

**REPORT ON MEASURES TO COMBAT
DISCRIMINATION IN THE 13 CANDIDATE
COUNTRIES (VT/2002/47)**

**COUNTRY REPORT
ROMANIA**

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Chapter 1 The legal framework, definitions and scope

a. The legal framework

Does national law guarantee the principle of equal treatment or non-discrimination with respect to the grounds racial or ethnic origin, religion or belief, disability, age and sexual orientation? If so, what is the nature of the national legal framework?

There are several provisions of the 1991 **Constitution** that either directly or implicitly address the issue of equality and forbid discrimination.

Article 1 (3) states that “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 and shall be guaranteed”.

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

One can easily note from this list of discriminatory grounds that some are missing: disability, age and sexual orientation. The explanations are different but they all relate to Romania’s stage of democratic development in 1991 when the Constitution was adopted. For example, the issue of sexual preference was unconceivable at that time, when homosexuality was considered a crime and sanctioned by the penal code. People with disabilities and their special needs were ignored immediately after 1989 just as they had been before. The declared aim of Romania’s communist ideology was to create a “new human being” totally devoted to the establishment of a communist society, physically and mentally capable to achieve this “noble goal”. Therefore, people who did not fit into this description could not be considered true “communist builders”. When not ignored, these persons were treated as if they were an embarrassment to the communist society. To break this marginalization approach a society needs more than a revolutionary change of its government. Age, on the other hand, did not constitute a source for discrimination during communism, or at least it occurred very seldom. After 1989, the issue of age was very sensitive due to some populist measures taken particularly in relation to retirement policy. Over more than two years, from 1990-1992, Romania adopted several legal regulations allowing many categories of persons to retire at a very young age, 45 to 55, compared to 57-62 as it had been before. Many did so, considering that a “safe” pension paid by the state was preferable to the uncertainties brought by the new laws of the markets. This policy, which continued for several years afterwards, although with some changes, is one important explanation for the country’s current situation, in which the number of retired people is much higher than the active population.

Romania’s democratic level in 1991 is the explanation for other grounds that were considered important not to be a source of discrimination: property and social origin. According to the reasons offered at that time, contrary to what someone might be tempted to think, these provisions did not intend to protect poor people against discrimination, but the emerging prosperous elite. The same explanation was given for a restriction to freedom of expression provided for by the Constitution, “any instigation to... class hatred” being prohibited by law [Article 30 (7)].

The right to one’s identity is provided for by Article 6 which states: “(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 protective

measures taken by the Romanian State for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens”.

Article 16 (1) provides for equality of rights and clearly forbids discrimination: “Citizens are equal before the law and public administration, without any privilege or discrimination”.

Article 38 of the Constitution, on Labour and social protection of labour, only explicitly addresses the issue of discrimination only when it is about equality between men and women. In relation to other persons it is only an indirect reference which has to be corroborated with the provisions mentioned above: “(1) The right to work cannot be restricted. Everyone has the free choice of profession and workplace. (2) All employees have the right to social protection of labour. The protecting measures concern safety and hygiene of work, working conditions for women and the young, the setting up of a minimum wage per economy, weekends, paid annual leave, work carried out under hard conditions, as well as other specific situations.

The situation of disabled persons is not addressed in terms of discrimination, but rather it is regarded as requiring special protection. Article 46, on Protection of the disabled, states that “Persons with disabilities shall enjoy special protection. The State shall ensure the promotion of a national policy of preventive care, treatment, readjustment, education, instruction and social integration of the disabled, while observing the rights and duties of their parents or legal tutors.”

Regarding the terminology used by the Romanian legislation in relation to people with disabilities, it must be mentioned that for several years the term employed was “handicapped people”. The Constitution is an example. Due to the fact that in daily language this term has a pejorative connotation, it was replaced at a later stage by “persons with handicap”. Expressions such as “disability” or “disabled” or “persons with disabilities”, although employed by the medical terminology, are not used by the legislation.

So far no cases on discrimination have been brought before the Romanian courts or before the Constitutional Court based on any of these articles, because in the absence of an express provision allowing the rights provided for by the Constitution to be directly enforced, the Romanian courts are extremely reluctant to consider them as such and have always asked for ordinary laws to include and develop such provisions, together with procedural terms.

In principle, the constitutional provisions, including the equality clause, can be invoked against a private party. However, the success of such a legal approach would be uncertain because the direct enforcement of constitutional provisions is not expressly provided for by the fundamental law, and it has been considered impossible by the judiciary. Over the years, several courts, among which the most prominent is the Supreme Court of Justice, have expressed the view that neither constitutional provisions nor Constitutional Court decisions have binding force. The Supreme Court ruled:

“...the constitutional provisions do not directly address the judiciary which apply the ordinary law, but only through the legislative body which has to comply with the Constitution and amend the ordinary laws [sic].

The decisions of the Constitutional Court have the same status. They represent a reproach to the legislative body and this legislative body must draw its conclusions from this reproach, amending those provisions of ordinary laws that were criticized by the decisions of the Constitutional Court...

If we apply another rationale it means that the law enforcing judicial organs, not having a concrete provision in the ordinary law, should refer to the constitutional text in order to reject the provisions criticized by the decisions of the Constitutional Court, which is inadmissible. The judiciary enforces the ordinary law that applies and not directly the Constitution: the legislative body has the obligation to comply with the Constitution and the constitutional principles by amending the ordinary law in order to observe the Constitution.”¹.

A similar rationale was employed in other decisions as well: “...At the same time, applying directly the provisions of the Constitution, they [the judges] would judge in the name of other normative provisions than those provided by the law, thus violating Article 123 (1) of the Constitution according to which justice shall be rendered in the name of the law.”²

According to the Romanian legal system, the decisions of the Supreme Court of Justice are not mandatory precedents for other courts. However, being the highest authority in the country it is very likely that many such cases will end up before it, therefore its views are taken into account by judges of lower courts. Legal scholars have also expressed their views on Constitution’s direct enforceability: “Therefore, judges are not allowed to directly apply the constitutional provisions ... just as they are not allowed to apply the international provisions on human rights, as provided for by Article 11 and 20 of the Constitution, because they have to observe during the trial and for the protection of procedural rights of the parties only the existing legal procedural provisions.”³ Accepting the possibility that judges “directly apply the Constitution and are not obliged to obey the provisions of the Penal Procedure Code would imply the acceptance that judges do not make justice in the name of the law, as required by Article 123 (1) of the Constitution, which is inadmissible”.

The Constitutional Court itself responded to all these views in its Decision No. 186 of 18 November 1999.⁴ It ruled that it is the obligation of the legal courts to directly enforce the provisions of the Constitution. The Court stressed the supremacy of the Fundamental Law as the source of the entire legal system, pointing out that those who refuse to directly enforce the Constitution pretending that they are bound only by the law (ordinary and organic) base their refusal specifically on the direct enforceability of other constitutional norms, Article 123 (1) and (2) and Article 125. “This is to say that the Constitution itself forbids the direct enforceability of the Constitution or that the direct enforceability of the Constitution represents a violation of the Constitution which is illogic.” At the same time the Court emphasized that some legal courts used the notion “law” in a wrong way thus concluding that the Constitution is not a law. Article 72 of the Constitution mentions the types of laws within the Romanian legal system: constitutional laws, organic laws and ordinary laws, the courts of justice having the obligation to observe all of them, and not being allowed to select only the organic and ordinary laws while refusing to apply the constitutional laws. So far the situation has not changed, and since the main reason seems to be the absence of a constitutional text on the direct enforceability of its provisions, the conclusion is that an amendment to the Constitution is needed. However, at the time of writing of this report, among the amendments to the Constitution that are under discussion there is nothing that would attempt to properly address this issue.

¹ The Supreme Court of Justice, Decision No. 1613 of 7 May, 1999.

² The Supreme Court of Justice, Decision No. 2531 of 17 June 1999.

³ Gheorghită Mateuț, ‘Conținutul jurisdicției constituționale și implicațiile ei asupra procesului penal’ [The Substance of Constitutional Jurisdiction and Its Effects on Penal Court Case], *Dreptul* [The Law], 2 (2000), p. 45

⁴ Decision No 186 of 18 November 1999, *Monitorul oficial al României*, Part I, No. 213 of 16 May 2000.

In August 2000 the Romanian Government adopted the first anti-discrimination legislation, **Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination**⁵ which will be exhaustively presented in this report. The Ordinance forbids and sanctions any discrimination based on “race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion”. [Article 2 (1)] Furthermore, Article 4 defines the term “disfavoured category” as a category of persons that is “either placed in a position of inequality as opposed to the majority of citizens due to the persons’ social origin or to a disability or is faced with rejection and marginalisation due to specific circumstances, such as a chronic non-infectious disease, HIV infection or the status of refugee or asylum-seeker.”

Although “age” is not covered by the definition provided for by Article 2 (1), one can state that age is considered as a ground of discrimination since other provisions specifically forbid discriminatory conduct based on age. This is the case for all articles on “Equality in economic activities and as regards employment and profession”, those on “Access to administrative, legal and health public services, to other services, goods and benefits”, on “Access to education”, and articles on “Freedom of movement, right to freely choose the residence and access to public places”. However, it is clear that there is an inconstancy between how the definition is worded and how various administrative offences are conceived in the mentioned sections. Moreover, surprisingly, Article 19 on “The right to dignity” does not mention age among possible cases in which specific conduct may be considered an administrative offence. Therefore, several amendments to the Ordinance should be adopted in order to make it a more coherent and easily enforceable legal instrument.

Two years later, the Ordinance was discussed by the Romanian Parliament, and in January 2002 the country’s legislative authority adopted the Law No 48 of 16 January 2002⁶, approving the Ordinance with a few changes, among which the scope of the regulation⁷.

Other major laws forbidding discrimination on several grounds are the recently adopted Labour Code, and the Penal Code in its current form and particularly the new draft.

Until recently, discrimination was not an administrative offence under administrative law, nor has the Labour Code sanctioned it. Although according to Article 11 of the Constitution the international treaties ratified by the Parliament “are part of national law” and take precedence over the domestic legislation (Article 20), lawyers have been extremely reluctant to take such cases to the court. Be it because of lack of information, insufficient training or lack of interest, neither the legal profession nor the NGOs or the individuals have done anything in this respect for more than 10 years, which explains, for example, why regulations such as those on the Financial Guard, clearly prohibiting women from becoming financial guardians, have never been challenged before the Constitutional Court.

In January 2002 the Romanian Parliament adopted a new **Labour Code**, which entered into force at the beginning of March. Several of its articles explicitly forbid discrimination. The Chapter on Fundamental principles contains two such articles:

⁵ The Ordinance No 137 of 31 August 2000 was published in *Monitorul Oficial al României* (the Official Gazette) No. 431 of September 2000.

⁶ The Law No. 48 of 16 January 2002 was published in *Monitorul Oficial al României* (the Official Gazette) No. 69 of 31 January 2002.

⁷ See question below, on the Scope/fields of application

Article 5: “(1) Labour relations are based on the principle of equality of treatment with regard to all employees and employers. (2) Any direct or indirect discrimination of an employee based on grounds such as sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union membership or activity is forbidden.”

Article 6: “(1) Every employee who works shall enjoy working conditions suitable to the respective activity, social protection, labour security and health, as well as respect for his/her dignity and conscience, without any discrimination.”

Similar provisions can be found in other chapters regulating specific aspects of labour relations. For example, according to Article 59 it is forbidden to dismiss an employee on grounds such as “sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union membership or activity.” Likewise, Article 154 states that when deciding the amount and the distribution of the salary “any discrimination on grounds such as sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union belonging or activity shall be forbidden.” However, there are no sanctions against employers who infringe these provisions, the only remedy being the employee filing a complaint and being successful.

The **Penal Code** also has some provisions in relation to the issue of discrimination. In 1996, an amendment was made to the Penal Code; Article 247, “on abuse at the place of work through restricting somebody’s rights” was changed to read “Restricting the use or the exercise of a citizen’s rights by a public servant or creating a situation that puts the citizen in an inferior position on the ground of nationality, race, sex or religion, shall be punished by imprisonment of 6 months to 5 years”. So far no one has been charged under this article.

