

HUNGARY

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1. National court system

The Hungarian judicial system is structured according to legal fields (criminal law, civil law, labour law, administrative law). There are basically two levels in the Hungarian judicial system (first instance and appeal level), however, certain extraordinary remedies are also available. In civil cases, there is a first instance and an appeal level, and the second instance decision usually has binding force, but extraordinary remedies – retrial and review by the Supreme Court – may be requested. The judicial review by a civil court of an administrative decision is possible. When reviewing administrative decisions, the judicial decision may not be appealed against as a main rule, however, extraordinary remedies are also available in these cases.

Victims of discrimination may sue in civil courts based on Articles 75 and 76 of Act IV of 1959 on the Civil Code,¹ (hereafter: Civil Code) claiming that inherent rights are protected by the Civil

¹ Hungary/1959. évi IV. törvény (11.08.1959).

Code, and that the right to equal treatment is an inherent right. (The Civil Code explicitly sets out that the infringement of the requirement of equal treatment shall be deemed as a violation of inherent rights.²) The provisions of the Civil Code provide victims of discrimination with a flexible instrument, as they apply to all types of discrimination no matter which field or ground is at issue. Furthermore, the Equal Treatment Act provides that claims arising from the violation of the principle of equal treatment may be enforced e.g. in the scope of civil lawsuits as well.³ The procedural rules to be applied in cases in front of a civil court are set forth by Act III of 1952 on the Code of Civil Procedure⁴ (hereafter: Civil Procedure Code). Judicial decisions may be subject to an appeal, and extraordinary remedies may be requested with respect to the second instance court decisions. (Legal disputes emerging in discrimination cases in the field of employment fall in the competence of the labour courts.⁵).

The appeal procedures in non-discrimination area are the following:

Judicial procedures

First instance judicial procedures may be appealed against on any ground, within 15 days from the communication of the judgement. (As it is outlined below, first instance court decisions reviewing administrative decisions cannot be appealed at all.) Appeals shall be submitted at the first instance court.⁶ In case of lawsuits initiated because of the infringement of inherent rights, the regional appellate courts are the second instance courts, and may uphold, alter or repeal the first instance decision partly or entirely, and order the first instance court to conduct a new proceeding.

There are no further ordinary remedies, but extraordinary remedies – retrial and review by the Supreme Court – are available. A retrial may be requested e.g. referring to a fact, evidence or administrative decision, which was not assessed by the first instance court, if the assessment of it may have changed the decision in favor of the party requesting retrial.⁷ A request for a retrial may be lodged within six months from the decision becoming final, or from the date the party concerned comes to know about the given fact, evidence, etc., but maximum five years from the

² Hungary/1959. évi IV. törvény/Article 76 (11.08.1959).

³ Hungary/2003. évi CXXV. törvény/Article 12 (28.12.2003).

⁴ Hungary/1952. évi III. törvény (06.06.1952).

⁵ Labour courts are relatively independent within the judiciary, and apply Act XXII of 1992 on the Labour Code, which sets out that the requirement of equal treatment shall be abided by in labour relationships. See:

Hungary/1992. évi XXII. törvény/Article 5 (04.05.1992).

⁶ Hungary/1952. évi III. törvény/Article 234 (1)-(3) (06.06.1952).

⁷ Hungary/1952. évi III. törvény/Article 260 (1) (06.06.1952).

decision becoming final.⁸ The court conducting retrial may uphold or repeal the judgement partly or entirely, and may deliver a new decision in the case.⁹ Review by the Supreme Court is possible only in case of a breach of legal provisions.¹⁰ Review by the Supreme Court may be requested within 60 days from the communication of the final decision, evidences may not be presented in the course of the proceedings.¹¹ The Supreme Court may uphold or repeal the judgement partly or entirely, and deliver a new decision or order the proceeding court to conduct a new proceeding.¹²

Non-judicial procedures

The decision of the Equal Treatment Authority may not be appealed against in the scope of a public administrative procedure, and is only subject to judicial review.¹³ Judicial review may be requested within 30 days following the communication of the decision, claiming that the decision of the Authority constitutes a breach of law.¹⁴ According to the provisions of the Civil Procedure Code, the court may repeal the decision of the Authority, and – if it is necessary – order it to conduct a new proceeding.¹⁵ Judicial decisions reviewing administrative decisions may not be appealed against,¹⁶ however, extraordinary remedies (retrial and review by the Supreme Court) are available.

2. Restrictions regarding access to justice

In non-discrimination area, lawsuits launched due to the violation of inherent rights, including the violation of the requirement of equal treatment fall into the competence of county courts¹⁷ located in county seats, which means that if the plaintiff does not live at or around the seat, money and time has to be spent on travel whenever a hearing is held (unless a legal representative is involved, in which case the plaintiff is only obliged to appear in court if the court wishes to hear him/her in person). Furthermore, civil proceedings can be lengthy, up to three or four years.

⁸ Hungary/1952. évi III. törvény/Article 261 (1) and (3) (06.06.1952).

⁹ Hungary/1952. évi III. törvény/Article 268 (06.06.1952).

¹⁰ Hungary/1952. évi III. törvény/Articles 270 (2) (06.06.1952).

¹¹ Hungary/1952. évi III. törvény/Articles 272 (1) and 275 (1) (06.06.1952).

¹² Hungary/1952. évi III. törvény/Article 275 (06.06.1952).

¹³ Hungary/2003. évi CXXV. törvény/Article 17 (1) (28.12.2003).

¹⁴ Hungary/2004. évi CXL. törvény/Article 109 (1) (28.12.2004).

¹⁵ Hungary/1952. évi III. törvény/Article 339 (1) (06.06.1952).

¹⁶ Hungary/1952. évi III. törvény/Article 340 (1) (06.06.1952).

¹⁷ Hungary/1952. évi III. törvény/Article 23 (1) g) (06.06.1952).

