

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

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Bucharest, Romania

February 2008 – March 2010

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Executive summary

Implementation of Employment Directive 2000/78/EC

Romania adopted comprehensive anti-discrimination legislation as early as 2000. The defining element for the Romanian case is the transposition of both directives in one piece of legislation, subsequently amended to increase compliance with the European norms, and the establishment of one common national equality body to deal with all forms of discrimination, including sexual orientation.¹ Gender identity and expression are not explicitly mentioned as protected grounds but they are covered by a catchall phrase: ‘any other criterion’.²

The Law on Equal Opportunities between Women and Men indirectly protects sexual orientation without explicitly mentioning it.³ The law does not cover transgender status. Transgender people are not explicitly protected by any Romanian law.⁴

The national equality body, *Consiliul Național pentru Combaterea Discriminării* [National Council on Combating Discrimination (NCCD)] started *ex officio* investigations in a number of relevant cases on sexual orientation discrimination and also received complaints from human rights NGOs and from individual victims of discrimination.⁵ A limited number of cases had been brought also before civil courts.

In 2008, the scope of the Anti-discrimination Law was substantially limited by series of decisions of the *Curtea Constituțională* [the Romanian Constitutional

¹ Romania/ Consiliul Național pentru Combaterea Discriminării [National Council for Combating Discrimination (NCCD)]. The official website of the institution is available at: <http://www.cncd.org.ro> (10.01.2008).

² For definitions of sexual orientation and gender identity see, Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, available at: http://www.yogyakartaprinciples.org/principles_en.htm (25.02.2008).

³ Romania/ Lege 340/2006 pentru modificarea și completarea Legii nr. 202/2002 privind egalitatea de șanse între femei și bărbați [Law 340/2006 for the amendment and approval of Law 202/2002 regarding equal opportunities between women and men] (25.07.2006).

⁴ ACCEPT, IGLHRC, ILGA Europe, joint submission to the United Nations Human Rights Council, under the Universal Periodic Review, available at www.iglhrc.org (08.02.2008).

⁵ The NCCD decided in cases of discrimination in labour relations, including testing of teachers and denial of employment on grounds of sexual orientation, access to health services, access to transportation services, discrimination resulting from harassment, victimisation or the denial of the right to dignity. See Annex 1 for a presentation of relevant case law from the NCCD.

Court] which nullified both the mandate of the *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)] and of the civil courts in regard of cases of discrimination generated by legislative provisions.

Freedom of movement

Current Romanian legislation does not provide for a definition of partnership between Romanian citizens. The new Civil Code adopted in 2009,⁶ includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages registered in other countries. Prior norms regarding freedom of movement spelled out in Ordinance 30/2006 included a definition of partnership for citizens of EU Member States for the purposes of free movement and residence in Romania, which deferred to the legislation of the country of origin. Thus, the partners of EU citizens had free access to Romanian territory if their partnership was valid in their Member State of origin. This regime was applicable also to de facto cohabitation and same-sex partnerships, provided they were recognised by the national legislation in their Member State of origin. The new Civil Code, to enter into force at a later date still unknown, mentions that the legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force without providing needed clarification regarding the conflict between the express provisions recognising the marital status of the EU citizens as granted by their countries mentioned in the legislation transposing Directive 2004/38/EC and the recent prohibition of recognition of same-sex marriages or partnership entered into abroad by same-sex couples.⁷

Unmarried partners of single Romanian citizens can join their partners only if they have at least one child together with the sponsor. The law does not distinguish between same-sex or opposite-sex partners.

⁶ Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

⁷ Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006) defines as a partner ‘a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.’

Asylum and subsidiary protection

Sexual orientation may be considered a common denominator to justify membership of a particular social group as a ground for persecution for the purpose of seeking refugee status. Asylum seekers invoking persecution due to their sexual orientation were initially rejected by the Romanian Office for Immigrations, however, a first case was won in court quashing the negative decision of the asylum authorities and granting asylum.⁸

The Romanian transposition of Article 2(h) of the Qualification Directive does not include unmarried partners among the family members in the context of asylum or subsidiary protection.

Family reunification

Foreigners granted refugee status or subsidiary protection can request family reunification for the husband/wife only if the date of the marriage predates the date when any of these forms of protection were established

Freedom of assembly

Marches with a pro-LGBT, pro-equality message have been organised since 2005. Though the authorities initially refused to allow the march in 2005, eventually these events started taking place and generated a vigorous counter-reaction from religious groups, conservative and nationalistic parties, as well as neo-Nazi groups. The authorities protected the participants on the pro-gay marches effectively but failed to take adequate measures against the counter-demonstrations when they degenerated into violent, illegal riots. Another positive aspect of State protection is a 2008 court decision dismissing a request for injunction against the gay march. The court decision was based on substantive grounds related to pluralism and ensuring the exercise of the right to freedom of association and assembly (reference to Art.11 of the ECtHR, applying *Baczowski v Poland*).