Another criminal provision which deals with racial or ethnic origin, although not with discrimination *per se* is Article 317, according to which “Nationalistic and chauvinistic propaganda or incitement to racial or national hatred ... shall be punished by imprisonment of 6 months to 5 years”.

A draft of a new Penal Code is currently under discussion. Article 334 on “racist or chauvinistic nationalist conduct” states that “Investigating the ethnic origin of a Romanian citizen with a view to establishing a discriminatory situation shall be punished by 3 months to one year of strict imprisonment, or by fine-days⁸.” The provisions mentioned above remain unchanged.

Over the last few years, other laws have made specific reference to their non-discriminatory enforcement, sometimes in a softer manner, sometimes more explicit. For example, the **Law on Health Social Insurance**, No. 145 of 1997 states in Article 3 (1) that “The insured persons and their family members have a non-discriminatory right to medical services, in accordance with the law”.

The **Law on the National System on Social Assistance**, No 705 of 2001, expressly states in Article 10 (1): “All Romanian citizens, having the domicile in Romania, have the right to social assistance in accordance with the law, without any differentiation based on race, nationality, ethnic origin, language, religion, sex, opinion, political appurtenance, wealth or social origin”.

⁸ Fine-days is an alternative form of punishment where one day of imprisonment has an assigned monetary value and, when the convicted person cannot pay the penal fine, the amount is automatically converted into days of imprisonment.

Again, one has to note that “age”, “disability” and “sexual orientation” are not covered by this article. This absence does not necessarily mean that these categories are allowed to be discriminated against but rather it shows that the philosophy at the foundation of the entire regulation is very superficial: the disabled and the elderly are legally considered as persons who need special protection. For example, Article 27 (2) of the same law states: “Social assistance institutions ensure protection, care, accommodation, health restoring activities, and social reintegration for children, the disabled, older persons and other categories of persons according to their specific needs”.

At the same time, the absence of sexual orientation from the above quoted text is significant for an assessment of how casually the whole issue of discrimination is perceived and dealt with by the Romanian legislators and legislation.

More recently, collective agreements have begun to make specific reference to the issue of non-discrimination. The **Unique National Level Collective Agreement** No. 1285 of 17 June 2002, for 2002-2003⁹ specifically mentions in Article 2 (3): “When hiring a person and deciding on individual rights, employers shall ensure equal opportunities and equality of treatment for all employees, without any direct or indirect discrimination based on race, nationality, ethnicity, language, religion, social category, belief, sex, sexual orientation or any other criterion which has a purpose or as an effect restricting or not recognizing the use or the enjoyment of the rights provided for by the labour collective agreements.” “Age” and “disability” are again missing and this is significant since collective agreements are concluded with trade unions. It shows that these two aspects are not taken into consideration by the trade unions themselves although the media often reports allegations of discrimination, particularly on the grounds of age, of both women and men.

In 2002 the Government issued the **Emergency Ordinance No 31/2002**¹⁰ forbidding organisations and symbols of a fascist, racist or xenophobic nature and the encouragement or venerating of persons guilty of crimes against peace and humanity, sanctioning racist speech and association.

Looking into all these regulations, one may note a certain inconsistency in the references to categories of people who have the right not to be discriminated against. Understandably, the issue of sexual orientation could not be taken into account during the time when “same sex relation” was a crime punished by the Penal Code. Even under those circumstances, Ordinance 137/2000 specifically mentioned the sexual orientation among the protected grounds of discrimination. The legal text that criminalized homosexuality was abrogated only in 2001, which means that for more than one year the Romanian legislation had two opposing legal provisions: one sanctioning same sex relations and forbidding the association of persons with homosexual orientation, and another which prohibited discrimination based on sexual orientation! More recently, the Collective labour agreement expressly mentioned sexual orientation among the aspects that must be protected by law in terms on non-discriminatory conduct. But as mentioned above, in other laws differences continue to exist, and therefore it would be a very good initiative of the National Council for Combating Discrimination to recommend more consistent definitions.

⁹ Published in *Monitorul Oficial al României* (the Official Gazette) Partea V, no. 12 of 25 July 2002

¹⁰ Emergency Ordinance No 31 of 13 March 2002, published in *Monitorul Oficial al României* (the Official Gazette) Partea I No. 214 of 28 March 2002.

In addition, it has to be mentioned that Romania has ratified a number of international treaties and conventions adopted under the aegis of United Nations and the Council of Europe on human rights and minority rights protection. Protocol No. 12 to the European Convention of Human Rights has been signed but not yet ratified. In his report, issued upon his visit to Romania, the Council of Europe Human Rights Commissioner recommended the Romanian Government “Ratify the European Charter for Regional or Minority Languages, and examine the possibility of ratifying Protocol No. 12 to the European Convention on Human Rights”.¹¹

With these remarks and those that will be made later on in this report, it can be stated that the present Romanian legislation forbids and sanctions discrimination of persons whose rights are specifically protected by Council Directive 2000/43/EC and Council Directive 2000/78/EC in a manner which, although not identical to the two Directives, is quite similar. If constantly enforced, the existing regulations would determine a behavioural change regarding the real sense of equality and non-discrimination.

b. The definition of discrimination

Direct and indirect discrimination

Is there a definition in law of both direct and indirect discrimination? If so, does this conform to the definitions in the Directives?

Currently there are three laws describing direct and indirect discrimination, each containing differing definitions.

Direct discrimination

Chronologically, the first legal text addressing this issue was the Governmental **Ordinance 137/2000 on Preventing and Punishing All Forms of Discrimination**. Article 2 (1) states: “According to the ordinance herein, the term 'discrimination' shall encompass any difference, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, belief, sex or sexual orientation, appurtenance to a disfavoured category or any other criterion, with the aim of 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.” This definition has to be read with the reference made in Article 1 (3) which states that “The exercise of the rights provided for by this article shall relate to persons in comparable situations”.

The second legal text is the **Law on Equal Opportunities between Women and Men**, No 202 of 19 April 2002¹². According to Article 4, which defines the terms used by the law, “a) *direct discrimination* shall be considered a difference in the treatment of a person, which is less favourable due to that person’s appurtenance to a certain sex or due to pregnancy, child delivery, maternity or paternal leave.”

The third definition is provided for by Article 5(3) of the new **Labour Code**, which considers direct discrimination as “the acts and facts of exclusion, differentiation, restriction or preference

¹¹ Office of the Commissioner for Human Rights, Report by Mr Alvaro Gil-Robles on his visit to Romania, 5-9 October 2002 for the **Committee of Ministers and the Parliamentary Assembly**, Strasbourg, 27 November 2002 Comm D H(2002)13

¹² The Law No. 202 of 19 April 2002 was published in *Monitorul Oficial al României* (the Official Gazette) No. 301 of 8 May 2002

based on one or several criteria as provided for by paragraph (2)¹³, which have as a purpose or effect not granting, restricting or not recognising the use or the enjoyment of the rights provided for by the labour law.”

Indirect discrimination

Ordinance 137/2000 does not mention the term “indirect discrimination” as such, but Article 2 (2) states that “Any active or passive behaviour that generates effects liable to favour or disadvantage, in an unjustified manner, a person, a group of persons or a community, or that subjects them to an unjust or degrading treatment, in comparison with other persons, groups of persons or communities, shall trigger administrative liability, unless it falls under the incidence of criminal law.”

The **Law on Equal Opportunities** provides in Article 4 b): “*indirect discrimination* shall be considered the application of apparently neutral provisions, criteria or practices, which through the effects generated have an effect on persons belonging to a certain sex, unless the application of such provisions, criteria or practices may be justified by objective factors not related to sex.”

The **Labour Code** has its own definition, in Article 5 (4): “Considered as indirect discrimination shall be the acts and facts based apparently on other criteria than those mentioned by paragraph (2)¹⁴ but which have the effect of direct discrimination”.

The general conclusion is that none of the three definitions of direct or indirect discrimination is legally worded in the same way as those provided for by the two Directives, but their spirit is quite the same and, if constantly applied by administrative and judicial authorities, they would generate a new attitude towards discrimination. However, since partially these definitions are inconsistent, an initiative aiming at their harmonization would be welcome.

Harassment

*Does national law define harassment, as defined in the Directives?
Are there any existing or forthcoming Codes of Practice on harassment?*

“Harassment” is a rather new concept for the Romanian legal system. After several years of discussion within the Parliament and the media, very often trivialising the entire issue, there are now several references. Ordinance 137 does not mention harassment. The Law on Equal Opportunities in Article 4 c) defines only “sexual harassment” as “any behaviour related to sex, which the responsible person knows affects persons’ dignity, if such behaviour is rejected and it represents the motivation for a decision affecting those persons”. The draft of the Penal Code also has an article on “sexual harassment” (Article 202), which considers such conduct a misdemeanour sanctioned by imprisonment of 3 months to 2 years or day-fines.

Apart from this there nothing on harassment in general terms nor can one identify any initiative for a Code of Practice. So far the Romanian Courts did not have the opportunity to rule on harassment since no such case was brought before them.

¹³ Article 5 (2) reads: Any direct or indirect discrimination of an employee based on grounds such as sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union membership or activity is forbidden

¹⁴ Ibidem

However, harassment is a daily reality informally reported by many people and a coherent definition is needed not only in relation to belonging to certain sex but on other grounds as well.

Instruction to discriminate

Is it contrary to national law to give instructions to discriminate? Does this conform to the Directives?

Currently there is no law in Romania that specifically prohibits giving instructions that would lead to discrimination. Moreover, it has to be noted that Ordinance 137/2000 had such a provision which stated: “Orders (instructions) or regulations issued by a natural or a legal entity which generate the effects listed in par. (2) shall trigger administrative liability¹⁵ of the natural or legal entity unless it falls under the incidence of criminal law” [former Article 2 (3)]. Unfortunately when the Ordinance was discussed in the Parliament a decision was taken to abrogate this provision and this is how Law 48/2002 was adopted.

The National Council for Combating Discrimination (NCCD) considers that – at least in theory - the request for sanctioning “instruction to discriminate” is met by the provisions of Governmental Decision No. 1194/2001 the Organisation and Functioning of the NCCD. According to Article 2 (1) this body “c) endorses the draft legal regulations regarding the exercise of rights and freedoms, in conditions of equality and non-discrimination; f) monitors the application and observance of the legal provisions on preventing, sanctioning and eliminating all forms of discrimination by public authorities, legal and natural entities”. However, one has to notice that there is quite a considerable difference between such vague wording and the clear request of the two Directives. Therefore, it remains to be seen how the NCCD will sanction such behaviour in real cases.

Nevertheless, for the 16 months that the provision of the Ordinance were in force, instructions to discriminate, although not followed by discriminatory acts were considered discrimination and thus punishable. In such a short time however, it was not possible to build a case-law, but based on this article of the Ordinance, and on those in the Law on Publicity¹⁶ which prohibits the use of discriminatory statements in public advertisements, a Roma NGO, “Romani Criss”, launched an investigation. Article 6 letter d) of the Law on Publicity states that “the publicity which includes discrimination based on race, sex, language, origin, social origin, ethnic identity or nationality is forbidden”. Violations of these provisions shall be documented by public administration officials who are empowered to impose fines that are to be paid by either the natural or legal person who wrote the announcement and by the newspaper that published it. Article 18 provides that “the author, the publicity producer and the legal representative of the means of spreading [media] are jointly responsible with the person who advertises in the case of violation of the provisions of the present law”.

¹⁵ Administrative pecuniary responsibility such as a fine.

¹⁶ Legea privind publicitatea, No. 148/2000, published in Monitorul Oficial, No. 359 of 2 August, 2000, entered into force in November 2000.

The report produced by the organisation¹⁷ showed at least two things. Firstly, that companies' personnel are given instruction on discriminatory advertisements. In addition, although it is hard to believe that upon hiring, the prejudice would not be present and the Roma persons would have equal chances with non-Roma, it is good that at least they no longer may publish discriminatory announcements. If it is true that law is shaped by the society, it is also true that it helps shape new behaviour. The other aspect relates to the media's lack of knowledge about their duties and responsibilities. In fact this is even more problematic since the vast majority of information in the country is intermediated by media. In this respect the media's *de facto* lack of accountability is a major problem that should be addressed if there is a desire for change. It is therefore even more deplorable that the Romanian Parliament decided not to sanction instruction to discriminate.

c. Scope

Fields of application

Does the prohibition of racial and ethnic discrimination apply to all the fields of application listed in Article 3 of the Racial Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?

