of the right to dignity.⁴⁴

³⁵ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006. English translation available at:

<http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>.

³⁶ Criminal Code, Law 278/2006, 4 July 2006.

³⁷ Labour Code, 24 January 2003.

³⁸ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (*Ordonanța de Guvern 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare*), 30 August 2000, published in *Monitorul Oficial al României* No. 431 of September 2000. See also: Law 48/2002 concerning the adoption of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 31 January 2002; see also Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2003; see also Law 27/2004 concerning the adoption of the Government Ordinance 77/2003 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 11 April 2004. See also: Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 20 July 2006; Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013; and Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 27 March 2013.

³⁹ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2.

⁴⁰ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Arts. 5-8.

⁴¹ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 10.

⁴² Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 11.

⁴³ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Arts. 12-14.

⁴⁴ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 15.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

Articles 1(3), 4(2), 6, 16 and 30(7) of the Romanian Constitution address issues that relate to the prohibition of discrimination.⁴⁵

'Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.' (Article 1(3))

'Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.' (Article 4(2))

'(1) The State recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.

(2) The protection measures taken by the Romanian State for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens.' (Article 6)

'(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.

(2) No one is above the law.

(3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities.

(4) After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies.' (Article 16)

'Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination ... shall be prohibited by law.' (Article 30(7))⁴⁶

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

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

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

⁴⁵ The Constitution of Romania of 1991 was amended by Law 429/2003 on the revision of the Constitution of Romania, 29 October 2003, available at <http://www.cdep.ro/pls/dic/site.page?id=371>.

⁴⁶ Constitution of Romania of 1991, as amended.

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 in Article 2(1): 'race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion.'⁴⁷ The Romanian Anti-discrimination Law includes all grounds listed by the directives and goes further than the directives because it also mentions other grounds such as 'social status,' 'belonging to a disadvantaged group' or 'any other criterion'. The catch-all phrase 'any other criterion', which turns the anti-discrimination principle into a broad equality principle, has proved to be the most challenging in cases where discrimination was not based on any of the criteria specified in the law. In practice, most petitions are filed on 'other grounds' such as socio-professional category or other ad hoc categories.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

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

a) Racial or ethnic origin

A definition of national minority as an 'ethnicity which is represented in the Council of National Minorities' is included, without further details, in the electoral legislation.⁴⁸ When ratifying the European Charter for Regional or Minority Languages, the Parliament chose not to define minority languages but to list them.⁴⁹ The manual for those carrying out the survey for the 2011 census defined ethnicity as 'the option (self-determination) of a person

⁴⁷ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(1).

⁴⁸ Law 35/2008 on the election of the Chamber of Deputies and of the Senate and for the amendment of Law 67/2004 on the election of local public administration authorities, of Law 215/2001 on local public administration and of Law 393/2004 on the Statute of officials elected in local elections (*Lege pentru alegerea Camerei Deputaților și a Senatului și pentru modificarea și completarea Legii nr. 67/2004 pentru alegerea autorităților administrației publice locale, a Legii administrației publice locale nr. 215/2001 și a Legii nr. 393/2004 privind Statutul aleșilor locali*), 13 March 2008, Art. 2 (29).

⁴⁹ Law 282/2007 for the ratification of the European Charter of Regional and Minority Languages (*Lege 282/2007 pentru ratificarea Cartei europene a limbilor regionale sau minoritare*), 6 November 2007. Article 2 of the law lists the following minority languages: Albanian, Armenian, Bulgarian, Czech, Croatian, German, Greek, Italian, Hebrew, Hungarian, Macedonian, Polish, Romani, Russian, Ruthenian, Serbian, Slovak, Tatar, Turkish and Ukrainian.

to belong to a human group with common elements of civilization and culture, through one or more characteristics regarding language, religion, common traditions and customs, lifestyle and other specific characteristics'.⁵⁰ None of these elements is further legally defined or interpreted. In the same guidelines, 'mother tongue' is defined as: 'the first language used regularly in the family of the person interviewed, during his or her early childhood'.⁵¹

b) Religion and belief

No legal definition of the protected ground of religion is provided in the Anti-discrimination Law. The 2011 census manual defined religion as 'the creed or the religious or spiritual option, regardless if this is manifested or not through affiliation to a permanent religious community'.⁵²

c) Disability

Article 2 of Law 448/2006 uses the following legal definition: '... disabled persons shall be those persons who, due to a physical, mental or sensorial affection, do not have the abilities for normally performing the day to-day activities, requiring protection measures in support of their social recovery, integration and inclusion'.⁵³ In a 2012 decision, the NCCD discussed the meanings of the two concepts 'handicap' and 'disability' used in Romanian legislation, mentioning its preference for using the term 'disability in an inclusive manner' and clarifying that 'to the extent that an illness is not a non-contagious chronic disease (meaning a protected criterion), it becomes a disability depending on the duration, nature or severity of the disease'.⁵⁴ This approach might be interpreted as being in line with the definition provided subsequently by the CJEU in Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring*.⁵⁵ The national strategy 'A Society without Barriers for Persons with Disabilities 2016-2020' and the operational plan for the implementation of the strategy adopted on 14 September 2016 include further definitions.⁵⁶ The strategy introduces the recognition of the social model of disability and defines disability as 'a generic term for deficiencies/impairments, limitations of the activity and restrictions in participation. The concept reflects the negative aspects of the interaction between the individual, who has a health problem, and environment and personal factors the person is living in.' Persons with disabilities are defined as 'persons with physical, mental, intellectual or sensorial deficiencies which are long lasting, deficiencies which, in interaction with various barriers, might limit full and effective participation of the persons in the society, in equal conditions with others.'⁵⁷

⁵⁰ Institutul Național de Statistică (2011), *Recensământul populației și al locuințelor 2011, Instrumentar*. Manual available in Romanian on the website of the 2011 census, in Part 3: <http://www.recensamantromania.ro/instrumentar/>. Definition available on page 73.

⁵¹ Institutul Național de Statistică (2011), *Recensământul populației și al locuințelor 2011, Instrumentar*. Manual available in Romanian on the website of the 2011 census, in Part 3: <http://www.recensamantromania.ro/instrumentar/>. Definition available on page 73.

⁵² Institutul Național de Statistică (2011), *Recensământul populației și al locuințelor 2011, Instrumentar*. Manual available in Romanian on the website of the 2011 census, in Part 3: <http://www.recensamantromania.ro/instrumentar/>. Definition available on page 73.

⁵³ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 5(4). An unofficial translation of the law is available at: <http://www.equalrightstrust.org/erdocumentbank/LEGE%20448%20engleza.pdf>.

⁵⁴ National Council for Combating Discrimination (Consiliul Național pentru Combaterea Discriminării) (NCCD), Decision 509, file no. 433/2012, *FEDRA v. SC SECOM SRL*, 26 November 2012.

⁵⁵ Court of Justice of the European Union (CJEU), judgment of 11 April 2013, *Ring and Skouboe Werge*, joined Cases C-335/11 and C-337/11, EU:C:2013:222.

⁵⁶ Government Decision 655 for the approval of the national strategy, 'A Society without Barriers for Persons with Disabilities 2016-2020' and the operational plan for the implementation of the strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități” 2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități” 2016-2020*) 14 September 2016, (*Monitorul Oficial*, 737, 22 September 2016).

⁵⁷ Government Decision 655 for the approval of the National Strategy 'A Society without Barriers for Persons with Disabilities 2016-2020' and the operational plan for the implementation of the strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități”*

d) Age

There is no definition of age in the Anti-discrimination Law. In case law of the NCCD and courts, the term was applied to cover both younger and older persons.

e) Sexual orientation

There is no definition of sexual orientation in the Anti-discrimination Law.

2.1.2 Multiple discrimination

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

'Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen in para. 1 shall constitute an aggravating circumstance in establishing the contraventional responsibility, unless one or more of its components is not subject to criminal law.'⁵⁸

Romanian data on cases of multiple discrimination are contradictory and their accuracy cannot be verified, as there is no public access to the databases of the NCCD or courts, and the ECRIS database (the national statistical application aggregating data introduced by all courts) does not record the number of complaints or decisions on discrimination filed in application of the Romanian Anti-discrimination Law (Government Ordinance 137/2000).⁵⁹ The NCCD reported sanctioning multiple discrimination falling under the scope of Directive 2000/43/EC in seven cases in 2002 and in two cases in 2004, but no cases were reported subsequently.⁶⁰ However, in a 2011 response to a public information request, the NCCD reported 12 cases in 2003, 1 case in 2004, 18 cases in 2005, 4 cases in 2006, 6 cases in 2007, 8 cases in 2008, 1 case in 2009, 4 cases in 2010 and 1 case in 2011. The activity reports of the NCCD published after 2011 do not mention multiple discrimination. Based on the cases made publicly available so far, it seems that most multiple discrimination cases include a gender dimension.

In one of its most discussed cases, which was a case against the President of Romania, in which the complainants sought a harsher sanction on grounds of the aggravating circumstance of multiple discrimination (the expressions used by Traian Băsescu in relation to a female journalist were 'birdie', a pejorative with sexual connotations, and 'filthy Gypsy'), the NCCD Decision 92 of 23 May 2007 did not consider that gender discrimination occurred and did not assess the case from the perspective of multiple discrimination.⁶¹

2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități" 2016-2020) 14 September 2016, (*Monitorul Oficial*, 737, 22 September 2016).

⁵⁸ Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, Art. 2 (6).

⁵⁹ Superior Council of Magistracy (Consiliul Superior al Magistraturii), response 5/27805 to public information request, 17 December 2015.

⁶⁰ National Council for Combating Discrimination (2011), *Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010*, Bucharest, available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/Raport_D43_2000_CNC_D_final.pdf.

⁶¹ National Council for Combating Discrimination, Decision 92, *Andreea Pană v. Traian Băsescu*, 23 May 2007.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Romania, discrimination based on a perception or assumption of a person's characteristics is not prohibited in national law although the case law developed by the NCCD proves that discrimination by assumption or by association is penalised in practice. The NCCD discussed the concept in cases of discrimination on grounds of association with a particular group or assumption of belonging to a protected group (mostly in cases involving sexual orientation) but did not develop this in its reasoning.⁶² It is still up to the courts to decide whether a prohibition of assumed discrimination can be inferred from the general definition of direct discrimination included in the Anti-discrimination Law, as applied by the NCCD.

b) Discrimination by association

In Romania, discrimination based on association with persons with particular characteristics is not prohibited in the national law, although the definition of discrimination provided by Article 2 is broad/open enough to allow for enforcement in line with the CJEU judgment in *Coleman v. Attridge Law and Steve Law*.⁶³ However, the practice of the courts is not consistent.

In *D.Z. v. Distrigaz Sud*, Decision 4222, of 1 August 2007, the court of first instance in Bucharest ruled in favour of the complainant, who complained against being subjected to discriminatory conduct based on his affiliation with an NGO active in defending the rights of LGBT people in Romania (ACCEPT) when paying a monthly utilities bill at the offices of the defendant. The defendant was ordered to pay EUR 1 000 (amount awarded in euros) as civil damages but the court denied the request of the complainant for institutional measures on combating discrimination in the workplace (the complainant requested that the defendant be ordered by the court to engage in general measures to combat discrimination in future, such as diversity management, equality training for employees, adopting a code of conduct with clear prohibitions). The decision was appealed both by the defendant and by the complainant but the decision of the first court was upheld.⁶⁴

However, in a 2006 case, the High Court of Cassation and Justice found that the NCCD wrongly issued a warning sanctioning as discrimination an advertising campaign targeting future mothers and encouraging them to undertake pre-natal screening by showing the difficulties experienced by mothers of children with disabilities.⁶⁵ As Romanian legislation allows for protection against discrimination, including on grounds of belonging to a 'social group' (such as mothers of children born with disabilities), the NCCD sanctioned the social campaign following requests from organisations of persons with disabilities, which deemed the message offensive and discriminatory. The NCCD defined mothers of children with disabilities as a social group and not as a group deserving protection against discrimination based on association with persons with disabilities. However, the High Court considered the subject of the advertising to be 'mothers raising their children born ill, persons for whose situation the law does not provide for a criterion of discrimination and it cannot be accepted ... that these mothers might constitute a "social category" as provided by Article 2(1) of the Ordinance ... From the evidence provided it is beyond any doubt that in the

⁶² National Council for Combating Discrimination, Decision 92, 23 May 2007 in *Romani CRISS v. Traian Băsescu*. The NCCD considered the assumption made by the President when calling a journalist 'filthy Gipsy' as being discriminatory to the Roma community in general.

⁶³ Court of Justice of the European Union (CJEU), judgment of 17 July 2008, *Coleman v. Attridge Law and Steve Law*, Case C-303/06 EU:C:2008:415.

⁶⁴ Court of first instance No. 4, Bucharest (Judecătoria sectorului 4 București), *DZ v. Distrigaz Sud*, Decision 4222 in File no. 710/4/2006, 1 August 2007. Upheld by Bucharest Court of Appeal from 17 September 2008. Available at: http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000163867&id_inst=2.

⁶⁵ High Court of Justice and Cassation, Decision 3866/2006, file no. 34843/2/2005, *CAN v. CNCD*, 9 November 2006.

particular advertisements there are no children or adults with disabilities, and the NCCD takes into consideration mothers raising their children who were born ill.' This reasoning of the court, which has not been changed by subsequent jurisprudence, contradicts the CJEU judgment in *Coleman v. Attridge Law and Steve Law*.

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

a) Prohibition and definition of direct discrimination

In Romania, direct discrimination is prohibited in national law. It is defined in Article 2(1) of the Anti-discrimination Law as

'any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.'⁶⁶

b) Justification for direct discrimination

With the exception of genuine and determining occupational requirements, the Anti-discrimination Law does not permit justification of direct discrimination in general, or in relation to particular grounds. Researchers and victims have criticised the practice of the NCCD in asking perpetrators to provide justifications even in cases of direct discrimination.

2.2.1 Situation testing

a) Legal framework

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

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

b) Practice

In Romania, situation testing is not used in practice by NGOs. There is no recent case law on situation testing.

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

a) Prohibition and definition of indirect discrimination

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

⁶⁶ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(1).

'any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para. (1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.'⁶⁷

Although the legal definition complies with those in the directives, in practice, enforcement of the prohibition of indirect discrimination is problematic. In its report assessing the implementation of the Racial Equality Directive, the NCCD mentions that between 2002 and 2010 it sanctioned nine cases of indirect discrimination.⁶⁸ However, not all the cases presented as indirect discrimination are clear-cut. For example, in Decision 222 of 7 April 2005, the NCCD found that the insistent objections of the local mayor against the appointment of the complainant as deputy director of the school on grounds of his being Romanian, and his lobbying in favour of employing a Hungarian deputy director, amounted to indirect discrimination.⁶⁹ In deciding thus, the NCCD stated that it took note of the apparently neutral justifications of the school (the position of deputy director was abolished) and of the fact that abolition of the position disadvantaged persons in a comparable situation (the Romanian community), and sanctioned the defendant with a warning. The jurisprudence of the NCCD also blurs the lines between direct and indirect discrimination in a 2006 case regarding discrimination in education. In this case, the NCCD reacted ex officio on the basis of media reports of separate classrooms for Roma pupils and classes with a higher percentage of Roma in a school in Tulcea. The NCCD found in Decision 75 of 2 March 2006 that indirect discrimination consisted in 'placing Roma children in separate classes or in classes with disproportional percentages of Roma' and sanctioned the school leadership with a warning.⁷⁰

A 2010 decision regarding denial of access to public places (a club) to Roma, based on absence of club membership cards evidenced a more nuanced approach. The four complainants were denied access to a club due to lack of club membership cards, while these were not requested from other (non-Roma) persons. The defendant claimed that club membership cards were required for access. In order to apply for a membership card, potential clients were requested to supply a copy of their ID, a copy of the employment registry entry (official record of employment relations), the original of their criminal record document and a scan of their fingerprints. In its Decision 67 of 19 May 2010, the NCCD stated that while requesting a membership card for access to a club is justified by a legitimate scope such as ensuring order and protecting property, the conditions imposed do not differentiate, and disproportionately affect persons convicted for minor offences or persons who work as freelancers and do not have an employment registry entry. 'Lacking objective criteria regarding the requirements, the granting of the membership card becomes, in practice, arbitrary ... if the different treatment is caused by arbitrary requirements, it cannot be decided that it is objectively justified and is reasonable from the perspective of the principle of equality.' The NCCD found that the situation amounted to indirect discrimination: 'even if an apparently neutral criterion had been invoked, in practice this led to disadvantaging two Roma as compared to other persons (Romanians), without an objective justification, also the means for achieving the objective were not adequate.'⁷¹

⁶⁷ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Art. 2(3).

⁶⁸ National Council for Combating Discrimination (2011), *Raportul privind implementarea Directivei rasiale în România pentru perioada 2003-2010*, Bucharest, available at: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/Raport_D43_2000_CNC_D_final.pdf.

⁶⁹ National Council for Combating Discrimination, Decision 222 of 7 April 2005.

⁷⁰ National Council for Combating Discrimination, Decision 75 of 2 March 2006.

⁷¹ National Council for Combating Discrimination, Decision 67 of 19 May 2010.

b) Justification test for indirect discrimination

In its case law, the NCCD extensively relies on ECtHR and CJEU jurisprudence when discussing indirect discrimination and assessing legitimate aims, appropriate and necessary measures or objective justification. In a 2006 case filed by Romani CRISS against the Dumbrăveni Theoretical High School, the NCCD sanctioned indirect discrimination and in its legal reasoning assessed the legitimate aims as well as the measures taken in order to pursue the declared aims.⁷² The claimant, a Roma NGO, complained about the practice of transferring Roma pupils from the theoretical high school to a special school, leading to a situation where almost 90 % of the pupils attending the special school were Roma. The high school instituted a procedure for transferring to the special school pupils who failed to attain the grades required to pass a class for more than two or three years in succession and who were evaluated for transfer by a special commission established by law at the level of the local general directorate for the protection of the child and for social assistance. The special commission decided if the pupils had intellectual disabilities and whether they needed special education. In its decision, issued on 11 June 2008, the NCCD referred to the ECtHR decision in *D.H. and Others v. the Czech Republic* of 13 November 2007,⁷³ assessed the adverse effect of incentives granted in support of children with disabilities (benefits in food, transportation, financial support etc.) and concluded that even if the procedure for transferring children to the special school observed the legal requirements, in practice it led to discriminatory outcomes. The NCCD decided that the case amounted to indirect discrimination and recommended the Ministry of Education take all 'measures necessary in order to ensure implementation of the principle of equal opportunities in schools, and to redress the discriminatory treatment of Roma pupils who had been transferred from regular schools to special schools based on socio-economic needs' (and not based on disability).

2.3.1 Statistical evidence

a) Legal framework

In Romania, there is legislation regulating the collection of personal data under specific conditions, such as those provided in Law 677/2001 on the protection of persons regarding the use of personal data and the free movement of personal data.⁷⁴ Articles 20(6) and 27(4) of the Anti-discrimination Law as amended in 2013 provide:

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

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

There are no reports regarding the use of statistical data before the courts of law or for purposes of public policy or positive action measures. There is a lack of relevant equality data due to a faulty interpretation of the specific data protection legislation. Article 7(1) of Law 677/2001 on the protection of persons regarding the use of personal data and the free

⁷² National Council for Combating Discrimination, Decision 733 of 11 June 2008.

⁷³ European Court of Human Rights (ECtHR), *D.H. and Others v. the Czech Republic*, [GC] No. 57325/00, 13 November 2007.

⁷⁴ Law 677 on the protection of persons regarding the use of personal data and the free movement of personal data, 21 November 2001.

movement of personal data prohibits 'the use of personal data regarding the racial or ethnic origin, political, religious, philosophical or similar beliefs, trade union membership, as well as personal data regarding health status or sexual life'.⁷⁵ However, collection of personal data is still possible under certain conditions, as provided by Article 7(2) of Law 677/2001:

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

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

Similarly, Article 5(5) of Law 489/2006 on religious freedom and the general status of religious denominations prohibits:

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

Law 489/2006 provides that 'it is hereby forbidden to compel an individual to declare his or her religion, in any relationship with public authorities or private-law legal entities.'⁷⁶

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

b) Practice

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

The NCCD made extensive use of statistical data in *A.M. v. Harghita County Public Finances General Inspectorate*, which was a case on the advertising of employment vacancies for civil servants with the local finances inspectorate, which mentioned 'knowledge of the

⁷⁵ Law 677 on the protection of persons regarding the use of personal data and the free movement of personal data, 21 November 2001.

⁷⁶ Law 489/2006 on religious freedom and the general status of religious denominations, 28 December 2006, Art. 5(6).

Hungarian language' as a specific condition.⁷⁷ The NCCD compared the percentages of civil servants speaking only Romanian or Hungarian and their specific positions within the institution as well as their geographical representation in the context of the percentages of Hungarians or Romanians in each city, to assess the defendant's understanding and fulfilment of its legal obligation to make arrangements to respond to the needs of national minorities in counties where national minorities represent at least 20 % of the population. The NCCD sanctioned the Harghita County Public Finances General Inspectorate with an administrative fine of EUR 250 (RON 1 000).

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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

A specific definition of sexual harassment is provided by the Law on equal opportunities between men and women, in the context of employment relations, in Article 4(c).⁷⁸ Article 223 of the Criminal Code, which was adopted on 17 July 2009 and entered into force on 1 February 2014, uses a different wording to define and punish sexual harassment.⁷⁹

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

There are cases in which harassment was used as a catch-all concept to prohibit forms of discrimination not otherwise provided for in the Anti-discrimination Law. Given that there is no specific prohibition of residential segregation in the Anti-discrimination Law, in 2011, the NCCD defined as harassment the erection of a concrete wall 1.8-2 metres high and approximately 100 metres long between a Roma neighbourhood and the main road in the northern Romanian city of Baia Mare. In response to a media outcry, the wall was presented by the mayor of the city as designed to prevent traffic accidents. In its Decision 439 of 15 November 2011, the NCCD discusses the impact of segregation on a community and condemns it as harassment provided for by Article 2(5) of the Anti-discrimination Law

⁷⁷ National Council for Combating Discrimination, *A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita*, [A.M. v Harghita County Public Finances General Inspectorate], Decision no. 43, file number 353/2007, 9 January 2008.

⁷⁸ Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men, 25 July 2006, defines sexual harassment as: 'any form of behaviour in relation to gender, which the person responsible knows affects the dignity of other persons, and where such behaviour is rejected and represents the motivation for a decision affecting those persons.'

⁷⁹ Law 286/2009 on the Criminal Code, 17 July 2009 defines sexual harassment as: 'repeatedly soliciting sexual favours as part of an employment relationship or a similar relationship, if by so doing the victim was intimidated or placed in a humiliating situation, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine.' Official translation available at: <http://www.legislationline.org/documents/section/criminal-codes/country/8>.

together with Article 15 on the infringement of human dignity. The NCCD decided that the erection of a concrete wall separating an area of social housing predominantly occupied by Roma from the rest of the neighbourhood 'is a very serious deed which negatively affects the life of the entire Roma community'. Subsequently, the NCCD decided to impose a fine of approximately EUR 1 500 (RON 6 000) and to recommend the demolition of the concrete wall. The NCCD decision was challenged by the Mayor of Baia Mare before the Cluj Court of Appeal, which decided that the aim invoked by Mayor Cherecheş (protection of public safety due to alleged traffic accidents in the area) was legitimate. The Court of Appeal underlined the proportionality of the measure, but failed to share the burden of proof and request evidence from the local authorities to support their justifications and it failed to interpret harassment correctly as unwanted conduct with the purpose or effect of creating an intimidating, hostile, degrading and humiliating environment by correlating the Romanian (incomplete) provision with the definition in Article 2(3) of Directive 43/2000/EC. The NCCD appealed the decision of the Cluj Court of Appeal before the High Court of Cassation and Justice as the final court. The High Court decided to modify the judgment of the Cluj Court of Appeal by rejecting the challenge filed by the mayor of Baia Mare, upheld the decision of the NCCD that discrimination had occurred and ruled that the mayor should pay a fine. The decision of the High Court is final.⁸⁰ The Cluj Court of Appeal decision, which differs from that of the High Court, indicates once more that judicial interpretation is required to confirm the compliance of Article 2(5) of the Anti-discrimination Law with the EU non-discrimination directives, given that the definition is not identical and only the actual outcome or effect, and not the purpose, is covered by the law.