Hate speech and criminal law

The *Codul Penal* [Criminal Code] was amended in 2006 to include incitement to discrimination based on all grounds of discrimination sanctioned by the

⁸ See Annex 1 for a presentation of relevant case law.

Legea Antidiscriminare [Anti-discrimination Law], including sexual orientation. The same amendment introduced discriminatory intent as aggravating circumstance in the commission of the offences. The implementation of these provisions by the law-enforcement agencies is not satisfactory. The new Criminal Code adopted in 2009 maintained the aggravating circumstances in case of deeds perpetrated with discriminatory intent, including based on sexual orientation, in Article 77. The new Code, to enter into force at a later, unknown date, rephrased the definition of incitement to hatred or discrimination in Article 369 by deleting the list of protected grounds and introducing a new language: ‘incitement of the public, by any means to hatred or discrimination against a category of persons is punished with prison from six months to three years or with fine.’⁹

Transgender issues

Romanian legislation does not mention the term ‘transgender’ or equivalent terms. Transgender people are theoretically protected by the provisions of the anti-discrimination legislation but have to bear the consequences of the legislative gap in relation to modifying identification data or undergoing a change of sex. Operating any changes in the civil status requires a court decision which, in practice, is based on a certificate issued by the *Institutul Național de Medicină Legală* [National Institute for Legal Medicine], following a very intrusive and arbitrary procedure, developed ad hoc to fill a legal vacuum.

Miscellaneous

Some themes are important for sexual minorities: the lack of relevant statistical data which would allow more effective policy making, the denial of access to marriage and partnership but also the increased violence, including sexual violence against homosexuals or detainees from vulnerable groups in penitentiaries.

A recent draft law proposed for public discussions by the *Oficiul Român pentru Adopții* [Romanian Office for Adoptions] regarding a new law regulating adoptions explicitly prohibits adoption of children by two persons of the same sex.¹⁰ Given that the current legislation specifically prohibits multiple

⁹ Romania/ Lege 286/2009 privind Codul Penal [Law 286/2009 on the Criminal Code] (17.07.2009)

¹⁰ Romania/Oficiul Român pentru Adopții, Proiect de modificare a legii privind regimul juridic al adopției available at http://www.adoptiromania.ro/documente_dezbatere.aspx (01.01.2010).

adoptions,¹¹ excepted in cases of married couples, the express prohibition proposed by the new draft, without any feasibility study to justify this legal solution, indicates institutional homophobia.

Good practices

Strategic litigation has been used by the NGO ACCEPT to promote non-discrimination in access to services.

¹¹ Art.7 of Romania/Lege 273 /2004 privind regimul juridic al adopției [Law 273/2004 on the legal regime of adoption](21.06.2004).

A. Implementation of Employment Directive 2000/78/EC

In an attempt to harmonise Romanian legislation with European standards, prior to EU accession, in 2000 the government adopted legislation responding to the needs served by both the Employment Directive and the Racial Equality Directive.¹² The law was adopted following a joint effort by civil society and human rights experts and the *Departamentul pentru Protecția Minorităților Naționale* [Department for the Protection of National Minorities] and used as framework advanced drafts of the European Directives.¹³ The law was amended subsequently in 2002, 2003, 2004 and 2006, to enhance harmonisation.

Explicit protection of sexual orientation and the subsequent work on LGBT-related cases by the national equality body is highly commendable given the level of rejection of homosexuality manifested by Romanian society. LGBT people remain the most rejected group according to statistics for 2005,¹⁴ 2007,¹⁵ 2008,¹⁶ and 2009.¹⁷

¹² Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

¹³ Renate Weber, Romania: Legal analysis of national and European anti-discrimination legislation; A comparison of the EU Racial Equality Directive & Protocol N° 12 with anti-discrimination legislation (2001), available at <http://www.migpolgroup.com/multiattachments/2426/DocumentName/Romaniaelectronic.pdf> (10.01.2008).

¹⁴ In December 2005, NCCD published the results of an official survey stating that 61 per cent of the interviewees avoid having relations with homosexuals. This is the highest rejection percentage, Roma ranking second with 34 per cent and persons living with HIV/AIDS ranking third with 26 per cent. The sample consisted of 1,238 Romanians and the margin of deviation amounts to ±2.8 per cent for a probability of 95 per cent. The survey can be found at: <http://www.cncd.org.ro/biblioteca/Sondaje-4/> (06.02.2008).