Does the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation apply to all the fields of application listed in Article 3 of the Employment Equality Directive, including both the private and the public sector? Does the prohibition go beyond the scope foreseen in the Directive?

As mentioned earlier¹⁸, there are several laws which explicitly forbid discrimination in the fields they regulate: on access to employment, vocational guidance, social protection, labour security and health, termination of labour contract, the amount and the distribution of the salary, social assistance, health insurance, etc. In this context, Ordinance 137 remains the most comprehensive regulation, mentioning all categories or rights covered. However, taken as a whole, the Romanian legislation prohibiting discrimination seems to lack coherence, as not all discriminatory possibilities are being expressly mentioned. Such inconsistencies should be addressed in order to offer comprehensive protection to all possible victims of discrimination.

According to Article 1 of Ordinance 137/2000¹⁹, discrimination is prohibited in relation to all categories of civil and political rights, and economic, social, cultural rights. The structure of this legal text is the following: the first chapter provides for definitions and principles; the second makes clear which deeds are considered administrative offences in each field; the last chapter provides for the penalties.

¹⁷ "In the period March 12 – 28, 2001, the <Anuntul Telefonic – The Gazette of Quick Businesses> newspaper published under the section <Job Offers> a discriminatory announcement regarding the Roma ethnic-group, that had the following content: <Total Protect hires security guards under the law 18/1996, **Roma excluded**, salary 1.700.000 – 2.5000.000; 659.37.65>". "The company that hired security guards excluding Roma was Total Protect Impex S.A. Obtaining information regarding the company, Romani CRISS officially contacted the hiring company on 28.03.2001, asking for its official stand on the issue. Also, on 03.04.2001, Romani CRISS addressed an official letter to the Director of the "Anuntul Telefonic" newspaper, asking for his official position. On 04.04.2001, at the Romani CRISS headquarters, a meeting took place with the representatives of the Total Protect S.A. company. During this meeting, the company representatives admitted their mistake and agreed to apologise in public to the Roma ethnic-group. As the leading body of "Anuntul Telefonic" had not given an official response, on 09.04.2001 Romani CRISS re-sent the letter addressed to them. The Secretary of the Editorial Office, Catalin Taloi, verbally admitted the fact that "Anuntul Telefonic" has published during the mentioned period the discriminatory announcement, but this fact was caused by an employee's error who was consequently fired". For more details see: "Legal analysis of national and European legislation anti-discrimination legislation", Report on Romania prepared by Renate Weber, September 2001.

¹⁸ See the section on "Legal framework".

¹⁹ See Annex

Article 1 encompasses a long list of rights in relation to which the elimination of all privileges and discrimination shall be guaranteed: the right to equal treatment before courts and any other jurisdictional bodies; the right to personal security and to be granted state protection against violence and mistreatment perpetrated by any individual, group or institution; political rights, namely electoral rights, the right to take part in public life and the right to access to public positions; civil rights (freedom of movement, the right to Romanian citizenship, the right to marry and to choose one's partner, the right to property, freedom of thought, conscience and religion, freedom of expression and opinion, freedom of meeting and association, etc); economic, social and cultural rights, (in particular the right to work, to freely choose an occupation, to fair working conditions, to equal pay for equal work, to fair wages, the right to establish and to join trade unions, the right to housing, the right to health, medical assistance, social security and social services, the right to education and to professional training, etc); the right of access to all public places and services.

According to paragraph (4) of the same article, the obligation to comply with these principles belongs to any natural or legal entity. Furthermore, Article 3 specifies that these provisions shall apply to all individuals, all public or private legal entities, as well as to public institutions that have responsibilities regarding employment (recruitment, selection and promotion); access to all forms and levels of vocational training and advanced training; social protection and security; public services; access to goods and facilities; education system; and enforcement of public order.

Chapter II of the Ordinance is divided into several sections, according to the domains addressed²⁰. It is in fact a long list of administrative offences based on discriminatory conduct in several fields.

Section I deals with “Equal opportunities in economic activities and as regards employment and profession”²¹. It covers the participation of a person in an economic activity or the free choice and exercise of a profession, and labour and social security relations, with respect to labour relation; granting social rights other than wages; vocational training, advanced training, conversion or promotion; the enforcement of disciplinary measures; and the right to join a trade union.

It also expressly forbids discrimination in relation to hiring someone or in conditions for filling a position following an advertisement or an examination organised by the employer or a representative thereof.

The Ordinance also requires individuals and legal entities with responsibilities in job brokerage to ensure the equal treatment of all job seekers and to provide their free and equal access to information regarding the labour market, consultancy on job opportunities and training for new skills. They are also required to refuse to support any discrimination in hiring on the part of employers [Article 7 (3)].

The employers have the obligation to grant social facilities to their employees on a non-discriminatory basis (Article 8). Article 9 is a protective clause for employers, mentioning that this provision shall not be interpreted in the sense of limiting the employer's right to refuse to hire a person who does not meet the usual requirements and standards in the respective domain.

The provisions of the recently adopted Labour Code must also be taken into account. Particularly because persons with disabilities are mentioned as such and new categories were added. Article 5

²⁰ See Annex

²¹ See Annex Articles 5-9.

(2) reads: “Any direct or indirect discrimination of an employee based on grounds such as sex, sexual orientation, genetic characteristics, age, national belonging, race, colour, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, trade union membership or activity is forbidden.”

One may state that, although structured in a different way, all these provisions basically cover the fields of application of Article 3 a), b), c), d), e) and f) of the Race Equality Directive and of Article 3 a), b), c), d) of the Employment Equality Directive.

Section II of Ordinance 137, on “Access to administrative, legal and health public services, to other services, goods and benefits”²², covers the fields protected by Article 3 h) of the Race Equality Directive and goes beyond the scope of Article 3 of the Employment Equality Directive.

Article 10 prohibits discriminatory behaviour in:

- refusals to ensure legal and administrative public services
- denial of access to public health services (choice of a family doctor, medical assistance, health insurance, first aid and rescue services or other health services)
- refusal to sell or rent a piece of land or building for housing purposes
- refusal to grant a bank credit or to conclude any other kind of contract
- denial of access to services provided by theatres, cinemas, libraries, museums and exhibitions
- denial of access to the services provided by shops, hotels, restaurants, bars, discotheques or any other service providers, whether they are public or private property, or by public transportation companies (by plane, ship, train, subway, bus, trolley-bus, tram car, taxi or by any other means of transport) on account of their
- denial of access to services provided by collective transportation companies (by plane, ship, train, subway, bus, trolley-bus, tram car, taxi or other)

Section III of Ordinance 137, on “Access to education” covers the domain protected by Article 3 g) of the Race Equality Directive. According to Article 15, discrimination is prohibited in relation to access of a person or of a group of persons to state-owned or private education of any kind, degree or level. The prohibition of discriminatory conduct refers to the establishment and licensing of education institutions as well.

Due to the fact that education in the minority mother tongue is an issue of an utmost importance in Romania, paragraph (3) of this Article considers requiring a declaration to prove a person or group's appurtenance to an ethnic group as a condition for access to education in their mother tongue as an administrative offence. However, there is an exception to this rule, namely the situation where 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 appurtenance to that minority by means of a document issued by a legally established organisation of the respective minority. In such cases, however, it is not that much about belonging to that minority as it is about being convinced that those who benefit from this system are active in those minority organisations, and will continue to be active after graduation. For example, Order No. 3294 of 1 March 2000 the Minister of Education on supporting the access of young Roma to pre-university and university institutions, according to which the places allotted for Roma students are subsidised, stated in Article 6 that the candidate-students “need a recommendation on behalf of a civic, cultural or political organisation”.

²² See Annex, Articles 10-14

Section IV of Ordinance 137, on “Freedom of movement, the right to freely choose residence and access to public places”²³ is intended to prevent any policy that could either destroy the groups’ identity or lead to assimilation, colonisation or forced movement of persons with a view to modify the ethnic, racial or social composition of a region. Any conduct that may lead to leaving one’s domicile is forbidden. So is any attempt to render living conditions much harder with the purpose of forcing a person or a group of persons belonging to a certain race, nationality, ethnicity or religion to give up their traditional domicile without their consent, or to compel a group of minority persons to leave a locality, an area or the regions of residence or a group of persons belonging to the majority to settle in localities, areas or regions inhabited by a population belonging to national minorities.

One may say that this regulation goes beyond the letter of Race Equality Directive. The explanation resides in Romania’s quite recent history, because during the last decades of the communist regime such a state policy *de facto* existed, particularly in relation to the Hungarian minority in Transylvania. For example the policy to set up various industries forced a huge number of persons from other parts of the country, the vast majority being of a Romanian origin, to settle in Transylvania, thus affecting the ethnic composition of the region. The Hungarians considered this to be a policy that aimed to diminish their proportion in the region’s total population. Another example relates to the policy on employment of young graduates. The Romanian communist system did not allow each graduate from universities to seek a job, instead it provided mandatory jobs. For years and years the rule was that those who graduated from the university in Iasi (the Moldavian region of the country), obviously of a Romanian origin, mostly got jobs in Transylvania, while those who graduated from the university in Cluj (in Transylvania), many of them of a Hungarian origin, were mostly sent to the Moldavian region. Moreover, during the communist regime freedom to settle and work anywhere in the country was not entirely allowed: a number of localities were considered “closed” and the only way to get permission to reside there was through marriage or based on a specific demand of an employer from these places.

Other provisions within the same section are consistent with Article 3 h) of the Race Equality Directive: prohibition of 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 appurtenance to a race, nationality, ethnic group, religion, social category or to a disfavoured category, on account of their belief, age, sex or sexual orientation (Article 17); and denial of access to public places on the same discriminatory grounds (Article 18).

Section V of the Ordinance, on the “Right to personal dignity” (Article 19) deals with limits set forth to freedom of expression, considering as an administrative offence “any public behaviour with a nationalistic-chauvinist propaganda character, any incitement to racial or national hatred, or any conduct aiming to prejudice a person’s dignity or to create a hostile, degrading, humiliating or offending atmosphere, perpetrated against a person, a group of persons or a community on account of race, nationality, ethnic group, religion, social category or their appurtenance to a disfavoured category, on account of belief, sex or sexual orientation”. As already mentioned, “age” is missing from this article.

Although Ordinance 137 was adopted almost three years ago, there is no case law based on its provisions. Only a few cases have been brought before the Courts, but for the time being the Courts have decided to suspend the judicial procedure and send the cases to the National Council for Combating Discrimination for a *prima facie* review. By the time this report was reviewed,

²³ See Annex, Articles 16-18

March 2003, the NCCD claimed not to have received any such case sent by a Court, which raises the question of how serious the Courts themselves are in relation to discriminations cases. Regarding the activity of the NCCD as such, it is too soon to speak about case law since the institution practically started to work in November 2002. Before the completion of this report the Council had decided on 15 cases, issuing 9 administrative fines and 6 warnings.

Exceptions and exemptions

- *Occupational requirements*

Do such exemptions exist on the national level? Does national law define 'genuine and determining occupational requirements' and, if so, how?

Please note that the Employment Equality Directive includes particular provisions with regard to organisations the ethos of which is based on religion or belief.

Does national law governing disability discrimination make any specific exceptions or provisions in relation to occupational health and safety rules?

The Romanian legislation does not address the issue of “genuine and determining occupational requirements”. However, a few provisions may be considered as representing such exemptions. For example, Article 15 (5) of the Ordinance 137/200 could be considered to be in line with Article 4.2 of the Employment Equality Directive when stating that “The provisions under paragraphs (1) and (2) shall not be interpreted as a restriction of the right of educational institutions that train personnel 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”.

Another law which mentions the right of religions not to be bound by the provisions on combating discrimination is the Law on Equal Opportunities between Women and Men, whose Article 3 reads: “The provisions set forth by the law herein shall not apply to religious denominations”.