Another restriction of access to justice concerns expenses: in civil lawsuits the party losing the suit is liable to pay the other party's legal costs.¹⁸ In other words, the financial risk of the procedure is carried by the defeated party, e.g. alleged victims of discrimination shall pay the costs of the procedure, if discrimination could not have been proved, even if they are considered as indigent in terms of Act LXXX of 2003 on Legal Aid.¹⁹ This possibility may considerably deter victims from initiating lawsuits in front of civil courts. It shall be also mentioned that from 6 February 2008 those who lose a case in front of a labour court are not exempted from paying the costs of the procedure neither, and shall bear the legal costs of the other party, as well as fees and other costs advanced by the state.²⁰ (Until February 2008, defeated parties had to pay only the other party's legal costs.)

Moreover, there are certain deadlines with regard to non-discrimination cases, e.g. when appealing against an administrative or judicial decision or when requesting judicial review of an administrative decision, but these deadlines cannot be considered as restrictions undermining the right of access to justice

3. Length of judicial proceedings

Judicial procedures

Judicial review of administrative proceedings (the period from the delivery of the administrative decision till the delivery of the judicial decision) was analysed with regard to nine cases, in four of which the length of the proceedings of the Equal Treatment Authority was also assessed. The shortest judicial review lasted for a bit more than seven months, while the longest judicial phase was one year and eight months long. Three judicial procedures were about eight months long, one eight month and a half, and two of them a bit longer than nine. One procedure lasted for ten months. Review by the Supreme Court was initiated in three cases. All of the reviews lasted for over a year: one year and one month, one year and two months, and one year and three months.

The lengths of second instance procedures in civil lawsuits initiated directly because of the violation of inherent rights vary greatly. (First instance procedures could not be assessed, due to the lack of proper data.) From the 16 cases assessed, the second instance of four cases lasted

¹⁸ Hungary/1952. évi III. törvény/Article 78 (1) (06.06.1952).

¹⁹ Hungary/2003. évi LXXX. törvény (06.11.2003).

²⁰ Hungary/56/2007. (XII. 22.) IRM rendelet (22.12.2007).

about one year, one of them was almost nine months long, and two of them were around seven and a half months. In three cases, second instance lasted for five and a half months long, in one case for five months and in one case for six months. The two shortest second instance procedures lasted for three and a half months.

Review by the Supreme Court lasted an additional one year more or less in the four cases applicable (the shortest was a bit longer than ten months, the longest took one year and one month).

Non-judicial procedures

33 cases of the Equal Treatment Authority were analysed with regard to the date of initiating the procedure and the date of delivering the decision. The shortest procedures of the Authority were one month long (four cases), the longest procedure lasted one year, but this has to be considered exceptional. Four procedures were about two months, two procedures lasted for two and a half months, four procedures lasted for three months and another four procedures for four months. Two procedures lasted for five months, another procedure for five and a half months, and one procedure was six months long. The procedure of the Authority took around seven months in three cases, and around eight months with regard to another two cases. One procedure lasted for eight months and a half, and two others for nine months each. Two procedures lasted for ten months.

It shall be noted that according to the provisions of the Government Decree 362/2004 (XII. 26.) on the Equal Treatment Authority and the Detailed Rules of its Procedure,²¹ as a main rule all decisions should be reached within 75 days from submitting the application or from initiating the ex-officio procedure.²² However, the cases examined show that the Authority often fails to comply with this requirement.

4. Are procedures concluded within a reasonable time?

Administrative proceedings are concluded within a reasonable time (even though the procedure of the Equal Treatment Authority often exceeds the time limit prescribed), but if there is a judicial

²¹ Hungary/362/2004. (XII. 26.) Korm. rendelet/Article 7 (1) (26.12.2004).

²² From 01.10.2009 on, decisions shall be reached within 50 working days.

review, it may result in lengthy procedure, especially if a review is conducted by the Supreme Court, which may itself exceed one year. Second instance court proceedings shall be considered as being concluded within reasonable time. However, taking the length of the second instance together with the perceived length of the first instance procedure, it results in proceedings easily exceeding one year. It shall be noted that the length of court proceedings is largely due to the workload of Hungarian courts.

5. Does provision exist for speedy resolution of particular cases?

As to the area of non-discrimination, the Government Decree 362/2004 (XII. 26.) on the Equal Treatment Authority and the Detailed Rules of its Procedure sets out that decisions shall be reached in a fast track procedure, but maximum within 45 days from submitting the application or from initiating the procedure with regard to ex-officio cases if (i) the client is a minor, (ii) the procedure was initiated by a Parliamentary Commissioner, or (iii) the procedure was initiated by the public prosecutor.²³ As to the practice, no relevant cases could be identified.

6. Is it possible to waive the right of access to a judicial body?

In general, according to the Civil Code,²⁴ contracts or statements restricting inherent rights, such as equal treatment, are considered as null and void. (The violation of inherent rights may not be established if the person affected agreed on the conduct restricting his/her inherent rights, however, this provision may be applied only if giving this kind of consent does not violate or endanger public interest.).

The waiver of the right of access to a judicial body is possible through a general mediation procedure, which has existed since March 2003.²⁵ Its aim is to facilitate the settling of civil law

²³ Hungary/362/2004. (XII. 26.) Korm. rendelet/Article 7 (2) (26.12.2004). From 01.10.2009 on, decisions shall be reached within 30 workdays, and the requirement of deciding in a fast track procedure (but maximum within 30 working days) will be limited to cases when interests of minors are endangered.

²⁴ Hungary/1959.évi IV. törvény/Article 75 (3) (11.08.1959.).

²⁵ Hungary/2002. évi LV. törvény (17.12.2002).

disputes emerging in connection with the personal and property rights of private and other persons in cases where the parties' right of determination is not limited by law. As no such limitation exists in relation on the ban on discrimination, victims of discriminatory acts are entitled to resort to the mediation. In the course of the mediation procedure the alleged discriminator and the victim are supposed to reach an agreement with the help of a mediator, who is called upon by the parties. (Mediators may be selected from a registry led by the Minister of Justice and Law Enforcement). Experts may be involved in the procedure if the parties agree on that; legal representation of the parties is possible. The procedure is terminated (i) if an agreement is concluded; (ii) if the parties agree on the termination of the mediation; (iii) if one of the parties declares that he/she considers the procedure as terminated; and (iv) unless the parties agreed on a different time limit, four months after the parties declared that they wish to undergo the mediation procedure. The agreement reached in a mediation procedure does not prevent the parties from asserting their claim in a court procedure.²⁶ However, in these cases plaintiffs are liable to pay all costs.