Findings regarding potential harassment are sometimes limited due to the use of two types of justification: invoking freedom of expression or presenting harassment as a violation of the right to dignity provided for in Article 15 of the Anti-discrimination Law which has, however, been interpreted by the NCCD as entailing the requirement to prove the intention to generate humiliation. In regard to the first limitation, Article 2(8) of the Romanian Anti-discrimination Law states that its provisions cannot be interpreted so as to limit freedom of expression, freedom of opinion and the right to information. Although the NCCD usually invokes the case law of the ECtHR on the limitations of freedom of expression, the practice of the NCCD and of the courts is not unitary and discriminatory speeches made by politicians remain unsanctioned on the basis of this justification and are not censured as abuse of the freedom of expression. As to the requirement to establish intention to discriminate in order to find an infringement of the right to human dignity, this interpretation has also been developed by the NCCD in relation to cases involving politicians and has been confirmed by the courts. For example, in the case of the allegedly discriminatory statements made by Prime Minister Victor Ponta on 20 March 2013 in relation to the Roma community, the NCCD found that no discrimination occurred, given that the defendant was exercising his right to free speech as provided for in Article 2(8) and that the claimants did not prove the intention of the defendant to violate human dignity.⁸¹ The Court of Appeal upheld the NCCD decision, finding that the claimant did not have the scope or intention to discriminate.⁸² The High Court of Cassation and Justice upheld this judgment as final in its decision of 12 March 2015.⁸³

b) Scope of liability for harassment

In Romania, when harassment is perpetrated by an employee, both the employer and the employee are liable. There is no specific provision in the Anti-discrimination Law and the

⁸⁰ High Court of Cassation and Justice, Decision 640, file 1741/33/2011, 27 September 2013. The summary of the decision of the court is available in Romanian at: <http://www.scj.ro/>.

⁸¹ National Council for Combating Discrimination, Decision 170, file 320/2013 and file 333/2013, 9 April 2013.

⁸² Bucharest Court of Appeal (Curtea de Apel Bucureşti), file 3123/2/2013, 9 October 2013.

⁸³ High Court of Cassation and Justice, Decision 735, 19 February 2015, file 3123/2/2013, 19 February 2015. The summary with the decision of the court is available in Romanian at: <http://www.scj.ro/1094/Detaliidosar?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=20000000304053>.

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Romania, instructions to discriminate are not explicitly prohibited in national law. Article 2(2) of the Anti-discrimination Law prohibits 'orders' to discriminate. Instructions to discriminate are not defined. Article 2(2) states: 'The order to discriminate against persons on any ground mentioned in para. (1) is considered discrimination.' It should be noted that the terminology might generate confusion as the wording used in Romanian is 'order', hence implying a hierarchical position, and not 'instruction', which has a wider application. Although the law provides for the prohibition of an order to discriminate, it fails to define this further, so that judicial interpretation is required in order to assess compliance with the definitions in the directives. The prohibition of orders to discriminate is applicable both to individuals and legal persons, as provided in Article 3 of the Anti-discrimination Law, in spite of specific provisions on the liability of legal persons. In practice, the NCCD and the courts assess the liability of the individual discriminator and of the legal person together.

The members of the steering board of the NCCD acknowledge difficulties in investigating cases of alleged orders to discriminate due to the challenges raised by the need to prove the existence of such orders (particularly in regard to access to pubs or clubs when door security guards invoke an instruction from owners or from management). In Decision 180 of 18 February 2008, the NCCD censured an instruction to discriminate leading to the denial of access to goods and services to a Roma. The complainant (H.C.) raised a complaint against an announcement posted at the entrance of an internet café stating: 'Beginning with [date] Roma are not allowed in this internet café because we had a lot of problems with them, they are quarrelling and fighting every evening.' The sanction issued both for direct discrimination and for the order to discriminate was a fine of approximately EUR 150 (RON 600).⁸⁴

The Criminal Code, which was adopted in 2009 and entered into force in February 2014, rephrased the definition of incitement to hatred or discrimination in Article 369 by deleting the list of protected grounds and introducing the following wording: 'Inciting the public, using any means, to hatred or discrimination against a category of individuals shall be punishable by no less than six months and no more than three years of imprisonment or by a fine.'⁸⁵

b) Scope of liability for instructions to discriminate

In Romania, the instructor and the discriminator are both liable. The Anti-discrimination Law does not include specific provisions on the scope of the liability. Liability is individual and in order to find discrimination, the NCCD identifies the agents of discrimination and their responsibility. The case law of the NCCD indicates that employers can be held liable for the actions of their employees if there is joint responsibility. The NCCD uses personal liability in determining the degree of responsibility for each party. Employers have not been held liable for actions of third parties. Trade unions or professional associations cannot be

⁸⁴ National Council for Combating Discrimination, Decision 180 of 18 February 2008.

⁸⁵ Law 286/2009 on the Criminal Code, 17 July 2009. Official translation available at: <http://www.legislationline.org/documents/section/criminal-codes/country/8>.

held liable for the actions of their members unless the discriminatory conduct represents the policy of the organisation or is carried out from a position of leadership, representing the policies of the entity.

The courts have imposed vicarious liability upon employers for the actions of their employees.⁸⁶ A person who discriminates in accordance with an instruction to discriminate would be held liable.

In its Decision 365 of 14 September 2011 in *NCCD and L Rausch v. S.C. Elaine S.R.L.* (owner of Heaven Club in Timișoara), the NCCD clarifies the conditions for determining the responsibility of a private company for the actions of its contractors (the security guard employed by a security company) and discusses the relationship of subordination between the contracting party and its contractor, by stating the obligation of private companies to include in their internal regulations provisions on equality and non-discrimination and provisions referring to the management of discrimination cases. In response to the petition of the complainant, who was refused entry to a night club due to her disability, the respondent stated, among other things, that: the security guard who refused entry to Ms Rausch was not an employee of the club but of a security company; the club was no longer working with this security guard; and the complainant had never had direct contact with a direct employee or representative of the club. The NCCD issued four separate administrative fines for two different situations, each violating two distinct articles of the Anti-discrimination Law, finding discrimination in access to services available to the public and discrimination affecting the right to human dignity of the person on the ground of disability. The NCCD fined the company owning the club a total of EUR 1 250 (RON 5 000), reportedly the highest penalty issued up to that time.⁸⁷

Article 219 of the Civil Code (Law 287/2009) sets out the regime of liability for legal acts:

'Lawful or unlawful acts perpetrated by the bodies of a legal entity create an obligation for the legal entity itself, but only if such acts relate to the powers or with the scope of the responsibilities assigned.

(2) Unlawful acts generate both the personal and joint liability of those who perpetrated them, both in relation with the legal entity itself and in relation to third persons.'

Article 220 on liability of members of the bodies of the legal entity provides that 'the decision-making body can decide, with the legally required majority, if it will take action against administrators, censors, directors and other persons who acted as members of the bodies of the legal entity, for damages caused by such persons when infringing their duties as assigned.'

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

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

In Romania, the duty on employers to provide reasonable accommodation is not included in the Anti-discrimination Law. The special legislation on the promotion and protection of the rights of persons with disabilities (Law 448/2006) provides for reasonable accommodation in the workplace as a facility for the employee but it does not establish any duty for the employer. Law 448/2006 mentions in general terms duties to facilitate

⁸⁶ Bihor County Tribunal (Tribunalul Bihor) Civil Judgement (*Sentinta Civila*) No. 620/L.M./2007, File No.6094/111/2006, *B. R. v. A. V.* [administrator of the Oradea Zoo], *M. I.*, [human resources manager] *Regia Autonomă de Piețe, Agrement și Salubritate Oradea* [employer], 1 October 2007.

⁸⁷ National Council for Combating Discrimination, Decision 365, *NCCD and L Rausch v. S.C. Elaine S.R.L.*, 14 September 2011.

accessibility to various public and private services and facilities. Law 448/2006 defines reasonable accommodation in the workplace as:

'all the changes undertaken by the employer in order to facilitate the exercising of the right to work of the person having a handicap [disability]; this entails adjusting the work schedule, buying supporting equipment, devices and technologies related to the disability and other similar measures.'⁸⁸

According to Article 83 of Law 448/2006, reasonable accommodation in the workplace is ensured both to persons with disabilities seeking a job and to those already employed, no matter the disability type. However, the law does not specify this as an obligation, and it does not establish the duty bearer. There is no provision for any limitation or restriction regarding persons entitled to claim reasonable accommodation, or guidance as to how the disability will be assessed and what tests for reasonableness/undue burden are to be applied.

Law 448/2006 provides no sanction to be used where there is failure to comply, but the general anti-discrimination provisions might be applied. Failure to provide reasonable accommodation as required in Article 83 of Law 448/2006 is mentioned among other arguments in a limited number of cases of the NCCD, which read the general prohibition of direct discrimination in conjunction with the legal provision in Article 83 to entail a duty to ensure reasonable accommodation.⁸⁹

In a notable case from 2008, the NCCD found against the General Directorate for Social Assistance and Child Protection, the Ministry of Labour, Family and Equal Opportunities and the National Authority for Persons with a Handicap for failure to ensure reasonable accommodation to a person with disabilities and for not providing adequate material support for persons with disabilities and their assistants.⁹⁰ The case was initiated by H. A., the mother of a visually impaired child, who complained about the lack of software needed for educational purposes and the absence of posts with audio signals at road crossings, and that the amount of money for disability benefits and personal assistant support is insufficient to ensure normal living conditions for two persons. The NCCD emphasised that the defendants have a duty to check observance of the relevant legal provisions and that they failed to prove that such checks took place. Consequently, the NCCD found that not ensuring provision of reasonable accommodation in the form of appropriate educational software amounts to discrimination, as does any failure to supervise the observance of legal provisions, which leads to discriminatory effects. The NCCD issued a recommendation to the National Authority for Persons with a Handicap, without imposing any monetary sanction.

In the specific area of employment, a similar decision would be also issued under the caveat of the new Article 4¹ of the Anti-discrimination Law as amended in 2013, which allows 'the difference of treatment based on one of the criteria provided for in Article 2 ... when due to the nature of the occupational activities or of the context in which it takes place, such a characteristic amounts to genuine and determining occupational requirements, under the requirement that the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary'. The new Article 4¹ follows the wording of Article 4 of Directive 2000/78/EC and repeals the former Article 9 of the Anti-discrimination Law. Currently, there is no legal wording to suggest a duty to consider whether making a reasonable accommodation would enable a person to comply with the requirements provided in the new Article 4¹.

⁸⁸ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 5(4). An unofficial translation of the law is available at: <http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>.

⁸⁹ National Council for Combating Discrimination, Decision no. 463, file number 210/2009, in petition no. 4918 of 12 May, *Complainant v. Respondent* [former employer], 2 September 2009.

⁹⁰ National Council for Combating Discrimination, Decision no. 596, file no. 441/2008, 13 November 2008.

b) Practice and case law

Existing NCCD and court jurisprudence does not allow an assessment of whether, when punishing failure to provide reasonable accommodation, the restrictive definition of disability in Law 448/2006 or the more comprehensive, broad approach to disability used so far by the NCCD would be applied. However, the NCCD approach is yet to be confirmed, as the body has so far been reluctant to clearly identify and consistently sanction failure to ensure reasonable accommodation, given that the legislation on the rights of persons with disabilities provides for other institutions to ensure its implementation.

The phrase 'disproportionate burden' is not used in the legislation. There is no legal provision or legal interpretation of what is 'reasonable' and what constitutes a 'disproportionate burden', neither in the practice of the NCCD nor of the National Authority for Persons with Disabilities (NAPD) (Autoritatea Națională pentru Persoanele cu Dizabilități). In view of the lack of specific legal provisions or consistent jurisprudence, it is impossible to assess whether there is any limit on the obligation to provide reasonable accommodation and how such a limit would be defined.

In a 2009 case regarding a person with disabilities who was refused a renewal of his employment contract using the justification of a no-hiring policy and a lack of vacant positions with working conditions appropriate for a person with an accentuated degree of disability, the NCCD rejected the arguments of the defendant, mentioning, among other things, the duty to provide reasonable accommodation as specified in the law and emphasising that, given that the complainant had worked for a long time in that specific position, it is reasonable to believe that there was no need for further accommodation. The NCCD did not look into the specifics of what measures were required to comply with the duty of ensuring reasonable accommodation, as, due to the prior employment relationship, it operated on the assumption that these requirements had already been met.⁹¹

Law 448/2006 introduces certain benefits for employers of persons with disabilities, including tax allowances for the costs of adaptation of the workplace and equipment and devices bought to accommodate people with disabilities.⁹² In addition, Law 448/2006 establishes a duty to provide adequate technical support in the area of education (Article 18), for access to public buildings (Article 63) and for access to transportation services (Article 64).

For example, Article 18 of Law 448/2006 mentions the duty to provide technical equipment, adapt furniture to the needs of pupils with disabilities, and to ensure special textbooks and software applications. Failure to comply with these obligations is punished with a fine in the range of approximately EUR 750 to EUR 2 250 (RON 3 000-9 000). The authority responsible for identifying and sanctioning such cases is the NAPD.⁹³ However, the NAPD has been reorganised and incorporated as a department within the Ministry of Labour as part of changes to institutional policies in response to the financial crisis, including the downsizing of social assistance services. Even prior to this, the NAPD was sanctioned by the NCCD for its failure to provide reasonable accommodation and to supervise observance of the legal provisions in this regard.⁹⁴

With few exceptions, the NCCD cases that might relate to penalising the failure to secure reasonable accommodation in areas outside employment do not specifically mention the concept of reasonable accommodation. This might be because it was easier for the NCCD

⁹¹ National Council for Combating Discrimination, Decision no. 77, file no. 260/2008, *Complainant v. ANIF R.A., Sucursala Teritorială Timiș*, 3 February 2009.

⁹² Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 84.

⁹³ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 100.

⁹⁴ National Council for Combating Discrimination, Decision no. 596, file no. 441/2008, 13 November 2008.

to apply the specific provision on denial of access to services or because reasonable accommodation and accessibility are not defined.

c) Definition of disability and non-discrimination protection

There is no definition of disability in the Anti-discrimination Law. The NCCD uses the legal definitions provided by the special legislation on the rights of persons with disabilities (Law 448/2006 and subsequent legislation). Article 2 of Law 448/2006 provides the legal definition of disabled persons as 'those persons who, due to a physical, mental or sensorial affection, do not have the abilities for normally performing the day-to-day activities, requiring protection measures in support of their social recovery, integration and inclusion.'⁹⁵

Government Decision 655 on the approval of the national strategy 'A Society without Barriers for Persons with Disabilities 2016-2020' and the operational plan for the implementation of the strategy from 14 September 2016 defines persons with disabilities in line with the UNCRPD approach as 'persons with physical, mental, intellectual or sensorial deficiencies which are long lasting, deficiencies which, in interaction with various barriers, might limit full and effective participation of the persons in the society, in equal conditions with others.'⁹⁶ When claiming reasonable accommodation, the general definition of disability as understood by the NCCD would apply.

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

In Romania, failure to meet the duty of reasonable accommodation is not mentioned as discrimination in the legal provisions but is penalised as such by the NCCD and by the courts. Law 448/2006 on the protection and promotion of the rights of persons with a handicap does not include specific sanctions for a failure to ensure reasonable accommodation in the workplace and does not define such failure as discrimination. Nevertheless, NCCD interpretation so far suggests that the failure to ensure reasonable accommodation would be judged as discrimination. The Anti-discrimination Law has so far been applied accordingly (Articles 5-8). However, Article 4¹ of the Anti-discrimination Law, as introduced in 2013, allows for justifications in cases of differential treatment in employment when the measures are objectively justified by a legitimate aim and the methods pursued are adequate and necessary. There is no jurisprudence from the courts or the national equality body so far, but in theory the exemption in Article 4¹ could be invoked in order to justify failure to secure reasonable accommodation if all the conditions of the test introduced in the new Article 4¹ are met.⁹⁷ Potential sanctions issued by the NCCD after the 2013 amendments to the Anti-discrimination Law are fines in the range of EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual and EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.

In the case *M.E.R. v. Dr. PG and the Mayoralty of Village V*, the NCCD found discrimination and issued an administrative warning against the defendant. The complainant, a dental technician with a hearing impairment complained that her patients and the doctors who

⁹⁵ An unofficial translation of the disability law is available at:

<http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>.

⁹⁶ Government Decision 655 on the approval of the national strategy 'A Society without Barriers for Persons with Disabilities 2016-2020' and the operational plan for the implementation of the strategy (*Hotărârea de Guvern 655 pentru aprobarea Strategiei naționale „O societate fără bariere pentru persoanele cu dizabilități” 2016-2020 și Planul operațional privind implementarea strategiei naționale O societate fără bariere pentru persoanele cu dizabilități” 2016-2020*) 14 September 2016, *Monitorul Oficial*, 737, 22 September 2016.

⁹⁷ The new Art. 4¹ as adopted in 2013 defines occupational requirements as reflected by Art. 4 of Directive 2000/78/EC and abrogated Art. 9, which previously dealt with this topic in a rather unclear manner, as it stated that 'the provisions of Arts. 5-8 (prohibition of discrimination in employment relations), cannot be interpreted as restricting the right of the employer to refuse to employ a person who does not correspond to determining occupational requirements in that particular field, as long as the refusal does not amount to an act of discrimination under the understanding of this Ordinance, and the measures are objectively justified by a legitimate aim and the methods used are adequate and necessary.'

worked with her could not reach her office as Dr PG, who had an office on the same floor, used to lock the doors, thus making access impossible as the complainant could not hear the bells. She requested that the entry into the building be left open during office hours to allow her to meet her clients. In its decision, the NCCD applied the provisions of Law 448/2006, in particular Article 74, providing for 'the right of the person with disabilities to enjoy all the conditions required for choosing and exercising his or her profession or trade, for getting and maintaining a job, as well as to develop professionally' and for the correlative duty of public authorities to 'a) promote the idea that a person with disabilities who is working constitutes added value to the society and for his or her community; b) promote a work environment open, inclusive and accessible for persons with disabilities.'⁹⁸

In 2015, the Bucharest Court of Appeal quashed in part NCCD Decision 126 of 25 February 2015, in which the NCCD found that no discrimination had occurred in the failure of two taxi companies to ensure reasonable accommodation in access to services.⁹⁹ The duty of taxi companies to ensure means of transportation for persons using wheelchairs that cannot be stowed in the luggage compartment of a car was discussed from the perspective of accessibility, as it clearly introduces the argument that failure to pre-emptively take all measures amounts to discrimination in access to public services. In its decision, the NCCD ruled that the behaviour of the cab driver did not amount to discrimination as the claimants did not specify the need for an adapted car when making the initial call and the cab driver's refusal was justified by the physical impossibility of fitting the wheelchair in the car boot. The claimants challenged the NCCD decision before the Bucharest Court of Appeal, seeking an annulment of the NCCD decision. The court upheld the NCCD decision in regard to the cab driver on the initial facts presented by the claimant but looked at the systemic challenge of accessibility. By extending the scope of the petition, the Court of Appeal found that the refusal of the two taxi companies amounts to discrimination as provided in Article 10(g) of the Anti-discrimination Law and issued a fine of approximately EUR 2 250 (RON 10 000) to each of the two companies. The Court of Appeal also ordered the two companies to redress the situation of discrimination by owning at least one specially adapted car to be used exclusively for persons with disabilities who use electric wheelchairs that cannot be stowed. The court also ordered Bucharest municipality, the General Directorate for Social Assistance and the Agency for Payments and Social Inspection of Bucharest to redress the situation of discrimination by taking all administrative measures provided by the legislation to oblige all companies authorised for taxi services to have at least one vehicle adapted for persons with disabilities who use electric wheelchairs that cannot be stowed.

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

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

For example, Article 18 of Law 448/2006 mentions the duty to provide technical equipment, adapt furniture to the needs of pupils with disabilities, and to ensure special textbooks and software applications. Failure to comply with these obligations is punishable by a fine in the range of approximately EUR 750-2 250 (RON 3 000-9 000). The authority responsible for identifying and penalising such cases is the NAPD.¹⁰⁰

⁹⁸ National Council for Combating Discrimination, Decision *M.E.R. v. dr. PG and Mayorality of V.*, 17 October 2007.

⁹⁹ Bucharest Court of Appeal, Decision 2547, 12 October 2015.

¹⁰⁰ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 100.

Most of the NCCD cases which could be relevant from the perspective of imposing sanctions for failing to secure reasonable accommodation in areas outside employment do not specifically mention the concept of reasonable accommodation. This might be because it was easier for the NCCD to look at the specific provision on denial of access to services or because reasonable accommodation and accessibility are not defined in the Anti-discrimination Law. A notable exception is a 2008 decision in which the NCCD found that the NAPD was responsible for the failure to ensure reasonable accommodation for a person with disabilities in meeting his education demands and for not providing adequate material support for persons with disabilities and their assistants. The NCCD issued a recommendation carrying no pecuniary penalty to the NAPD.¹⁰¹

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

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

Limited accommodation in respect of religion is provided in Article 134(1)(f) of the Labour Code in relation to observance of religious celebrations of employees by granting two days' holiday for two religious celebrations each year, to be taken in accordance with the faith of the employee, subject to the condition that the faith of the employee is recognised as one of the 18 state-recognised religions (*cult*) – a special procedure established by Law 489/2006, the Law on religious freedom and the general status of religious denominations.¹⁰²

In addition, in an attempt to accommodate Muslim religious burial rituals, the Parliament adopted Law 75/2010 on discharge from hospitals or morgues of deceased Muslims.¹⁰³ Law 75/2010 adapts the current provisions on hospitalisation and discharge from hospitals and from morgues of deceased persons to Islamic tenets. In order to observe religious prescriptions, Law 75/2010 provides in Article 1 that in the case of a deceased person belonging to and practising the Muslim religion, upon the request of the family, the corpse is discharged within 24 hours of establishment of death, and in accordance with Law 104/2003 regarding the handling of human corpses and removal of organs and tissues from corpses for transplant. The Ministry of Health had 30 days to propose adequate amendments to the methodological norms for the implementation of Law 104/2003 regarding the handling of human corpses and removal of organs and tissues from corpses for transplant, approved in Government Decision 451/2004 but no such norm was issued.

¹⁰¹ National Council for Combating Discrimination, Decision no. 596, file no. 441/2008, 13 November 2008.

¹⁰² This provision however might be in breach of the Directive 2000/78/EC given the recent judgment of the CJEU in *Case C-193/17, Cresco Investigation GmbH v Markus Achatzi*.