The issue of “traditional” occupations of persons belonging to a certain group, in the Romanian context especially of Roma population, is not dealt with as such. The only law which mentions the concept of “traditional” but in connection with residence, not to activities, is Ordinance 137: Article 16 (2) considers as an offence the “rendering of living conditions much harder with the purpose of forcing a person or a group of persons belonging to a certain race, nationality, ethnicity or religion to give up their **traditional domicile** without their consent”. Since for some minorities the traditional place of residence is related to a specific activity, it can be seen as a way of indirect protection of those activities. This is the case, for example, of Russian Lipovans who live in the Danube Delta, their only occupation being fishery.

The most recent document addressing the issue of traditional occupation is a political one, namely “**The Strategy of the Government of Romania for Improving the Condition of the Roma**”, adopted in May 2001. Among the objectives set forth in the document is a specific mention of “Ensuring facilities for the practice and revival of traditional handicrafts which meet the demands of the market”. However, it is rather unclear how this would be realised. In November 2002 a unique trade fair took place in Bucharest with products traditionally made by Roma. But, although the event enjoyed media coverage and many visitors, it is rather difficult to believe that enough buyers will emerge in order to make such activities profitable.

Reasonable accommodation

Are there specific national law provisions regulating the use of pre-employment medical examinations? If so, what are the main provisions/norms? What is the relationship between this body of law and the principle of equal treatment/prohibition of disability discrimination? How does this body of law relate to the duty to provide a ‘reasonable accommodation’? Does national law permit an employer to inquire about disabilities prior to entering into a contractual relationship with a prospective employee? If so, in which stage of the job application procedure? Are prospective employees required to disclose, prior to employment, disabilities that impact on job performance? If so, how much and what type of information are they obliged to disclose? According to the law, what consequences follow if they fail or refuse to disclose the information? Is the duty to provide reasonable accommodation defined by law? Is the failure to provide such accommodation considered to constitute direct or indirect discrimination and/or does it infringe other (labour law) standards? Does such a duty exist only with respect to people with disabilities or also with respect to people discriminated against on the other grounds covered by the two Directives? How do courts determine whether accommodation is ‘reasonable’ or whether it imposes a ‘disproportionate burden’? What type of criteria is used (medical, occupational, educational, grants etc.)? How does, under national law, a failure to provide reasonable accommodation relate to the prohibition of (direct or indirect) discrimination?

It has to be emphasized that the Romanian legislation does not use the term “disability” or “persons with disabilities”. Instead, it employs the expression “handicap” and “persons with handicap”. Although Ordinance 137/2000 does not mention this category explicitly, the expression “appurtenance to a disfavoured category” refers to persons with disabilities as well, as Article 4 explains. This means that all the provisions of the Ordinance forbidding and sanctioning discriminatory conduct apply to the disabled as well. It would be a highly appreciated initiative of the National Council for Combating Discrimination to explicitly list all categories of persons whose right not to be discriminated against is covered by Ordinance 137. It is important to mention that due to the evidence required, within the Romanian legal system there is a clear difference between disabled persons and those with handicaps: the legislation demands medical evidence attesting the handicap degree in order to consider a person as a beneficiary of a special provision or as enjoying a non-discriminatory policy.

In addition, there are two major laws which address the needs of persons with disabilities. One is the **Emergency Ordinance on Special Protection and Employment of Persons with Disabilities**, No 102 of 29 June 1999²⁴ as amended by the Emergency Ordinance No 40 of 25 April 2000, and by Law No. 519 of 12 July 2002. The other is the new **Labour Code**. Article 27 of the Labour Code regulates the general framework of pre-employment medical examinations: “(1) A person may be employed only on the basis of a medical certificate attesting that the person is suitable for that work. (2) Individual labour contracts in non-compliance with the provisions of paragraph (1) shall be annulled”. However, if the employee shows the medical certificate after the conclusion of the individual labour contract, and according to the certificate the respective person is suitable to work, the contract shall be valid. The same article forbids requesting pregnancy tests upon employment, and allows specific medical tests to be required for employment in specific domains, such as health, restaurants, groceries, education, etc. In addition, Article 28 requires a medical certificate in a number of situations, including a suspension of activity for more than one year where the employee changes workplace.

²⁴ Published in *Monitorul Oficial al României* (the Official Gazette) No. 310, of 30 June 1999.

Regarding the definition, as provided for by Law 519/2002, persons with disabilities are “those persons whose access based on equal opportunity to social life, according to their age, sex, social, economic and cultural factors, is totally or partially limited by a social environment unsuited to their physical, sensorial, or mental deficiencies, thus requiring special protective measures in view of their social integration”.

With regard to how disabled persons may be employed, Article 35 states that “Employment of persons with disabilities and their possibility to have an income shall be possible according to general labour legislation and other regulations as well as the provisions of this emergency ordinance with the purpose of socio-professional integration of these persons.” The definition was amended in 2000 by Emergency Ordinance 40 which added a new category, namely people with individual convention on labour relations within cooperative organisations.

It is to be noted that the wording of Article 36 is rather on granting possibilities to persons with disabilities than on firm policies: “(1) disabled persons may be employed in compliance with the law, by natural or legal persons who hire paid workers, in conformity with their professional background and their physical and intellectual skills, based on individual labour contract. (2) Employment of persons with disabilities may be realized by creating protected working places, specially organised with the purpose of eliminating any obstacle, and ensuring appropriate facilities.” The only genuine opportunity is provided for by paragraph (3) which allows persons with disabilities to be employed and work in their own homes, whilst establishing a duty of the employer to ensure transport to and from the house of raw material and products. However, this opportunity does not consider the need for bringing these persons into the mainstream labour market but rather to keep them away thus re-enforcing the marginalization approach.

The same Emergency Ordinance requires the establishment of “commissions for the socio-professional integration of persons with disabilities” whose role is, among others, “to coordinate training and professional orientation activities as well as employment of disabled persons” [Article 45 (2)]. All these activities are supported by the Social Solidarity Fund for Persons with Disabilities within the limits of the funds collected in conformity with Article 43. This may be a real problem, since allegedly in Romania almost 40% of its economy is “the grey economy”, which does not pay any tax.

There is no legal provision on the right of an employer to inquire about disabilities prior to entering into a contractual relationship with a prospective employee. The requirement of the medical certificate is the only one. Nor is any legal provision on protecting information obtained by an employer in such circumstances.

The same Emergency Ordinance requires the employers to do a number of things in order to ensure “accessibilities for persons with disabilities”, such as: “The buildings of public, cultural, sport, or recreation institutions, the dwellings built with public funds, collective transport, public phones and access roads shall be done in such way as to allow unrestricted access of disabled persons.” (Article 11). Moreover, the Emergency Ordinance requires that until 31 December 2003 all those responsible comply with its requirements, but it is highly questionable whether this deadline will be met. At the same time it has to be stressed that non-compliance with any requirement set forth by this Emergency Ordinance does not trigger any sanction.

The concept of “reasonable accommodation” is unknown to the Romanian legislation.

The only legal act which speaks about confidentiality in relation to persons with disabilities is The Emergency Ordinance No. 79 of June 2002 on the General Framework on Communication Regulation²⁵, according to which a National Authority on Communication Regulation is set up. Among the objectives of this institution, Article 45 mentions the advancement of specific interest of disabled users and of users with special needs, and also the “protection of the rights of persons with disabilities, particularly the right to privacy regarding the use of personal data in electronic communication and post service.” However, the law does not provide any sanction where such information is disclosed leading therefore to the only potential legal solution: a civil law suit seeking remedies for possible damage.

A recent report issued by the National Council for Combating Discrimination on its incipient activity refers to a meeting with representatives of people with disabilities at which specific problems were raised such as access to public institutions of persons with a loco-motor disability, access to employment of persons with acoustic and visual deficiencies, and access to institutionalised houses for persons with mental deficiencies. However, the report says nothing about the strategy and activities the NCCD will undertake on the basis of such complaints.

Minimum requirements and positive action

- *Minimum requirements*

When is differentiation on grounds of age ‘objectively and reasonably’ justified under national law? How is this test being applied?

Are any specific arrangements made in national law regarding age discrimination and occupational social security schemes? (Consider this question with reference to article 6.2 Employment Directive).

Is compulsory retirement permitted? Are there any national provisions on retirement? Do they allow the fixing retirement ages by individual or collective labour -agreements and, if so, what are the conditions?

Are mandatory retirement ages fixed in national legislation/legally binding collective agreements? At what ages? What (if any) conditions/restrictions are imposed (e.g. not before state pension age/entitlement to (full) state pension?)? Are rights to protection from unfair dismissal lost upon reaching this retirement age?

Are mandatory retirement ages (widely) imposed by employers (even if apparently in agreement with employees)? At what ages? Are rights to protection from unfair dismissal lost upon reaching these retirement ages?

Are early retirement schemes promoted by the State? If so, are they justified (or might they be justified) by any of the examples provided in Article 6 of the Directive (legitimate employment policy, labour market and vocational training objectives etc)?

Is selection for redundancy widely decided on age grounds?

Is there obvious evidence of age discrimination in access to training opportunities?

Please, do not undertake far-reaching socio-economic research here, but just mention points that are well-known already to the national experts or easily accessible (for example, existing research, national reports, reports of international organisations etc...).

Romania’s legislation does not employ the concept of differentiation on grounds of age as ‘objectively and reasonably’. The only age related provisions of the Labour Code are on the minimum age for employment, which is 15. At the same time the Labour Code provides for some protective measures such as recreation, holidays, conditions of work, for employees under the age

²⁵ Published in *Monitorul Oficial al României*, No. 457 of 27 June 2002.

of 18 (minors). Apart from this and the general interdiction of Article 5 to discriminate against based on the age of the employee there is nothing else in this law in relation to age.

The **Unique National Level Collective Agreement** No. 1285/2002 does not mention anything in relation to the age and employment conditions.

Recently the entire retirement scheme has been changed. Since the collapse of the communist regime Romania has faced a very difficult situation in relation to conditions of retirement. Although the general age of retirement was 62 for men and 57 for women, in reality, for almost a decade the government allowed early and very early retirement age for both men and women belonging to certain categories of employees. Such decisions were taken either for populist reasons, or as a form of avoiding unemployment. The result has been extremely painful: currently the number of active population is smaller than of the retired, and this has had dangerous consequences for the pension system. In 2001 a new law was adopted, changing the entire procedure. The Law on Public Pension Scheme, No. 19/2000²⁶, provided for a 13-year period until reaching its last requirements. A dual approach is used, the age for retirement and the individual contribution of the employees to the pension system. The standard age for retirement will by the end of this 13-year period be 65 years for men and 60 for women. Until then the retirement age will be different, calculated based on a certain algorithm. The length of the individual contribution to the pension system will also be different each year, also based on a specific algorithm. While the minimum will be the same for women and men and will grow from 10 years in 2001 to 15 years in 2015, the maximum will be different, in 2015, men's contribution being 35 years and women's contribution 30 years.

The law provides for exemptions as well. Where working conditions are particularly hard, namely where the working capacity is entirely or partially affected, the standard retirement age may be lowered, though not under 55 for men and 50 for women. Other employees, who worked in mining, nuclear sites, radiation areas and some artistic activities, may retire after the age of 45 on the condition that they contributed to the pension system for a certain number of years.

Persons with disabilities, depending on the gravity of the handicap, are allowed to retire based on a different algorithm for the contribution scheme.

The age provided for retirement is not optional but mandatory. Employers are not allowed to specify in the individual employment contract an earlier retirement age than the legally approved ones.

When looking into the country's real situation one has to bear in mind that there is a difference between what is in the book and what occurs in practice. The country is facing a lot of economic difficulties; on the one hand privatisation did not take place but for in a few circumstances; on the other hand, the state is no longer financially capable of subsidising those huge factories that have produced financial disasters. Therefore, many of them simply close down and the first to be dismissed in such circumstances are those whose age is closest to the age of retirement.

Those who pass the legally established retirement age are more or less automatically dismissed and they may not successfully challenge such decisions. However, there are exceptions when persons beyond the retirement age can be found as civil servants in central or local administration, allegedly because of their skills. Similar situations are to be found in the private sector as well, not as a rule, and questionable if due to those persons' capabilities or due to other

²⁶ The Law entered into force on 1 April 2001.

parochial interests. In such cases, no one may challenge the employers' decision to keep those persons, nor are the persons in such situations protected against any unfair dismissal.