¹⁵ G. Bădescu, M. Comșa, D. Sandu, M. Stănculescu, Barometrul de Opinie Publică, October 2007, BOP 1998-2007, available at http://www.fsd.ro/ro/evenimente_detaliu.php?eveniment=28 (17.12.2007). The Public Opinion Barometer of the Soros Foundation, published in December 2007, found that in the last three years, homosexuals remained one of the most rejected categories of the population: as at October 2007, 61 per cent of the respondents declared that they would not want to have a homosexual neighbour. The same survey conducted in 2005 revealed a rejection rate of 51 per cent and when conducted in October 2006 revealed a 61 per cent rejection rate. In these surveys LGBT people rank third in the question on rejecting particular groups as neighbours, after people who are addicted to drugs and alcoholics.

¹⁶ A 2008 study *Percepții și atitudini ale populației României față de fenomenul de discriminare*, The Gallup Organization Romania, Cercetare realizată la cererea Consiliului Național Pentru Combaterea Discriminării, found that the highest degree of intolerance is manifested in relation to sexual minorities (68 per cent of respondents consider homosexuality a bad thing, 36 per cent consider that homosexuality should be sanctioned and

A.1. Concepts defined by national anti-discrimination legislation

Anti-discrimination legislation sanctions ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’²⁰

Though the law does not explicitly mention gender identity and expression, including transsexualism, a catch-all phrase ‘any other criterion’ would apply in conjunction with a wider interpretation of sexual orientation.

Even though not all the legal concepts present in the two Directives were initially transposed into law, due to subsequent amendments, Romanian legislation covers both direct and indirect discrimination and also includes other relevant legal institutions²¹ such as: indirect discrimination;²² multiple

19 per cent of the interviewees think that the sanction should be the prohibition of some rights, 42 per cent mention administrative fines and 28 per cent mention the criminal detention. Study available at www.cncd.org.ro (20.10.2008).

¹⁷ Romania, Consiliului Național Pentru Combaterea Discriminării, Fenomenul discriminării în România – percepții și atitudini (The Phenomenon of Discrimination in Romania - Perceptions and Attitudes) research conducted by Institutul Național pentru Studii de Opinii și Marketing (INSOMAR) in September 2009. The survey shows that while 55.9 per cent of the respondents believe that the LGBT are discriminated or very discriminated against, only 4.9 per cent would accept an LGBT member of the family, only 23 per cent would accept an LGBT friend and more than 55 per cent believe that sexual minorities should be treated medically for their sexual orientation.

²⁰ Art. 2, Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

²¹ A. Tabacu, R. Iordache (2003), ‘Not Yet Viable: Discrimination Action in Romania’ in: Roma rights /2003 pp. 61-70, available at http://errc.org/tr_nr1-2_2003/noteb6.shtml.

²² Art. 2.(3), Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006): ‘Any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected groups, excepting the cases when these practices, criteria and provisions have an objective justification based on a legitimate purpose and the methods used to reach that purpose are adequate and necessary.’

discrimination;²³ positive action;²⁴ harassment;²⁵ victimisation;²⁶ and instruction to discriminate.²⁷

The internal legal framework makes no reference to standards detailed by European Commission against Racism and Intolerance (ECRI) General Policy Recommendation no. 7 but the casework of the *Consiliul Național pentru Combaterea Discriminării* [National Council on Combating Discrimination (NCCD)] has gradually incorporated most relevant legal concepts suggested by this document into the interpretation of the law.²⁸

A.1.1. Areas covered by anti-discrimination legislation

Romanian anti-discrimination legislation encompasses the areas protected by the Employment Directive and the Race Directive: employment and labour-related issues, access to services, access to health, education etc., and goes beyond these standards by introducing the concept of protection of the right to dignity. The principle of equality and prohibition of discrimination applies in

²³ Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006), Article 2 (6), reads: ‘Any distinction, exclusion, restriction or preference based on two or more of the criteria foreseen at para. 1 shall constitute an aggravating circumstance in establishing the contraventional responsibility if one or more of its components is not subject to criminal law.’

²⁴ The law explicitly allows affirmative actions or special measures to be instituted in favour of persons or groups of persons belonging to vulnerable or disadvantaged groups, with the purpose of ensuring they enjoy equal opportunities.

²⁵ Art. 2.5. Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006): ‘Any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, belonging to a disadvantaged group, age, disability, refugee or asylum seeker status or any other criterion, which leads to establishing an intimidating, hostile, degrading or offensive environment.’

²⁶ Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006), Art. 2. 7: any adverse treatment triggered by a complaint to the NCCD or by a case lodged with the courts of law regarding the infringement of the principle of equal treatment and non-discrimination.