¹⁰³ Law 75/2010 on discharge from hospitals or morgues of deceased Muslims, 6 May 2010.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Romania, there are no residence, citizenship or nationality requirements for protection under the relevant national laws transposing the directives. Article 1(2) of the Anti-discrimination Law guarantees the principle of equality among citizens and provides for the prohibition of discrimination in the same context. A limitation is triggered by the constraints of Article 1(3) of the Romanian Constitution, which guarantees fundamental rights in relation to citizens only. However, the comprehensive definition of discrimination provided in Article 2(1) of the Anti-discrimination Law does not include any residence, citizenship or nationality requirements to qualify for protection, as confirmed by the case law of the NCCD.¹⁰⁴

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

a) Protection against discrimination

In Romania, the personal scope of the Anti-discrimination Law covers natural and legal persons for the purpose of protection against discrimination. Article 3 of the Anti-discrimination Law specifies that all public and private natural or legal persons have an obligation to observe the principles of Article 1(2). Article 26(2) provides that sanctions can also be enforced against legal persons. Article 26 provides for higher fines for discrimination perpetrated against groups or communities: the amount of the fine is within the range of approximately EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual, and within the range of EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.¹⁰⁵ Furthermore, Article 26(3) of the Anti-discrimination Law establishes an obligation for 'legal representatives of authorities and public institutions and of the economic agents under investigation, as well as natural persons' to:

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

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

b) Liability for discrimination

In Romania, the personal scope of the Anti-discrimination Law covers natural and legal persons for the purpose of liability for discrimination. Article 3 of the law specifies that it applies to all public and private natural or legal persons with mandates regarding:

- (a) conditions of hiring, criteria and conditions for recruitment, selection and promotion, access to all forms and levels of orientation, training and professional development;

¹⁰⁴ National Council for Combating Discrimination, Case no. 221, *D. v. N. and Șofronea swimming pool*, 21 September 2005, in which the victim of discrimination was an Egyptian national.

¹⁰⁵ Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013, Art. 26.

- (b) social protection and security;
- (c) public services and other services, access to goods and facilities;
- (d) education system;
- (e) ensuring freedom of movement;
- (f) ensuring public order;
- (g) other fields of social life.

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

- a) Protection against discrimination

In Romania, the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination according to Article 3 of the Anti-discrimination Law. Article 26 of the law provides for differentiated sanctions depending on whether the victim is a group or an individual.¹⁰⁶

- b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Article 5 – ‘According to the ordinance herein, conditioning the participation of a person in an economic activity or the freely chosen exercise of a profession on grounds of belonging to a race, nationality, ethnic group, religion, social category, on beliefs, gender or sexual orientation, age or on belonging to a disadvantaged group shall constitute a contravention.’¹⁰⁷

Article 6 – ‘According to the ordinance herein, the following constitute contraventions: discrimination in relation to employment and social protection on grounds of race, nationality, ethnic group, religion, social status or belonging to a disadvantaged group, beliefs, age, gender or sexual orientation, excepting the cases provided for by the law, with respect to:

- a) initiation, suspension, modification or termination of the employment relationship;
- b) establishing and modifying job-related duties, the place of work or wages;
- c) granting of social rights other than wages;
- d) professional training, refresher training, conversion training or promotion;
- e) enforcement of disciplinary measures;
- f) right to join a trade union and to access to the facilities it ensures;
- g) any other conditions related to carrying out a job, in accordance with the law in force.’

¹⁰⁶ According to Article 26 of the Anti-Discrimination Law, the amount of the fine as modified in 2013 is within the range of approximately EUR 250-7 500 (RON 1 000-30 000) if the victim is an individual, and within the range of EUR 500-25 000 (RON 2 000-100 000) if the victims are a group or a community.

¹⁰⁷ Unofficial translation.

Article 7 – '(1) In accordance with the ordinance herein, the refusal of any legal or natural person to employ a person on grounds of the applicant's race, nationality, belonging to an ethnic group, religion, or disadvantaged group, social status, beliefs, age, gender or sexual orientation shall constitute a contravention, excepting the cases specified by the law.

(2) If, in any job advertisement or interview, an employer or employer's representative sets conditions for appointment to a position related to an applicant belonging to a race, nationality, ethnic group, religion, or disadvantaged group, or to the social status, age, gender, sexual orientation or beliefs of the applicant, except for the situation provided for under Art. 2 paragraph 9, this shall constitute a contravention.

(3) Natural or legal persons involved in mediating and distributing positions of employment shall ensure equal treatment of all applicants, their free and equal access to opportunities to consult the supply and demand of the labour market, to consult on opportunities to obtain a job or a qualification, and shall refuse to support any discriminatory requirements on the part of employers. All information related to the race, nationality, membership of an ethnic group, religion, gender or sexual orientation of applicants for a job or any other private information shall be confidential.'

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

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

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

'1) in employment relations the principle of equal treatment in relation to all employees and employers applies;

2) any direct or indirect discrimination against an employee on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political beliefs, social origin, handicap [disability], family situation or responsibility, membership of or activity in a trade union is prohibited;

3) direct discrimination consists in exclusion, difference, restriction or preference, based on one or more grounds provided for in para (2), which have the purpose or the effect of not granting, limiting or denying the recognition, use or exercise of the rights provided for in the labour legislation;

4) indirect discrimination consists in acts or facts which in appearance are based on other criteria than those provided for in para. (2), but which generate the effects of direct discrimination.¹⁰⁸

¹⁰⁸ Law 40/2011 for amending and completing Law 53/2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

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

- 'a) on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political beliefs, social origin, handicap [disability], family situation or responsibility, membership or activity in a trade union;
- b) for exercising, according to the law, the right to strike and trade-union related rights.¹⁰⁹

There is no jurisprudence available to indicate whether the labour courts interpret the prohibition of discrimination on grounds of religion strictly as belonging to a state-recognised religious faith or to a religious association duly registered according to Law 489/2006 or in the light of the understanding promoted in the jurisprudence of the European Court of Human Rights, which has also been referred to by the Romanian Constitutional Court in its decisions.¹¹⁰

Although discrimination is prohibited, the Labour Code does not offer guidance in the case of employees dismissed or censured when they are not available or competent to do their job due to a family situation or disability and the author of this report can identify no labour law jurisprudence on this issue.

The Criminal Code, adopted in 2009, which entered into force in February 2014, outlaws under Article 297 (on abuse in the exercise of authority) the action of a civil servant who during the course of work-related duties, limits the exercise of a right of a person or creates a situation of inferiority for that person on grounds of age, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political membership, beliefs, wealth, social origin, age, handicap (disability), non-contagious chronic disease or HIV/AIDS; the deed is punishable with a term of imprisonment of from two to seven years and exclusion from holding a public position. In 2017, the coalition Government announced planned amendments in relation to anti-corruption provisions, including Article 297, which generated wide social protests. No amendments have been adopted so far.

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

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

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

¹⁰⁹ Law 40/2011 for amending and completing Law 53/2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011, Art. 59.

¹¹⁰ Constitutional Court, Decision 72, 18 July 1995.

Access to employment for migrants is regulated by a strict set of conditions established in the Law on the status of foreigners in Romania, adopted in 2002,¹¹¹ and Ordinance no. 25/2014 on the employment and transfer of foreigners on Romanian territory of August 2014.¹¹²

Conditions for access to employment and criteria for various professional activities in the public sector are mostly determined by law. This means that following decisions of the Romanian Constitutional Court that declared that the courts are not mandated to repeal legal provisions when deemed as conducive to discrimination (Decisions 818, 819 and 820 of 2008 on *de jure* discrimination) and decisions finding that the mandate of the national equality body is unconstitutional in cases of petitions filed in relation to discrimination triggered or embedded in legislative norms (Decision 997/2008), there is a *de facto* difference between the public and the private sectors in relation to the justiciability of discrimination in conditions for access to employment. In addition, following this line of jurisprudence, the national equality body (NCCD), faced with legal provisions incompatible with the anti-discrimination principle, does not have a mechanism allowing it to decline to apply that particular legal provision, as provided by the Court of Justice of the European Union (CJEU) in C-555/07 *Kücükdeveci*,¹¹³ while national courts cannot repeal the discriminatory norm but can still bring an exception of unconstitutionality before the Constitutional Court.

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

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

The lists of grounds from Articles 5, 6 and 7 should be read as including all grounds protected by Romanian legislation in Article 2, including disability, which is not specifically mentioned. The NCCD and the courts have confirmed this interpretation.

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

In Romania, national legislation prohibits discrimination in: vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities. Although it does not use the wording of Article 3(1)(b) of Directive 2000/43/EC, the Anti-discrimination Law mentions specific prohibitions against discrimination in access to vocational guidance, professional training, continuing professional training and practical work, both in the section on access to work in Article 6 and in the section on access to education in Article 11, which does not distinguish between the different forms, types, stages or levels of education. The relevant articles state:

'(1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.

¹¹¹ Emergency Ordinance no. 194/2002 on the status of foreigners in Romania (*OUG nr. 194/2002, Ordonanța de urgență privind regimul străinilor în România*), 5 June 2008.

¹¹² Ordinance no. 25/2014 on employment and transfer of foreigners on Romanian territory (*Ordonanța nr. 25/2014 privind încadrarea în muncă și detașarea străinilor pe teritoriul României și pentru modificarea și completarea unor acte normative privind regimul străinilor în România*), 26 August 2014.

¹¹³ Court of Justice of the European Union (CJEU), 19 January 2010, *Seda Küçükdeveci v. Swedex GmbH & Co. KG*, C-555/07 EU:C:2010:21.

(2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.'

'(4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category, by his/her beliefs, age, gender or sexual orientation.'

'(6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged category in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute a contravention.'

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

The lists of grounds in Article 6 and Article 11 should be read as including all grounds protected by Romanian legislation, including disability, although this is not specifically mentioned, given the correlation with Article 2(1) of the Anti-discrimination Law, which includes an open list of protected criteria.

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

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

The lists of grounds in Article 6 should be read as including all grounds protected by Romanian legislation, including disability, which is not specifically mentioned. Further protection was ensured in the 2011 legislation on social dialogue¹¹⁴ and in the Labour Code, both of which clearly spell out the prohibition of dismissal of employees due to their exercise of the right to strike and of their rights related to their trade union activities.¹¹⁵

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

In Romania, national legislation prohibits discrimination in: social protection, including social security and healthcare, as formulated in the Racial Equality Directive. Protection against discrimination in social protection is provided for, both in connection to employment relationships and in general in relation to all grounds. Article 6 of the Anti-discrimination Law prohibiting discrimination mentions 'granting of social rights other than the wages' and 'any other conditions related to the carry out [sic] of a job, in accordance with the law in force'. Article 8 states:

¹¹⁴ Law 54 /2003 Trade Unions Law, 24 January 2004, was abrogated and replaced by Article 224 of Law 62/2011 on social dialogue, 10 May 2011.

¹¹⁵ Law 40/2011 for amending and completing Law 53/2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011, Article 59(b).

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

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

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

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

The lists of grounds in Articles 6, 7 and 8 should be read as including all grounds protected by Romanian legislation, including disability, although this is not specifically mentioned. Judicial interpretation is required to confirm the inclusive approach of the NCCD.¹¹⁶

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

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

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

In Romania, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive. The Anti-discrimination Law prohibits discrimination in granting social advantages in Article 6 and in Article 8, without distinguishing between the different types of benefits and social advantages private or public actors might grant to their employees. It includes the 'granting of social rights other than the wages' and 'any other conditions related to the carry out of a job, in accordance with the law in force'. Article 8 states:

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

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

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

¹¹⁶ National Council for Combating Discrimination, Decision 94 of 5 February 2014.

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

Although it is not specifically mentioned, disability should also be a protected ground in regard to access to services, interpreted under the general concept of 'disadvantaged group' and in light of the general definition of discrimination in Article 2(1), which lists disability as a protected ground.¹¹⁷ Judicial interpretation is required to confirm this inclusive approach.

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

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

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

'(1) Under the ordinance herein, denying the access of a person or of a group of persons to the state-owned or private education system of any kind, degree or level, on account of their belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, on account of their beliefs, age, gender or sexual orientation, shall constitute a contravention.

(2) The provisions of the paragraph above shall be applicable to all stages and levels of education, including admission or enrolment in education institutions and the assessment and examination of students' knowledge.

(3) Under the ordinance herein, requiring a declaration to prove a person's or group's belonging to an ethnic group as a condition for access to education in their mother tongue shall constitute a contravention. The exception to the rule is the situation when the candidates apply in the secondary and higher education system for places allotted specifically to a certain minority, in which case they must prove their belonging to that minority by means of a document issued by a legally established organisation of the respective minority.

(4) The provisions under paragraphs (1), (2) and (3) shall not be interpreted as a restriction of the right of an education institution to deny the application of a person whose knowledge and/or prior results do not meet the required admission standards of that institution, as long as the refusal is not determined by the person's belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group, by his/her beliefs, age, gender or sexual orientation.

(5) The provisions under paragraphs (1) and (2) shall not be interpreted as a restriction of the right of education institutions that train religious personnel in view of being employed in worship places to deny the application of a person whose religious status does not meet the requirements established for access to the respective institution.

(6) According to the ordinance herein, any restrictions based on belonging to a race, nationality, ethnic group, religion, social category or to a disadvantaged group in the establishment and licensing of education institutions set up in accordance with the legal framework in force shall constitute a contravention.'

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

The requirement in Article 11(3) has been interpreted as a letter issued by a legally established non-governmental organisation of the respective minority or by a body

¹¹⁷ National Council for Combating Discrimination, Decision 94 of 5 February 2014 against the Mayor of Galați for delays in responding to a request to build a ramp.

containing in its statutes a declaration of interest in working on behalf of a particular minority group.

The Law on the status of foreigners in Romania from 2002 provides for the right to access education for foreigners.¹¹⁸ The Ordinance on the social integration of foreigners also mentions in Article 9 that foreigners granted any form of protection in Romania have equal access to all forms of education similar to Romanian citizens.¹¹⁹ However, due to the small number of immigrants, public institutions with a role in education do not feel responsible for designing integration programmes for migrants, mainly leaving the responsibility for migrants to immigration authorities.¹²⁰

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

The National Education Law (Law 1/2011), provides in Article 2(4) that the state 'grants equal rights of access to all levels and forms of pre-university and higher education, as well as lifelong learning, for all citizens of Romania, without any form of discrimination'.¹²¹ Thus, the previous prohibition of discrimination regardless of 'race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, belonging to a vulnerable group category as well as any other criterion' mentioned in Article 9 of the previous draft was replaced by a more vague principle of equity defined as absence of discrimination in general in access to education. Only discrimination in tertiary education is expressly prohibited, in Article 118 and in Article 202.

Although the previous Education Law of 1995¹²² defined segregation in education in Articles 5(48) and 8, these definitions were omitted from the current law.¹²³ In Article 3, the National Education Law provides as a defining principle 'the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity' as well as the principle of 'ensuring equal opportunities'. Notably, Article 50 provides that 'abusive diagnostic assessment of children based on criteria of race, nationality, ethnicity, language, belonging to a disadvantaged category, or any other criterion, which leads to their inclusion in special

¹¹⁸ Emergency Ordinance no. 194/2002 on the status of foreigners in Romania (*OUG nr. 194/2002, ordonanta de urgenta privind regimul strainilor in Romania*), 5 June 2008.

¹¹⁹ Ordinance no. 44/2004 on the social integration of foreigners who were granted a form of protection or residence status in Romania, and of EU citizens and citizens of the European Economic Area (*Ordonanța nr. 44/2004 privind integrarea socială a străinilor care au dobândit o formă de protecție sau un permis de ședere în România, precum și a cetățenilor UE și a Spațiului Economic European*), 2004, available at: <http://www.mmuncii.ro/pub/imagemanager/imaget/file/Legislatie/ORDONANTE-DE-GUVERN/OG44-2004.pdf>.

¹²⁰ Alexe, I., Ulrich, L., Stănciugelu, Șt, Mihăiță, V., Bojincă, M. (2010), *Gestionarea benefică a imigrației în România*, Soros Foundation Romania, p. 24.

¹²¹ Law 1/2011 on National Education (*Legea Educației Naționale*), 10 January 2011.

¹²² Education Law 84 of 1995, published as amended by Law 151/1999, republished in *Monitorul Oficial*, No. 370/3 August 1999.

¹²³ The draft 2009 Education Code, which was declared unconstitutional for procedural flaws, defined segregation in education in Art. 5(48) as 'a serious type of discrimination consisting in physical separation, with or without intention, of minority children and youth from the rest of the children and youth, in groups, classes, buildings, educational institutions and other accommodation facilities used for education, so that the percentage of minority children and youth out of the total of children/youth in that particular educational institution/ classroom/ group is disproportionate when compared to the percentage of minority children and youth of that particular age out of the total population of the same age in that particular administrative-territorial unit (village or city).' The Code added in Art. 8 that 'the organizing, functioning and content of education cannot be structured based on exclusivist, segregationist and discriminatory criteria on grounds of ideology, politics, religion or ethnicity' and in Art. 8(6) specifically prohibited segregation without providing for a specific sanction. 'Organizing the educational process so that to allow teaching of mother tongue and/or other/all courses in mother tongue, as well as similar cases expressly provided in the law, are not considered as segregation.'

education needs groups, shall be punished'. However, there are no specific sanctions included in the law.

a) Pupils with disabilities

In Romania, the general approach to education for pupils with disabilities does raise problems, as the inclusive legal framework is not matched by effective measures to ensure inclusive education of pupils with disabilities. Most of these pupils remain in special educational units and attempts to advocate the principle of normalisation are met with resistance from the authorities and educational personnel. Disabilities activists promoting inclusive education have come under aggressive attack.¹²⁴

The education of pupils and students with disabilities is accommodated according to the National Education Law and the special legislation on the rights of persons with disabilities. Article 15 of Law 448/2006 on special protection for persons with disabilities guarantees the right to education of children with disabilities (without distinguishing between different types or degrees of disability) in the form chosen by the child, or the child's parents or guardians.¹²⁵ Article 15(2) guarantees the right to permanent education and continuing education of persons with disabilities.

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

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

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

The National Education Law fails to address the issue of children dropping out as a result of discrimination and harassment on grounds of disability. Although it establishes fines for parents who fail to ensure that their children go to school, it does not include any penalty for harassment that induces children to drop out. In addition, the National Education Law does not provide for sanctions for schools or school inspectorates that refuse to create appropriate schooling solutions for children.

Integration and equal opportunities in social life are recognised as critical needs in relevant legislation. Thus, the Law on the protection and promotion of the rights of the child

¹²⁴ The European Centre for the Rights of Children with Disabilities (*Centrul European pentru Drepturile Copiilor cu Dizabilități*, CEDCD) and its leader came under attack from local media and trade union leaders due to its work on a proposed bill on special education seeking to advocate for a CRPD-compliant reform of the system of education for children with disabilities. Subsequently, a complaint was filed with the NCCD against a journalist, the leader of a trade union of teachers and two teachers in special schools for the statements made by these persons in a series of articles published in a regional newspaper *Evenimentul Regional al Moldovei*. The NCCD dismissed the claim, defining the statements as free speech in its Decision 14 of 14 January 2015, communicated on 22 May 2015.

¹²⁵ Law 448/2006 on the protection and promotion of the rights of persons with a handicap, 6 December 2006, Art. 17.

establishes an obligation for central and local public authorities to initiate projects and provide the funding to develop services targeted to satisfy the needs of children with disabilities in conditions observing their dignity, autonomy and active participation in the life of the community.¹²⁶ There is no subsequent legislation further defining this obligation and the mechanism for its implementation. The case law and the NGO reports indicate that the problem remains the implementation of the legal framework in order to ensure inclusive education in practice.¹²⁷

Law 272/2004 on the protection of the rights of the child states that 'the child with disabilities has the right to education, recuperation, compensation, rehabilitation and integration, adapted to the own possibilities, in view of his or her personality.'¹²⁸ Law 272/2004 fails to provide any implementation mechanism that would allow its enforceability or any sanction in case of failure to observe these rights.

In the particular case of children living with HIV/AIDS, their right to education is provided for in Article 3 of Law 584/2002, the framework law for the protection of persons living with HIV/AIDS, which states that 'persons infected with HIV or living with AIDS are entitled to social protection and non-discriminatory treatment in regard of their right to education.'¹²⁹ Law 584/2002 does not include any enforcement mechanism or sanctions.

Although it also lacks the methodology that would allowing enforcement, framework order 6234/2016 defines an inclusive school as 'a friendly and democratic school, which values the socio-ethnic-cultural diversity, a school in which all children are respected and integrated without discrimination and without exclusion triggered by their ethnic origin, mother tongue, disability and / or special educational needs, socio-economic status of their families, residential environment or educational achievement of the beneficiaries.'¹³⁰

In a 2013 decision, the NCCD found that discrimination was perpetrated by a school against a child with Asperger syndrome. Following protests from parents of other children, school officials started to put heavy pressure on the child and his parents to transfer him to a different class.¹³¹ In its decision, the NCCD assessed each of the defences invoked by the defendant, concluding that the justifications were not objective and were not legitimate. Consequently, the NCCD found a violation of Article 2(1) – direct discrimination, Article 11 – discrimination in education, Article 2(5) – harassment and Article 15 – discrimination affecting the right to dignity, of the Anti-discrimination Law and fined the school approximately EUR 220 (RON 1 000). The NCCD also recommended that the school inform the parents of other children regarding the decision and in future it should not yield to pressure from other parents regarding exclusion of children with disabilities from classrooms.

In a 2009 decision, the NCCD fined a school EUR 125 (RON 600) due to an initiative by a teacher to collect signatures with the purpose of excluding a pupil from a class because of disability. This was deemed as discrimination affecting the right to education and in addition to the fine, the NCCD issued a warning and recommended 'initiating courses for

¹²⁶ Law 272/2004 on the protection and promotion of the rights of the child, 21 June 2004, Art. 46 4.

¹²⁷ European Centre for the Rights of Children with Disabilities, July 2012, report available at: <http://www.cedcd.ro/despre-noi/rapoarte/150,raportul-anual-de-activitate-al-cedcd-2012/>.

¹²⁸ Law 272/2004 on the protection and promotion of the rights of the child, 21 June 2004, Art. 46 2.

¹²⁹ Law No. 584/2002 on measures to prevent the spread of AIDS in Romania and to protect persons infected with HIV or suffering from AIDS (*Legea nr. 584/2002 privind masurile de prevenire a raspandirii maladiei SIDA in Romania si de protectie a persoanelor infectate cu HIV sau bolnave de SIDA*), 29 September 2002, Art. 3.

¹³⁰ Ministry of National Education and Scientific Research, Framework order no. 6134 prohibiting school segregation in primary and secondary education, 22 December 2016, Article 1(2). Available at: <http://edu.ro/politici-publice-%C3%AEn-educa%C8%9Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare>.

¹³¹ National Council for Combating Discrimination, Decision 6444, 30 October 2013.

the educational personnel of the school on topics such as respect for human rights and the principle of equality to prevent such cases in the future'.¹³²

b) Trends and patterns regarding Roma pupils

In Romania, there are specific trends and patterns (legal and societal) in education regarding Roma pupils, such as segregation. Another challenge is poorer quality education for Roma children.

Segregation of Roma pupils remains a problem, as evidenced by research supported by UNICEF in 2011, which found that almost 60 % of Roma children who attend pre-school education go to segregated kindergartens (that is, where over 50 % of the children are Roma), and 11.7 % of Roma children are in all-Roma kindergarten groups.

In regard to segregation in education, the Romanian Ministry of Education adopted Order no. 1540/2007 on banning school segregation of Roma children and on approving the methodology on preventing and eliminating school segregation of Roma children. Order no. 1540/2007 is intended to prevent, ban and eliminate segregation, seen as a severe form of discrimination with negative consequences on equal access of children to quality education. It includes penalties for those who do not observe its provisions.