7. Access to non-judicial procedures

Except the access to court proceedings, victims of an alleged discrimination may initiate the procedure of Hungary's equality body, the *Egyenlő Bánásmód Hatóság*, (the Equal Treatment Authority, EBH or Authority) , which has been in operation since 1 February 2005. The Equal Treatment Act (ETA) created the framework of setting up the Authority as a central public administrative body supervised by the Minister responsible for the promotion of equal opportunities, currently by the Minister of Social Affairs and Labour.²⁷ However, it may not be regarded as a typical administrative body which is part of the regular state structure without independence from the executive branch of the state, as it may not be instructed by the Minister, and it also enjoys financial independence – even though its budget has been shrinking.

The Authority is vested with the right and duty to act against any discriminatory act on all the grounds of discrimination (sex, race, ethnicity, disability, age, etc.), irrespective of the field concerned (employment, education, housing, access to goods and services, etc).²⁸ The Authority's scope of authority extends to all actions and omissions of all public actors.

²⁶ Hungary/2002. évi LV. törvény/Article 36 (17.12.2002).

²⁷ See: Hungary/2006. évi LV. törvény (02.06.2006).

²⁸ Hungary/2003. évi CXXV. törvény (28.12.2003).

The ETA specifically lists the powers of the Authority. The relevant article²⁹ reads as follows: the Authority (i) shall, based on a complaint or – in cases defined in the ETA – ex officio, conduct an investigation to establish whether the principle of equal treatment has been violated, or based on a complaint conduct an investigation to establish whether employers obliged to adopt an equal opportunities plan have abided by this duty, and deliver a decision on the basis of the investigation; (ii) may initiate an *actio popularis* lawsuit (a civil or a labour suit) with a view to protecting the rights of persons and groups whose rights have been violated; (iii) review and comment on drafts laws and reports concerning equal treatment; (iv) make proposals concerning governmental decisions and legislation pertaining to equal treatment; (v) regularly inform the public and the government about the situation concerning the enforcement of equal treatment; (vi) in the course of performing its duties, co-operate with the social and representational organisations and the relevant state bodies; (vii) continually provide information to those concerned and offer help with acting against the violation of equal treatment; (viii) assist in the preparation of governmental reports to international organisations, especially to the Council of Europe concerning the principle of equal treatment; (ix) assist in the preparation of the reports for the Commission of the European Union concerning the harmonisation of directives on equal treatment; (x) prepare an annual report to the government on the activities of the Authority and its experiences obtained in the course of the application of the ETA.

With regard to the private sector, only a limited circle, four groups of actors fall under the scope of EBH's authority: (i) those who make a public proposal for contracting (e.g. for renting out an apartment) or call for an open tender; (ii) those who provide services or sell goods at premises open to customers; (iii) self-employed persons, legal entities and organisations without a legal entity receiving state funding in respect of their legal relations established in relation to the usage of the funding; and (iv) employers with respect to employment (interpreted broadly).³⁰

The ETA excludes the possibility that the EBH investigates decisions and measures of public power by the Parliament, the President, the Constitutional Court (AB), the State Audit Office (ÁSZ), the Parliamentary Commissioner or Ombudsman, the courts and the public prosecution.³¹ (This means that other types of actions of these authorities, e.g. their acts as employers, fall under the Authority's scope of action.)

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³⁰ Hungary/2003. évi CXXV. törvény/Article 5 (28.12.2003).

³¹ Hungary/2003. évi CXXV. törvény/Article 15 (6) (28.12.2003).

The EBH's main function is the investigation of individual complaints filed about the violation of the principle of equal treatment (each natural or legal person has the right to file a complaint with the Authority). The Authority conducts its proceedings on the basis of the Administrative Proceedings Act,³² with certain specificities set out in the Government Decree 362/2004 (XII. 26.) on the Equal Treatment Authority and the Detailed Rules of its Procedure.³³

As far as sanctions imposed by the EBH are concerned, they may be used to redress discrimination in any sector and based on any ground. If the EBH establishes that the principle of equal treatment has been violated, it may (i) order that the situation constituting a violation of law be eliminated; (ii) prohibit the further continuation of the conduct constituting a violation of law; (iii) publish its decision establishing the violation of law; (iv) impose a fine, amounting from HUF 50,000 to 6,000,000.³⁴ The legal consequences may be applied jointly.³⁵ No parallel proceeding of the EBH and a court (civil or labour) is possible.

In discrimination cases on the ground of race or ethnicity, the EBH applies the whole range of possible sanctions.

The sanctions of ordering to eliminate the situation constituting a violation of law and the prohibition of the further continuation of a conduct constituting a violation of law are not always effective and dissuasive sanctions due to the lack of effective follow up and monitoring mechanisms, as already outlined in the previous sections. Publishing the EBH's decision establishing discrimination could be a dissuasive sanction. However, in most cases the Authority's decisions are ordered to be published only on the Authority's own website for a limited period of time, which lowers the efficiency of this sanction. With regard to the sanctioning practice of the EBH, it can be said that it applies fines between HUF 500,000 and 3,000,000 in ethnic discrimination cases. It has to be noted that the amount of fines imposed by the Authority have shown an increasing tendency in the past years.

As to the amounts awarded in discrimination civil court cases, the following can be said. According to the Hungarian law, damages can be both pecuniary and non-pecuniary. In discrimination cases non-pecuniary damages are obviously more characteristic. Since non-pecuniary damages cannot be quantified, it is up to the Court to decide about the quantum of the compensation. There is no upper statutory limit, however, Hungarian courts for a long time

³² Hungary/2004. évi CXL. törvény (28.12.2004).

³³ Hungary/362/2004. (XII. 26.) Korm. rendelet (26.12.2004).

³⁴ Article 16 (1) and (4) of Hungary/2003. évi CXXV. törvény (28.12.2003).