²⁷ Art. 2.2. Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

²⁸ Para. 6 of the ECRI General Policy Recommendation no. 7 reads as follows: ‘The law should provide that the following acts, inter alia, are considered as forms of discrimination: segregation; discrimination by association; announced intention to discriminate; instructing another to discriminate; inciting another to discriminate; aiding another to discriminate.’

relation to all 'human rights and fundamental freedoms or rights recognised by Romanian legislation, in the political, economic, social and cultural field or in any other domains of public life.'²⁹

A series of decisions of the *Curtea Constituțională* [the Romanian Constitutional Court] limited both the mandate of the national equality body³⁰ and of the civil courts in regard of cases of discrimination generated by legislative provisions.³¹ Thus, the scope of the Anti-discrimination Law was substantially diminished in 2008, excluding cases of discrimination triggered by legislative norms.

A.2. NCCD work on discrimination on the grounds of sexual orientation

Though Art. 23 of Ordinance 137 from August 2000 provided that a national equality body would be established within 60 days of the law being published, it took more than a year for the government to issue a decision establishing the NCCD.³² Despite a rather slow start in its first years of functioning, the NCCD gradually became a proactive actor, engaging in a multitude of projects and establishing itself as a serious voice in combating discrimination. Unfortunately, the institution was paralysed since the summer of 2009 until April 2010, following the failure of the Parliament to appoint new members in the Steering

²⁹ Article 3 of the Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

³⁰ Romania/Curtea Constituțională/Decision 997 from 7.10.2008 finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to finding and sanctioning discrimination triggered by legislative provisions is unconstitutional.

³¹ Romania/Curtea Constituțională/Decisions 818, 819 and 820 (3.07.2008) published in the Official Gazette 537 from 16.07.2008. In these three decisions, the Constitutional Court has concluded that the dispositions of Article 1(2) letter e) and of Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that in the application of the Law, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus 'creating legal norms or substituting them with other norms of their choice.' Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20.02.2009). See also Romania/Curtea Constituțională/Decision 1325 (04.12.2008) repeating the earlier finding that Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

³² Romania/ Hotărârea de Guvern 1194 privind înființarea CNCD, Government Decision 1194 from 2001 establishing the National Council on Combating Discrimination (12.12.2001).

Board, leading to the impossibility of issuing new decisions, absent a simple majority of five out of nine members.

A.2.1. Profile of the national equality body

In September 2006, the NCCD became an autonomous public authority under the control of the Parliament. This change was intended to ensure the independence of the NCCD.

As part of its mandate, the NCCD is requested to propose draft laws in the field of combating discrimination and to initiate acts to ensure the harmonisation of other legal provisions with the equality and non-discrimination principle.³³

The powers of the NCCD include preventing discrimination via awareness raising and education campaigns, mediating between the parties, providing support for the victims of discrimination, investigating and sanctioning discrimination, including *ex officio*, as well as initiating drafts to ensure harmonisation of legal provisions with the equality principle.³⁴

The internal proceedings for addressing the cases of discrimination and for solving a petition are spelled out by the internal procedures adopted in April 2008.³⁵

The role of the NCCD as a quasi-judicial body was confirmed in 2008 and 2009 by the Constitutional Court in several cases challenging the constitutionality of the mandate of the NCCD.³⁶

³³ See Article 19³ of the Romania/ Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, amended (20.07.2006); see also Article 2 para. (1) point (b), (c), (d) of the Romania/ Hotărârea de Guvern 1194, Government Decision 1194/2001 regarding the organisation and functioning of the National Council for Combating Discrimination, amended (17.11.2003).

³⁴ The NCCD is still working on developing a mechanism for tracking complaints and drafting statistics based on relevant indicators. So far the effort of collecting data was undertaken in an empirical manner based on ad hoc requests.

³⁵ Romania/Ordin. 144 din 11.04.2008 privind aprobarea Procedurii interne de soluționare a petițiilor și sesizărilor, Consiliul Național Pentru Combaterea Discriminării, Monitorul Oficial nr. 348 din 6.05.2008 [Order 144/2008 approving the Internal procedures for solving petitions filed with the NCCD.] (11.04.2008).

³⁶ Romania/Curtea Constituțională Decision 444 from 31.03.2009 published in Official Gazette 331 din 19.05.2009 is reaffirming the role of the national equality body as an autonomous specialized public administrative body with a mandate in combating discrimination. The decision of the CCR clearly spells out the role of the NCCD as an administrative body with a jurisdictional mandate which enjoys the independence entailed by an administrative-jurisdictional activity.