In 2010, the Ministry of Education issued Notification 28463 regarding segregation of Roma in education, which regulates the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the educational system.¹³³ This notification is an internal norm intended for school inspectorates, kindergarten and school headmasters, as well as teachers, to specifically deal with the prevention and elimination of segregation of Roma pre-school and primary and secondary school pupils in the education system. The notification also includes some measures regarding education in minority languages.

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

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

On 22 December 2016, the Ministry of National Education and Scientific Research issued two orders: Order no. 6158 adopting the action plan on school desegregation, and Framework order no. 6134 for prohibiting school segregation in primary and secondary education. Both orders aim to establish public policy regarding segregation in education in Romania in relation to the following criteria listed as protected grounds: ethnic origin, mother tongue, disability and/or special educational needs, socio-economic status of the

¹³² National Council for Combating Discrimination, Decision 101, 17 February 2009.

¹³³ Ministry of Education, Research, Youth and Sports, Notification 28463/2010, available at <http://www2.edu.ro/index.php/legaldocs/?sort=title&letter=N>.

families, residential environment or educational achievement of the beneficiaries.¹³⁴ Despite introducing needed and valuable clarifications, the two standards are still not enforced as no implementation mechanism was adopted.

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

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

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

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

The NCCD case law on segregation is rather diverse including cases of placing Roma children in different schools or within schools by establishing buildings or classes with a disproportionate number of Roma and with significantly lower educational conditions, or through transfer of Roma children in classes or schools for children with special needs, such as Cehei (2003), Glina (2007), Atid, Special School Dumbraveni (2008), Luceafarul School (2012), Ionita Asan (2012).¹³⁵ Even if segregation is not specifically defined in the GO 137/2000, the NCCD issued decisions against the schools initially finding indirect discrimination and later on (increasingly) finding direct discrimination under Article 2(1) combined with Article 11.

¹³⁴ Ministry of National Education and Scientific Research, Order no. 6158 adopting the action plan on school desegregation, and Framework order no. 6134 for prohibiting school segregation in primary and secondary education, 22 December 2016. Available at: <http://edu.ro/politici-publice-%C3%AEn-educa%C8%99Bie-pentru-prevenirea-combaterea-%C8%99i-interzicerea-segreg%C4%83rii-%C8%99colare>.

¹³⁵ Romani CRISS filed a complaint with the NCCD on 25 January 2007 regarding the differentiated treatment applied to Roma pupils in Dumbrăveni by separating them from the majority pupils in grades 1 to 8 and moving them from the local Theoretical High School to a special school. According to Romani CRISS, over 90 % of the students in the special school are Roma, and they are transferred to special schools because they fail to obtain pass grades in the mainstream school, and not because they have special needs. Roma parents claim that their children fail because they are seated at the back of the classroom, and the teachers do not pay due attention to them. In a similar case, on 7 February 2007, Romani CRISS filed a complaint with the NCCD reporting on discrimination against Roma children in 3rd, 4th and 6th grades in School no. 17, and 1st, 3rd and 4th grades in School no. 19, both in Craiova, Dolj County. These children are allegedly segregated from majority students because their parents enrol them late. Roma parents state that the teachers physically abuse their children and the educational provision is of poorer quality than that received by the majority students in the same school. The NCCD issued a decision stating that discrimination occurred in these schools and urging the school to initiate a desegregation process.

In a 2012 case, the NCCD found discrimination in the form of segregation of Roma children, by assigning Roma pupils to one class during enrolment and providing a classroom with significantly poorer conditions. The NCCD punished the school with a fine of approximately EUR 460 (RON 2 000) and the school inspectorate with a fine of EUR 460 (RON 2 000). The NCCD also required the school inspectorate to desegregate the school and to monitor the activities of the school. Based on its investigation, the NCCD concluded that 'the system of assignment to class 1B is not transparent and that the criteria for assigning the children to one class or another, even if they seem neutral, have a discriminatory effect in relation to children belonging to a vulnerable category, without being objectively justified by a legitimate scope.' The NCCD refers to ECtHR jurisprudence and continues by highlighting the positive obligation of the school leadership 'to make sure that pupils from a disadvantaged ethnic group are not segregated in one classroom ... it is the duty of the educational personnel to assign the children in classes in a proportional manner, without taking into consideration criteria (such as the choice of the parents) which might infringe the rights of the pupils as well as their dignity.'¹³⁶ As a reference, it is worth mentioning a report published by Romani CRISS, one of the NGOs that monitored school segregation cases and brought cases before the NCCD. The report provides details on multiple cases, the outcomes and the different strategies of the local authorities and schools.¹³⁷

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

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

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

- refusal to ensure legal and administrative public services;
- denial of access of a person or of a group of persons to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services);
- ...
- refusal to grant a bank credit or to conclude any other kind of contract;
- denial of access for a person or a group to services offered by theatres, cinemas, libraries, museums, exhibitions;
- denial of access for a person or a group to services offered by shops, hotels, restaurants, pubs, discos or any kind of service provider, whether private or public;

¹³⁶ National Council for Combating Discrimination, Decision 559, file 52-2012, 12 December 2012.

¹³⁷ Romani CRISS (2015), *Ghid pentru documentare și monitorizarea segregării școlare în România*, (Documenting and Monitoring School Segregation in Romania), available in Romanian at: <http://www.dare-net.eu/cms/upload/file/guide-for-monitoring-and-documenting-school-segregation-romania-in-romanian.pdf>.

- denial of access for a person or a group to services provided for by public transportation companies – plane, ship, train, underground railway, bus, trolleybus, tram, cab, or any other means of transportation;
- refusal to grant the rights or benefits to a person or a group of persons.’ (Article 10)

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

a) Distinction between goods and services available publicly or privately

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

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

In Romania, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. The Anti-discrimination Law covers selling as well as renting a plot of land or a building for housing purposes, as well as illegal forced evictions, internal displacement and deportations on any of the grounds protected. However, the Anti-discrimination Law does not specifically prohibit segregation, as proved by a 2011 NCCD case, which attracted a lot of media attention. In condemning the erection of a wall segregating Roma social housing from the rest of the city of Baia Mare, the NCCD had to rely on the prohibition of harassment and on the right to dignity as protected by the Anti-discrimination Law, an interpretation that was subsequently endorsed by the courts when reviewing the case.¹³⁸

The Anti-discrimination Law currently provides, under Article 10:

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

Article 12 of the law states:

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

¹³⁸ National Council for Combating Discrimination, Decision 439 in file no. 4A/2011, *ex officio v. Cătălin Cherecheș*, 15 November 2011.

In addition, Article 13 states:

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

The Anti-discrimination Law does not provide explicitly for disability as a protected ground in relation to housing. As the NCCD approach to the list of protected grounds has so far been inclusive, interpreting disability as a protected ground, this approach needs to be confirmed through judicial interpretation.

Law 448/2006 on the rights of persons with disabilities provides for preferential access to public housing for persons with disabilities in Article 20 and according to Article 20(2), persons certified with a serious disability can receive a supplementary room and pay a minimal rent when granted public housing. However, no data are available to assess the level of implementation of these provisions. In 2009, the Parliament adopted a law providing for exemptions from paying rent for public housing or housing provided by county authorities to persons with a serious disability.¹³⁹

Article 6 of the Ordinance on the social integration of foreigners notes that foreigners granted a form of state protection can have access to housing under the same terms as Romanian citizens.¹⁴⁰

a) Trends and patterns regarding housing segregation for Roma

In Romania, there are patterns of housing segregation and discrimination against Roma because the high levels of urban private rents and the deficit of social housing, as well as the high cost of utilities, disproportionately affect Roma. The main cases of housing discrimination (evictions, demolitions, spatial segregation) are concentrated in Roma communities.

The Housing Law (Law 114/1996) does not mention any prohibition of discrimination in the area of housing.¹⁴¹ Roma are not expressly mentioned as one of the social groups entitled to social housing provided for in Articles 42-43 of the Housing Law. This raises concerns of indirect discrimination, given the dire situation of the large number of Roma who have housing needs that are systematically ignored.¹⁴²

¹³⁹ Law 359/2009 providing for exemptions for paying rent for public housing or housing provided by county authorities which are used by persons with a serious disability, 20 November 2009.

¹⁴⁰ Ordinance 44/2004 on the social integration of foreigners who were granted a form of protection or residence status in Romania, and of EU citizens and citizens of the European Economic Area, 2004, available on the website of the national authority for immigration at: <http://www.mmuncii.ro/pub/imagemanager/images/file/Legislatie/ORDONANTE-DE-GUVERN/OG44-2004.pdf>.

¹⁴¹ Housing Law, Law 114/1996, republished, 11 October 1996.

¹⁴² Article 43 of the Housing Law provides for the beneficiaries as decided by local authorities according to annually established criteria, and in the order of priority as established by the law they can be: persons and families evicted, or who are to be evicted from houses returned to former owners, young people up to 35 years old, young people leaving social protection institutions who have turned 18, people with physical disabilities of degree I and II, 'handicapped' persons, pensioners, war veterans and widows, the beneficiaries of the Law 341/2004 for the recognition of martyr-heroes and fighters who have contributed to the victory of the Romanian revolution from December 1989 as well as of the persons who have sacrificed their life and have suffered as a consequence of the workers' anti-Communist revolt of Brasov 1987 and of Law 118/1990 (persons who have suffered for political reasons during Communism), and other persons or families which might be entitled to the right to housing.

The 2002 National Action Plan on Social Inclusion¹⁴³ mentions housing as one of the priorities and includes Roma as a particularly vulnerable group, without providing for any effective follow up. Roma are not explicitly mentioned as a vulnerable group in the Law for preventing and combating social marginalisation.¹⁴⁴ In its 2009 report, *Risks and Social Inequities in Romania*, the Presidential Commission for the Analysis of Social and Demographic Risks identified the increased vulnerability of Roma in relation to housing, and provided data indicating the severity of the problem, but there was no policy or legislative follow-up to these findings.¹⁴⁵

There are no official statistics on racist incidents and discrimination in housing against Roma. The media and NGOs report cases of institutional violence against and assaults on Roma, such as police raids and forced evictions in Roma communities without provision for alternative accommodation. The Roma minority in Romania lacks legal protection from forced evictions, and Roma families are often left in sub-standard housing conditions with no chance of redress.¹⁴⁶

In 2016, the NCCD initiated an ex officio investigation against several mayors and county councils regarding the criteria they had established for social housing. The NCCD found that the criteria de facto limited the access of vulnerable categories in need of social housing. The NCCD noted that a local administration did not meet its own duties under the burden of proof by failing to provide a justification for the differential criteria under which housing points were awarded in proportion to the level of education. In the Reghin municipality, the NCCD found that the number of points awarded for the level of education was not proportionate with the goal pursued and that it caused the exclusion of persons with a low level of education, which led to indirect discrimination against Roma.¹⁴⁷ The NCCD fined the municipality RON 2 000 (approx. EUR 400) and the ordered it to publish a summary of the decision on its website.¹⁴⁸ Reghin municipality challenged the NCCD decision before Târgu Mureş Court of Appeal, claiming that a combination of the three criteria used (level of income, number of children and level of education) read together lead to an affirmative measure.¹⁴⁹ Reghin municipality stated that the criterion 'level of education' pursued the purpose of 'stimulating social inclusion and professional inclusion.' Also, it was argued that deciding on the priority criteria for social housing falls in 'the margin of appreciation and the discretionary powers' of the local authorities. Târgu Mureş Court of Appeal took into consideration statistical data provided by the NCCD showing that more than 50 % of the Roma population did not graduate, compared to Romanians or Hungarians (15 %), but also statistical data on the living conditions of Roma – more than 50 % live in spaces of less than 4 sqm per person, as compared to 10 % of other ethnic groups living in similar conditions. The Court of Appeal rejected the appeal against the NCCD and concluded that the 'criterion level of education limits access to social housing for persons with a lower level of education.' The court stated: 'based on the statistical data of the Romanian census regarding the level of education of the different ethnic communities, granting an increasing number of points proportionally with the higher level of education leads to negative consequences in relation to the Roma community, amounting to indirect discrimination.' The court concluded that while for other types of public housing, prioritising higher levels of education is useful as this might encourage education, for social housing, such a criterion is not objectively justified. It concluded that

¹⁴³ Government Decision for the approval of the National Plan against Poverty and for Promoting Social Inclusion, 31 July 2002.

¹⁴⁴ Law 116/2002, Law for preventing and combating social marginalisation, 21 March 2002.

¹⁴⁵ Presidential Commission for the Analysis of Social and Demographic Risks (2009), *Riscuri și inechități sociale în România* (Risks and social inequities in Romania), available at: http://www.presidency.ro/?_RID=det&tb=date&id=11426&PRID.

¹⁴⁶ Amnesty International (2011), *Romania: Mind the legal gap: Roma and the right to housing in Romania*, London, Amnesty International, 23 June 2011. Report available at: <http://www.amnesty.org/en/news-and-updates/report/romania-legal-system-condemning-roma-poor-housing-2011-06-23>.

¹⁴⁷ The mechanism granted one point for those who graduated primary school, two points for professional school, three points for those with high school studies and five points to those with higher education.

¹⁴⁸ NCCD, Decision No 511 of 20 July 2016.

¹⁴⁹ Târgu Mureş Court of Appeal decision No 30/2017 of 17 March 2017, communicated in January 2018.

'eligibility criteria established by local authorities in relation to the level of education of the residents disadvantage poor and vulnerable persons who usually do not have higher education and often lack the registration documents required.' The court stated that 'the right of appreciation of the public authorities does not entail the possibility of acting in an abusive, arbitrary manner, without legal justifications and escaping any control, the exercise of such powers being under the principle of proportionality.'

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Romania, national legislation provides for an exception for genuine and determining occupational requirements. The 2013 amendments to the Anti-discrimination Law introduced a new Article 4¹, which states:

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

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

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

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

Law 489/2006 on religious freedom and the general status of religious denominations includes provisions on employment relations within state-recognised religious denominations (*culțe*).¹⁵⁰ Law 489/2006 established a three-tier system with traditional religious denominations being granted the status of state-recognised religious denominations (*culțe*) under very strict requirements, religious associations (*asociații religioase*)¹⁵¹ and religious groups (*grupuri religioase*), which do not meet the strict criteria established by the law or choose not to register as legal persons.¹⁵² According to Articles 23-26 of Law 489/2006, state-recognised religious denominations have the right to select, appoint, employ and discipline their own employees, a practice already in force in 2000 when the Anti-discrimination Law was adopted. Issues of internal discipline are resolved in accordance with bylaws and internal provisions by the religious courts of each denomination. Theoretically, the legal regime established in this chapter in relation only to religious personnel of recognised denominations could be extended to religious personnel of other entities the ethos of which is based on religion or belief (such as registered religious associations), in accordance with the legal principle that where the reason behind a normative provision is the same, the norm applied should accordingly be the same. There is no reported jurisprudence developed in this field so far to allow any assessment of whether the provisions are interpreted in accordance with Article 4(2) of Directive 2000/78.

¹⁵⁰ The 2006 Law on religious freedom and the general status of religious denominations recognises the same 18 religions that were recognised prior to its adoption.

¹⁵¹ Law 489/2006 on religious freedom and the general status of religious denominations (*Legea nr. 489/2006 privind libertatea religioasă și regimul general al cultelor*), 28 December 2007. Art. 40 of Law 489/2006 provides that entities seeking registration as religious associations have to reach a higher threshold than other types of association (at least 300 members who are Romanian citizens or residents in Romania while secular not-for-profit associations need at least three members).

¹⁵² Law 489/2006 on religious freedom and the general status of religious denominations, 28 December 2007.

– Religious institutions affecting employment in state-funded entities

In Romania, religious institutions are permitted to select people (on the basis of their religion) to employ or to dismiss from a job when that job is in a state entity, or in an entity financed by the state. The 2011 National Education Law¹⁵³ states that religion is a subject for primary and secondary and vocational education in the case of the 18 state-recognised religions and is guaranteed irrespective of the number of pupils willing to take the subject. In November 2014, the Constitutional Court found that Article 18 of the National Education Law, establishing the procedure according to which the parents or the legal guardian of a pupil could file a written request so that the pupil would not have to take the class, was unconstitutional but maintained the constitutionality of religious education classes offered as part of the general curricula.¹⁵⁴

Only the 18 state-recognised religious denominations can sign partnerships with the Ministry of Education to secure teaching of religious instruction classes as requested by pupils, a mechanism which has been contested in the past. The confessional model of teaching religion has a negative impact on the legal regime applicable to teaching staff, which is de facto in a dual relation of subordination, as it has to observe both internal religious norms and the general provisions on education staff.¹⁵⁵

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

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

The Law on the status of educational personnel, Law 128/1997, in Article 136 provides the conditions for employment of teachers of religion, on the basis of agreements between the Ministry of Education and the 18 state-recognised religions (no other religious denominations). The wide competency of state-recognised denominations in selecting, approving or dismissing educational personnel teaching religion classes conflicts with the principles established by the Labour Code and by Law 128/1997 on the status of educational personnel and arbitrarily places the educational personnel teaching religion classes in a difficult situation. So far, neither the NCCD nor the courts have reported any cases of complaints from teachers of religion dismissed from their positions in public schools after not being deemed acceptable due to an infringement of doctrinal requirements (such as, divorce in the case of Catholic education, single mothers or people living in consensual relations or homosexuality in the case of Orthodox education, women not willing to wear the hijab in the case of those teaching about Islam). Such agreements concluded under domestic law provide for the structure of religious education, including the requirements for teachers of religion. The law allows for religious personnel who have

¹⁵³ Law 1/2011 on national education (*Legea Educației Naționale*), 10 January 2011.

¹⁵⁴ Constitutional Court, Decision 669, 12 November 2014.

¹⁵⁵ Enache, S. (coord.) (2007), *Promovarea interesului superior al copilului în educația religioasă. Monitorizarea educației religioase în școlile publice din România*, Târgu-Mureș, Editura Pro Europa, available at http://www.proeuropa.ro/norme_si_practici.html#juridic.

graduated from higher religious education or theology seminaries and have work experience of at least five years in the field to teach religion for primary and secondary education classes. Such staff would be paid by the Ministry of Education as teachers, subject to the requirement to pass an examination, as established by the National Education Law.

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

In Romania, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC). However, the genuine occupational requirements introduced in Article 4¹ in 2013 can be invoked in relation to age and disability requirements for the armed forces, police, prison or emergency services:

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

Article 36 of Law 80/1995 on the status of military personnel includes an age limit for those who qualify to become active officers: 'e) active military sub-officers (non-commissioned officers, NCOs), licensed graduates of higher tertiary education with a similar profile to the military units, who are a maximum of 35 years old.'¹⁵⁶

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

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

Law 360/2002 on the status of the police provides in Article 10 that for the entrance examinations in the educational units of the Ministry of Interior or in the case of direct employment of specialists, any person who complies with the general requirements for civil servants and with other specific requirements listed in the law 'has access, irrespective of race, nationality, gender, religion, wealth or social origin'.¹⁵⁷ Specific requirements listed in Article 10 include being declared 'medically, physically and psychologically able/fit'. Age is not mentioned in the list.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

¹⁵⁶ Law 80/1995 on the status of military personnel (*Lege privind Statutul cadrelor militare*), 11 July 1995.

¹⁵⁷ Law 360/2002 on the status of the police (*Lege privind Statutul polițistului*), 6 June 2002.

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

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

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

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

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

a) Benefits for married employees

In Romania, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees who are married, as marital status could be included in the list of protected grounds (an open list in Article 2). Romanian legislation does not mention any specific provision on the right of employers to provide benefits solely to a certain category of employees (married, with children etc). The general prohibition in Articles 6 and 8 of the Anti-discrimination Law would apply:

'According to the ordinance herein, the following constitute contraventions: discrimination on account of the race, nationality, ethnic group, religion, social status or disadvantaged group one belongs to, respectively on account of one's beliefs, age, gender or sexual orientation in a labour and social protection relation, excepting the cases provided for by the law, with respect to:

...

c) granting of social rights other than the wages'. (Article 6)

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

On 18 July 2018, the Constitutional Court reached its decision in *Coman, Hamilton, ACCEPT v. IGI*¹⁵⁸ and admitted the complaint challenging the constitutionality of Article 277(2) and

¹⁵⁸ Adrian Coman (a Romanian citizen) and Robert Clabourne Hamilton (a US citizen) were married in 2010 in Belgium. Two years later, the couple applied to the Romanian authorities for a residence permit so that the US citizen could join the Romanian citizen, to live and work in Romania, as his spouse. This request was refused under the justification that the Romanian Civil Code prohibits in Art. 277(2) the recognition of same-sex marriages or partnerships. The couple filed a discrimination complaint in 2013 against the Romanian Immigration Inspectorate. For two years the couple, represented by the NGO ACCEPT Romania, went before different courts for deliberations over which court would hear the case as court of first instance. In 2015, the first hearing took place in Bucharest before Sector 5 court of first instance. In the first instance court, the Coman-Hamilton family challenged the constitutionality of the Civil Code Article 277(2) denying recognition to married same-sex couples, and Article 277(4) which provides for a theoretical exception in case of the application of freedom of movement. At the request of ACCEPT and Coman-Hamilton family, the Romanian Constitutional Court (RCC) suspended the case and referred four questions for a preliminary ruling to the Court of Justice of the European Union basically asking the CJEU to define the term "spouse" in

277(4) of the Civil Code. The Constitutional Court stated that these provisions are constitutional only if they are applied in a way that allows granting the right to stay on Romanian territory to the spouses who are citizens of EU Member States or citizens of third states in a marriage with an EU citizen, if the marriage was concluded in an EU Member State, in accordance with EU law. In paragraph 41, the Court states:

'In this light, applying the CJEU decision (in case C-673/16), which interpreted the European law, the [Romanian] Constitutional Court finds that the relationship of a same-sex couple is part of "private life" and also "family life," similar to the relationship of a heterosexual couple, which brings the protection of the fundamental right to private and family life, guaranteed by Art. 7 of the Charter of Fundamental Rights of the EU, art. 8 of the European Convention on HR, and art. 26 of the Romanian Constitution. Enjoying the right to private and family life, same-sex couples, who form stable couples, have the right to express their personality within these relationships and to enjoy, in time and by the means provided for by law, legal and judicial recognition of the corresponding rights and duties.'¹⁵⁹

b) Benefits for employees with opposite-sex partners

In Romania, there have been no cases in which an employer has provided benefits to those employees with opposite-sex partners and was accused of discrimination. Such a claim of discrimination on grounds of civil status would probably be rejected as there is no legislation allowing same-sex or heterosexual partnerships. The Civil Code, adopted in 2009,¹⁶⁰ which entered into force in 2011, includes in Article 277 an express prohibition of same-sex partnership and marriage, and also includes a prohibition of the recognition of partnerships and same-sex marriages registered in other countries, even if they were legally registered.¹⁶¹ This provision was declared in part unconstitutional in the *Coman, Hamilton, ACCEPT* case.¹⁶² The Civil Code also states that the legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force. These include Ordinance 30/2006, which provides a definition of partnership for citizens of EU Member States for the purposes of free movement and residence in Romania, which defers to the legislation of the country of origin.¹⁶³ In 2016, a citizens' initiative to amend Article 48 of the Romanian Constitution¹⁶⁴ was allowed by the Constitutional Court.¹⁶⁵ The proposed amendment defined 'the family' as based on the 'freely entered into union between a man and a woman, the equality between them and the right and the obligation of the parents to ensure the upbringing, education and instruction of children.'¹⁶⁶ The referendum, conceived as a de facto constitutional ban on same-sex marriages, was held on 6-7 October 2018 and failed due to the low turnout generated by a comprehensive boycott campaign carried out by civic NGOs.