³⁵ Article 16 (2)-(3) of Hungary/2003. évi CXXV. törvény (28.12.2003).

tended to be rather cautious in establishing the amounts. In a number of cases concerning discrimination in access to services (most frequently the denial of Roma guests to enter discos and bars), the amount of compensation was quite steadily around the double of the legally set monthly minimum wage, i.e. not a very dissuasive sanction. Recently however, the average amounts have started to rise. In some recent cases, discrimination based on racial or ethnic origin was sanctioned with non-pecuniary damages of around HUF 500,000, which is a promising change in the general judicial approach. Punitive damages do not exist, but a so-called ‘public interest fine’ may be imposed by the court if the amount of the damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is however rarely applied and is payable to the State and not to the victim.

The most typical sanctions are administrative fines (issued by the Authority) and civil sanctions (non-pecuniary compensation ordered by civil courts).

The decision of the Authority cannot be appealed against in the scope of a public administrative procedure, and is only subject to judicial review.³⁶ The Authority is vested with the right to deliver a decision in discrimination cases and impose sanctions on persons and entities violating the principle of equal treatment. If, as a result of its investigation, the Authority establishes that the principle of equal treatment has been violated, it may impose certain sanctions.³⁷ The decision-making of the Authority in discrimination cases is a quasi judicial function.

As a main rule, a hearing is held in non-discrimination cases by the Equal Treatment Authority, if the procedure is initiated by a victim of discrimination.³⁸ According to the provisions of the Administrative Proceedings Act, the client (meaning both the victim and the alleged discriminator) shall be notified by the Equal Treatment Authority about the procedural acts, such as hearings of witnesses and experts,³⁹ inspections of scenes or objects⁴⁰ and other hearings not less than five days in advance. The notice – unless the circumstances suggest otherwise – shall be delivered to the clients at least five days before the scheduled date of the given procedural act.⁴¹

36 Hungary/2003. évi CXXV. törvény/Article 17 (1) (28.12.2003).

37 Hungary/2003. évi CXXV. törvény/Article 16 (1) and (4) (28.12.2003).

38 Hungary/362/2004. (XII. 26.) Korm. rendelet/Article 9 (1) (26.12.2004).

39 An expert shall be heard or an expert opinion shall be obtained if the competent authority does not have an employee with sufficient expertise and special expertise is required in the case for establishing a material fact, other circumstance or for the law applicable; or if applying an expert is obligatory by separate legal provisions. See: Hungary/2004. évi CXL. törvény/Article 58 (1) (28.12.2004).

40 An inspection may be ordered to ascertain the relevant facts of the case. On the one hand, the owner of any relevant object may be compelled to present the object to the Authority; on the other hand, scenes related to the procedure and the objects at the scene may be inspected (on-site inspection). See: Hungary/2004. évi CXL. törvény/Article 56 (1) (28.12.2004).

41 Hungary/2004. évi CXL. törvény/Article 49 (28.12.2004).

If clients are heard by the Authority, the officer in charge shall submit to them the relevant information in advance, and shall inform them about their rights and obligations.⁴² Clients may be represented by legal representatives in the course of the proceedings.

If the officer in charge does not speak the language spoken and understood by the victim of discrimination, an interpreter shall be involved in the procedure. (If the officer in charge speaks the foreign language, but the alleged discriminator does not, an interpreter shall be involved as well.)⁴³ If a person with any speech or hearing impairment is involved in administrative proceedings, a sign language interpreter shall be applied.⁴⁴ Applicants may make a recommendation as to the interpreter. Furthermore, the Authority may appoint another interpreter upon request. However, the costs of the interpreter shall be advanced by the party requesting it.⁴⁵

No parallel proceeding of the Authority and a court (civil or labour) is possible. In terms of the Equal Treatment Act,⁴⁶ if the victim of discrimination also files a lawsuit with the court, the Authority shall suspend its procedure until the case is adjudicated, and notifies the court about the suspending decision. When the court case is closed, the court notifies the Authority about its decision. The Authority then can proceed but shall do so on the basis of the facts of the case as established by the court. If the case has been judged by the court before the victim turns to the Authority, the Authority (i) may not proceed in the same case with regard to the same persons, and (ii) shall proceed with regard to other persons on the basis of the facts as established in the binding decision of the court.

Administrative bodies, such as the Equal Treatment Authority, may not grant compensation to the victim and may not oblige the discriminator to apologise or provide moral remedy in any other way. It is therefore advisable from a strategic point of view to first launch an administrative proceeding, within which the acting body gathers the evidence and establishes the facts of the case in a relatively short time. Using this evidence, it will become possible for the victim to turn to a court for compensation.

The establishment of the Authority did not mean that the administrative organs that used to have authority to act in discrimination cases were deprived of their powers.⁴⁷ There are still a number

⁴² Hungary/2004. évi CXL. törvény/Article 51 (7) (28.12.2004).

⁴³ Hungary/2004. évi CXL. törvény/Article 60 (1) (28.12.2004).

⁴⁴ Hungary/2004. évi CXL. törvény/Article 60 (2) (28.12.2004).

⁴⁵ Hungary/2004. évi CXL. törvény/Article 60 (2) (28.12.2004).

⁴⁶ Hungary/2003. évi CXXV. törvény/Article 15/A (28.12.2003).

⁴⁷ The key principle is that it is up to the victim to decide which authority he/she wishes to turn to: a violation of the principle of equal treatment within the scope of the Equal Treatment Act shall be investigated by the Authority or

of administrative organs with the mandate to apply sanctions in cases of discrimination, e.g. the National Inspectorate for Labour Affairs and Safety,⁴⁸ the Health Insurance Supervising Authority,⁴⁹ and the Office of Education.

Furthermore, discrimination in a number of fields qualifies as a petty offence.⁵⁰ In order to avoid double procedures conducted by the administrative organs above and the Authority, a system preventing a clash of authority was created, but the Authority has some degree of dominance.⁵¹

Other fora to be approached in cases of discrimination include the Parliamentary Commissioners (Ombudsmen), having the power under the constitutional provisions⁵² to investigate violations of constitutional rights and initiate general or individual measures to remedy such violations. With regard to discrimination, the Parliamentary Commissioner for Civil Rights and the Parliamentary Commissioner for the Rights of National and Ethnic Minorities are worth mentioning. Their procedures are limited to issuing non-binding recommendations, are complementary to other legal remedies and in general open only against final decisions of public administration and public service providers. The Ombudsmen do not have the competence to proceed against private individuals and entities.