A.2.2. Venues available for anti-discrimination complaints

The 2006 amendments of the anti-discrimination legislation, adopted under the impact both of the two EU directives and of the ratification of Protocol no.12 of the European Convention on Human Rights (ECHR),³⁷ underlined the optional character of the administrative procedure for sanctioning discrimination before the NCCD.³⁸ The victim of discrimination can choose between filing a complaint with the NCCD, which will result in an administrative sanction, and/or filing a civil complaint for damages with the court of law, with the advantage of being exempt from paying judicial taxes. These venues are not mutually exclusive and the plaintiff can choose to use them simultaneously, which in practice creates problems for all the parties involved. Courts decide independently, but, if the NCCD has issued a decision prior to the civil case, the NCCD decision has the benefit of a strong presumption of legality and it can be used before the civil court in proving discrimination, liability and the existence of damages. This presumption in favour of the NCCD decision is not, however, absolute and the defendant can challenge the legality of the decision by the NCCD and submit evidence which would lead the civil court to pass over the NCCD decision.

A.2.2.1. Administration of anti-discrimination complaints

Any individual or any legal entity with an interest can file a complaint with the NCCD within one year of the event or from the date when it was possible to find out about the discrimination according to Art. 21 of the NCCD Internal Procedures. The NCCD can also start the case *ex officio*.³⁹ The NCCD has 90 days to investigate the case, organise hearings and decide whether anti-discrimination provisions were breached or not.

The NCCD rules on the existence of a discriminatory act and issue an administrative sanction while compensation claims for discrimination can be decided only in the civil court. The NCCD rulings and sanctions can be appealed before the administrative courts.

³⁷ Protocol no.12 of the European Convention on Human Rights (ECHR) was ratified by Romania in 2006.

³⁸ See Article 21 of Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

³⁹ Art.19.(2), Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

In accordance with the directives, the anti-discrimination legislation introduces the concept of ‘sharing the burden of proof.’ Instead of shifting the burden of proof onto the defendant,⁴¹ the Romanian law provides that ‘the interested party has the obligation to prove the existence of facts which allow the existence of direct or indirect discrimination to be presumed, and the party against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’⁴²

The 2006 amendment of the law allowed as means of proof for acts of discrimination any type of evidence, including audio and video recordings, as well as statistical data.⁴³

⁴¹ Article 8 of the Council Directive 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin reads: ‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’ See also, ECRI General Policy Recommendation no. 7, para. 11, which states: ‘The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.’

⁴² Art.20.(6) and Art.27.(4), Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

⁴³ See Article 20 (6) and Article 27(4) of the Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

A.2.3. Remedies and sanctions applied under the anti-discrimination legislation

A.2.3.1. Remedies and sanctions applied by the NCCD

The NCCD can issue administrative sanctions: administrative warnings and fines.⁴⁴ The NCCD has informally developed a practice of adopting recommendations carrying no financial damages when the perpetrators are central governmental agencies or public actors (e.g. discrimination is triggered by a minister's orders or the internal regulations of central public administration).⁴⁵

A.2.3.2. Remedies and sanctions applied by the civil courts

According to Article 27 of, Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, the person who considers him or herself discriminated against has three years to file a complaint for civil damages, requesting moral and pecuniary damages, or re-establishing *status quo antes* or, nullifying the situation established as a result of the discrimination, according to civil law.⁴⁶

The courts of law can also decide that the public authorities will withdraw or suspend the authorisation of legal persons who caused significant damage as a result of discriminatory action or who repeatedly infringed the provisions of the anti-discrimination legislation.⁴⁷

⁴⁴ The amount of the fines differs: when the victim is only one individual, the amount varies from 400 RON to 4,000 RON (114-1,114 Euro) when the victims are a group or a community (e.g.: ethnic minority or the LGBT community as a group), the fine ranges between 600 and 8,000 RON (170-2,285 Euro).

⁴⁵ See Romania-CNCD, Decision 260, ACCEPT v. the Ministry of Health from 29.08.2007 (in annex 7).

⁴⁶ Art. 27, Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

⁴⁷ Art. 27.5, Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

A.2.4. Gradual increase of visibility of the NCCD

Though recent reports note a lack of awareness regarding the existence and the enforcement of anti-discrimination legislation in general,⁴⁸ a series of high profile cases in 2006-2008, as well as a sustained effort of enhanced public presence have led to a gradual increase in the public visibility of the NCCD.⁴⁹

The NCCD, both in its Plan of Action⁵⁰ and in its 2007 National Strategy, included relevant data on discrimination on the grounds of sexual orientation.⁵¹

Since its establishment, the NCCD has received 46 complaints of discrimination on the grounds of sexual orientation, has started one case *ex officio*, following media reporting and has issued decisions in 33 of them. Of this total, the NCCD found and sanctioned discrimination in eight different cases. Four decisions of the NCCD on the grounds of sexual orientation has been appealed before the administrative courts, three had been maintained by the courts of law and one case is still pending.⁵²

A.2.4.1. Employment-related cases

The NCCD has decided in cases where the victims of discrimination were harassed and penalised in their work context following the disclosure of their sexual orientation or following allegations about their presumed homosexuality.⁵³

⁴⁸ Romania/ANES/ Studiu Privind Discriminarea Multipla pe Piata Muncii [press release on Study on Multiple Discrimination of the Labour Market], available at <http://www.anes.ro/> (19.01.2008).