Military personnel enjoy different regulations, the entire retirement scheme being different. The age for retirement is 55, the additional requirement being 30 years of work for men (15 as a military) and 25 for women (10 as a military). In special situations, particularly related to the reorganisation of the Army, or of other structures with military personnel – all intelligence services – the age of retirement may be 50 on the condition that the length of the activity is observed.

- *Positive action*

Do specific measures exist in order to ensure or promote full equality or to compensate disadvantages linked with racial or ethnic origin, religion or belief, age, disability or sexual orientation (e.g. mandatory or voluntary quota systems, positive action programmes, financial incentive schemes, etc.)? Is the government considering adopting such measures? Are there comparable specific measures in relation to gender discrimination?

If interpreted literally, Article 6 (2) of the Constitution prohibits positive action since protective measures taken by the State “for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principle of equality and non-discrimination in relation to the other Romanian citizens”. The Constitution says nothing about other categories. For years and years the debate within the Romanian Parliament and media was dominated by those who, invoking Article 16 (1) of the Constitution stating that “citizens are equal before the law and public authorities, without any privilege or discrimination”, stressed the need for equality emphasizing their absolute opposition toward any positive action. No consideration has been given to the fact that without special measures for people traditionally discriminated against equality cannot be achieved. Structural discrimination has not yet been considered and addressed, either by the legal community or by political scientists.

The approach has changed over the years and more recently the idea of special measures or supportive action has been discussed more and to a certain extent accepted, and such measures have been taken on several occasions. However, it is true that there is a difference between how this aspect is dealt with in legislation, and the political commitments related to it: sometimes legal provisions may be just on paper while *ad-hoc* policy may be more effective. For example, for more than one decade already special measures have been taken by various universities on enrolling students of a Roma origin, providing a quota to them. Such affirmative actions have been adopted for social assistance students, for students in law or political science.

In order to understand the mentality of legal drafters it is worth looking into the Law on Equal Opportunities between Women and Men. Its Article 2 reads: “Measures taken for the advancement of equal opportunities between women and men and for the elimination of direct and indirect discrimination based on sex shall apply in fields such as labour, education, health, culture and information, participation in decision making, as well as in other domains as provided for by specific laws”. But within the law there is nothing that could be considered as “special measures” or “positive action”. Every single article speaks only about non discrimination and supporting equality. Regrettably, legal rhetoric is often used, particularly when requirements are set forth by international institutions, such as the European Union, but its relation to the understanding of the real need does not exist. The result is either contradictory regulations or good legal texts that are never enforced.

Article 42 (1) of the Emergency Ordinance 40/2000 compels commercial companies, state autonomous companies, national companies and other economic agents with more than 100 employees “to hire persons with disabilities based on individual labour contracts representing at least 4% of the total number of employees.” Those who do not employ disabled persons in this percentage are obliged to pay a monthly contribution to a special fund, “The Social Solidarity Fund for Persons with Disabilities”. The amount is decided according to a mathematic formula (Article 43). This provision may look impressive, but so far its enforcement has not brought any change. Romania is a country with a rather disorganised way of regulating, but with very high taxes. On several occasions complaints have been made by employers on how confusing and contradictory legal regulations are and how difficult it is to keep track of changes that directly or implicitly happen every week. Therefore, even good provisions should carefully be looked at and not be seen as the result of profound consultations calling for action. For example, the above mentioned provisions are simply considered as just a new tax imposed by the state, not at all changing the employers’ mentality on how they should treat persons with disabilities.

From a legal perspective the situation is similar in relation to that of other categories of persons who should benefit from non-discriminatory provisions. It is only the Governmental Decision on the Organisation and Functioning of the National Council for Combating Discrimination, No. 1194 of 27 November 2001²⁷ which, among the tasks of this unique structure in the country includes: “recommends the setting up, in accordance with law, of special measures or actions for the protection of disfavoured persons and categories who either find themselves in an unequal position as compared to the majority due to their social origin or a disability, or are confronted with rejection and marginalization and do not enjoy equal opportunities” (Article 2). A recent Governmental Decision, No. 1514/2002, broadened the NCCD scope of activity, and specifically provides for “affirmative action on preventing discriminatory deeds” to be elaborated and instituted (Article 2 letter h¹). Since the Council also has the competence to recommend legislative changes, it is expected that in the future several such initiatives will be seen.

The Strategy of the Government of Romania for Improving the Condition of the Roma, adopted in May 2001, acknowledges the current situation and lays down specific objectives: “Considering the fact that, in the course of history, Roma were objects of slavery and discrimination, phenomena that have left deep marks on the collective memory and which have led to the social limitation of the Roma; Considering the difficulties the Romanian citizens that are Roma ethnics have to cope with, as well as the wish to identify optimal solutions for their resolution”. However, so far this approach has not been transposed into legal regulations or other implementing mechanisms.

Among the objectives of the Strategy is: “Removing the stereotypes, prejudices and practices of certain civil servants of the central and local public institutions who are encouraging the discrimination of Romanian citizens of Roma ethnic origin compared with other citizens” and “Determining a positive change in public opinion concerning the Roma ethnics, on the basis of tolerance and social solidarity principles”. For the achievement of this goal, the Strategy mentions several actions among which the specific mention of a Roma representative may be considered to be positive action: “Setting up the National Council for Combating Discrimination and including Roma representatives in this structure; Initiating and developing some educational actions regarding the fight against discrimination targeted at civil servants in the central and local public administration; Monitoring the application of Emergency Ordinance No. 137/2000 and punishing the civil servants who have committed discriminative acts against citizens”. It is therefore surprising that when the Council was set up no Roma representative was appointed to the leading

²⁷ Published in *Monitorul Oficial al României* No. 792 of 12 December 2001

body of this structure, although all its members were appointed by various governmental structures. This aspect was emphasised by the European Council High Commissioner for Human Rights in his recent Report on Romania: “With regards to the actual absence of representatives of vulnerable groups on this body, the authorities informed me that the Council was presently studying the advisability of hiring members of the Roma/Gypsy community.”²⁸ However, there is a difference between hiring staff belonging to discriminated groups, which is normal and welcome, and appointing persons belonging to such groups, particularly Roma, in the leading body of the Council, namely the Steering Board²⁹, which would have been in line with the recommendation made by the Governmental Strategy on Roma. In December 2002 the Government amended the Decision 1194/2001 on the Organisation and Functioning of NCCD and a few changes were brought in relation to its structure and activities. According to Decision 1514/2002, the NCCD is no longer headed by a Steering Board but by a President (Article 3 .1) who “in the field of establishing and sanctioning the discrimination deeds...is assisted by a Steering Committee, deliberative body in this domain” (Article 3. 2). Currently, a Roma person is hired as a personal counsellor of the President of the Council and among the members of the Steering Committee is a person belonging to the Hungarian minority.

Particularly because of long centuries of discrimination against Roma, there is an urgent need for positive action regarding this minority. For the same reason, the *ad-hoc* policy on special measures such as quota for university entry were welcomed by the public at large as well. However it must be mentioned that almost nothing else has been done in other fields such as vocational training, social security, property, etc. In order to understand the complexity of this problem it is worth quoting the conclusions of the 1999 Report of the Ombudsman: “Where the citizen belonging to the majority sees the cases in which the law is violated, an effect of corruption or his/her lack of financial means to influence the observance of the law, the minority citizen perceives this as discrimination, hostility or rejection”.

In this context it is interesting to note that neither the Economic and Social Council³⁰ nor any trade union have ever addressed the issue of Roma as a disadvantaged population which would need special measures particularly in relation to their access to the labour market. Nor have they done something for any other group covered by the two Directives. Discrimination seems not to be understood as a genuine problem of the Romanian society and by the Romanian society. Only some women’s departments of large trade unions have produced some policy papers suggesting affirmative actions on gender although not very successfully.

The new Labour Code contains just a few articles providing for persons with disabilities when it regulates some aspects related to employment, but they fit into the category of special social protection rather than positive action. For example, Article 31, which deals with trial periods of new employees, normally 30 days for execution staff and 90 days for management, has a distinct paragraph for the disabled, stating that “Verifying the professional skills of persons with disabilities shall exclusively be done by a trial period of a maximum of 30 days.” Another provision, Article 142, provides for a supplementary holiday of at least 3 working days for

²⁸ Office of the Commissioner for Human Rights, Report by Mr Alvaro Gil-Robles on his visit to Romania, 5-9 October 2002 for the **Committee of Ministers and the Parliamentary Assembly**, Strasbourg, 27 November 2002 Comm D H(2002)13.

²⁹ The Romanian title is “Colegiul director”.

³⁰ This has been an initiative aiming at supporting the dialogue between the employers and the trade unions. Currently its structure and functioning are regulated by Law 109 of 1997 (published in *Monitorul Oficial* No. 14 of 4 July 1997), as amended by Law No. 492 of 1 October 2001 (published in *Monitorul Oficial* No. 623 of 3 October 2001) and its three party structure encompasses an equal number of representatives of the Government, nationwide representatives of the trade union Confederations and nationwide representatives of the employers’ Confederation.

‘employees who undertake hard or harmful work, sightless persons and other persons with disabilities, as well as young people up to 18 years of age.’

More recently the National Council for Combating Discrimination has started a campaign with the aim of establishing a number of cooperation protocols with public authorities, among which the Economic and Social Council, for better implementation of non-discrimination strategies.

In relation to the whole issue of discrimination and affirmative action it is interesting to note the difference between how the Roma population is perceived and how the Hungarian or German communities are viewed. While Roma persons are discriminated against and they themselves complain about it, neither the Hungarians nor the Germans consider themselves as being discriminated against. The German minority, reduced to a just few tens of thousands, most of them rather elderly, probably does not have the feeling of being subjected to discrimination. On the other hand, the Hungarian minority, the largest in the country, encompassing some 1,600,000 persons, has constantly complained about the fact that persons of Hungarian origin cannot be found in central administration or other central public authorities, such as the Ministry of Foreign Relations, the Army, or Intelligence services. However, they have never considered this as a discrimination but as “under-representation”.

Similarly, the public opinion considers that Roma persons should enjoy special attention, and affirmative action is needed, given the long centuries of discrimination against this population, but it strongly opposes the idea of such special measures for Hungarians who are considered to be well educated and capable of succeeding by themselves without any additional support that would be considered as positive action.

Chapter 2 Remedies and enforcement

a. Judicial and/or administrative procedures

What judicial, administrative and conciliation procedures are available on the national level for the enforcement of the principle of equal treatment? Is action needed on the national level to comply with Articles 7.1 and 9.1 respectively?

Ordinance 137/2000 provides for two categories of procedures related to discrimination cases.

The first is of an administrative nature and calls for certain discriminatory acts to be considered as administrative offences and punishment to be sought. The Ordinance established a National Council for Combating Discrimination which, according to Article 23 is “a specialised body of the central public administration, subordinate to the Government”. As provided for by Article 21 (3) “Attesting and punishing the administrative offences stipulated under Chapter II of the present Ordinance come under the jurisdiction of the National Council for Combating Discrimination. The provisions of Law 32/1968³¹ on attesting and punishing administrative offences, with its subsequent amendments, shall apply accordingly”. This means that any person who considers himself/herself discriminated against in a specific situation can submit a complaint to NCCD.

According to the same Ordinance this institution was supposed to be established two months after the entry into force of the Ordinance. However, the Governmental Decision on the Organisation

³¹ In 2001 a new regulation was adopted as a general framework on administrative offences, Ordinance No 2 of 12 July 2001, published in *Monitorul Oficial al României*, Part I, NO. 40 of 25 July 2001.

and Functioning of the Council was only adopted in November 2001³² and the Steering Board was appointed almost one year later by Decision of the Prime-Minister No. 139 of 31 July 2002, with the institution as such beginning to function in October-November 2002.

The second procedure provided for by the ordinance is for judicial remedies. Article 21 (1) stipulates that: “In all cases of discrimination set forth in the present Ordinance, the persons discriminated against shall have the right to claim compensation in proportion with the damage they incurred, and to demand the restoration of the situation that existed before the discrimination or the cessation of the situation that was created as a result of the discrimination, according to general legal framework”.

As a novelty of the Romanian legal system, the second paragraph states: “(2) The lawsuit on compensation shall be exempted from judicial stamp tax”. This is a particularly important provision since the court tax for other lawsuits is 10%, which quite often renders access to justice almost impossible.