Another option would include a general mediation procedure has existed since March 2003.⁵³ Its aim is to facilitate the settling of civil law disputes emerging in connection with the personal and property rights of private and other persons in cases where the parties' right of determination is not limited by law. As no such limitation exists in relation to the ban on discrimination, victims of discrimination are entitled to mediation, whereby the alleged discriminator and the victim are to reach an agreement with the help of a mediator, who is chosen by the parties. (Mediators may be selected from a registry managed by the Minister of Justice and Law Enforcement.) Legal representation of the parties is possible in the procedure. The procedure is terminated (i) if an agreement is concluded; (ii) if the parties agree on the termination of the mediation; (iii) if one of the parties declares that she considers the procedure as terminated; and (iv) unless the parties

another public administrative body that has been granted authority in a separate act for assessing violations of the principle of equal treatment, as chosen by the offended party. See: Hungary/2003. évi CXXV. törvény/Article 15 (1) (28.12.2003).

⁴⁸ Hungary/1996. évi LXXXV. törvény (18.10.1996).

⁴⁹ Hungary/2006. évi CXVI. törvény (18.12.2006).

⁵⁰ Petty offence proceedings in the Hungarian legal system are quasi criminal proceedings devised for small scale violations. Some petty offences are punishable with detention of up to 60 days, but none of the offences related to discrimination fall into this category.

⁵¹ The Authority may participate as an intervener in the judicial review of a public administrative decision brought by another public administrative body concerning the principle of equal treatment. See: Hungary/2003. évi CXXV. törvény/Article 15 (7) (28.12.2003).

⁵² Hungary/1949. évi XX. törvény/Article 32/B (20.08.1949).

⁵³ Hungary/2002. évi LV. törvény (17.12.2002).

agreed on a different time frame, four months after the commencement of the mediation procedure. The agreement reached in a mediation procedure does not prevent the parties from asserting their claim in a court procedure.⁵⁴ However, in these cases plaintiffs are liable to pay all costs.

The ETA does not explicitly authorise the Authority to mediate between the parties, but under the relevant provisions of the Act on the General Rules of Administrative Procedure and Services,⁵⁵ the Authority, as a public administrative organ, is authorized to try to resolve the conflict through forging a friendly settlement between the parties, if the circumstances of the case seem to allow it. If the parties reach a settlement in the course of the complaints procedure, the Authority includes it in a formal decision.⁵⁶ If the attempt to reach an agreement between the parties is not successful, the Authority continues its proceeding. Some of the cases are published on the website of the Authority, including the outcomes of agreements reached in the given case.

There is a special procedure with regard to the field of access to goods and services,⁵⁷ and mediation is also exercised by the *Oktatási Biztos* (Commissioner for Educational Rights), whose unit, the *Oktatási Biztos Hivatala* (Office of Commissioner for Educational Rights) is an independent, internal organizational unit of the *Oktatási és Kulturális Minisztérium* (Ministry of Education and Culture) that promotes citizens' rights concerning education.⁵⁸

8. Legal aid

Legal assistance may be received from the Legal Aid Services. Under Act LXXX of 2003 on Legal Aid,⁵⁹ the mandate of the Legal Aid Services is to provide free legal aid to indigent persons with legal problems, which may also include the violation of the right of equal treatment. The Legal Aid Services provide the indigents with legal advice, prepare legal petitions for them, and since 1 January 2008, they are also authorized to provide the indigent clients with legal representation before the courts. The entitlement to free of charge legal support depends on whether the applicant meets the legal criteria based on social or financial status. The Legal Aid Services of the regional offices of the Office of Justice decide on the requests for legal aid. If the

⁵⁴ Hungary/2002. évi LV. törvény/Article 36 (17.12.2002).

⁵⁵ Hungary/2004. évi CXL. törvény/Article 64 (28.12.2004).

⁵⁶ Hungary/2004. évi CXL. törvény/Article 75 (28.12.2004).

⁵⁷ Hungary/1997. évi CLV. törvény/Article 18 (23.12.1997).

⁵⁸ Hungary/40/1999. (X. 8.) OM rendelet (8.10.1999).

⁵⁹ Hungary/2003. évi LXXX. törvény (06.11.2003).

decision is positive, the client may choose the legal aid provider from the list of registered legal aid providers.

The eligibility is determined on the basis of a means test, which involves the amount of the minimum old-age pension and the minimum wage. Indigence threshold concerning state funded legal aid is very low: the state pays for the legal aid if the party's monthly income does not exceed the minimum old age pension (HUF 28,500 or EUR 105), and has no assets (car, real estate, etc.). The state advances the fees and costs of the legal aid provider if the party's income does not exceed 43% of the gross average national salary of the second year preceding the year in which the legal aid is provided (HUF 73,616 or EUR 272), and has no assets.⁶⁰ Based on the income test, approximately 40% of the population may be eligible for legal aid,⁶¹ but since assets shall also be taken into consideration, it is not possible to accurately assess the proportion of the population eligible for legal aid.

As far as the area of non-discrimination is concerned, there are some additional state-funded institutions, as well as NGOs that provide help to victims of discrimination. In this respect, it should be noted that the Equal Treatment Act (ETA) introduced the possibility of bringing an *actio popularis* claim: if the principle of equal treatment is violated or there is a direct danger⁶² thereof, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by (i) the Public Prosecutor; (ii) the Authority, or (iii) any social and interest representation organisation (i.e. an NGO, trade union or minority self-government), provided that the violation of the principle of equal treatment or the direct danger thereof was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately. A *társadalmi és érdek-képviseleti szerv* [social and interest representation organization] may – if the above conditions prevail – also choose to launch a proceeding before the Authority.⁶³

Furthermore, under the provisions of ETA, unless stipulated otherwise by the law, these social and interest representation organisations may – based on an authorization by the victim – engage on behalf of the victim in proceedings initiated due to the infringement of the requirement of equal treatment. Also, social and interest representation organisations are entitled to the rights of

⁶⁰ Hungary/2003. évi LXXX. törvény/Articles 5 and 6 (06.11.2003.).