Between 2008-2018, six different draft bills on same-sex partnerships have been shelved or rejected by the Parliament. The most recent bills, initiated in November 2018 by the national equality body and ACCEPT and supported by various members of the Parliament, are still pending in the Chamber of Deputies after being rejected by the Senate. No case law has been reported on this issue so far.

Article 2(2)(a) of the Free Movement Directive (2004/38) and whether it includes same-sex couples. The CJEU Grand Chamber issued its judgment on 5 June 2018 in case C-673/16.

¹⁵⁹ Constitutional Court, Decision 534, 18 July 2018.

¹⁶⁰ Law 289/2009 on the Civil Code (*Legea 289/2009 privind Codul Civil*), 17 July 2009.

¹⁶¹ Law 289/2009 on the Civil Code, 17 July 2009, Art. 277. '[S]ame-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognised in Romania.' Similarly, the Civil Code mentions that same-sex or opposite-sex civil partnerships registered or contracted abroad by Romanian citizens or foreigners are not recognised in Romania.

¹⁶² Constitutional Court, Decision 534, 18 July 2018.

¹⁶³ Law 500/2006 on amending and approving Ordinance 30/2006, 28 December 2006.

¹⁶⁴ Citizens' initiative published in *Monitorul Oficial*, 883/1, 25 November 2015.

¹⁶⁵ Constitutional Court, Decision 580, 20 July 2016.

¹⁶⁶ Unofficial translation of the proposed constitutional referendum as stated in the citizens' initiative, published in *Monitorul Oficial*, 883/1, 25 November 2015.

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

In Romania, there are no specific exceptions provided for in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). However, the genuine occupational requirement allowed by Article 4¹ might be applicable.

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

4.7.1 Direct discrimination

In Romania, national law does not provide for specific exceptions for direct discrimination on the ground of age. However, age discrimination may be justified under Article 4¹ if it corresponds to a determining occupational requirement. The wording of the test is compliant with the test provided by Article 6 of Directive 2000/78/EC, although its interpretation still needs confirmation from the courts.

In its Decision no. 42 of 9 January 2008, file 498/2007, in the case *F.K v. Ministerul Educației, Cercetării și Tineretului* [Ministry of Education], *Inspectoratul Școlar Județean M.* [M. county school inspectorate], the NCCD noted that the refusal to allow the complainant to participate in a competition for the position of school director because he had less than four years left before reaching the pensionable age amounts to discrimination. The refusal was based on an Order of the Ministry of Education,¹⁶⁷ which provided that 'at the date of the competition, candidates should have an age at least four years less than the standard pensionable age'. The NCCD considered that the refusal to allow the complainant to participate in the competition for the position of school director was discriminatory and recommended that the Ministry of Education modify the criteria for competitions for the position of school director.¹⁶⁸

In a 2006 decision, *I.N. v. Administrația Națională a Penitenciarelor* [National Administration of Prisons], the NCCD found that the upper age limit of 35 years for taking the examination to become a prison officer was discriminatory and recommended to the Ministry of Justice and the National Administration of Prisons that they modify this requirement, in spite of claims from the authorities that a lower age was required in order to secure 'dynamism, flexibility and optimism'.¹⁶⁹

a) Justification of direct discrimination on the ground of age

In Romania, national law does not provide for justifications for direct discrimination on the ground of age, although such a justification would be accepted according to Article 4¹ of the Anti-discrimination Law if it qualifies as a determining occupational requirement. No cases have been identified in this regard.

b) Permitted differences of treatment based on age

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

¹⁶⁷ Order of the Ministry of Education (*Ordinul Ministrului Educației și Cercetării*) no. 5617, 14 November 2006.

¹⁶⁸ National Council for Combating Discrimination, Decision no. 42, file 498/2007, *F.K. v. Ministerul Educației, Cercetării și Tineretului* [Ministry of Education], *Inspectoratul Școlar Județean M.* [M. county school inspectorate], 9 January 2008.

¹⁶⁹ National Council for Combating Discrimination, Decision *I.N. v. Administrația Națională a Penitenciarelor* [National Administration of Prisons], 11 May 2006.

must have a lunch break of at least 30 minutes (Article 130, renumbered as Article 133); and have a supplementary holiday entitlement of three days (Article 142, renumbered as Article 147 (2)).¹⁷⁰

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

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

Law 263/2010 on the unitary system of pensions was adopted on 16 December 2010 and entered into force in 2011.¹⁷¹ The law was adopted after heated legal debates regarding the different retirement ages for men and women.¹⁷² The Constitutional Court was approached once again by a group of parliamentarians who alleged potential discrimination between men and women due to the lack of a differentiated system of contributions to the retirement scheme, leading to lower net pensions for women. On 15 December 2010, the Constitutional Court considered the constitutional complaints and decided to uphold the Law on the unitary pensions system in its current form, including the differentiated retirement age for women and men, as proposed by the President, without a mechanism addressing the disparate impact of the different contribution periods.

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

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

In Romania, there are special conditions set by law for older or younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection. The Labour Code provides for specific protective measures in relation to employees under 18 years of age who must have a work programme of no more than six hours/day and 30 hours/week (former Article 109, renumbered as Article 112); cannot work supplementary hours (Article 121, renumbered as Article 124) or during night shifts (Article 125, renumbered as Article 128); must have a lunch break of at least 30 minutes (Article 130, renumbered as Article 133); and have a supplementary holiday entitlement of three days (Article 142, renumbered as Article 147 (2)).¹⁷³

¹⁷⁰ Law 40/2011 for amending and completing Law 53/2003, the Labour Code (*Legea nr. 40/2011 pentru modificarea si completarea Legii nr. 53/2003 Codul Muncii*), 31 March 2011.

¹⁷¹ Law 263/2010 on the unitary system of pensions, 16 December 2010.

¹⁷² The initial draft of this law was brought before the Constitutional Court because of its provision in Article 53(1), introducing an equal retirement age for men and women of 65 years. The Constitutional Court upheld the draft in its decision of 6 October 2010 by stating that equalising the retirement age of men and women does not infringe the constitutional provisions on equality and that opposing such equalisation would be tantamount to opposition to an international trend. However, the Romanian President later refused to sign the law and sent it back to the Parliament, stating that he could not agree with the equal retirement age of 65 years for both men and women. The President requested the Parliament to consider introducing a differentiated retirement age of 63 years for women and 65 years for men, due to the socio-economic realities entailing a more difficult situation for women.

¹⁷³ Law 40/2011 for amending and completing Law 53/2003, the Labour Code, 31 March 2011.

Employers may benefit from fiscal advantages if they hire students during their vacations or recent graduates, according to Law 76/2002.¹⁷⁴ Article 80 of Law 76/2002 provides that employers who hire young graduates for at least 3 years are exempt for 12 months from paying contributions to the public unemployment fund in respect of the graduates they employ, and receive a monthly contribution from the state, which can be the minimum average income or higher, depending on the education of the employee.

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

The Labour Code provides for an exception from the general prohibition against individual fixed-term employment contracts, and allows such contracts in Article 81(d) renumbered as Article 83(e) in the case of a person who is seeking employment and who will reach the standard pensionable age within five years.¹⁷⁵

4.7.3 Minimum and maximum age requirements

In Romania, there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training. Article 13 of the Labour Code establishes the minimum age for access to employment as 16 years, or 15 years with the approval of the parents or guardians of the person, 'if the health, and professional development are not jeopardised'. Employment of children under 15 years of age is prohibited.¹⁷⁶ Article 13(5) also provides that employment in difficult, damaging and dangerous conditions (as established in a government decision) can only be carried out by persons over 18 years of age.

However, special legislation establishes specific limitations which are not always justified – for example, only persons between 18 and 65 years of age can act as tourist guides, according to Annex 1 of Order 637 of 1 April 2004 on approving the methodological norms for the conditions and criteria for selecting, educating, certifying and utilising tourist guides, issued by the Ministry of Transport, Construction and Tourism. Law 22/1969 on employing treasurers (paying tellers) provides that paying tellers must be at least 21 years of age.¹⁷⁷ The conformity of such provisions with the anti-discrimination legislation and with Directive 2000/78 is questionable.

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

4.7.4 Retirement

a) State pension age

The Law on the unitary system of pensions, adopted in December 2010, introduced a new pension age of 63 years for women and 65 years for men.¹⁷⁸ This law has been in force since 1 January 2011.

¹⁷⁴ Law 76/2002 on the system of funds for unemployment and encouraging occupation (*Legea șomajului*) 7 February 2002.

¹⁷⁵ Law 40/2011 for amending and completing Law 53/2003, the Labour Code, 31 March 2011.

¹⁷⁶ Law 40/2011 for amending and completing Law 53/2003, the Labour Code, 31 March 2011.

¹⁷⁷ Law 22/1969 on employing treasurers (paying tellers), (*Lege Nr. 22 din 18 noiembrie 1969 privind angajarea gestionarilor, constituirea de garanții și răspunderea în legătura cu gestionarea bunurilor organizațiilor socialiste*), 18 November 1969.

¹⁷⁸ Law 263/2010 on the unitary system of pensions, 16 December 2010.

If an individual wish to work longer, the pension can be deferred. An individual can collect a pension and continue to work, with effect from 19 October 2014, when Law 134/2014 entered into force.

The mechanism developed in Law 19/2000 and maintained by Law 263/2010 provides that pensions are calculated on a confirmed formula, based on points and taking into account the employee's contribution and the contribution period; one pension point is equal to 45 % of the average gross salary paid in Romania; the pay-as-you-go (PAYG) system became a combined one, which includes defined benefits for minimum stages of contribution and specified contributions for the rest.¹⁷⁹

Persons who reach the standard pensionable age but want to work longer may continue their activities if their employers agree. After retiring, pensioners can work under an individual work contract or under a civil convention (a contract ruled by civil law provisions and not by the Labour Code, which has as its object providing services).

Persons who retire for medical reasons before reaching the statutory pensionable age with type 1 or type 2 invalidity pensions can earn revenues from independent work but not from salaries while collecting the pension.

b) Occupational pension schemes

In addition to the public PAYG pension scheme, a mandatory personal accounts system was introduced at the beginning of 2007. A system of voluntary pension schemes also started operating in 2007. Participation in pension schemes (*pensii private*) has been compulsory for employees since 2007, in accordance with Law 411/2004 on private (universal) pension schemes.¹⁸⁰ Law 411/2004 and the subsequent amendments do not provide information on whether payments from such occupational pension schemes can be deferred if an individual wishes to work longer after reaching the retirement age, or whether the individual can collect a pension and continue to work.

A voluntary system of contributions is established by Law 204 from 2006 on optional pension schemes,¹⁸¹ according to which occupational pension schemes are considered facultative / optional pension schemes proposed either by employers or by employers and trade unions. Employees and the self-employed may participate in voluntary schemes. Participation is voluntary for employees. Employees can participate in as many occupational schemes as they wish and cumulate pension rights and benefits. The contributions can be shared between employer and employee in accordance with the scheme regulations or a collective agreement. Employees may at any time change the level of contributions or cease paying contributions altogether, but must notify the employer and the pension scheme administrator. Participants can retire when they reach the age of 60 years (both men and women), subject to the condition of having made contributions for a period of at least 90 months.

¹⁷⁹ The pension is calculated using a points system: the employee receives a maximum of three credit points per full year of earnings at or above the average economy-wide wage. The pension points are calculated as the ratio of the person's monthly gross wages and other compensation to the national average monthly gross wage for that year. The employee's pension is determined by multiplying the pension points with the pension point value, which is laid down in the social security budget law every year. The system aims to ensure a pension of 45 % of the average wage in the year of retirement for an employee with a full working career. By 2015, the full old age pension will be payable to men aged 65 years with 35 years of service and women aged 60 years with 30 years of service. Early retirement of up to 5 years is possible if the full-service period has been completed. See OECD Report: Romania, <http://www.oecd.org/countries/romania/3>.

¹⁸⁰ Any worker under the age of 35 years has to become a contributor to a private pension fund. The contributions are optional for active workers between the ages of 36 and 45 years. The retirement age is the same as for the state social security pension, with the law providing for the possibility of requesting retirement five years earlier if the participant has completed the full contribution period.

¹⁸¹ Law 204/2006 on optional pension schemes, 22 May 2006.

c) State-imposed mandatory retirement ages

In Romania, there are state-imposed mandatory retirement ages. Law 263/2010 established a new retirement age of 63 years for women and 65 years for men in Article 53 and a mandatory contribution period of 35 years applicable to both men and women.¹⁸² However, there are exceptions to the state-imposed mandatory retirement age, as persons of pensionable age who want to carry on their activities can do so, if their employers agree.

The Labour Code establishes the possibility in Article 61(e), renumbered as Article 56(c), for an employer to ask for termination of the employment relationship when an employee reaches the standard pensionable age and has contributed for the required number of years to the state contribution schemes, even if the employee does not file a request for retirement.

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

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

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

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

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

In a change from previous legislation,¹⁸³ Law 62/2011 on social dialogue does not provide that employees in certain sectors (difficult working conditions, dangerous, toxic or degrading conditions), could benefit from reductions of the pensionable age, in accordance with special laws and special collective contracts concluded at the level of each sector of the economy.¹⁸⁴

¹⁸² Law 263/2010 on the unitary system of pensions, 16 December 2010.

¹⁸³ The National Collective Agreement for 2007-2010, signed in accordance with Art. 10 of Law 130/1996, 29 January 2007.

¹⁸⁴ Law 62/2011 on social dialogue, 10 May 2011.

d) Retirement ages imposed by employers

In Romania, national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

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

If discriminatory retirement ages were to be established as a result of collective bargaining or individual contracts, the NCCD would find these as discriminatory treatment. An analogy can be drawn with the NCCD decision in the case *Uniunea Sindicatelor Libere din Învățământul Preuniversitar* [the Undergraduate Education Trade Union] v. *Ministerul Educației și Cercetării* [the Ministry of Education] of 16 April 2007, file no. 78/2007, in which the NCCD issued sanctions due to the fact that teaching and auxiliary educational personnel received a minimum gross salary lower than the minimum gross salary provided at national level in the National Collective Agreement for 2007-2010. The NCCD recommended the Ministry of Labour, Social Solidarity and Family make the relevant changes to ensure that the minimum gross salary – as a social protection measure – is the same for all categories of employees.¹⁸⁵

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights does apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age. According to Article 61(e) renumbered as Article 56(c) of the Labour Code, if an employee reaches the standard pensionable age and has contributed for the required number of years to the state contribution schemes, the employer can ask for termination of the employment relationship, even if the employee has not filed a request for retirement or opposes termination of the employment relationship.

f) Compliance of national law with CJEU case law

In Romania, national legislation is in line with the CJEU case law on age regarding mandatory retirement. Although the Anti-discrimination Law does not include wording similar to that of Article 6(1) of Directive 2000/78, in limited conditions the genuine occupational requirements clause provided for in Article 4¹ of the Anti-discrimination Law can be interpreted as allowing the option to derogate from the principle of prohibiting discrimination on grounds of age in respect of measures justified by legitimate social policy objectives specific to the occupation in question, in conformity with the jurisprudence of the Court of Justice of the European Union (CJEU), such as *C-388/07 Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, 2009.¹⁸⁶

The provisions on compulsory retirement in Article 53 of the Law on the unitary system of pensions are problematic, from the perspective of the justifications allowed by Article 6 of Directive 2000/78, as well as in relation to gender, given that the same period of contribution is required for men and women although the retirement age is different and the work experiences of the two groups might be significantly different.

¹⁸⁵ National Council for Combating Discrimination, Decision on file no. 78/2007, *Uniunea Sindicatelor Libere din Învățământul Preuniversitar* [Undergraduate Education Trade Union] v. *Ministerul Educației și Cercetării* [Ministry of Education], 16 April 2007.

¹⁸⁶ Court of Justice of the European Union (CJEU), judgment of 5 March 2009, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07, EU:C:2009:128.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

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

These differentiations were not maintained by the 2011 Law on social dialogue, which abrogated the national collective agreement.¹⁸⁷ More recent collective agreements change the order of priority – for example, in Article 172 on collective redundancies, the National Collective Agreement on Automobile Constructions for 2016-2017 lists first, persons of pensionable age and secondly, persons who have an additional job or who draw pension as well as salary.¹⁸⁸

b) Age taken into account for redundancy compensation

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

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

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

4.9 Any other exceptions

In Romania, the only exception to the prohibition of discrimination (on any ground) provided in national law is freedom of expression and the right to access to information, specifically mentioned in Article 2(8) of the Anti-discrimination Law, which states that its provisions cannot be interpreted so as to limit these rights. Guidelines on balancing freedom of expression and the right not to be discriminated against are absent, the case law of the NCCD and of the courts is not coherent and cases have been reported in which misinterpretation of this exception has led to harassment not being penalised.

¹⁸⁷ Law 62/2011 on social dialogue, 10 May 2011.

¹⁸⁸ Collective Agreement no.1 for machine constructors and steel constructions 2016-2017, 22 December 2015.

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

a) Scope for positive action measures

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

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

Since 2007, positive action measures came under attack from extreme-right groups, such as Noua Dreaptă (New Right),¹⁸⁹ which filed petitions with the NCCD, all of which were rejected. In a particular case of the NCCD, Decision 433 of 5 November 2007, file number 448/2007, *C.E v. C.*, where the denial of access to special measures in relation to a Roma student had been questioned, the NCCD cited the jurisprudence of the Court of Justice of the European Union on the principle of equality, which prohibits different treatment for comparable situations, with the exception of cases where such treatment has an objective justification. The NCCD stated that

'the measures adopted by the Romanian authorities, in particular the Ministry of Education, in relation to Roma pupils had the purpose of ensuring equality of opportunities, resulting in the implementation of affirmative measures. Such affirmative measures, by their own nature, had as their purpose progressive equalisation of the situation of Roma children from the perspective of opportunities in education, in order to bring them into a position similar or analogous with the situation of other pupils. The Ministry of Education prepared specific procedures in order to implement such measures.'¹⁹⁰

In its assessment of an alleged case of positive action, the NCCD stated:

'employment of persons belonging to minority communities implies an affirmative measure in relation to that particular community. Such a measure can be maintained only until the objectives are reached and not afterwards. When the percentage of employees from a community in a particular institution corresponds with the percentage of the respective community in the area of its location, affirmative measures cannot be maintained because they would in themselves create a situation of inequality.'¹⁹¹

¹⁸⁹ Noua Dreaptă (New Right) is a non-governmental organisation registered in Romania. It acknowledges its descent from the interwar Romanian fascist movement called Legionari, whose head, Corneliu Zelea Codreanu – was executed by the Romanian authorities in 1938. See more information on the organisation's website <https://nouadreapta.org/>.

¹⁹⁰ National Council for Combating Discrimination, Decision no. 433, file number 448/2007, *C.E v. C.*, 5 November 2007. The complainant complained that her son was not accepted for a special place for Roma students in the institution of his choice, as the application filed for her son under a particular procedure was set aside by his teachers and replaced with a fake application on his behalf. The NCCD found that the complainant did not observe the special requirements in filing the application to qualify for special places for Roma students and decided that discrimination took place as alleged by the complainant.

¹⁹¹ National Council for Combating Discrimination, Decision no. 43, file number 353/2007, *A.M. v. Direcția Generală a Finanțelor Publice a județului Harghita* [Harghita county Public Finances General Inspectorate] 9 January 2008.

b) Quotas in employment for people with disabilities

In Romania, national law provides for a quota for people with disabilities in employment.

Article 78(2) of Law 448/2006 on the protection and promotion of the rights of persons with a handicap introduced the obligation for all authorities and public institutions, public or private legal persons with at least 50 employees to employ persons with disabilities at a level of at least 4 % of the total number of employees¹⁹². However, there are no official data available regarding the number of persons employed following this provision or the number of employers complying with the requirement. Employers who fail to employ people with disabilities in accordance with the law can choose between:

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

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

¹⁹² The percentage of employed persons with disabilities is calculated on the basis of data drawn from the medical certificates that are part of all hiring procedures.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

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

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

In a November 2009 decision, the Constitutional Court concluded that the NCCD is not an extraordinary court and confirmed the constitutionality of the mandate of the national equality body as an administrative-jurisdictional entity. The Court noted that the NCCD is not a mandatory forum and that victims may choose between the two forums (courts and NCCD) to enforce their rights.¹⁹³ The possibility of dual, even simultaneous venues as an exception to the principle that once a venue is chosen there is no recourse to another, was confirmed by the High Court of Justice and Cassation, which emphasised that using one forum, the NCCD (in the case concerned, an administrative complaint before the NCCD under Article 20 was followed by an administrative appeal challenging its decision), does not have any impact on the admissibility of a petition filed before the civil court under Article 27.¹⁹⁴

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

In a series of decisions issued in 2008, the Romanian Constitutional Court (Curtea Constituțională) limited the mandates of both the NCCD¹⁹⁵ and the civil courts in relation to discrimination generated by legislative norms.¹⁹⁶ Subsequently, protection against

¹⁹³ Constitutional Court, Decision 1470, 10 November 2009.

¹⁹⁴ High Court of Justice and Cassation, Decision 5211, 7 December 2012, available in Romanian at: <http://www.scj.ro/>.

¹⁹⁵ Constitutional Court, Decision 997, 7 October 2008, finding that Article 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

¹⁹⁶ Constitutional Court, Decisions 818, 819, 820, 3 July 2008. The Constitutional Court concluded that the dispositions of Article 1(2)e and of Article 27 of the Anti-discrimination Law are unconstitutional, to the

discrimination in cases where the discrimination is triggered by legislative norms is limited and depends on the willingness of the Ombudsman to bring a case before the Constitutional Court, which can declare discriminatory norms unconstitutional. In cases where a legal provision is incompatible with the anti-discrimination principle, thus falling outside the scope of European Union law, the national equality body (NCCD) does not have a mechanism allowing it to decline to apply that particular legal provision, as provided by the CJEU in *C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. K.G.*¹⁹⁷

b) Barriers and other deterrents faced by litigants seeking redress

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

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

Individuals bringing cases before the courts might be discouraged by the prohibitive costs of legal services and by the length of judicial proceedings. While a claim before the NCCD or before the civil court is exempted from judicial taxes, a tax must be paid when challenging a decision of the NCCD before administrative courts.

c) Number of discrimination cases brought to justice

In Romania, there are no available statistics on the number of cases related to discrimination brought to justice. The Ministry of Justice and the Superior Council of Magistracy do not provide information on statistical data regarding the cases related to discrimination brought to justice, as ECRIS does not currently record relevant items on the use of the Anti-discrimination Law.

In its annual reports, the NCCD provides information regarding the number of petitions received and decisions issued each year, including the number of decisions issued by the NCCD and subsequently challenged before the courts; it also includes information regarding the number of cases in which, on the basis of Article 27 of the Anti-discrimination Law, the civil courts asked the national equality body to join the proceedings as an expert. For example, the 2016 annual report mentions the participation of the NCCD in 750 cases (out of which 365 were new cases filed in 2016).¹⁹⁸ For 2017, the NCCD reports participation in 723 civil cases on moral damages and 712 cases filed under other claims (work conflicts). The report also mentions that 714 civil complaints had been admitted and 870 were rejected by the courts.¹⁹⁹ The 2018 report mentions that the NCCD participated as an expert institution in civil cases on grounds of the Anti-discrimination Law in 862

extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

¹⁹⁷ Court of Justice of the European Union (CJEU), 19 January 2010, *Seda Küçükdeveci v Swedex GmbH & Co. K.G.*, C-555/07, EU:C:2010:21.