Closely related to the judicial remedies is, beyond compensation for damages, the possibility of the judge requiring the withdrawal of the functioning license: “(3) Upon request, the court can order that the competent authorities withdraw the functioning license of legal entities that significantly prejudice by means of a discriminatory action or, although have caused minor damages, have repeatedly violated the provisions of the Statutory order herein”. Apart from these provisions of Ordinance 137/2000 there are no other administrative or judicial procedures. There is no conciliation procedure in such cases.

The judicial procedure was conceived as an alternative for those who are discriminated against: a person may choose to either require a certain discriminatory act to be considered an administrative offence and sanctioned as such by NCCD, or to go to the court and seek judicial remedies, including financial ones for the damage he/she suffered due to that discriminatory action.

When assessing how beneficial these provisions will be in combating discrimination, particularly regarding judicial remedies, one has to also bear in mind the legal culture of the country and the perception of the judiciary. Mediation is not a traditionally approach in Romania. Quite the opposite, its citizens often go to court in order to seek justice. At the same time, the entire legal system is rather conservative and innovation is viewed as something bizarre that will not last. “*Dura lex sed lex*” is one of the most used saying, without any consideration regarding the role of the law in a society, the progress that it should bring or support. The legal profession is far more conservative than the rest of the population. Therefore, although each day, in every court, many cases are brought to be decided, it is extremely seldom that among them are cases based on regulations that lawyers are not familiar with or do not understand. Unfortunately, regulations on discrimination fall under this category. To this lack of trust in non-discrimination provisions, one has to add the country’s general perception of this issue, expressed particularly by the political elite and by the media, namely that discrimination is not really a problem in Romania, and if it happens it is just by accident, therefore not requiring too much attention. Lack of appropriate training for both law students and practicing lawyers is another explanation.

Regarding the victims’ audacity to challenge discrimination in Court, the complexity of this issue is a problem for several reasons: firstly, because generally those discriminated against are

³² Governmental Decision, No. 1194 of 27 November 2001, Published in *Monitorul Oficial al României* No. 792 of 12 December 2001.

vulnerable people, particularly in terms of financial possibilities, who do not have money and time to spend on legal action; secondly because particularly these people do not trust the system of justice and the judiciary which is perceived as very corrupt (approx. 70% of the population share the same vision); thirdly it would be unrealistic to believe that in a field where lawyers themselves do not know exactly how to approach such cases, ordinary people, victims of discrimination have enough confidence in themselves and knowledge so as to convince judges who do not know much about this topic. Therefore, the role of NGOs that can assist victims of discrimination is crucial and those few cases that have already been heard were supported by NGOs.

It is too soon to have case law of the National Council for Combating Discrimination. Regarding the courts, however, the situation does not look as good as one would have imagined three years ago.

Only a few cases, regarding the denial of Roma persons to enter restaurants, have been dealt with since the adoption of the Ordinance. But, for the reasons mentioned above, most likely the lack of knowledge of how to handle cases of discrimination, the courts did not hand down any decision either in 2001 or 2002. Once the National Council for Combating Discrimination was established, all these cases were sent to the Council, the courts considering that the Council is entitled to undertake a pre-judicial procedure, which is wrong. One does not need to have a certain deed considered and sanctioned as an administrative offence by NCCD before seeking judicial remedies from a court. This is not what the drafters had in mind in 2000. However, it is true that the wording of Article 21 is rather vague and confusing enough as to allow a judge to come to such a conclusion.

This initiative of the courts, basically to “dismiss” discrimination cases by sending them to the NCCD, will even more discourage people to bring such cases to the courts.

Of all the provisions in Romanian legislation, Article 21 is by far the most advanced but reluctance to enforce it would bring tremendous harm to the entire effort to prevent and sanction discrimination. It will be again the task of the National Council for Combating Discrimination to either hold common meetings with judges to try to reach a common understanding of these provisions, or to recommend amendments to this article which would be the right thing to do.

Regarding the National Council for Combating Discrimination, according to the general provisions of Ordinance No 2/2001 on the legal framework of administrative offences, its decisions are legally binding and those who have committed an administrative offence are obliged to pay the fine. However, before paying his fine, within a period of 15 days after the decision was issued, the defendant may challenge the NCCD decision before the first level court. The court shall conduct its own investigation on the substance of the complaint and decide whether or not it was a discriminatory act that needed to be sanctioned. In turn, this court decision may be appealed to a higher court and the final decision will belong to the latter.

To conclude, one may say that although on paper the existing legal texts to a large extent comply with the two Directives’ requirements, in real terms efforts will be necessary in order to ensure their implementation by the courts and by the NCCD as well.

b. Associations

Are associations and other entities with a legitimate interest in ensuring compliance with anti-discrimination law entitled to engage in judicial and/or administrative procedures on behalf of or

in support of the complainant? If so, how often do associations and other entities make use of this possibility and with what results?

During the last decade a few the Romanian NGOs have been quite active not only in defending human rights in general but particularly in fighting discrimination and a high-quality expertise has been developed. Associations such as the Romanian Helsinki Committee, the Pro-Europe League, Romani CRISS, ACCEPT, the Foundation for an Open Society and others have played a crucial role on bringing the issue of discrimination into public discussion, in challenging media to present it, and even on issuing and adopting legislation to combat discrimination. Their capacity to influence decision-makers however, is limited, depending not only on mechanisms that they can put into effect, but also on the authorities' willingness to appropriately approach sensitive issues.

The Romanian Civil Procedure Code allows the intervention of a third party in a lawsuit either on his/her/its own interests or in the interests of one of the parties to the trial. During the last 13 years there were only a few cases in which human rights groups used this procedure, and not always successfully. The main problem lies in the fact that the Code requires the action to already be taking place between two parties, the NGO being the third party. This means that according to this procedure, an NGO may not initiate legal action in its own name.

In 1995 for the first time a law was adopted allowing non-governmental organisations to take action in a case in which the organisation was not a victim *per se*. This is the Law on the protection of the Environment No. 137 of 29 December 1995³³. Article 87 reads as follows: "Non-governmental organisations are entitled to file a case with view to preserving the environment regardless of who suffered the damage". No court cases based on this procedure have been brought as yet.

Ordinance 137/2000 is the second law allowing legal action to be taken by a non-governmental organisation in two different situations. Article 22 provides that:
“(1) Human rights non-governmental organisations shall have active standing in courts, as parties, in cases in which the discrimination takes place in their domain of activity and prejudices a community or a group of persons.
(2) The organisations mentioned in the above paragraph shall have active legal standing in courts as parties also where the discrimination prejudices one single person, if the person delegates the organisation to that effect”.

Until now discrimination cases brought before the courts have been only on the initiative of such organisations, and it is precisely this possibility that would make a change in the future to the fight against discrimination through the judicial machinery. In relation to this legal possibility it is interesting to note that the Legislative Council³⁴ made some aggressive comments, considering that this provision which in principle is “in line with the European doctrine (sic!) emphasising the role of the civil society in the evolution of social life” should have been more precise. The suggestion was that “these organisation could have active standing only insofar as their [court registered] statutes provide for this possibility. In its current wording, Article 22 – *ex lege* - adds to the statute of all non governmental organisations whose purpose is the protection of human rights, which, in a democratic society, is unacceptable.” Of course, the Legislative Council did not take into account the fact that the right granted by the law does not imply an obligation of all

³³ The Law on the Protection of Environment was re-published in *Monitorul Oficial* al României, No. 70 of 17 February 2000.

³⁴ According to the Constitution this is a consultative body to the Parliament.

human rights groups to exercise it. Fortunately the Law 48/2002 did not bring any change in this respect.

At the same time the Courts are rather split on how to enforce this possibility. Although in a couple of cases an NGO was allowed to bring a case on behalf of an individual without a specific mandate³⁵, in other cases, four different courts considered that 6 people do not represent “a group of persons” as required by Article 22. In 2001, a well known Roma association, Romani CRISS and Roma student association (ROMANITIN) filed two cases with a local Court in Iasi regarding two different actions where several Roma persons were denied access to public locations, namely disco bars, due to the fact they were Roma. The local court on both occasions did not rule on the merits of the case, but on an exception raised by itself regarding the NGOs’ capacity to represent the alleged victims. In the end the courts dismissed the cases, considering that the organisations did not have a specific mandate from the victims, and that the provisions of Article 22 (1) regarding a “group of persons” are not applicable because the legal text must be interpreted as considering a group of persons more than “an addition of individual persons”, it must be “a distinct entity”³⁶. The higher court upheld these decisions. How the court reached this conclusion on what is a group of persons is impossible to say. Particularly since Ordinance 137 does not mention anything on “a distinct entity”. The organisations appealed these decisions and at the time of writing are waiting for the case to come to court³⁷.

One important question which will find its answer in the future relates to the right or the possibility of such organisations to launch a complaint to the National Council for Combating Discrimination as well. The wording of Article 22, “an active standing”, means within the Romanian legal system the right to stand in a court of justice. It will be the practice of the Council that will show its openness toward recognising the same for its administrative procedures.

It is also worth mentioning that the Law on Equal Opportunities between Women and Men does not provide for the possibility of a human rights or women’s rights organisation to have active standing on behalf of a victim of discrimination or sexual harassment. However, since Ordinance 1378/2000 applies also to sex based discrimination cases, women’s NGOs should have an active role in judicial proceedings as well.

Before the adoption of Ordinance 137 the only possibility for a victim or a non-governmental organisation was to file a complaint to the Ombudsman. According to Chapter IV of the Constitution on the “Advocate of the People”, this is an institution whose role is “to defend the citizens’ rights and freedoms” when infringed by administrative authorities [Article 55 (1)]. Regarding the “Exercise of powers”, Article 56 provides that: “(1) The Advocate of the People shall exercise its powers *ex officio* or upon the request of persons aggrieved in their rights and freedoms, within the limits established by law. (2) It is binding upon the public authorities to give the Advocate of the People the necessary support in the exercise of its powers”. However, since the establishment of this institution, NGOs have been reluctant to bring cases to this structure’s attention for reasons that will be explained later in this report.

The possibility of an NGO representing a victim of discrimination or acting on his/her behalf is extremely important since it provides real hope that such cases will be brought to justice.

³⁵ ACCEPT – a human rights NGO, dealing mostly with homosexuals’ rights – has a couple of cases pending before the courts regarding discriminatory conducts against homosexuals.

³⁶ Local Court in Iasi, Decisions No. 22050/2002, and No. 22051/2002; Iasi Tribunal, Decisions No. 1614/2002 and No. 1615/2002.

³⁷ Romani CRISS, Report on “Monitoring discrimination cases against Roma, and the enforcement of Ordinance 137/2000”, issued March 2003.

Currently, efforts are being made to train lawyers and NGOs on how to deal with discrimination cases.

The Romanian legislation on the right of NGOs to engage in judicial and administrative procedures on behalf of or in support of the complainant may be considered in line with the requirements of the Directives, but overcoming courts' and other structures' prejudices regarding the role of such NGOs will still need some time and adequate training should be considered.

c. Time limits

What is the situation concerning time limits?

According to the Romanian Civil Procedure Code, a case based on Article 21 will have three degrees of jurisdiction: the competent court to receive the complaint is the first level court (judetorie) and afterwards its decision may be appealed (apel) to the hierarchical court (tribunalul); in turn this decision may be appealed (recurs) to the next hierarchical court (curtea de apel). The law also lays down the time limits for all these stages.

The Ordinance 137/2000 does not refer to any time limit for a lawsuit to be filed, nor a special competence of a court, therefore the general provisions of the civil and civil procedure law apply. Under the provisions of Article 21 (2), a discrimination lawsuit is court tax exempt.

With regard to the time limit, several remarks must be made. The general provision is that any lawsuit based on a claim may be filed within a three years period³⁸ from the moment the legal situation occurred, in this case the date the discrimination took place. The fact that the relationship in which the discrimination occurred has ended has no relevance. However, the lack of a special time limit for such situations may pose some problems in practice, due to the fact that labour law relationships and cases based thereon are regulated by different procedures and have other time limits than civil law relationships and cases. Similarly, the judicial review of administrative acts – if the discrimination occurred through such an act – has its own procedure.