⁶¹ Economy and Society – report of the Central Office of Statistics. See at: <http://portal.ksh.hu/pls/ksh/docs/hun/xftp/gyor/jel/jel20601.pdf> (16.09.2009).

⁶² The term 'direct danger of a violation' was originally not included in the ETA, it was inserted into the law reflecting to the experiences in the first case ever emerging under the ETA, an *actio popularis* claim brought by a gay organisation against a denominational university. The ETA was amended to make it absolutely sure that no *actio popularis* claims can be rejected on the basis of the lack of a concrete violation taking place.

⁶³ Article 20 (1)-(2) of Hungary/2003. évi CXXV. törvény (28.12.2003).

the concerned party in administrative proceedings initiated due to the infringement of the requirement of equal treatment.⁶⁴ Therefore, the minimum requirements under Article 7/2 of the Racial Equality Directive have been met.

Due to their authorization of launching *actio popularis* claims, the procedural role of NGOs goes beyond the minimum requirements set out by the Racial Equality Directive. Namely, in case of *actio popularis* lawsuits regulated by the ETA the Public Prosecutor, the Authority or social and interest representation organizations can initiate legal proceedings under their own names even if no concrete complainant is identifiable or willing to take action.

The role of NGOs is important with regard to racial and ethnic discrimination, since discrimination on these grounds in Hungary occurs often in a way which affects a larger group of persons that cannot be determined accurately (e.g. school segregation and discrimination regarding employment affecting Roma and migrants). The role of NGOs is crucial in cases where the potential complainants are somehow dependent on the alleged discriminator (e.g. segregated schoolchildren and their parents), since these victims of discrimination try to avoid further conflicts with the alleged perpetrator, and it is likely that none of the victims will turn to the Authority or to the court.

There are several NGO's informing and assisting victims of ethnic discrimination and the growing number of complaints filed with the Equal Treatment Authority shows that victims are increasingly aware of the available remedies.

The precise number of the NGOs offering legal assistance in discrimination cases is hard to estimate, and the mapping of all local NGOs dealing with discrimination cases is beyond the scope of this study. The most important NGOs offering assistance to victims of discrimination on the grounds of race or ethnic origin are the following: *Nemzeti és Etnikai Kisebbségi Jogvédő Iroda* (Legal Defence Bureau for National and Ethnic Minorities, NEKI),⁶⁵ *Esélyt a Hátrányos Helyzetű Gyerekeknek Alapítvány* (Chance for Children Foundation, CFCF),⁶⁶ *Roma Polgárjogi Alapítvány* (Roma Civil Rights Foundation, RPA)⁶⁷ and the *Magyarországi Roma Parlament Konfliktusmegelőző és Jogvédő Irodája* (Hungarian Roma Parliament, Office for Conflict Prevention and Legal Defence).

64 Article 18 (1)-(2) of Hungary/2003. évi CXXV. törvény (28.12.2003).

65 Website: <http://www.neki.hu>.

66 Website: <http://www.cfcf.hu>.

67 Website: <http://rpa.ingenyweb.hu> (under construction).

According to Article 3 e) of the ETA⁶⁸ a trade union is considered an interest representing organisation for the purposes of the Act and thus may bring an *actio popularis* complaint to the Equal Treatment Authority "if the violation of the principle of equal treatment or a direct threat of the violation was based on such a characteristic that is an essential feature of the individual, and the violation of law or a direct threat of the violation affects a larger group of persons that cannot be determined accurately."⁶⁹ The trade unions have such right in respect of matters related the employees' material, social and cultural situation, as well as living and working conditions.⁷⁰

The fact that relatively few employees join the trade unions and in general the prestige of the unions is very low also contributes to the reluctance of victims of discrimination to address specifically the problem of workplace discrimination.⁷¹ The representative of the employees' side in the *Országos Érdekegyeztető Tanács* (National Council for the Reconciliation of Interests, NCRI) also expressed his doubts as to whether or not the trade unions have a clear mandate for dealing with discrimination on the basis of race or ethnic origin on an individual basis.⁷²

Furthermore, the Equal Treatment Authority itself has a mandate to assist victims. The Authority provides independent assistance to victims of discrimination in the following ways: (i) it may initiate an *actio popularis* lawsuit if the violation of the principle of equal treatment was based on a recognised discrimination ground and if the violation of law affects a larger group of people that cannot be determined accurately with a view to protecting the rights of persons and groups whose rights have been violated;⁷³ (ii) it may participate as an intervener in the judicial review of a public administrative decision delivered by another public administrative body concerning the principle of equal treatment;⁷⁴ (iii) it may act as a representative in legal procedures authorised by the party who suffered from a violation of the principle of equal treatment;⁷⁵ (iv) it provides information to those concerned and offers assistance in acting against the violation of equal treatment.⁷⁶

Finally, the Ministry of Justice and Law Enforcement has been operating the Roma Antidiscrimination Network Service (IRM-RAÜH) since 2001 to ensure equal opportunities for the Roma population. The network has both the mandate and the funding to provide support to

⁶⁸ Article 3 e) of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁶⁹ Article 20 of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁷⁰ Article 3 e) of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁷¹ Interview with Marianna Lupkovic, Trade Union of Commercial Employees (02.03.2009).

⁷² Interview with András Pásztóy (17.02.2009).

⁷³ Article 14 (1) (b) and 20 (1) of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁷⁴ Article 15 (7) of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁷⁵ Article 18 (1) of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁷⁶ Article 14 (1) (g) of Hungary/2003. évi CXXV. törvény (28.12.2003).

victims of discrimination. The attorneys partaking in the Network provide legal aid (providing legal advice, drafting legal documents, initiating lawsuits and representation in court) specifically in cases where clients' rights were infringed because of their Roma origin. The attorneys provide free legal aid, they may not receive any fees from the clients. The Ministry ensures the financial resources of the operation of the Network (lawyers' fees) and the potential costs of initiating lawsuits. The Network is continuously expanding: the initial number of attorneys was 23 in 2001, 27 in 2003 and 30 in 2005. Currently clients may receive legal aid in 44 offices, and there are more attorneys in regions where Roma are overrepresented.