¹⁹⁸ National Council for Combating Discrimination (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016*, (2016 annual report), available in English at <http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016>.

¹⁹⁹ National Council for Combating Discrimination (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017*, (2017 annual report).

cases. While not providing information on the resolution of these civil cases, the report mentions that 1 135 civil complaints had been admitted and 1 382 were dismissed by the courts (the higher number being explained by the backlog of cases).²⁰⁰ The workload of the courts in discrimination cases seems to be increasing.

d) Registration of discrimination cases by national courts

In Romania, discrimination cases are not registered as such by the national courts.²⁰¹ Only the NCCD registers cases by ground and field and makes the data available to the public each year in its activity report.

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

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

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

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

When a petition regarding the unconstitutionality of the provision granting legal standing to NGOs was brought before the Romanian Constitutional Court, in Decision 285 of 1 July 2004, the RCC rejected the argument of the petitioners, who claimed that recognising legal standing for NGOs led to 'a situation of inequity and discrimination for the parties which did not put themselves under the protection of an NGO of this kind'.²⁰² In practice, NGOs working on behalf of various vulnerable groups extensively use the legal possibility of filing a petition before the NCCD.

The proof that the victim delegated the NGO to ensure support during NCCD or court proceedings can take the form of a contract establishing the power of the NGO to act on behalf of the victim.

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

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

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

²⁰⁰ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018*, (2018 annual report)

²⁰¹ Superior Council of Magistracy, response 5/27805 to public information request, 17 December 2015.

²⁰² Constitutional Court, Decision 285, 1 July 2004.

of a complainant. The internal procedures of the NCCD mention the possibility of *amicus curiae* from NGOs with expertise in a particular field.²⁰³

c) *Actio popularis*

In Romania, national law allows associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*). According to Article 28(1) of the Anti-discrimination Law, associations with protection of human rights as their mandate can file complaints on their own behalf, both with the NCCD and with the courts, when the target of discrimination is a group or a community. The same rules of procedure apply, the only additional requirement being that the NGOs must provide their statutes in order to show that their declared statutory objective is protecting human rights or combating discrimination.

The provisions of Article 28(1) of the GO 137/2000 are doubled by Article 37 of the Civil Procedure Code which provides that

'in the cases and conditions specifically provided for by the law, complaints can be filed or defences can be submitted by persons, organisations, institutions or authorities which, without justifying a personal interest, act for the defence of rights and legitimate interests of persons who find themselves in special situations or, as necessary, with the purpose of protecting a group or a general interest.'²⁰⁴

There are no specific provisions regarding remedies sought or special rules, including on the burden of proof. However, the remedies that can be obtained in *actio popularis* cases are limited, given that, irrespective of the legal standing recognised, a direct, personal and actual interest and effective damages (harm suffered, material damages) must be proved before the civil courts. As NGOs have difficulties in providing the courts with evidence regarding quantifiable damages, the NCCD remains the main available forum for such cases.

In 2015, when proceedings in the dispute *ACCEPT v. NCCD* reopened before the national courts, it became apparent that there are significant limitations in the understanding of the NCCD and of the courts regarding the standing of NGOs and of their 'interest'. In its final decision in the proceedings reopened after the CJEU decision in case C-81/12,²⁰⁵ the High Court of Cassation and Justice concludes that 'the complainant association (ACCEPT) cannot justify the infringement of a legitimate public interest, under the meaning of Art. 2 (1) letter r of Law 554/2004 (*Legea Contenciosului Administrativ*), given the fact that the NCCD issued a warning for George Becali and not an administrative fine.'²⁰⁶

d) Class action

In Romania, national law allows associations / organisations / trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. Class actions are not allowed under civil procedure in Romanian law nor are they specifically mentioned in the Anti-discrimination Law. However, in the case of the NCCD, though not defined as class action, aggregate claims by more than one individual victim arising from the same event would be annexed as one file both before the NCCD and the

²⁰³ National Council for Combating Discrimination, Order approving the internal procedure in resolving petitions, 11 April 2008.

²⁰⁴ Law 134/2010 Civil Procedure Code, 1 July 2010.

²⁰⁵ Court of Justice of the European Union (CJEU), 25 April 2013, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275. Request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Romania), judgment of 25.04.2013, available at: <http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12>.

²⁰⁶ High Court of Cassation and Justice, decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: <http://www.equalitylaw.eu/country/romania>.

courts as provided by Article 66 of the NCCD internal procedures. The individual victim may request or oppose such an aggregation of the complaints. If NGOs represent more than one victim, as provided by Article 28, declarations issued by each individual victim must be included. The procedures and remedies remain the same.

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

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

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

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

In a 2009 decision,²⁰⁷ the NCCD extensively discussed the theoretical aspects of the burden of proof, referring to previous leading cases in which the NCCD stated that 'the defined procedure for the shift in the burden of proof is more nuanced than the wording would suggest and, in practice, the principle implies dividing the onus of the evidence and a transfer to the defendant of those elements related to him, in relation to the facts of the case.'²⁰⁸ The NCCD added that 'it cannot be interpreted that this is an absolute exemption from the procedural rules of *onus probandi incumbit actori*, reversing the burden of proof completely, as the very legal provision from Article 20(6) specifies the duties of the parties by sharing the burden of proof between the complainant and the defendant.'

In spite of the very detailed guidance offered by the Court of Justice of the European Union in C-81/12 (the *ACCEPT* case), the interpretation proposed by the NCCD and endorsed by the Bucharest Court of Appeal and by the High Court of Cassation and Justice in 2015 reflects a rather limited approach to the burden of proof.²⁰⁹ The High Court uses the conclusions of the Court of Appeal in the reasoning: 'it was correctly concluded by the first instance (Bucharest Court of Appeal) that there are no elements which would allow us to find that the Football Club initiated any step, of any type, to contract the sportive services of the player I.I.' The reasoning of the High Court underlines that:

'In reality, the entire procedure had been launched based on purely speculative statements (by Mr. Becali) ... even if the author of the statement is a person which cannot be dissociated in the public perception from the Football Club Steaua

²⁰⁷ National Council for Combating Discrimination, Decision 77, 3 February 2009.

²⁰⁸ National Council for Combating Discrimination, Decision 180, *Romani CRISS v. C.P.T.*, 17 July 2007.

²⁰⁹ High Court of Cassation and Justice, decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: <http://www.equalitylaw.eu/country/romania>.

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

In its decision, which is final, the High Court decided that there are no elements suggesting that Steaua Football Club is liable for discrimination in employment on grounds of sexual orientation. This judicial interpretation creates the risk that discriminatory statements will not be effectively punished, a line of reasoning replicated in other cases and contrary to the CJEU in C-81/12.

The Labour Code, as modified and consolidated by Law 40/2011, mentions the burden of proof in employment-related disputes in Articles 272-273, ²¹⁰ *noting in Article 272 on the burden of proof that the 'burden of proof in labour disputes is on the employer, which shall submit the evidence for its defence by the first day of appearance' and in Article 273 on the administration of evidence that the 'evidence shall be administered under the emergency procedure, and the court shall have the right to reject the right to submit evidence to the party groundlessly delaying its administration'* (unofficial translation).

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

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

In Romania, there are legal measures for protection against victimisation, which have been actively used both before the courts and before the NCCD. Article 2(7) of the Anti-discrimination Law defines as victimisation 'any adverse treatment triggered by a complaint in general or by a case lodged with the courts of law regarding the infringement of the principle of equal treatment and non-discrimination'. Protection against victimisation is not limited by Romanian law to the complainant but also extends to the witnesses. As the law does not distinguish, victimisation is prohibited not only in relation to complaints filed with the NCCD but also in relation to those filed with any other public or private institution (labour inspectorate, consumer protection office etc). No provision regarding the burden of proof in cases of victimisation is included in the law.

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

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

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

²¹⁰ Law 40/2011 for amending and completing Law 53/2003, the Labour Code, 31 March 2011.

The amount of the fines increased after the 2013 amendments: where the victim is an individual, the amount of the fine is within the range of EUR 250-7 500 (RON 1 000-30 000); where the victims are a group or a community, the fine is within the range of EUR 500-25 000 (RON 2 000-100 000).²¹¹

In *ACCEPT v. NCCD* (the Becali case), both the Bucharest Court of Appeal and the High Court of Cassation and Justice decided that 'there are no elements suggesting that the Football Club Steaua București is liable for discrimination in employment on grounds of sexual orientation.' When discussing the warning applied to Mr Becali as a sanction in the first instance, which was challenged by the complainant as not being 'dissuasive, proportionate and adequate enough for a case of discrimination', the High Court stated that:

'contrary to the statements of the complainant, warning (as sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction [original emphases]. In applying this sanction, the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society.'²¹²

This statement contradicts the very specific guidance offered by the Court of Justice of the European Union when discussing this case, which states that: 'In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.'²¹³

In the case of a civil complaint for damages, the complainant can request pecuniary and moral damages and other types of penalty (injunctive relief, withdrawal or suspension of licence for private entities providing services). The courts of law can decide that the public authorities must withdraw or suspend the authorisation to operate of legal persons who cause significant damages as a result of discriminatory action or who repeatedly infringe the provisions of the anti-discrimination legislation as provided in Article 27 of the Anti-discrimination Law. This provision is not supported by reported jurisprudence. Both the NCCD and the courts can oblige the defendant to publish their decisions in the media.²¹⁴

The remedies provided for by the courts might be different, however, as proof of direct and effective damage incurred needs to be provided under torts provisions. In a 2006 case, *D.Z. v. Distrigaz Sud*, the complainant – an employee of an NGO working in the field of LGBT rights who was harassed because of his association with the NGO – sought civil damages and asked the court to order the defendant to take institutional measures to preclude discriminatory behaviour in the future, to include in its internal norms a specific prohibition of discrimination on all grounds and to train its employees on anti-discrimination provisions. The court defined 'interest' in conjunction with 'the practical gain obtained' and stated that 'interest must exist, be personal, real and actual and legal.' The

²¹¹ Prior to the March 2013 amendments, where the victim was only one person, the amount of the fine was within the range of EUR 100-1 000 (RON 400-4 000) and where the victims were a group or a community, the fine was within the range of EUR 150-2 000 (RON 600-8 000).

²¹² High Court of Cassation and Justice, decision 224 in file 12562/2/2010, 29 May 2015. See *Romania - High Court confirms rejection of the action of ACCEPT in the case based on CJEU C-81/12*, available at: <http://www.equalitylaw.eu/country/romania>.

²¹³ Court of Justice of the European Union (CJEU), 25 April 2013, *ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275. Request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Romania), judgment of 25.04.2013, available at: <http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-81/12>.

²¹⁴ Law 189/2013 for the ratification of Emergency Ordinance 19/2013 for the amendment of Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 25 June 2013.

court also discussed the issue of systemic remedies, such as institutional measures on combating discrimination and diversity management policies, or the training requested by the complainant as a possible remedy and decided not to grant such remedies. It considered that there was no 'actual interest' for the complainant in being granted such general remedies, given that by the time of the decision the defendant had already adopted internal regulations, including non-discriminatory provisions.²¹⁵

In work-related disputes brought before the labour courts (sections within the civil courts specialising in labour law), the complainants can also request moral damages, including on grounds of discrimination. The Labour Code was amended in 2007 to include 'moral liability', a specific obligation on the employer to pay both moral and material damages to the employee, to compensate the employee for loss, injury or any harm suffered during employment, or in connection with work activities.²¹⁶

b) Ceiling and amount of compensation

Compensation can be awarded solely by the courts of law. There are no ceilings established for the amount of compensation awarded in a civil case for damages on grounds of discrimination, but the courts are rather reluctant to award moral damages as a result of a long legal tradition prior to 1989 of describing moral damages as unjust enrichment. A trend of awarding higher moral damages in cases of discrimination became apparent in 2010, when the Craiova Court of Appeal increased the damages awarded in a case of discrimination in the education of a Roma pupil to EUR 10 000.²¹⁷ Subsequent cases have confirmed EUR 10 000 as informal ceiling.

c) Assessment of the sanctions

The NCCD has informally developed a practice of adopting recommendations initially carrying no pecuniary damages when the perpetrators are central government agencies or public actors such as politicians (e.g. where discrimination is triggered by a Government minister's orders or the internal regulations of central public administration) or when the conditions established by the law are not fully met (for example, prior to 2013, in many cases, due to the statute of limitations, no administrative sanction could be applied – as was the case in the situation leading to the CJEU decision in C-81/12).²¹⁸

The law does not specifically mention recommendations as remedies. The NCCD argues that they fall under its preventive mandate and are future-oriented. NGOs criticise this practice, arguing that they fail to provide effective remedies for cases of discrimination, contrary to Article 17 of Directive 2000/78/EC and Article 15 of Directive 2000/43/EC.

The more recent practice of the NCCD reflects a growing interest in issuing both recommendations and fines and in increasing the amount of the fines.

In 2015, out of 752 petitions received, discrimination was found in 102 cases, for which the NCCD issued 63 fines amounting to a total of approximately EUR 44 000 (RON 200 000),²¹⁹ 68 warnings with no financial penalty and 30 recommendations. The NCCD ordered the perpetrators to publish the NCCD decision in 26 cases and it also started one monitoring exercise.

²¹⁵ Bucharest Court of first instance No. 4, (*Judecătoria sectorului 4 București*), Decision 4222, file no. 710/4/2006, 10 August 2007.

²¹⁶ Law 237/2007 amending the Labour Code, 12 July 2007.

²¹⁷ Craiova Court of Appeal (*Curtea de Apel Craiova*), Judicial decision, File 8011/101/2009, 19 May 2010.

²¹⁸ National Council for Combating Discrimination, Decision 260, *ACCEPT v. the Ministry of Health*, 29 August 2007.

²¹⁹ National Council for Combating Discrimination (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).

In 2016, out of the 842 petitions received, the NCCD found that discrimination occurred in 112 cases. It issued 111 fines amounting to an unprecedented total of approximately EUR 152 800 (RON 687 000), 53 warnings, 44 recommendations, started eight monitoring exercises and ordered 63 perpetrators to publish a summary of the NCCD decision.²²⁰ For example in 2016, in one single decision against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors, a monitoring exercise started by the NCCD ex officio based on prior decisions from 2014 and 2015²²¹ on the failure of local authorities to ensure conditions for local transportation for persons with mobility disabilities, the NCCD ordered cumulative fines to a total of EUR 69 000 (RON 314 000), which is higher than the total amount of all fines issued in 2015.²²²

In 2017, the NCCD found discrimination in 117 cases (a similar number to 2016). According to its 2017 annual report, the NCCD issued 65 fines, 51 warnings, 47 recommendations, 3 decisions to continue monitoring the situation and in 40 cases the perpetrators were ordered to publish summaries of the NCCD decision in the media. In 2017, the highest fine applied was of EUR 14 000 (RON 50 000). The 65 fines issued in 2017 amounted to approximately EUR 44 000 (RON 239 000), which amounts to about a third of the amount of fines issued in 2016.²²³

The 2018 annual report mentions 822 petitions received and that the NCCD found discrimination in 97 cases. Although discrimination was found in a lower number of cases than in 2017, there was an increase in the remedies ordered by the NCCD: 86 fines, 56 warnings, 41 recommendations, 7 decisions to continue monitoring of the situation and in 46 cases the perpetrators were ordered to publish summaries of the NCCD decision in the media. The highest amount of fines applied was of EUR 6 300 (RON 30 000). The 86 fines issued in 2018 cumulatively amount to approximately EUR 100 000 (RON 475 000).²²⁴

Although Article 19(d) of the Anti-discrimination Law mentions monitoring of acts of discrimination among the functions of the NCCD, in practice there is no mechanism that would allow adequate monitoring of compliance with the decisions issued, and the NCCD is less active in relation to this part of its mandate. In practice, monitoring of enforcement of sanctions or recommendations depends on the interest taken by the member of the NCCD steering board responsible for each file. In theory, the person fined by the NCCD or by the courts has a duty to send proof of paying the fine (copy of the receipt). However, there is no information available as to whether such communication ever occurs and whether the NCCD compiles this type of information.²²⁵

The lack of consistent and adequate monitoring of enforcement of the sanctions issued by the NCCD detracts from the effectiveness and dissuasive and educational impact such sanctions are supposed to have.

There is no clear picture and no assessment of the sanctions issued by courts in cases of discrimination. Given the limited number of cases publicly available, it can be concluded that the courts established a ceiling for moral damages of a maximum of EUR 10 000 – this was awarded in a limited number of cases. Pecuniary damages need to be proved based on the regular civil procedure on torts.

²²⁰ National Council for Combating Discrimination (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report). Available in English at <http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016>.

²²¹ National Council for Combating Discrimination, Decision 271 of 10 June 2015.

²²² National Council for Combating Discrimination, Decision 357 of 11 May 2016.

²²³ National Council for Combating Discrimination (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017*, (2017 annual report).

²²⁴ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

²²⁵ National Council for Combating Discrimination, Official communication no. 6082, 22 April 2008, and communication sent on 25 February 2009 as a response to request for information no. 1216 of 30 January 2009.

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

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

The National Council for Combating Discrimination (Consiliul Național pentru Combaterea Discriminării, NCCD) is the specialised national equality body with a duty to monitor and combat all forms of discrimination. The mandate of the NCCD goes beyond the required powers established by Article 13 of Directive 2000/43/EC. The institution is an all-grounds equality body with administrative-jurisdictional powers and its decisions are binding. The Romanian Anti-discrimination Law provides for an open list of grounds which the NCCD covers.

The NCCD was established in 2002, two years after the adoption of the Anti-discrimination Law. Since September 2006, the NCCD has been an autonomous public authority under the control of the Parliament. The NCCD is independent in carrying out its mandate, which includes:

'(1) The Council is responsible for enforcing and controlling the observance of the provisions of this law, in its line of work, as well as for harmonising the provisions from normative or administrative act infringing the principle of non-discrimination.
(2) The Council develops and enforces public policies in the field of anti-discrimination. With this purpose, the Council will consult with public authorities, non-governmental organisations, trade unions and other legal entities with a mission in protecting human rights or with a legitimate interest in combating discrimination.'
(Article 18)

'With the purpose of combating discrimination, the Council will exercise its mandate in the following areas:

- a) preventing cases of discrimination;
 - b) mediating in cases of discrimination;
 - c) investigating, finding and punishing cases of discrimination;
 - d) monitoring cases of discrimination;
 - e) providing specialised assistance to victims of discrimination.
- (2) The Council exercises its mandate upon request from an individual or a legal person or ex officio.' (Article 19)

The NCCD is governed by a steering board of nine members, ranked as secretaries of state, and is managed by a President elected by the members of the steering board (Article 22). The steering board is a collegial body, responsible for enforcing the legal mandate of the NCCD (Article 23). The members of the steering board are proposed and appointed in a joint session of the Parliament by the two chambers of the Parliament (Article 23(2)) with the requirement that at least two-thirds of the members are law graduates. The 2015 appointments have been criticised for failing to observe the legal procedures, lacking transparency and introducing additional hearings to privilege a politically supported candidate as well as for being in violation of Article 23. The 2018 appointments were also criticised for not observing legal requirements and following a request filed by the Liberal Party, the Constitutional Court revoked the mandate of one of the members of the steering board, finding that her appointment did not respect the legal requirement in Article 23 of the Anti-discrimination Law that a minimum of two-thirds of the board's members must be law graduates (as four of the nine members did not have a legal background).²²⁶ No further appointment was made by Parliament after the revocation.

²²⁶ Constitutional Court, Decision 434/2018 on the unconstitutionality of the Decision of the Parliament 21/2018 regarding the appointment of a member of the NCCD Steering Board from 21 June 2018.

Different departments within the NCCD handle investigations, mediation and assistance for victims as well as raising awareness. The NCCD is a quasi-judicial body featuring both tribunal and promotional type attributes. The steering board of the NCCD is responsible for assessing petitions and issuing decisions under the misdemeanour procedure of the Anti-discrimination Law. Its decisions can be challenged in administrative courts.

In 2008, the Romanian Constitutional Court, when asked to review the constitutionality of the NCCD, found that 'the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative-judicial activities and complies with the constitutional provisions from Art. 124 on administration of justice and Art. 126 (5) prohibiting the establishment of extraordinary courts of law.'²²⁷ In a 2009 case, the Constitutional Court reaffirmed the role of the national equality body as an autonomous specialised public administrative body with a mandate to combat discrimination.²²⁸

Other public institutions with mandates to protect the rights of specific groups, such as persons with disabilities (National Authority for Persons with Disabilities), women (National Agency for Equal Opportunities), and children (National Authority for the Protection of the Rights of Children) do not have any role in addressing discrimination based on these specific grounds and have all been subsumed as departments within the Ministry of Labour following institutional restructuring in 2010-2011 caused by financial constraints.²²⁹ The institution of the Ombudsman (Avocatul Poporului), while entrusted by law with a general mandate covering equality and protection against discrimination, and having a significantly larger budget than the NCCD, including 14 regional offices, does not report any significant activities in support of vulnerable groups.²³⁰

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

The political elite does not necessarily favour the NCCD, given the previous and continuing experiences of politicians being issued a sanction for discriminatory speech. The appointment procedure usually follows a political algorithm of distribution of the positions of members of the NCCD steering board, based on political support. This system of appointment, as well as the fact that the appointments often do not observe the legal requirements, has been criticised by NGOs for triggering the politicisation of the institution. There are, however, some members of the steering board who are indeed experts and work to maintain and foster the independence and expertise of the NCCD.

Attempts to adopt amendments to GO 137/2000 in order to dilute the legal standards of protection or to limit the institutional mandate are periodically submitted by parliamentarians who have been subject to sanction by the NCCD. Such retaliatory amendments are usually rejected by the parliamentary committees and the plenum.

²²⁷ Constitutional Court, Decision 1096, 15 October 2008. The court maintained the constitutionality of Articles 16-25 of the Anti-discrimination Law regarding the quasi-judicial nature of the national equality body.

²²⁸ Constitutional Court, Decision 444, 31 March 2009. A petitioner who challenged a decision of the NCCD before the court of appeal used this opportunity to take his challenge to the Constitutional Court. He based his complaint on Art.20 alin.(1) and (2) on international treaties and human rights, Art.75 alin.(1), (4) and (5) on the legislative procedures in adopting legislation, Art.117 alin.(3) on establishment of autonomous administrative authorities, Art.140 alin.(1 on the Court of Audit), and Art.126 alin.(5) on the prohibition to establish extraordinary courts of law and the conditions for establishing specialized courts, maintaining that the national equality body is an extraordinary court established by means of delegated legislation and that the fact that the Ministry of Finances issues an advisory opinion on the budget of the NCCD infringes the independence of this institution as a pre-requirement for a quasi-judicial body. The Constitutional Court found that the complaint against Art. 2 is not a constitutional challenge but merely a complaint as to the interpretation of the law; that the challenge against Art. 16 is ill-founded and also ill-founded is the complaint against Art.20 alin.(8), (9) and (10). Consequently, the Constitutional Court rejected the objection on the constitutionality of the provisions of the Anti-discrimination Law regarding the quasi-judicial mandate of the national equality body.

²²⁹ Government Decision No. 728/2010.

²³⁰ Ombudsman (Avocatul Poporului) (2017), *Raport anual de activitate* (Annual activity report for 2016) available at: http://avp.ro/index.php?option=com_content&view=article&id=50&Itemid=174&lang=ro-ro.