Article 283 of the Labour Code decides on the time limit in two different ways:

- (1) Complaints related to labour conflicts may be submitted:
 - a) within 30 days from the moment the employer's unilateral decision regarding the completion, implementation, modification, suspension or termination of an individual labour contract was communicated;
 - b) within 30 days from the moment the decision on a disciplinary sanction was communicated;
 - c) within a period of 3 years from the moment the right to launch a complaint was born where the object of the individual labour conflict relates to unpaid salaries, or of other pecuniary rights, as well as in the case of an employee's pecuniary responsibility towards the employer;
 - d) during the entire existence of the contract if the object of the complaint is the annulment of an individual or collective contract or of some of its provisions.
- (2) In all other cases than those provided for by paragraph (1), the time limit is 3 years from the moment the right was born.

There is no case law explaining how these different time limits would be considered and enforced. However, theoretically the answer is not that difficult since the role of Ordinance

³⁸ Based on the provisions of Article 3 of Decree 167 of 1958.

137/2000 is to ensure as much protection as possible to the alleged victims. This would imply that the choice of bringing either a labour or an administrative action or a civil lawsuit belongs to the claimant. If he/she chooses to base the complaint on the Labour code, the time limit is provided by this law – 30 days after the situation occurred and the person was informed about it (e.g. being fired). The main demand in such cases would be the annulment of the discriminatory act. At the same time, within the same labour lawsuit the person may choose to use the provisions of Article 21 of the Ordinance and ask for civil remedies. In this case the two demands would be decided together. However, if for any reason, the alleged victim chooses either not to file the labour lawsuit or not to ask for civil remedies within the same case, he/she will be entitled to use exclusively the civil provision and therefore have a three-year time limit to ask for civil remedies.

A similar rationale must be used in cases of judicial review of an administrative act. If the person brings such an action then the first demand must be the annulment of the discriminatory act and the time limit is determined by the Law on judicial review of administrative acts – namely, one year. The person may either choose to seek civil remedies within this lawsuit or in separate legal action within a three years time. It is obvious, however, that Ordinance 137 should have been more precise about these possibilities, and not mentioning anything in this respect leaves – theoretically – the door open to some contradictory court decisions in the future.

With regard to the competence of the National Council for Combating Discrimination to sanction those deeds considered as administrative offences the time limits are laid down in the provisions of Ordinance No. 2/2001³⁹ on the general legal framework on administrative offences (contraventions) as amended by Law No. 189/2002⁴⁰.

According to Article 13, a sanction for an administrative offence shall be issued within 6 months from the moment the deed was perpetrated. However, if the deed has a continuous nature, the 6 months time limit shall be considered from the moment the offence is noticed. If a specific deed was initially considered and investigated as a penal crime and afterwards a decision was taken to consider it an administrative offence, the administrative sanction must be issued no longer than one year from the moment the deed was perpetrated. Article 14 provides for a general obligation, which is legally binding on the NCCD as well, to send the offender notice of the deed and the sanction within one month. If this obligation is not observed then the sanction issued may not be enforced. The same article states that any administrative sanction consisting of a fine must be enforced within a two years from the moment it was issued. Otherwise it may not be enforced.

d. The burden of proof

Does the principle of the shift or easing of the burden of proof in cases of discrimination exist under national law (constitutional, civil, penal, labour and administrative)? AH: as mentioned before, if included in penal law, this would be contrary to international human rights law.

Are there comparable provisions in national law in relation to gender discrimination (NB this is covered by Directive 97/80/EC on the burden of proof in cases of discrimination based on sex).

The working group, which in 2000 issued the draft ordinance, included the shift of the burden of proof in its provisions. Unfortunately the Government did not agree with this, and in its current form Ordinance 137 does not provide for either the reversal or the easing of the burden of proof. When discussing this Ordinance, the Parliament agreed with this solution, therefore the Law 48/2002 did not bring any improvement in this respect.

³⁹ Published in Monitorul Oficial al României, Part I, No. 410 of 25 July 2001.

⁴⁰ Published in Monitorul Oficial al României, Part I, No. 268 of 22 April 2002.

This approach is very much consistent with the old fashioned Romanian lawyers' mentality, which does not even want to consider the new European trends on this matter. In fact, the real problem may be the incapacity to understand what discrimination is and how it should be overcome. Implicitly it demonstrates a lack of understanding of the role of positive discrimination measures, the reversal of the burden of proof being just one of them. It seems to be much more convenient to invoke the Roman law principle according to which the person who claims something has to prove his/her case.

The situation is the same regarding gender discrimination. The Romanian legal provisions, contrary to the EU Directive, stipulate that the burden of proof rests with the plaintiff. As a result, it is not very difficult for employees to prove a case based on discrimination, but this approach also discourages individuals from bringing cases to court. The new Law on Equal Opportunities does not shift the burden of proof from the employee to the employer or the alleged perpetrator.

It was only an early version of the Draft Law on Equal Opportunities that provided for the reversal of the burden of proof for only one situation and in a very limited way: under Article 18 “(1) The employee who consider herself/himself discriminated against...through actions that infringe the personal dignity, and which in the sense of the present law are defined as sexual harassment, is entitled to seek compensation from the persons who committed such actions. (3) Providing evidence before courts regarding the non-committing (sic!) of actions infringing the personal dignity which in the sense of the present law are defined as sexual harassment, exceptionally and only in these cases of discrimination, is the obligation of the defendant”.

It will be the role of the National Council for Combating Discrimination to recommend such a change of the legislation.

Regarding the procedures that shall be applied by the National Council for Combating Discrimination it must be mentioned that this is conceived as a body competent to investigate the facts of the case therefore the provisions of Article 8.5 of the Racial Equality Directive and of Article 10.5 of the Employment Equality Directive are applicable.

The conclusion however is that the Romanian legal system's rules for judicial proceedings in discrimination cases are not in compliance with the two provisions of the Directives regarding the shift of the burden of proof.

e. Victimisation

Does protection against victimisation, as defined in Article 9 and Article 11 respectively, exist in national law?

Neither Ordinance 137/2000 nor any other legal act addresses the issue of victimisation in the way the Race Equality Directive and the Employment Equality Directive do. Nor does the Law on Equal Opportunities between Women and Men. For the time being no one can say that “adverse treatment” or other “adverse consequences” occurred against a person who complained of being discriminated against. But this is merely due to the fact that such complaints have not been filed yet. For the future a similar protective clause to that of Article 9 and Article 11 will be necessary. However, it should be accompanied by other measures to make it effective, such as the reversal of the burden of proof given that retaliation would not occur as a transparent treatment and requiring the alleged victim to prove s/he was a victim one more time would render the provision ineffective and preserve the person's status as a victim.

f. Sanctions

What provisions exist on the application of effective, proportionate and dissuasive sanctions, penalties and remedies in anti-discrimination cases? How do these compare to sanctions in other areas (i.e. labour law)? Do equivalent provisions already exist on the national level in other areas? Is multiple discrimination an aggravating circumstance?

The choice of Ordinance 137/2000 was to consider discriminatory conduct not as a crime sanctioned by imprisonment but as an administrative offence punished by fine.

Currently such discriminatory behaviours are sanctioned by a fine of 1,000,000 to 10,000,000 lei⁴¹ when the victim is an individual, and 2,000,000 to 20,000,000⁴² when the victims of discrimination are a group of persons. One can easily argue that fines of such an amount instead of discouraging discrimination may send the opposite message. Others may argue that, in a country where the average salary is approx. 150 Euro per month, a fine whose maximum reaches this the average salary has a genuine dissuasive character. This is not really true, since discrimination is very serious conduct affecting not only the victim as such but also society. Particularly if we consider that most discriminatory behaviour takes place in relation to employment, a fine of 250 Euro represents no loss for a company.

If compared to other laws regulating contraventions and the fines provided for by those laws, one has to admit that Ordinance 137/2000 is much weaker. For example, the Labour Code lists a number of contraventions for which the employer has to pay much higher fines. Preventing participation in a strike is sanctioned by a fine of 15,000,000 to 30,000,000 lei⁴³. Hiring a minor without respecting the age condition and special working requirements, or not observing the legal national holidays and asking employees to work those days is conduct sanctioned between 50,000,000 and 100,000,000 lei⁴⁴.

However, the amount is just one aspect of the sanction. More important is the real and daily enforcement of the Ordinance thus sending a clear message to the entire society that Romania no longer tolerates discrimination.

It is interesting to note, however, that fines similar to those provided for by Ordinance 137 are provided for by the Law on Equal Opportunity between Women and Men: 1,500,000 to 15,000,000⁴⁵. One may take this as an indication that discrimination is not really high on the agenda of the Romanian Parliament.

In addition to the fines, the victim may claim financial remedies without any amount limit for pecuniary and moral damages through a judicial trial. There is still no practice in this respect in Romania. The only court cases in which such claims were made were either dismissed on procedural grounds or suspended and sent to the NCCD.

A third sanction would be the possibility offered to the judge to require the withdrawal of the license of a company that is found to have acted in a discriminatory way. This is new under the Romanian legal system and until now the courts have not issued any decision on this possibility.

⁴¹ Approx. 25 to 250 Euro.

⁴² Approx. 50 to 500 Euro.

⁴³ Approx. 450 to 900 Euro.

⁴⁴ Approx. 1,600 – 3,200 Euro.

⁴⁵ Approx. 30 to 300 Euro.

The law says nothing about “multiple discrimination”. However this could easily be considered, either by a judge or by the National Council for Combating Discrimination, as an aggravating circumstance thus imposing the maximum fine or admitting the victim’s claim for damages of a larger amount.

When compared to the two Equality Directives it has to be noted that the Romanian legislation does not meet the requirements set forth therein, because it mostly has in view the idea of sanctioning the offender instead of compensating the victim. The amount of money mentioned above is in fines that the offender has to pay, and which go entirely to the state budget, and not to compensating the victim of discriminatory conduct.

g. Dissemination of information

What action is being taken or is planned to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

What action is being taken or is planned to ensure - by means of information and training and where necessary by effective sanctions - that all officials and other representatives of the public authorities at every level abstain from any discriminatory speech or behaviour in the exercise of their functions?

Bearing in mind that it took almost two years after the adoption of the Ordinance 137/2000 to set up the National Council for Combating Discrimination it is quite obvious that not much was done to inform the public about this legal text and the possibility to use its provisions. Regrettably nothing was done during these two years to train civil servants on discrimination related aspects and at the moment the Council was established it had no minimum staff trained on how to handle cases of alleged discrimination. Therefore, the Council now has the urgent need to train its own staff.

Regarding the informing the general public, so far the Ministry of Public Information has no plans to disseminate information on the provisions of Ordinance 137.

In April 2003 the National Council for Combating Discrimination has set up a National Alliance Against Discrimination, a forum encompassing NGOs, trade unions, and employers’ associations, whose aim is to assist the Council in the process of implementing the National Plan for Combating Discrimination. How effective the role played by this Alliance will be is still to be seen.

The Strategy of the Government on Roma is the only act mentioning measures with the aim of disseminating such information and monitoring its implementation. However, it is far from clear how these will be implemented in daily life. Several training activities are envisaged for civil servants and the media, but this would require years and years of workshops. There is no national programme on educating the population on preventing discrimination and fighting against it.

The first step in training a group of professionals on taking discrimination cases to the courts was undertaken by the Open Society Foundation-Romania and the Open Society Institute in Budapest. In November 2001 a group of 12 persons from the Roma NGOs, women’s NGOs and homosexual activists were trained together with a group of 12 lawyers. It is likely that civil society will continue to be active in the dissemination of information on anti-discrimination law than the Government as such.

A short time ago, an initiative of the National Council for Combating Discrimination emerged regarding the establishment of a National Alliance Against Discrimination as a forum for dialogue and debates where human rights non-governmental organisations will be represented. At the same time a National Plan for Combating Discrimination is under discussion representing a complex strategy encompassing national awareness campaigns.

All these ideas are very recent and to assert their effectiveness will require some time and monitoring.

h. Social dialogue and NGOs

Has the government taken steps to promote dialogue with the social partners at national level? If so, what are the measures adopted and what are the results?

Has the government taken steps to promote dialogue with non-governmental organisations at national level? If so, what are the measures adopted and what are the results?