⁴⁹ Romania/ National Council for Combating Discrimination, Perceptions and Attitudes towards Discrimination, available at: <http://www.cncd.org.ro/studiianalize.swf>. (20.01.2008). See also Romania/ National Council for Combating Discrimination, Direcția Relații Internaționale, Integrare Europeană, Politici Afirmative, Studii și Monitorizare, [Department for International Relations, European Integration, Affirmative Policies, Studies and Monitoring], Analiza de imagine a Consiliului Național pentru Combaterea Discriminării pentru primul semestru al lui 2006, available at: <http://www.cncd.org.ro/studiianalize.swf>.

⁵⁰ Romania/Hotărârea de Guvern 1258 privind adoptarea Planului Național de Acțiune pentru Combaterea Discriminării, Government Decision 1258 on adopting the National Action Plan to Combat Discrimination (13.08.2004).

⁵¹ Romania/Consiliul Național pentru Combaterea Discriminării, Strategia națională de implementare a măsurilor de prevenire și combatere a discriminării (2007-2013) on file with national FRALEX expert.

⁵² Response of the NCCD to FRALEX request from 31.01.2008, on file with national FRALEX expert and Response of the NCCD to FRALEX request from 06.01.2010, on file with national FRALEX expert.

⁵³ Romania/CNCD/ACCEPT on behalf of B. R. v. AV, MI and Regia Autonoma Decision 29 of the NCCD, (07.09.2007). See also Romania/CNCD/ ACCEPT and CRL on behalf of PMG v. IS, Decision 16(18.01.2005).

The Council also supported the lobbying efforts of ACCEPT in 2003 when a Joint Order issued by the Ministry of Education and the Ministry of Health required the psychological evaluation of teachers and stated that homosexuality was incompatible with teaching. The regulation was repealed in 2003, but in 2006, discrimination on the basis of sexual orientation and gender identity was again included in a joint order by the two institutions, which once again mentioned homosexuality on the lists of conditions triggering the prohibition to work as teacher.⁵⁴ Following public positions by the NCCD, the two ministries agreed to clarify the meaning of the regulation to eliminate discrimination and created a working group which, however, had not convened by February 2008.⁵⁵

A.2.4.2. Access to services

The most famous court decision in relation to discrimination based on sexual orientation was decided in 2007 by a court of first instance in a civil suit for damages against a gas company, *Distrigaz Sud*.⁵⁶ The plaintiff who was subjected to degrading language and behaviour when he went to pay the gas bill for an NGO working on sexual minorities, ACCEPT, was awarded 1,000 Euro in civil damages. The decision was confirmed in appeal.

In its first major decision on sexual orientation, the NCCD found against the Romanian airline, TAROM, for denying same-sex couples access to its transport services caused by the explicit exclusion of same-sex couples from the promotion for Valentine's Day specials for couples (opposite-sex couples were allowed to participate in the promotion without any restrictions).⁵⁷

A.2.4.3. Access to health services

Access to health services was discussed in two cases, in the context of restrictions applied to homosexual men in relation to donating blood. The legitimate interest in public health and blood safety was balanced by the NCCD against the measures proposed by the Ministry of Health (permanent exclusion

⁵⁴ Romania/Ministry of Education and Research, Ministry of Health and the National Health Insurance Authority, Order No. 4840/IR 38342/2796/2005 on mandatory health check of school personnel.

⁵⁵ ACCEPT, IGLHRC, ILGA Europe, joint submission to the United Nations Human Rights Council, under the Universal Periodic Review, available at www.iglhrc.org (08.02.2008).

⁵⁶ Romania/ Judecătoria sectorului 4 Bucuresti/ D.Z. v. Distrigaz Sud, Decision 4222 in File no.710/4/2006 (01.08.2007).