In surveys on population attitudes, the national equality body features as one of the most well-known state institutions. This visibility and brand recognition is caused by the large number of cases involving politicians. Although there is no evidence that the popular debate is either supportive or hostile to equality and diversity in general and of the NCCD specific mandate in particular, the number of groups asking for a limitation of the mandate of the national equality body or for its abolition is increasing.

c) Institutional architecture

In Romania, the designated body does not form part of a body with multiple mandates. The NCCD was established as a national equality body with a mandate targeting all forms of discrimination and covering an open list of grounds. The institution was highly involved in reporting before the UN (UPR, CERD, HRC). Beginning in 2017, the mandate of the NCCD was defined in Article 4 of Law 106/2017 as to include monitoring of the rights of EU citizens exercising their freedom of movement in Romania and as a national focal point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.²³¹

The visibility of the NCCD increased exponentially from 2006 onwards due to the way in which the NCCD understood and carried out its mandate to raise awareness and due to cases widely discussed in the media.²³² The NCCD issued exemplary decisions against important politicians (e.g. President Traian Băsescu, former Prime Minister Călin Popescu Tăriceanu, former Minister of Foreign Affairs Adrian Cioroianu, former Minister of Foreign Affairs Theodor Baconschi, head of the România Mare party Corneliu Vadim Tudor, former Prime Minister Victor Ponta and former Prime Minister Mihai Tudose) and in a number of sensitive cases (the display of religious symbols in classrooms in public education, blood safety in regard to LGBT donors, discriminatory statements made by journalists or politicians, segregation in education of Roma children or children and young people living with HIV/AIDS, and discriminatory incidents during football games). In 2018, the NCCD was criticised for showing bias in the decisions it issued in cases involving politicians.²³³

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

i) Status of the body

The NCCD is an equality body featuring both tribunal-type and promotional-type elements as a specialised body mandated to deal with all forms of discrimination on every ground, including race or ethnic origin, nationality, religion (including religious or non-religious belief), disability, age, sexual orientation or gender. Since September 2006, the NCCD has been an autonomous public authority under the control of the Parliament.

Its steering board is comprised of nine members elected by the Parliament. Currently there are only eight members appointed. Any Romanian citizen can be appointed as a member of the steering board under the following conditions:

²³¹ Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in the EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*) (22.05.2017).

²³² Gallup Organization Romania (2008), *Percepții și atitudini ale populației României față de fenomenul de discriminare* (Perceptions and Attitudes towards Discrimination), Bucharest, National Council for Combating Discrimination, available at <http://www.crj.ro/userfiles/phphqFQ72.pdf>. See also National Council for Combating Discrimination, Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring (Direcția Relații Internaționale, Integrare Europeană, Politici Afirmative, Studii și Monitorizare) (2006), 'Analiza de imagine a Consiliului Național pentru Combaterea Discriminării pentru primul semestru al lui 2006', available on request from the NCCD.

²³³ United States, Department of State (2019), *Country Reports on Human Rights Practices, Romania 2018*, 13 March 2019, available at: <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/romania/>.

- has full legal capacity;
- graduated from university education with a diploma (*licența*);
- does not have a criminal record and has a good reputation;
- his/her activity in the field of protecting human rights and combating discrimination is well known;
- did not collaborate with the Communist political police;
- did not collaborate with the secret service.

Article 24 of the Anti-discrimination Law establishes the procedures for the appointment of the members of the steering board. The process is supposed to start 60 days before the positions are vacated.²³⁴ The permanent bureaux of the Parliament publish information on proposals for candidates on their websites and send the proposals to six specialised parliamentary committees to organise hearings in a joint session. The law provides for a period of 10 days from the date of publication of this information when anybody can register written objections in relation to the candidates. After hearing the candidates, the special parliamentary committees issue a joint opinion, which is presented to the parliamentary chambers convened in a joint session. Candidates are approved by a majority of votes of the deputies and senators present. The mandate of the members is for a period of five years and is renewable (Article 25). Although designed to secure the independence of the institution, this appointment procedure has often been criticised for leading to its politicisation, given the use of the political algorithm in the selection of the candidates.

The President of the NCCD is elected by the steering board and is in charge of recruiting and managing the staff of the institution.

In terms of accountability, the NCCD presents its annual activity report to the two chambers of the Parliament for deliberation and approval, in accordance with Article 22(2) of the Anti-discrimination Law.

The total figures for the budget vary in different official responses and reports and the amounts are approximate. The budget of the NCCD in 2002, its first year of operation, was initially less than EUR 200 000 (ROL 223 000). The budget gradually increased until it reached a peak of EUR 1.7 million (RON 6 303 000) in 2008, when a significant decline began with annual budgets ranging around EUR 1 Million. Another peak was in 2015 when the NCCD had an allocated budget of approximately EUR 3 011 000 (RON 13 720 000) and an annual executed budget of approximately EUR 2 528 000 (RON 11 518 000).²³⁵ Subsequent budgets ranged between EUR 1.1-1.2 million. In 2018, the annual budgetary allocation was of approximately EUR 1 200 000 (RON 5 704 000) and the executed budget was approximately EUR 1 140 000 (RON 5 424 000).²³⁶

²³⁴ Law 61/2013 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 21 March 2013.

²³⁵ National Council for Combating Discrimination (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).

²³⁶ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

Figure 1: Budget and staff of the NCCD by year, 2015-2018

	Budget allocated	Budget executed	Staff positions budgeted out of the 89 needed for 2015-2017 and 96 positions needed in 2018	Staff positions occupied out of the 89 needed
2015	RON 13 720 000 (approx. EUR 3 011 000)	RON 11 518 000 (approx. EUR 2 528 000)	70	62
2016	RON 5 318 000 (approx. EUR 1 175 000)	RON 4 999 000 (approx. EUR 1 105 000)	70	63
2017	RON 5 856 000 (approx. EUR 1.3 million)	RON 5 424 000 (approx. EUR 1 205 000)	70	67
2018	RON 5 704 000 (approx. EUR 1 200 000)	RON 5 424 000 (approx. EUR 1 140 000)	70	64

The annual report for 2013, released in 2014, notes that the staff of the NCCD occupied a total of 89 posts, 69 of which were budgeted for, and by the end of the year only 63 of these posts were occupied.²³⁷ The situation is similar in 2014-2018; for example, the structure for 2017 remained unchanged with 89 positions needed, only 70 budgeted for and only 67 employees actually hired.²³⁸ In 2018, out of the 96 staff positions needed, only 70 were budgeted but the institution had to function with only 64 employees.²³⁹

ii) Independence of the body

The Anti-discrimination Law specifically provides that the NCCD is independent in carrying out its mandate:

'In exercising its mandate, the NCCD carries out its activity independently, without being hindered or influenced by other institutions or public authorities.' (Article 17)

Following irregularities in the selection procedures and controversial appointments in 2007, 2010, 2012, 2015, 2017 and 2018, the NCCD was criticised by NGOs active in the field for being politicised at the expense of the independence and professionalism of the institution. De facto the NCCD depends on the Government and on Parliament for the approval of its budget or the possibility of recruiting staff needed to fulfil its mandate.

²³⁷ National Council for Combating Discrimination (2014), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2013* (2013 annual report).

²³⁸ National Council for Combating Discrimination (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

²³⁹ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

e) Grounds covered by the designated body/bodies

The Romanian equality body (NCCD) deals with all grounds provided for in Article 2 of the Anti-discrimination Law: race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or any other criterion.

There are no priorities in the level of attention given to particular grounds, although in its awareness-raising work, the NCCD appears to emphasise the grounds that seem to be more vulnerable, based on the number of petitions received and the statistical analysis of the surveys carried out each year regarding the attitudes and perceptions of the population.

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

i) Independent assistance to victims

The NCCD has the competence to provide independent assistance to victims according to Article 19(1)(e) of GO 137/2000. Assistance to potential victims interested in filing a complaint is provided by a specialised department within the NCCD. The civil servants working in this department interact with those seeking help when planning to file a complaint before the NCCD. Investigation and review of the complaints is done by other departments and the steering board deliberates on complaints and issues sanctions.

No independent assistance is provided to victims of discrimination interested in pursuing the alternative route of filing torts claims before the civil courts rather than with the NCCD. Instead, under the Anti-discrimination Law, the courts are obliged to invite the NCCD as an expert/intervening party in all such cases.

There is no official assessment of the effectiveness of assistance provided to victims of discrimination. No specific information is available assessing the level and quality of resources, staff and financial resources available for independent assistance provided to the victims at the level of the national equality body.

ii) Independent surveys and reports

The national equality body has the competence to conduct independent surveys and publish independent reports according to Article 2(1)(i) and (j) of Government Decision 1194/2001.²⁴⁰ Depending on the resources available, almost every year, the NCCD produces surveys on perceptions and attitudes of the population regarding discrimination. These surveys are often the only comprehensive information regarding trends and attitudes in Romanian society regarding discrimination. The NCCD is independent in choosing topics or methodologies for the reports and surveys.

An annual activity report is published by the NCCD and presented to the Parliament according to Article 22(2) of the Anti-discrimination Law (GO 137/2000).

iii) Recommendations

In Romania, the national equality body has the competence to issue independent recommendations on discrimination issues as part of its mandate of preventing discrimination, provided for in Article 19(1)(a) of the Anti-

²⁴⁰ Government Decision 1194/2001 on the organisation and functioning of the NCCD, 12 December 2001.

discrimination Law. Besides this proactive, general type of recommendation on a relevant issue of public interest, the NCCD also extensively issues recommendations, instead of financial sanctions in cases of discrimination involving public authorities or public figures. This practice has often been criticised by NGOs as eroding the overall effectiveness of the mechanism and the adequate, proportionate and dissuasive character of the remedies. The NCCD explains this approach as exercising a proactive prevention function. However, in contrast to general recommendations, issuing recommendations in relation to specific cases, when finding that discrimination has occurred dilutes the meaning of effective remedies in such cases and increasingly, the courts of law when faced with appeals against such decisions, have decided to return the files to the NCCD with instructions to issue an adequate remedy when discrimination is found.

When issuing recommendations, the NCCD acts independently. There is no assessment of the effectiveness or the impact of the recommendations issued by the NCCD.

iv) Other competences

The mandate of the NCCD as defined by Article 19 of the Anti-discrimination Law and further detailed by Article 2 of Government Decision 1194/2001 includes preventing discrimination on all grounds via awareness-raising and education campaigns, mediating between the parties concerned, investigating and issuing sanctions against discrimination, including ex officio, monitoring discrimination, as well as initiating drafts to ensure the harmonisation of legal provisions with the equality principle.²⁴¹ All these competences are exercised independently.

In 2017, the mandate of the NCCD was extended to cover monitoring of the rights of EU citizens exercising their freedom of movement in Romania based on Article 4 of Law 106/2017. The law defined NCCD as the national focal point under Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.²⁴²

g) Legal standing of the designated body/bodies

In Romania, the designated body does not have legal standing to bring discrimination complaints (on behalf of identified victim(s)) before civil courts in legal cases concerning discrimination or to bring discrimination complaints (on behalf of non-identified victims) to court or to bring discrimination complaints ex officio to court.

According to Article 19(2) and Article 21 of the Anti-discrimination Law, the NCCD can exercise its mandate upon request from an individual or a legal person or ex officio within its own procedure.

Following the 2006 changes to the Anti-discrimination Law, the NCCD must be subpoenaed as an intervening party/expert in all cases on grounds of the Anti-discrimination Law filed directly with the civil courts. This competence to provide informed opinions to the courts, which can be seen as an *amicus curiae* duty set out in imperative terms in Article 27(3) of

²⁴¹ National Council for Combating Discrimination (2007), *Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013)* (National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013)).

²⁴² Law 106/2017 on measures to improve the exercise of rights in the context of freedom of movement in the EU (*Legea nr. 106/2017 privind unele măsuri pentru îmbunătățirea exercitării pe teritoriul României a drepturilor conferite în contextul liberei circulații a lucrătorilor în cadrul Uniunii Europene*), 22.05.2017.

the Anti-discrimination Law, has positive aspects in informing and educating judges and ensuring uniformity in discrimination cases. However, it has also contributed to a further strain on the already limited resources of the NCCD and has generated a serious backlog, as the NCCD has not only had to deal with complaints received in *nome proprio* within its own procedures, but also to issue opinions in all civil cases filed before the courts.

In exercising the duty to provide independent opinions in civil cases that have been filed based on GO 137/2000, the NCCD took the opportunity to advocate in support of the principle of equality and non-discrimination in ground-breaking cases before the Constitutional Court and the Court of Justice of the European Union.²⁴³

A 2008 decision of the Constitutional Court, in which the Court declared unconstitutional the power of the NCCD to find that a legislative provision triggered discrimination and to suspend it, raised the subsequent question of the ability of the NCCD to intervene in such cases. As the NCCD cannot currently bring a case before the Constitutional Court, the mandate of the NCCD might only be extended to include legal standing by legislative amendments. The possibility of automatically bringing before the Constitutional Court cases of discrimination triggered by laws or ordinances is currently provided, in accordance with Article 146(d) of the Constitution, to the Ombudsman (Avocatul Poporului).

h) Quasi-judicial competences

In Romania, the NCCD is a quasi-judicial institution. The 2006 amendments to the Anti-discrimination Law incorporated enhanced guarantees of independence by specifically stating that the NCCD is an autonomous public authority under the control of the Parliament, which maintains its independence in carrying out its mandate.

The NCCD is a specialised body and its role as a quasi-judicial institution was recognised by the Romanian Constitutional Court in its Decision 1096 of 15 October 2008, in which it ruled in favour of the NCCD.²⁴⁴ The Constitutional Court repeatedly affirmed the legality of the NCCD and its status of special administrative jurisdiction, an optional forum in addressing cases of discrimination, and confirmed that proceedings before the NCCD under Article 21(4) are constitutional. The Court found that the NCCD is an administrative body with a jurisdictional mandate, which features the elements of independence required for administrative-judicial activities and which observes the provisions of Articles 124 and 126(5) of the Constitution on the prohibition of establishing extraordinary tribunals.

Victims of discrimination and NGOs can choose between filing a complaint with the NCCD or with the courts. A procedure before the NCCD does not have a suspensive effect as to the time limit to file a complaint before the civil courts.

Decisions of the NCCD impose administrative sanctions (fines or warnings) that can be appealed before the courts of law under administrative law provisions. In the absence of a mechanism for monitoring compliance with NCCD decisions, it is impossible to assess the impact of these decisions. In particular cases the NCCD established an internal informal mechanism of monitoring the implementation of its recommendations and revisited the defendants as a follow-up measure. For example, in 2016, the NCCD started an *ex officio* monitoring exercise based on prior decisions from 2014 and 2015 on the failure of local authorities to ensure conditions for local transportation for persons with mobility disabilities and, in one single decision against the Ministry of Labour, the National Agency for Payments and Social Inspection and 34 city mayors, the NCCD ordered cumulative fines to a total of

²⁴³ CJEU, 5 June 2018, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația ACCEPT v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne, Consiliul Național pentru Combaterea Discriminării*, (Request for a preliminary ruling from the Curtea Constituțională a României (Constitutional Court, Romania)), Case C-673/16, EU:C:2018:385.

²⁴⁴ Constitutional Court, Decision 1096 of 15 October 2008.

EUR 69 000 (RON 314 000), which is higher than the total amount of all fines issued in 2015.²⁴⁵

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

In Romania, the NCCD registers the number of complaints and decisions (by ground, field, type of discrimination, etc). These data are available to the public in its annual activity reports and are broken down by protected ground and the fields in which the alleged act of discrimination took place.²⁴⁶

In 2017, out of the 652 petitions received, the largest number were petitions on the ground of belonging to a social category (114) and the smallest numbers were on grounds of race (2) and HIV status (8). Also relevant is the number of petitions on grounds of religion (18), language (12), age (31), nationality (64), sexual orientation (17), disability (74), and ethnicity (53). The NCCD 2017 annual report notes that 273 petitions were about access to employment, 154 were about access to public services, 144 were on personal dignity, 51 were on access to education, 6 were on housing and 27 were on access to public spaces.²⁴⁷

The 2018 annual report states that out of the 822 petitions received, the largest number of petitions received were on the ground of belonging to a social category (302) and the smallest numbers were on grounds of race (0) and HIV status (4). Also relevant is the number of petitions on grounds of religion and belief (11), language (17), age (29), nationality (56), sexual orientation (13), disability (81), and ethnicity (52). In 2018, the NCCD report notes that 365 petitions were about access to employment, 160 were about access to public services, 177 on personal dignity, 50 on access to education, and 22 on access to public spaces.²⁴⁸

The annual activity reports also provide information regarding the cases in which the NCCD decisions had been challenged before the courts according to Article 20 (9-10) of the Anti-discrimination Law. In 2016, the NCCD report claims a judicial success rate of 86 %.²⁴⁹ In 2017, the NCCD had to defend its decisions when challenged in 423 cases out of which the courts decided in 130 cases in favour of the NCCD, against the NCCD in 35 cases, with 365 cases still pending. The success rate in 2017 indicated by the annual report is 80 %.²⁵⁰ In 2018 the success rate remained 80 %: the NCCD had to defend its decisions before the administrative courts in 422 cases and in 138 cases the courts decided in favour of the NCCD, and against the NCCD in 37 cases, with the remaining cases still pending at the time of writing of this report.²⁵¹

In 2015, the NCCD was called to participate in 680 civil cases²⁵² and in 750 cases in 2016.²⁵³ In its 2017 annual report, the NCCD states that, in 2017 its presence as an expert in court cases was required in 723 civil cases on moral damages and 712 cases filed under

²⁴⁵ National Council for Combating Discrimination, Decision 357 of 11 May 2016.

²⁴⁶ National Council for Combating Discrimination (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report), available in English at <http://cncd.org.ro/2017-04-20-raportul-de-activitate-al-cncd-anul-2016>.

²⁴⁷ National Council for Combating Discrimination (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

²⁴⁸ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

²⁴⁹ National Council for Combating Discrimination (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report).

²⁵⁰ National Council for Combating Discrimination (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

²⁵¹ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

²⁵² National Council for Combating Discrimination (2016), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2015* (2015 annual report).

²⁵³ National Council for Combating Discrimination (2017), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2016* (2016 annual report).

other claims (work conflicts).²⁵⁴ In 2018, the institution reports its participation in 862 cases.²⁵⁵

j) Stakeholder engagement

The NCCD engages constantly with all governmental and non-governmental stakeholders relevant to the implementation of its mandate. Civil society associations representing different vulnerable groups have the possibility to establish partnerships or develop joint projects with the NCCD. In practice, this leads the NCCD to carry out multiple common projects and joint interventions with the Centre for Legal Resources, the Institute for Public Policies, ACCEPT, ADIS (Association for Rights' Defence and Social Integration) etc. This potential and openness on the part of the NCCD also extends to service provider networks and organisations and trade unions, although information regarding such collaboration is scarce.

The NCCD also has collaboration protocols with professional groups and key bodies, such as the National Institute for Magistracy (Institutul National al Magistraturii) and with the Police Inspectorate, which has led to periodic training sessions for these professional groups.

Although the openness of the NCCD to establish partnerships and work together with other governmental or non-governmental bodies in projects that come under its mandate is clear and constant, the lack of a strategy detailing the priorities and the lack of annual plans to implement those priorities leads to a dilution of the efficiency of the NCCD's interventions.

k) Roma and Travellers

The National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013) (*Strategia Națională de Implementare a Măsurilor de Prevenire și Combatere a Discriminării* (2007-2013)) published in October 2007, set out the main principles, priorities and areas of intervention of the NCCD for 2007-2013, and mentioned Roma-related objectives without making Roma-related themes a priority of the NCCD's work.²⁵⁶

The official position of the NCCD dating from 2008 in relation to Roma is that

'from the NCCD statistics it is clear that Roma are the most frequent victims of discrimination in all areas of social life: access to education (cases of segregation), equality in the labour market (refusal to employ Roma), access to services and public places (refusal to provide certain services, to allow access to public places such as clubs, pubs, restaurants, internet cafes), right to dignity (public statements, hostile and degrading media articles).'

Consequently, the NCCD launched campaigns for combating racism and offered special training for relevant professions, such as civil servants, teachers, policemen, magistrates as well as persons who can provide support to the victims of discrimination.²⁵⁷

²⁵⁴ National Council for Combating Discrimination, (2018), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2017* (2017 annual report).

²⁵⁵ National Council for Combating Discrimination (2019), *Raportul de activitate al Consiliului Național pentru Combaterea Discriminării 2018* (2018 annual report).

²⁵⁶ National Council for Combating Discrimination (2007), *National Strategy for the Implementation of Measures for Preventing and Combating Discrimination (2007-2013)* (Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013)).

²⁵⁷ NCCD official position communicated on 8 May 2008.

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)

In spite of a serious lack of human, financial and material resources and lack of solid institutional support from the political sphere or from the Government, the visibility of the NCCD increased significantly after 2006 due to the way in which the NCCD understood and carried out its mandate to raise awareness.²⁵⁸ The NCCD carried out national awareness-raising campaigns, organised cultural events, summer schools, courses and training, round tables discussing public policies and affirmative measures targeting children, students, teachers, civil servants, policemen, riot police, judges, lawyers, NGO representatives, medical doctors and medical personnel.²⁵⁹

- 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 NCCD works closely with NGOs representing various vulnerable groups, carries out joint projects and consults with major NGOs in developing its programmes in relevant areas. However, NGOs have criticised its failure to engage in dialogue on amending the Anti-discrimination Law in 2013. Criticisms have also been made regarding the failure to adopt a new national strategy for equality.

- 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)

Government institutions do not have the objective of promoting dialogue with social partners to give effect to the principle of equal treatment within the workplace. Codes of practice, codes of conduct, measures to ensure workforce monitoring and diversity management are not common in the Romanian context and the NCCD has so far not assumed an active role in promoting these themes.

- d) Addressing the situation of Roma and Travellers

The National Agency for Roma is responsible for addressing Roma issues at national level. The impact of projects carried out with European funds, including the ESF, has not been assessed.

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

- a) Mechanisms

As the principle of equality is clearly guaranteed in the Constitution, any contrary provisions would be unconstitutional and illegal under the Anti-discrimination Law as *lex specialis*.

²⁵⁸ Gallup Organisation Romania (2008), *Percepții și atitudini ale populației României față de fenomenul de discriminare* (Perceptions and Attitudes towards Discrimination), Bucharest, National Council for Combating Discrimination, available at <http://www.crj.ro/userfiles/phphqFO72.pdf>. See also National Council for Combating Discrimination, Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring (2006), *Analiza de imagine a Consiliului Național pentru Combaterea Discriminării pentru primul semestru al lui 2006*, available on request from the NCCD.

²⁵⁹ Response from the NCCD, 4 March 2009. See also NCCD annual reports for 2006, 2007, 2008, 2009 and 2010.

However, due to the limitations established by the Constitutional Court, neither the NCCD²⁶⁰ nor the courts²⁶¹ can set aside discriminatory legal provisions.

The constitutional provisions and the framework established by the Anti-discrimination Law prevail in relation to any clauses included in contracts or collective agreements, internal rules of procedure or rules governing the independent occupations and professions.

b) Rules contrary to the principle of equality

Following the decisions of the Romanian Constitutional Court that limited both the mandate of the NCCD²⁶² and that of the civil courts in relation to discrimination generated by legislative norms,²⁶³ only the Constitutional Court may review discriminatory norms containing provisions contrary to the principle of equality. As legal standing before the Constitutional Court is limited by the Constitution to specified categories (courts of law during proceedings or the Ombudsman), the Romanian legal framework currently has a de facto gap in protection against *de jure* discrimination provisions that fall outside the scope of the EU acquis on anti-discrimination. No list of norms contrary to the principle of equality has been compiled.