Thus far the issue of discrimination on various grounds has not constituted a matter of interest for the Economic and Social Council, the most representative structure with the aim of supporting the dialogue between the Government, the employers and the trade unions. Trade unions do not have this subject on their agenda and NGOs of various groups covered by anti-discriminatory provisions have not been active enough in pressing trade unions to consider such aspects.

During the last few years the co-operation with non-governmental organisations, particularly with Roma NGOs, has improved. For a couple of years even a representative structure existed, GLAR, the Romanian acronym for the Working Group of Roma Associations. It had quite a constant dialogue with the Inter-ministerial commission on Roma. Unfortunately the group no longer exists and there is currently no, real dialogue taking place. However there is hope for the future since the Governmental Strategy on Roma mentions the absolute necessity of working together with Roma NGOs several times. If translated into practice, the Roma NGOs would in fact have powers and possibilities, including financial, to correct things and promote good ideas and projects. Even without governmental assistance it is clear that Roma NGOs will be indispensable for all activities aimed at promoting the principle of equal treatment.

The Romanian Council for Refugees is the non-governmental association dealing with asylum seekers and refugees. So far it has not made any public gesture showing that the provisions of Ordinance 137 would be of any practical interest for its work.

Organisations belonging to persons with disabilities work in particular with the State Secretariat for Person with Disabilities.

One may fairly state that dialogue with NGOs is more by accident than conceived as a general policy to consult the public or the civil society on issues that are of utmost importance for the entire society. The most significant example is of the Economic and Social Council which although conceived as supporting the dialogue with the Government encompasses several members of the Government but has only one position for the civil society.

This general attitude of rather ignoring civil society whilst pretending to discuss with it, explains why active and leading NGOs, which worked very hard when Ordinance 137/200 was adopted and lobbied for the establishment of the NCCD were not at all consulted when NCCD was finally set up, certainly not in relation with those who were appointed as members of the Steering Board.

As mentioned earlier, the National Council for Combating Discrimination has started to conclude cooperation agreements with various governmental agencies, ministries such as the Ministry of Labor and Social Solidarity, with the Economic and Social Council in order to exchange information and expertise regarding the fight against discrimination. It is also seeking advice from NGOs in order to design a national plan for combating discrimination. Whether or not the views and opinions of the NGOs will be incorporated into this plan remains to be seen.

Chapter 3 Specialised bodies

Does such a body exist on the national level? Where it does, what are its resources (staff and budget), powers and duties in relation to the requirements of the Racial Equality Directive? Has it also a mandate on other grounds of discrimination?

Are existing bodies addressing the issue of multiple discrimination?

Where a body does not exist on the national level, are there plans to establish such a body?

The National Council for Combating Discrimination

The institution in charge with sanctioning discriminatory conduct and preventing future discrimination is the National Council for Combating Discrimination, set up by Ordinance 137/2000. According to Article 23 this is not an independent agency but a specialised body of the central public administration, subordinate to the Government. Its organisational structure and other responsibilities are regulated by Governmental Decisions.

In early 2000, there was an attempt to ensure the Council's independence through the Governmental decision and an early draft mentioned that this new institution "while exercising its competencies shall be an independent body, its activity not being allowed to be restricted or influenced in any way by other institutions or public authorities" (Article 1. 3). However, the **Governmental Decision on the Organisation and Functioning of the Council**, adopted in November 2001⁴⁶ did not provide for such independence, the legal explanation being that a Governmental decision may only regulate as to apply the law and not amend it, therefore the provision of the Ordinance regarding the Council subordination to the Government had to be observed.

Even in such circumstances there are a few provisions which were meant to ensure the institution's autonomy. For example, Article 1 reads: "(2) The Council has the role to implement the principle of equality between citizens, as provided for by the Constitution of Romania, the current legislation and by international treaties to which Romania is a party to. (3) For the period of exercising its competencies the Council shall act independently, without any restriction or influence of its activity by other public institutions or authorities."

In addition, other provisions and mechanisms could ensure its autonomy. The Council is a legal entity with its own budget and is allowed to manage its own funds. Important guarantees relate to its Board members, particularly their appointment and dismissal. All 7 members of the Steering Board have a mandate for a period of 7 years that may be renewed only once. They may be dismissed only by the Prime Minister only in the following situations: resignation, end of the

⁴⁶ Governmental Decision, No. 1194 of 27 November 2001, Published in *Monitorul Oficial al României* No. 792 of 12 December 2001.

mandate, labour incapacity according to the law, criminal conviction, changes regarding the conditions provided for by Article 5 (4)⁴⁷

The first Steering Board was appointed by Decision No. 139 of 31 July 2002 of the Prime Minister, the institution as such beginning to function in October-November 2002. But the independence of such a structure is not an issue that can be addressed or explained merely by legislation. It is very much something that depends on the independence of its Board members and most of all will be proven by the Council's activity.

In December 2002 the structure and functions of NCCD were changed by the provisions of Governmental Decision 1514/2002. The role of the Steering Board was drastically reduced and it no longer runs the Council. Instead, the President is the head of the Council and he is assisted by the Steering Board only "in the field of establishing and sanctioning the discriminatory deeds". Which means that in all other activities the President is entitled to take any decision he considers necessary.

The NCCD's competencies are quite broad. The Council:

- suggests affirmative action or special measures for the protection of disfavoured persons recommending to the Government draft laws on its field of activity;
- approves draft laws that deal with the equal and non-discriminatory exercise of rights and liberties;
- co-operates with public authorities with a view to harmonising domestic legislation with international norms on non-discrimination;
- co-operates with public authorities, legal entities and natural persons in view of ensuring the prevention, the sanctioning and the elimination of all forms of discrimination;
- receives petitions on the infringement of the provisions on equality and non-discrimination submitted by physical persons, by NGOs whose objective is human right protection, by other legal persons, and public institutions, and analyses these petitions and takes appropriate action, and responds to the petitioner;
- issues studies and research on the observance of the equality and non-discrimination principles which afterwards are presented to the Government and published;
- determines and sanctions the contraventions provided for by Ordinance 137/2000;

It is again worth mentioning that the Legislative Council was very critical of the Ordinance provision regarding the establishment of this institution, considering that it overlaps with other types of inspectors that exist under the labour legislation. It even stated that although the Ordinance mentioned that similar bodies exist in other countries the Legislative Council was not able to identify such institutions with general competence. And it is also interesting to note that the Law on Equal Opportunities between Women and Men does not make any reference to Ordinance 137/2000 nor the Council, although it was adopted two years after the enforcement of the Ordinance and three months after the Law 48/2002 was discussed and adopted by the Parliament. This not only proves a lack of knowledge regarding existing legislation but more specifically a lack of genuine interest regarding all the aspects of discrimination.

In March 2003 the National Council for Combating Discrimination issued its first Report of activity regarding the period 1 August – 31 December 2002. According to this report, the first major short term objectives were:

- acquiring an appropriate office

⁴⁷ The requirements on Romanian citizenship, domicile within the country, legal capacity, legal background, knowledge of Romanian language, no criminal record, good reputation.

- elaborating the National Program for Combating Discrimination
- monitoring activities regarding:
 - discriminatory trends based on criteria provided for by Ordinance 137 through studies and statistics
 - evaluating discriminatory effects that may lead to conflict
 - the degree of awareness of existing legislation (the responsibility of those who spread information of a discriminatory character and the knowledge of legal non-discriminatory provisions)
 - the effects of NCCD actions as reflected by the media
- issuing a study on the harmonization of domestic legislation with standards provided for by European Directives 2000/43/EC and 78/2000/EC
- issuing the Strategy on Approaching Civil Society with the aim of establishing partnerships, of elaborating and implementing the National Plan for Combating Discrimination.

The same report mentions that until the end of 2002 no study was issued and no case was sanctioned. Instead the methodology for investigation was issued and a project on monitoring “the discriminatory trends through advertisements was carried out in order to assess the role that media can play on disseminating discriminatory concepts”. In the period 22 – 29 October 33,972 advertisements were monitored in 11 national newspapers on four discriminatory grounds: age, race/ethnicity, sex (man/woman), professional category⁴⁸. According to the Report, 668 discriminatory adverts were identified and the results were presented to the media.

Although in legal terms the NCCD does not entirely fit into the requirements of the Race Equality Directive, it could play a significant role in combating discrimination and promoting equality and equal opportunities policies. However, this remains to be proved by the institution itself.

The Ombudsman⁴⁹

According to Article 55 (1) of the Constitution, the Ombudsman’s role is to defend citizens’ rights and freedoms, his powers being exercised either *ex officio*, or upon request of persons who claim that their rights have been violated by administrative (public) authorities. Regrettably, the Ombudsman has not been very active in relation to discrimination. The only reports to address this topic were issued in 1999 and 2000. At that time the institution expressed its interest to tackle discrimination and it is worth quoting the conclusions of the 1999 Report: “Where the citizen belonging to the majority sees the cases where the law is violated an effect of corruption or his/her lack of financial means to influence the observance of the law, the minority citizen perceives this as discrimination, hostility or rejection”.

Based on the individual complaints received, the Ombudsman involved itself in such cases and both 1999 and 2000 Reports mention several cases where discrimination against Roma persons was documented. Apart from several situations in which Roma persons were denied entrance into restaurants in various cities in the country, the most relevant cases concerned vital social aspects where allegations of a discriminatory implementation of the law were made by large groups of populations. The 2000 Report mentions 56 complaints where clearly discriminatory behaviour on the part of local authorities occurred⁵⁰.

⁴⁸ Ordinance 137 does not mention professional category as a ground for discriminatory conduct and it is unclear what was monitored in this respect.

⁴⁹ According to the Romanian Constitution, the Ombudsman is named “the Advocate of the People”.

⁵⁰ The local authorities due to insufficient amount of money for social assistance decided to reduce the number of beneficiaries and in order to do so applied a very arbitrary way of calculating the income of each family. The result was that Roma families, although the poorest in the village, were denied the social benefits they were entitled to according

A major problem with the Ombudsman's powers is that they are limited and depend to a great extent on authorities' willingness to accept co-operation and change patterns of behaviour. The only thing that the Ombudsman may do is simply indicate to the central or local authority that something was wrong in their conduct and to recommend a change. What the authority does in response is something which cannot be addressed by the Ombudsman. According to the law the institution could issue recommendations to the Parliament and the Government but in real life this possibility was very seldom used and had no impact.

However, the most serious problem regarding this institution is that during the last two years it has no longer dealt with individual human rights or discrimination cases. In fact, what the Ombudsman did was merely send "opinions" to the Constitutional Court in relation to those cases the Court was supposed to decide. It has to be stressed that this may be something in addition to the institution's mandate (although it is not) but certainly should not be seen as its main priority.

Chapter 4 Compliance and implementation

a. Screening

Does national law provide a mechanism for the abolition of laws, regulations and administrative provisions that are contrary to the principle of equal treatment?

Is there a mechanism under national law by which provisions in agreements, contracts or rules relating to professional activity, workers and employers that are contrary to the principle of equal treatment can be declared null and void or amended?

In principle, due to the fact that the principle of equality is laid down in the Constitution, laws and regulations that intentionally discriminate against or although apparently neutral lead to discrimination must be abolished or amended. The Legislative Council, for example, is the official advisory expert body of the Parliament that initiates "draft normative acts for the purpose of a systematic unification and co-ordination of the whole body of laws" (Article 79 of the Constitution). In real terms however, this has happened only to a very little extent. In turn, the Ombudsman makes recommendations on new legislation or amending legislation.

Regarding the possibility of declaring discriminatory provisions of agreements, contracts or rules relating to professional activity null and void, this would be by means of judicial action. However, it is fair to say that at this time there is either no capacity to cope with such situations nor expressed interest.

The National Council for Combating Discrimination will be the incremental institution for the implementation of non-discriminatory policy: although its powers are limited, the Council is the most appropriate mechanism for the abolition of laws, regulations and administrative provisions that are contrary to the principle of equal treatment since it may initiate changes and present them to the Government. How efficient it will be, is something that the Council has to demonstrate.

to the law. The consequence was that in the absence of this social assistance, the right to free health assistance was also denied. Several women who had to give birth during that period were obliged to pay for it and their choice was simply to run away from the hospitals without getting the birth certificates for the newborn children. The Ombudsman report emphasised how one discriminatory act leads to the second and the third thus making victims' life more and more difficult.