⁵⁷ Romania/CNCD/ Tarom Decision, decision 39 (01.03.2005).

of gay men from donating blood) which were considered both inadequate and unnecessary.⁵⁸

A.2.4.4. Right to dignity

The NCCD invoked the provisions on the right to dignity⁵⁹ in almost all its decisions on the grounds of sexual orientation, either in conjunction with other provisions specifically prohibiting discrimination in various areas, or on its own, particularly in cases of messages using offensive or insulting language, or creating an intimidating and hostile environment in relation to the victim or the LGBT community as a group.⁶⁰

A.2.4.5. Incitement to hatred

Since 2000, the Anti-discrimination Law has integrated a provision against incitement to hatred on all grounds of discrimination, against behaviour which takes place in public and harms the dignity of an individual, and against harassment based on any ground of discrimination.⁶¹ The NCCD issued two sanctions against articles published in newspapers⁶² which had a discriminatory element based on sexual orientation and three sanctions against discriminatory utterances in the workplace⁶³ and in 2008-2009, the NCCD issued two sanctions

⁵⁸ Romania/CNCD/ ACCEPT v. the Ministry of Health for the National Institute of Haematology, Decision 337, (21.11.2005) and Romania/CNCD/ ACCEPT v. the Ministry of Health, Decision 260, (29.08.2007).

⁵⁹ Art. 15 of Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006).

⁶⁰ Romania/CNCD/ Asociația Attitude v. Gazeta de Cluj, Decision No. 207 (14.07.2003). See also Romania/CNCD/ SA v. Ziarul Atac, Decision 231 (29.08.2005). See also Romania/CNCD/ Decision 598 from 26.11.2009.

⁶¹ Article 19 of Ordonanță 15 Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea și sancționarea tuturor formelor de discriminare [Law 324/2006 for the amendment of the Government Ordinance No.137/2000 regarding the prevention and sanctioning the punishment of all forms of discrimination] (30.08.2000).], (20.07.2006)..

⁶² Romania/ CNCD, Hotărârea nr. 207/14.07.2003 of the Steering Committee of the National Council for Combating Discrimination, Asociația Attitude v. Silviu Manastire (journalist) and Gazeta de Cluj, and Romania/ CNCD, Hotărârea nr. 231/29.08.2005 of the Steering Committee of the National Council for Combating Discrimination, S.A. v. Atac Newspaper.

⁶³ Romania/ CNCD, Hotărârea nr. 16/18.01.2005 of the Steering Committee of the National Council for Combating Discrimination, Mr. P.M.G. v. I.S. & Episcopia D, Romania/ CNCD, Hotărârea nr.29/07.02.2007, of the Steering Committee of the National Council for Combating Discrimination, B.R. v. A.V., M.I. & Regia Autonomă de Piețe, Agreement și Salubritate Oradea, Romania/ CNCD, Hotărârea nr.102/24.05.2007 of the Steering Committee of the National Council for Combating Discrimination, Mr. R.G. v. Jandarmeria Buzau.

for incitement to discrimination and harassment which took place in public places, out of the ten complaints specifically on discrimination on grounds of sexual orientation.⁶⁴ See the discussion in Section A.2 and cases presented in Annex 1.

A.3. Work of other national bodies

The Annual Report of *Avocatul Poporului* [the Romanian Ombudsman] does not explicitly mention sexual orientation, although it does mention cases of discrimination on other grounds.⁶⁵ Upon being requested for more information on this issue, the Ombudsman reported receiving no complaints on the grounds of sexual orientation between 2000 and 2007 and initiating one case *ex officio* – the case was closed for lack of competence.⁶⁶ In its 2010 response, the Ombudsman mentions that its ‘annual activity reports do not include specific information regarding alleged infringements of human rights based on homophobia.’⁶⁷

A.4. Work of NGOs

Romanian anti-discrimination law creates legal standing for NGOs with an interest in combating discrimination.⁶⁸

⁶⁴ Romania/ HotarareaCNCD, Hotărârea nr. 16/18.01.2005 800/04.12.2008 of the Steering Committee of the National Council for Combating Discrimination, Mr. P.M.G.Asociația ACCEPT v. I.S. & Episcopia D.G.A., Romania/ HotarareaCNCD, Hotărârea nr.29/07.02.2007, 598/26.11.2009 of the Steering Committee of the National Council for Combating Discrimination, B.R. v. A.V., M.I. & Regia Autonoma de Piete, Agreement si Salubritate Oradea, Romania/ Hotararea nr.102/24.05.2007 of the Steering Committee of the National Council for Combating Discrimination, Mr. R.G. v. Jandarmeria Buzau..

⁶⁵ Romania/ Avocatul Poporului [the Romanian Ombudsman], Raport anual 2006, available at: <http://www.avp.ro/> (12.11.2007). The Ombudsman reports that the institution received 78 complaints from persons who considered themselves to have been discriminated against (no grounds are individualised) out of the 6,407 petitions received in 2006.