9. Forms of satisfaction available to a vindicated party

Remedies for discriminatory acts can be sought under the Civil Code,⁷⁷ Act XXII of 1992 on the Labour Code⁷⁸ and various administrative proceedings, including the procedure of the Equal Treatment Authority. Even though the notion of equal treatment became unified due to adopting the Equal Treatment Act, with regard to sanctions no such uniformity has been achieved, as the system of sanctions set up by the Equal Treatment Act is amplified by some sectorial provisions.

Judicial procedures

Victims of discrimination may sue in civil courts on the basis of the Civil Code, claiming that inherent rights are protected by the Civil Code. The person whose inherent rights have been violated may have the following options under civil law: (i) demand a court declaration of the occurrence of the infringement; (ii) demand to have the infringement discontinued and the perpetrator restrained from further infringement; (iii) demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution; (iv) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their

⁷⁷ Hungary/1959. évi IV. törvény/Articles 75-76 (11.08.1959).

⁷⁸ Hungary/1992. évi XXII. törvény (04.05.1992). The most important remedies applicable by the labour courts when resolving disputes are the following: (i) the declaration of an agreement as null and void; (ii) order to continue employment; (iii) reinstatement and the payment of average earnings for a maximum of twelve months; (iv) employer's full liability for damages including the payment of lost income, material damages and justified expenses.

injurious nature; (v) file charges for damages in accordance with the liability regulations under civil law.⁷⁹

Punitive damages do not exist, but a so-called ‘fine to be used for public purposes’ may be imposed by the court if the amount of the damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct.⁸⁰ This fine is however rarely applied and is payable to the state and not the victim.

Non-judicial procedures

When establishing that the principle of equal treatment has been violated, the Equal Treatment Authority may (i) order that the situation constituting a violation of law be eliminated; (ii) prohibit the further continuation of the conduct constituting a violation of law; (iii) publish its decision establishing the violation of law; (iv) impose a fine, amounting from HUF 50,000 to 6,000,000⁸¹ (from EUR 185 to EUR 22,140). The legal consequences may be applied jointly.⁸²

With regard to the sanctioning practice of the Authority, it appears to apply fines between HUF 500,000 (EUR 1,845) and HUF 3,000,000 (EUR 11,070). It has to be noted that the amount of fines imposed by the Authority have been increasing.

10. Adequacy of compensation

Judicial procedures

According to the Hungarian law, damages can be both pecuniary and non-pecuniary. In discrimination cases non-pecuniary damages are more common. Since non-pecuniary damages cannot be quantified, it is up to the court to decide about the quantum of the compensation. There is no upper statutory limit, however, Hungarian courts for a long time tended to be rather cautious about the amount. In a number of cases concerning discrimination in access to services (most frequently the denial of Roma guests to enter discos and bars), the amount of compensation was quite steadily around the double of the legally set monthly minimum wage,⁸³ i.e. not a very

⁷⁹ Hungary/1959. évi IV. törvény/Article 84 (1) (11.08.1959).

⁸⁰ Hungary/1959. évi IV. törvény/Article 84 (2) (11.08.1959).

⁸¹ Hungary/2003. évi CXXV. törvény/Article 16 (1) and (4) (28.12.2003).

⁸² Hungary/2003. évi CXXV. törvény/Article 16 (2)-(3) (28.12.2003).

⁸³ The monthly minimum wage was HUF 69,000 (EUR 255) in 2008, and it rose to HUF 71,500 (EUR 264) on 01.01.2009. See: Hungary/321/2008. (XII. 29.) Korm. rendelet/Article 2 (1) (29.12.2008) and Hungary/316/2005. (XII. 25.) Korm. rendelet/Article 2 (1) (25.12.2005).

dissuasive sanction. Practising lawyers say that recently however, the average amounts have started to rise, which is a promising change in the general judicial approach.

Non-judicial procedures

The sanction of ordering to eliminate the situation constituting a violation of law and the prohibition of the further continuation of a conduct constituting a violation of law are not always effective and dissuasive, given the lack of effective follow up and monitoring mechanisms on behalf of the Equal Treatment Authority. Publishing the Authority's decision establishing the violation of law could be a dissuasive sanction, however, the Authority's decisions are ordered to be published in most cases only on the Authority's own website for a limited period of time, which lowers the dissuasiveness of this sanction.

11. Rules relating to the payment of legal costs

Judicial procedures

Expenses of a judicial procedure are carried by the defeated party, since in civil lawsuits the party losing the suit is liable to pay the costs of the procedure, including the other party's legal costs.⁸⁴ The court may grant exemption from costs to persons who – due to their income and financial situation – are unable to pay for all or part of the procedural costs, which means total or partial exemption from procedural fees and costs.⁸⁵ Given that the a party is considered indigent in terms of Act LXXX of 2003 on Legal Aid,⁸⁶ he/she may be entitled to benefits, meaning that the state advances or bears legal costs and court fees partly or entirely. If someone's monthly income does not exceed the minimum old age pension (HUF 28,500 or EUR 105), and has no assets (car, real estate, etc.) beyond what is necessary for normal life, he/she may be granted full cost exemption. For persons earning more than the minimum old age pension but not exceeding 43% of the gross average national salary of the second year preceding the year in which the legal aid is provided (HUF 73,616 or EUR 272) – given that they do not have assets –⁸⁷ the law provides for exemption from having to advance the costs of procedures. Certain categories of persons are

⁸⁴ Hungary/1952. évi III. törvény/Article 78 (1) (06.06.1952).

⁸⁵ Hungary/1952. évi III. törvény/Article 84 (1) (06.06.1952).

⁸⁶ Hungary/2003. évi LXXX. törvény (06.11.2003).

⁸⁷ Hungary/2003. évi LXXX. törvény/Articles 5 and 6 (06.11.2003.).

automatically deemed indigent, such as homeless persons, beneficiaries of social welfare assistance and asylum seekers. However, if the plaintiff loses the case he/she has to pay the other party's legal costs irrespective of his/her indigence.