In the past, the NCCD found that particular norms were contrary to the principle of equality and issued recommendations to the relevant authorities that they amend the legislation, but without any adequate follow-up. Relevant cases reported in the media included:

- Two cases regarding restrictions applied to homosexual men in relation to donating blood. The measures proposed by the Ministry of Health (permanent exclusion of gay men from donating blood) were considered both inadequate and unnecessary, but as the initial decisions and recommendations were not observed, a second petition was necessary and the issue was tabled again even after a second decision.²⁶⁴ The latest decision of the NCCD is still not being complied with.
- NCCD Decision No. 323 of 21 November 2006 issued a recommendation to the Ministry of Education that it draft a set of regulations to: ensure the exercise of the right to education in equal conditions for all pupils; observe the right of parents and guardians to ensure the religious education of their children as they choose; observe the secular character of the state and the autonomy of religious denominations; ensure freedom of religion and beliefs for all children equally; and allow for the display of religious symbols only during religious instruction classes or in places devoted to religious education. The decision was partially appealed and the NCCD recommendations were upheld by the Court of Appeal. Nevertheless, on 11 June 2008, the High Court of Cassation and Justice accepted the final appeal submitted by the Ministry of Education and a coalition of religious associations and quashed the decision of the Court of Appeal. As the initial appeal regarded only some parts of Decision 323, the decision of the High Court of Cassation and Justice makes void only the relevant recommendations and the Ministry of Education is still supposed to enforce the remaining recommendations. However, the Ministry refuses to do so, invoking the High Court decision.

²⁶⁰ Constitutional Court, Decision 997, 7 October 2008, finding that Article 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

²⁶¹ Constitutional Court, Decision 818, 3 July 2008.

²⁶² Constitutional Court, Decision 997, 7 October 2008, finding that Article 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

²⁶³ Constitutional Court, Decision 818, 3 July 2008.

²⁶⁴ National Council for Combating Discrimination, Decision 337, *ACCEPT v. the Ministry of Health for the National Institute of Haematology*, 21 November 2005, and Decision 260, *ACCEPT v. the Ministry of Health*, 29 August 2007. A second case was necessary because the Ministry of Health did not comply with the recommendation of the NCCD in its first decision.

- The NCCD position regarding the three-tier recognition system for religious denominations established by the Law on religious freedom and the general status of religions, which was deemed as discriminating against smaller or newer religious minorities.²⁶⁵
- In its decision of 14 March 2006 in file 9165/22.12.2005, the NCCD found that the provisions of Article 30(1)(c) of Law 248/2005 regarding the free movement of Romanian citizens abroad discriminates on grounds of marital status against the parents of minors whose parents are divorced in relation to the right of a parent granted custody of a child to remove the child from Romanian territory without the consent of the other parent. After finding that the legal provision leads to discrimination, the NCCD recommended that the Ministry of Interior take the measures necessary to remedy this. The legal provision was not amended and there was no follow-up.²⁶⁶

²⁶⁵ Law 489/200 on religious freedom and the general status of religions, 8 January 2007.

²⁶⁶ National Council for Combating Discrimination, Decision, *RR petition against Law 248/2005*, 14 March 2006.

9 COORDINATION AT NATIONAL LEVEL

By law, the NCCD is responsible for all matters in regard to anti-discrimination in Romania, although most of its visibility comes from reviewing petitions in alleged cases of discrimination. However, conflicts of competence have occurred, with the courts deciding against the NCCD in cases regarding discriminatory language used in the media. Therefore, the National Audiovisual Council (*Consiliul Național al Audiovizualului*) is competent to decide whether an advertising clip or statements during a TV show are discriminatory or not and to impose appropriate sanctions in accordance with the Audiovisual Law, which is considered *lex specialis* in relation to the Anti-discrimination Law.²⁶⁷

Emergency Ordinance 83/2012, adopted in December 2012 and aimed at amending the legislation on equal opportunities to bring it in line with European standards, introduces further confusion in its Article 23, as it creates overlapping competences with the NCCD when it mandates the Ministry of Labour, Family and Social Protection to:

- a) receive complaints regarding infringement of legal provisions on the principle of equal opportunities and treatment between women and men and of non-discrimination on the ground of sex, by individuals, legal entities, public and private institutions, and convey them to the institutions responsible for resolving them and for applying sanctions and ensuring counselling for victims under legal requirements;
- b) prepare reports, studies, analyses and make prognoses regarding enforcement of the principle of equality of opportunities and treatment between women and men in all fields of activity;
- c) ensure exchange of information with the European bodies in the field of equal opportunities between men and women.²⁶⁸

In spite of the confusion, the ministry has not replaced the NCCD as equality body, as it has a duty to transfer complaints to the NCCD. The same Emergency Ordinance 83/2012 introduces different definitions of discrimination, indirect discrimination, harassment, the burden of proof and different ranges for the fines applicable in cases of discrimination on grounds of gender, although it mentions the NCCD as the responsible entity in Article 46.

In 2016, the Parliament adopted Law 8 on the establishment of the mechanisms provided by the Convention on the Rights of Persons with Disabilities from 18 January 2016 (*Legea nr. 8 din 18 ianuarie 2016 privind înființarea mecanismelor prevăzute de Convenția privind drepturile persoanelor cu dizabilități*),²⁶⁹ which aims to establish the monitoring mechanism under Article 33(2) of the UNCRPD. The media has reported numerous challenges in establishing the monitoring council including the resignation of the first director of the council.²⁷⁰ There are no reports on the effectiveness of the monitoring council or suggesting any coordination with the NCCD so far.

²⁶⁷ Bucharest Court of Appeal (*Curtea de Apel București, Secția a VIII Contencios Administrativ și Fiscal*), File 34845/2/2005, 18 January 2006.

²⁶⁸ Emergency Ordinance EO 83/2012 on modifying Law 202/2002 on equal opportunities and treatment between women and men, 13 December 2012.

²⁶⁹ Law no. 8 on the establishment of the mechanisms provided by the Convention on the Rights of Persons with Disabilities (*Legea nr. 8 din 18 ianuarie 2016 privind înființarea mecanismelor prevăzute de Convenția privind drepturile persoanelor cu dizabilități*), 18 January 2016.

²⁷⁰ Elena Georgiana Pascu, Resignation request files with the Romanian Senate, registered with no. I1760, 18 July 2016, available at: <http://www.activewatch.ro/Assets/Upload/files/georgiana%20pascu%20Cerere%20de%20eliberare%20din%20functie%20CM.pdf>.

10 CURRENT BEST PRACTICES

At national level there are no assessments of Government policies or initiatives that could be qualified as promising or as best practice. Of the initiatives of the NCCD that can be commended, its role in the litigation before the Constitutional Court and the Court of Justice of the European Union in case C-673/16 and its subsequent engagement in drafting and supporting a bill on civil partnerships are notable.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

1. The limitation of the Anti-discrimination Law by the Romanian Constitutional Court in a series of decisions issued in 2008 and 2009, which limited both the mandate of the NCCD²⁷¹ and that of the civil courts in relation to discrimination generated by legislative provisions,²⁷² created a gap in the effective protection against discrimination.²⁷³ As the Constitution provides for limited standing and specific conditions for constitutional review and the Constitutional Court is the only entity able to assess and decide when a legal provision conflicts with the equality principle enshrined in the Constitution, the mandate of the NCCD should be adequately amended to include the potential for the national equality body to automatically bring before the Constitutional Court cases of *de jure* discrimination, which is currently only provided, in accordance with Article 146(d) of the Constitution, to the Ombudsman (Avocatul Poporului). Without this power, the national equality body (NCCD), faced with a legal provision falling within the scope of European Union law which is incompatible with the constitutional anti-discrimination principle does not have a mechanism, as indicated by the Court of Justice of the European Union (CJEU) in C-555/07 *Seda Küçükdeveci v. Swedex GmbH & Co. KG.*, allowing it to decline to apply that particular legal provision.

2. None of the definitions of harassment from the various relevant norms (Anti-discrimination Law, Equal Opportunities Law, Criminal Code) are in full compliance with the definition of harassment set out in Article 2(3) of the directives, as the Romanian provisions fail to punish as harassment unwanted conduct with the *purpose* of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment and punish only harassment having the *effect* of violating the dignity of a person.

3. The use of the word 'order' instead of 'instruction' in Romanian might lead to a restrictive interpretation of instructions to discriminate, limiting the prohibition to hierarchical relations. While the NCCD interpretation complies with the meaning of the directives, interpreting the terminology extensively, the courts have still to determine the understanding of Article 2(2) and its limitations.

4. The concept of reasonable accommodation for persons with disabilities is not included in the Romanian Anti-discrimination Law but is currently defined in special legislation on the promotion and protection of the rights of persons with disabilities but without provision for any sanction. The jurisprudence of the NCCD and of the courts is not unitary. Although the UN Convention on the Rights of Persons with Disabilities has been signed and ratified by Romania, the official translation includes major errors on key concepts, such as 'legal capacity,' which was translated as 'legal assistance,' and there have been no attempts to further harmonise the legislation with the convention.

²⁷¹ Constitutional Court, Decision 997, 7 September 2008, which found that Art. 20 (3) of the Anti-discrimination Law (GO 137/2000), defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions, is unconstitutional.

²⁷² Constitutional Court, Decisions 818, 819 and 820, 3 July 2008. The Constitutional Court has concluded that the dispositions of Art. 1(2) e) and of Art. 27 of the Anti-discrimination Law (Governmental Ordinance 137/2000) are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms where they consider that such norms are discriminatory.

²⁷³ In theory, when confronted with *de jure* discrimination, the Romanian courts could proceed with a review of compatibility with EU law on grounds of Article 148(2) of the Constitution, which asserts the priority of EU legislation and could, eventually disapply the discriminatory norm. This has never happened in practice, the tendency instead being to refer the potential cases to the Constitutional Court for a constitutional review in light of the equality and non-discrimination provisions in the Constitution. This practice might be explained by the very clear wording of the Romanian Constitutional Court in its decisions from 2008 (Decisions 818, 819 and 820) and from 2009 (Decision 997) when the courts or the NCCD decided to disapply discriminatory norms. This was treated as an issue of the separation of powers, with a need to prevent the courts from being perceived as negative legislators.

5. Although compliance is mentioned in the Anti-discrimination Law, the NCCD has not so far developed an operational mechanism to monitor infringements of the legislation or to continuously monitor compliance with its decisions, hence it is difficult to assess the effectiveness of its mandate and the effective, proportional and dissuasive character of the sanctions issued.

6. In spite of the adoption by the Ministry of Education of three different sets of regulations regarding desegregation in education, with a clear definition of segregation that could be enforceable, the failure to apply these provisions and to establish a functional implementation mechanism with clear procedures, has led to further cases of segregation being reported.

7. The NCCD practice of not issuing an administrative fine and issuing only administrative warnings or recommendations in some of its cases erodes the effective, proportionate and dissuasive character of the remedies and is contrary to Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78. NCCD warnings do not carry financial penalties.

8. The politicisation of the steering board was visible in several areas: controversial decisions in cases involving politicians; the demise of effective remedies in favour of recommendations lacking any legal power; the quality of legal reasoning; and the number of NCCD decisions upheld by the courts after being appealed.

9. An Emergency Ordinance adopted in December 2012, amending the Equal Opportunities Law, introduced different definitions of discrimination on the ground of gender, creating different legal regimes and generating confusion.

11.2 Other issues of concern

Disability, age and sexual orientation are not established as protected grounds in Article 16 of the Romanian Constitution. Notably, disability is not specifically mentioned as a protected ground in the special clauses in the Anti-discrimination Law defining prohibition of discrimination in employment (Articles 5-8), access to public services – social protection, advantages, goods and services, housing (Article 10), education (Article 11), forced displacement (Article 13), and access to public places (Article 14). This is an omission in the law that is, however, rectified in practice by the NCCD and by the courts by interpreting these articles in conjunction with the general definitions of discrimination including the full list of protected grounds in Article 2.

Romanian anti-discrimination legislation applies to an open-ended list of criteria of protection going beyond those provided by the directives and the scope of the Anti-discrimination Law is applicable to areas beyond those set out in the directives. The open list of protected grounds also gives rise to some disadvantages, as the ever-expanding and tailored list of criteria deemed as being in need of protection turns the anti-discrimination principle into a general equality and fairness principle.

The courts as well as the NCCD interpreted the legal provision on the gratuity of filing a discrimination complaint as applying solely to the complaints before the NCCD or the civil courts. The courts and NCCD interpretation is that the benefit of being exempted from the court tax that is meant to encourage victims of discrimination to use existing procedures does not apply to cases when the NCCD decisions are challenged before the administrative courts. This is a deterrent.

The fact that Romanian legal provisions go beyond the minimum requirements of the directives and, most importantly, place emphasis on 'the right to dignity' in combating discrimination, increases the effectiveness of the anti-discrimination mechanisms and helps to increase the visibility of the NCCD and awareness of the provisions of the Anti-discrimination Law. The 'right to dignity' has been invoked in cases where the legal

provisions were not fully sufficient, as was the case in regard to the dividing wall segregating the Roma community in Baia Mare.²⁷⁴ However, in relation to the right to dignity, a worrying practice is being developed by the NCCD and by the courts, requiring claimants to produce evidence that defendants actually had an intention to discriminate. The NCCD practice in attempting to find a balance between protection of the principle of equality and non-discrimination and freedom of expression is not coherent, and contradictory results are often reached in similar cases. The Anti-discrimination Law provides in Article 2(8) that its provisions cannot be interpreted so as to limit freedom of expression, freedom of opinion and the right to information. However, although the NCCD usually invokes the case law of the ECtHR in understanding the limitations of freedom of expression, the practice of the NCCD and of the courts is not consistent and many discriminatory statements, in particular those made by politicians, continued not to attract sanctions and are not recognised as an abuse of rights.

The budget of the NCCD is not stable enough to allow the consolidation and development of the institution. The annual budgetary allocations are limited and only the institutional efforts to attract external funding allow the body to carry out certain activities.²⁷⁵

A worrying trend widely reported in the media, but which was not framed as a legal complaint so far is the increasing number of cases of denial of access to medical services such as legal abortions or contraceptives by Ob-Gyn doctors or pharmacists who invoke their religious objections. Religious ethos is claimed to de facto deny access to public services to women who cannot afford to pay for those services in private hospitals.

²⁷⁴ National Council for Combating Discrimination, Decision No. 439, file no. 4A/2011, *Ex officio v. Cherecheș*, 15 November 2011.

²⁷⁵ See Chapter 7(d) above for an overview of the NCCD's budget.

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

No important legislative developments took place in 2018.

12.2 Case law

Name of the court: Romanian Constitutional Court

Date of decision: 18 July 2018

Name of the parties: *Coman, Hamilton and ACCEPT v. Inspectoratul General pentru Imigrari*

Reference number: 534/2018

Address of the webpage: <https://www.ccr.ro/>

Brief summary: Adrian Coman (a Romanian citizen) and Robert Clabourne Hamilton (a US citizen) married in 2010 in Belgium. Two years later, the couple applied to the Romanian authorities for a residence permit so that the US citizen could join the Romanian citizen, to live and work in Romania, as his spouse. This request was refused under the justification that the Romanian Civil Code prohibits in Article 277(2) the recognition of same-sex marriages or partnerships. The couple filed a discrimination complaint in 2013 against the Romanian Immigration Inspectorate. For two years the couple, represented by the NGO ACCEPT Romania, went before different courts for deliberations over which court would hear the case as court of first instance. In 2015, the first hearing took place in Bucharest before Sector 5 court of first instance. In the first instance court, the Coman-Hamilton family challenged the constitutionality of the Civil Code Article 277(2) denying recognition to married same-sex couples, and Article 277(4), which provides for a theoretical exception in case of the application of freedom of movement.

At the request of ACCEPT and Coman-Hamilton family, the Romanian Constitutional Court (RCC) suspended the case and referred four questions for a preliminary ruling²⁷⁶ to the Court of Justice of the European Union basically asking the CJEU to define the term 'spouse' in Article 2(2)(a) of the Free Movement Directive (2004/38)²⁷⁷ and whether it includes same-sex couples. The CJEU Grand Chamber issued its judgment on 5 June 2018 in case C-673/16. In July 2018, after a new round of hearings and deliberations, the Romanian Constitutional Court announced on 18 July 2018 that it admitted the complaint challenging the constitutionality of Article 277(2) and 277(4) of the Civil Code and stated that the provisions are constitutional only if they are applied in a way which allows granting the right to stay on Romanian territory to the spouse citizens of EU Member States or citizens

²⁷⁶ Questions referred by the RCC to the CJEU under C-673/16: '1. Does "spouse" in Article 2(2)(a) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, include a spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State?

2. If so, do Articles 3(1) and 7(1) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence on its territory for a period of longer than three months to a spouse of the same sex as the European Union citizen?

3. If the answer to the first question is negative, can the spouse of the same sex as the European Union citizen, to whom the citizen is legally married under the law of a Member State other than the host Member State, qualify as "any other family member," as per art. 3(2)(a) of Directive 2004/38/EC or as "the partner with whom the EU citizen has a stable relationship, which can be properly documented," as per 3(2)(b) of Directive 2004/38/EC, with the related obligation of the host Member State to facilitate entry and residence, even if the host Member State does not recognize same sex marriages and does not provide for any alternative form of legal recognition, such as civil partnership?

4. If the answer to the third question is affirmative, do art. 3(2) and 7(2) of Directive 2004/38/EC, read with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence on its territory for a period of longer than three months to a spouse of the same sex as the European Union citizen?'

²⁷⁷ Citizens Directive (2004/38), governing free movement and residence rights of EU citizens, and family reunification rights of migrant Union citizens with their third-country national family members.

of third states in a marriage with an EU citizen, if the marriage was concluded in an EU Member State, in accordance with EU law.

On 18 July 2018, the Constitutional Court reached its decision and admitted the complaint challenging the constitutionality of Article 277(2) and 277(4) of the Civil Code. The Constitutional Court stated that these provisions are constitutional only if they are applied in a way which allows granting the right to stay on Romanian territory to the spouse citizens of EU Member States or citizens of third states in a marriage with an EU citizen, if the marriage was concluded in an EU Member State, in accordance with EU law. In paragraph 41, the Court states:

'In this light, applying the CJEU decision (in case C-673/16), which interpreted the European law, the [Romanian] Constitutional Court finds that the relationship of a same-sex couple is part of "private life" and also "family life", similar to the relationship of a heterosexual couple, which brings the protection of the fundamental right to private and family life, guaranteed by Art. 7 of the Charter of Fundamental Rights of the EU, art. 8 of the European Convention on HR, and art. 26 of the Romanian Constitution. Enjoying the right to private and family life, same-sex couples, who form stable couples, have the right to express their personality within these relationships and to enjoy, in time and by the means provided for by law, legal and judicial recognition of the corresponding rights and duties.'

Name of the court: Romanian Constitutional Court

Date of decision: 21 June 2018

Name of the parties: National Liberal Party, Theodora Bertzi

Reference number: Decision 434/2018 on the unconstitutionality of the Decision of the Parliament 21/2018 regarding the appointment of a member of the NCCD Steering Board

Address of the webpage: <https://www.ccr.ro/>

Brief summary: Article 23(4) of GO 137/2000 establishes that when appointing new members for the steering board of the NCCD, the Parliament should make sure that a minimum of two thirds of the members are law graduates. However, in spite of protests of NGOs, in 2015, 2017 and 2018 the ratio of 2/3 was not complied with. The parliamentary group of the Liberal Party challenged before the Constitutional Court the last two decisions of the Parliament appointing members to the NCCD steering board. In its complaint, the Liberal Party invoked the failure to observe this requirement, as well as the requirement of having prior relevant experience in the field of human rights or anti-discrimination. The Constitutional Court of Romania rejected the constitutional challenge regarding one appointment decision from 2017 (for which the two thirds conditionality was met at the time of the appointment). However, the Court accepted the challenge raised in relation to the parliamentary decision appointing a member of the NCCD in 2018. The Court annulled the parliamentary decision, which de facto leads to the revocation of the mandate. In reaching its decision, the Constitutional Court endorsed the argument presented in an amicus curiae by the anti-discrimination coalition of NGOs that the requirement of having a proportion of two-thirds law graduates on the steering board is not a mere recommendation, but a legal obligation meant to secure the effectiveness and legitimacy of an administrative-jurisdictional body.

No new trends and patterns emerged in 2018 in cases brought by Roma and Travellers. No data are available so far in this regard.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Romania
Date: 31 December 2018

<p>Title of the law: Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination Abbreviation: GO 137/2000 (Anti-discrimination Law) Date of adoption: 31.08.2000 Entry into force: 30.10.2000 Latest relevant amendments: 25.06.2013 Web link: http://cncd.org.ro/?language=en Grounds protected: race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion Civil/administrative Material scope: employment access to goods or services (including housing and health), social protection, social advantages, education, right to dignity Principal content: Prohibition of direct, indirect and multiple discrimination, harassment, instruction to discriminate and victimisation. Establishing the specialised body, the National Council on Combating Discrimination</p>
<p>Title of the law: Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men Abbreviation: Law 340/2006 Date of adoption: 25.07.2006 Latest relevant amendments; 4.12.2012 Entry into force: 1.04.2002 Web link: - Grounds covered: gender Administrative Material scope: Employment relations, access to goods and services Principal content: Prohibition of direct, indirect discrimination in the context of equal opportunities between women and men and of sexual harassment. Establishing a body mandated to develop equal opportunities policies, the National Agency for Equal Opportunities Between Men and Women</p>
<p>Title of the law: Law on the protection and promotion of the rights of persons with a handicap Abbreviation: Law 448/2006 Date of adoption: 06.12.2006 Latest relevant amendments; 1.11.2012 Entry into force: 1.01.2008 Web link: - Grounds covered: disability Administrative Material scope: Any field Principal content: Rights and duties of persons with disabilities. Obligations in relation to the accommodation of the needs of persons with disabilities. Establishing the National Authority for the Persons with a Handicap</p>
<p>Title of the law: Labour Code Abbreviation: Labour Code Date of adoption: 24.01.2003</p>

Latest relevant amendments; 24.10.2012

Entry into force: 1.03.2003

Web link: -

Grounds covered: gender, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union membership or activity

Administrative

Material scope: Employment

Principal content: direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Romania
Date: 31 December 2018

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	7.10.1993	20.06.1994	No.	Yes.	Slow process of recognition of the relevant case law of the ECHR by the courts and legal profession.
Protocol 12, ECHR	4.11.2000	17.07.2006	No.	N/A	Not relevant
Revised European Social Charter	14.05.1997	07.05.1999	No.	Ratified collective complaints protocol? No.	Not relevant
International Covenant on Civil and Political Rights	27.06.1968	9.12.1974	Yes.	Yes. No interstate complaints (art.41)	Not relevant
Framework Convention for the Protection of National Minorities	01.02.1995	11.05.1995	No.	N/A	Not relevant
International Covenant on Economic, Social and Cultural Rights	27.06.1968	9.12.1974	Yes.	N/A	Not relevant
Convention on the Elimination of All Forms of Racial Discrimination	N/A	15.09.1970	Yes.	Yes.	Not relevant
Convention on the Elimination of Discrimination Against Women	4.09.1980	07.01.1982	No.	N/A	Not relevant

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
ILO Convention No. 111 on Discrimination	N/A	11.05.1973	No.	N/A	Not relevant
Convention on the Rights of the Child	26.01.1990	28.09.1990	No.	N/A	Not relevant
Convention on the Rights of Persons with Disabilities	26.09.2007	11.11.2010	No.	N/A	Not relevant

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