Non-judicial procedures

In the course of an investigation conducted by the Equal Treatment Authority on the basis of a complaint, the costs occurring in connection with their participation in the procedure shall be advanced by the alleged discriminators, while all other procedural costs are advanced by the Authority.⁸⁸ If the complaint is rejected, the complainant shall bear the other procedural costs only if the Authority establishes that he/she acted in bad faith.⁸⁹

12. Rules on burden of proof

The provisions concerning the shift of the burden of proof⁹⁰ were amended as of 1 January 2007. With the amendments, the Hungarian legislation has come clearly in line with the Directives, and, in fact, it may be described as even more advantageous for the victims.

The provision reads as follows: In procedures initiated because of a violation of the principle of equal treatment, the injured party or the party entitled to launch an *actio popularis* claim shall substantiate that (i) the injured person or group has suffered a disadvantage, or – in a case of *actio popularis* claims – there is a direct danger thereof; and (ii) the injured party or group possesses – or is by the violator assumed to possess – characteristics defined in the Equal Treatment Act (ETA). If the case described has been substantiated, the other party shall prove (i) that the circumstances substantiated by the injured party of the entity entitled to launch an *actio popularis* claim do not prevail; or (ii) that it has observed or in respect of the relevant relationship was not obliged to observe, the requirement of equal treatment. The provision setting out the shift of the burden of proof is applicable on all grounds of discrimination, in all fields and all types of procedures, except for criminal and petty offence proceedings.⁹¹

⁸⁸ Hungary/2003. évi CXXV. törvény/ Article 15 (8) (28.12.2003).

⁸⁹ Hungary/2003. évi CXXV. törvény/ Article 15 (9) (28.12.2003).

⁹⁰ Article 19 of Hungary/2003. évi CXXV. törvény (28.12.2003).

⁹¹ It is an important development that the ETA has extended the reversal of the burden of proof to all procedures related to discrimination (with the exception of penal law and petty offence procedures). Before the statute's coming into effect the reversed burden of proof existed only in labour law.

The ETA requires complainants to substantiate the real or perceived disadvantage and the protected characteristic. This means that the Hungarian test for the shift of the burden of proof only requires that the allegedly injured party substantiates, rather than proves, his/her claims. Substantiation means a lower level of certainty, if therefore the injured party establishes facts from which it may be presumed that a disadvantage was suffered and that the party possesses a protected feature (or the other party must have assumed so), then the burden of proof is shifted. This is more generous than the solution applied by the Directives, because in the Hungarian system the causal link between the protected ground and the disadvantage does not need to be substantiated in any way. In the Hungarian system a causal link is presumed once disadvantage and a protected characteristic are established, and it is then the task of the other party to prove that there is no such link.

As far as the use of statistical evidence is concerned, it is not excluded by Hungarian law: according to the Code of Civil Procedure⁹² and to the Act on the General Rules of Administrative Procedures and Services,⁹³ both courts and public administrative authorities are free to accept all types of evidence, which is useful with a view to establishing the facts of a case, and enabling the court (authority) to come to a decision.

However, the Hungarian data protection rules are very strict concerning ‘special (i.e. sensitive) data’, which are personal data relating to (i) racial, or national or ethnic minority origin, political opinion or party affiliation, religious or ideological belief, or membership in any interest representing organisation; (ii) state of health, pathological addictions, sexual life or criminal personal data.⁹⁴ On account of the strict rules⁹⁵ public authorities have fully stopped collecting data concerning these sensitive grounds, which is clearly detrimental in relation to monitoring discrimination in different fields of life.⁹⁶ Thus, even though the law does not exclude the processing of personal data for scientific and statistical purposes,⁹⁷ due to the lack of systematic

⁹² Article 3 (5) of Hungary/1952. évi III. törvény (06.06.1952).

⁹³ Article 50 (4) of Hungary/2004. évi CXL. törvény (28.12.2004).

⁹⁴ Article 2.2. of Hungary/1992. évi LXIII. törvény (17.11.1992).

⁹⁵ According to Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest, special data shall not be processed unless the data subject has given his/her written consent; or regarding the types of special data set out in group (i), the processing is prescribed by an international agreement or it is set forth by an Act, either in order to enforce a fundamental right provided for in the Constitution or in the interest of national security, crime prevention or criminal investigation; or the processing is prescribed by an Act in the case of data not falling into group (i). See: Article 3 (2) of Hungary/1992. évi LXIII. törvény (17.11.1992).

⁹⁶ For instance, the last official data concerning the numbers of Roma children in education are from 1993. Since that time, sociological researches have been the only source of information with regard to this crucial issue.

⁹⁷ Article 32-32/A of Hungary/1992. évi LXIII. törvény (17.11.1992).

(or practically any) data collection by official authorities, there are no databases on which researchers and statistical experts may rely. They have to take serious efforts to collect the data directly from data subjects. This of course makes research very expensive and time consuming, as a result of which national surveys are very rare, which constitutes a severe obstacle in the way of assessing country-wide trends and problems, and designing positive measures. Furthermore, it has to be stressed again that the Authority itself does not carry out surveys either.

There are certain instances though, where sensitive data are officially collected, the most obvious being the regular census.⁹⁸ Besides, there are also certain special measures, positive actions, which make it necessary to collect data, e.g. minority education⁹⁹ and minority elections.¹⁰⁰

⁹⁸ At the 2001 census, as opposed to other questions (to which answering could not be refused), answering to questions concerning health status (including disability), religion, mother tongue and ethnicity was voluntary. Furthermore, it needs to be pointed out that census data do not always give a reliable estimation concerning the number of certain minority groups.

⁹⁹ Minority education is supported by the state of a per capita quota basis, which naturally requires that those pupils who participate in minority education be registered by the school.

¹⁰⁰ Minorities have the right to form their local, regional and national self-governments, which have wide-ranging rights in relation to the preservation of the language and traditions of the given minority. To curb the phenomenon of 'minority business' (i.e. when candidates misuse their minority identity for the sake of political or economic ambitions), a registration system was introduced in 2005, according to which one has the right to vote and run as a candidate if he/she is registered in the Minority Election Register, declaring his/her affiliation with one of the 13 national and ethnic minorities recognized by law in Hungary. The Minority Election Register is not public, but the number of voters registered in the Minority Election Register is to be regarded as public information, which is published by the Országos Választási Iroda [National Election Office]. See: Hungary/2005. évi CXIV. törvény (26.10.2005) and Hungary/1997. évi C. törvény (06.11.1997).