⁶⁶ An article was published by *Adevarul* on 18.01.2001 and was entitled: ‘The Investigation by the Police of a Young Gay Leading to a Strasbourg Case’. As the article mentioned interrogations on the sexual preferences of the plaintiff and offensive treatment by the police, the representatives of the Ombudsman wrote to the police office. When the plaintiff filed a criminal complaint against the police officers for the criminal offence of abuse in service with the limitation of certain rights, the Ombudsman ceased to monitor the case. Response of the Romanian Avocatul Poporului [Ombudsman] to FRALEX national expert request for information 15.01.2008, on file with FRALEX national expert.

⁶⁷ Response of the Romanian Avocatul Poporului [Ombudsman] to FRALEX national expert request for information 11.01.2010, on file with FRALEX national expert.

⁶⁸ Art. 28, Romania/Lege pentru modificarea și completarea Ordonanței Guvernului nr. 137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare [Law 324/2006

The vast number of anti-discrimination complaints filed with the NCCD originated from human rights associations working for the protection of sexual minorities (ACCEPT Romania⁶⁹ (approx. 25 complaints) and Attitude Cluj)⁷⁰ and from the Centre for Legal Resources.⁷¹

In particular, ACCEPT and the Centre for Legal Resources were actively involved in supporting the amendments to the anti-discrimination legislation and in strengthening the capacity of the NCCD.⁷²

ACCEPT is a member of an informal coalition of human rights NGOs representing various groups who are potential victims of discrimination. Together they coordinate their efforts for more effective advocacy within the Anti-discrimination Coalition.⁷³

for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination], (20.07.2006): (1) Human rights non-governmental organisations can appear in court as parties in cases involving discrimination pertaining to their field of activity and which prejudice a community or a group of persons. (2) The organisations provided in the above paragraph can also appear in court as parties in cases involving discrimination which prejudices a natural entity, if the latter delegates the organisation to that effect.

⁶⁹ See www.accept-romania.ro (04.02.2008).

⁷⁰ See www.attitude.ro (04.02.2008)

⁷¹ See www.crj.ro (13.02.2008).

⁷² See http://accept-romania.ro/index.php?option=com_content&task=view&id=37&Itemid=55 (10.02.2008).

⁷³ See www.antidiscriminare.ro (20.02.2008).

B. Freedom of movement

Oficiul Român pentru Imigrări [Romanian Office for Immigration (ROI)] reports transposition of Directive 2004/38/EC in the Ordinance 30/2006 on the free movement of citizens of the EU and of the EEA in its 2008 response.⁷⁴

According to the Ordinance 30/2006, a partner is ‘a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.’⁷⁵ The legal definition does not distinguish between *de facto* partners or registered partnerships, between same-sex or heterosexual partnerships, but it leaves it to the national legislation in the country of origin to establish the validity of the partnership.

The new Civil Code adopted in 2009,⁷⁶ includes in Article 277 a prohibition of same-sex partnership and marriage, including also a prohibition to recognize partnerships and same-sex marriages registered in other countries, be it between Romanian or foreign citizens.⁷⁷ The Ordinance 30/2006 included a definition of partnership for citizens of EU Member States for the purposes of free movement and residence in Romania, which deferred to the legislation of the country of origin. Thus, under Ordinance 30/2006 the partners of EU citizens had free access to Romanian territory if their partnership was valid in their Member State of origin. This regime was applicable also to *de facto* cohabitation and same-sex partnerships, provided they were recognised by the national legislation in their Member State of origin. The new Civil Code, to enter into force at a later date still unknown, mentions that the legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force without clarifying however the conflict between the express provisions recognising the marital status of the EU citizens as granted by their countries

⁷⁴ Romania/Governmental Ordinance 102/2005 on the freedom of movement and of residence of EU citizens (14.07.2005) was approved and amended by Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006).

⁷⁵ Art. 2.(1)7 of Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006).

⁷⁶ Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

⁷⁷ Art. 277 of Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009). ‘same-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognized in Romania.’ Similarly, the new Civil Code mentions that same-sex or opposite-sex civil partnerships registered or contracted abroad by Romanian citizens or foreigners are not recognized in Romania.

mentioned in the legislation transposing Directive 2004/38/EC and the recent prohibition of recognition of same-sex marriages or partnership entered into abroad by same-sex couples.⁷⁸

Currently, the validity of same-sex partnerships or marriages is regulated by the national legislation of each partner-spouse, as established by the private international law regulations, Law 105/1992.⁷⁹ Law 105/1992 provides in Article 11 that ‘the status, the capacity and the family relations of the individual are ruled by his or her national law, with the exception of cases when there are special norms prescribing differently.’ The law did not specifically mention registered partnerships or same-sex marriages, but it can be argued that the legal provisions apply *mutatis mutandis*.

In its 2008 response the ROI reported that it did not register any requests for admission or registration from LGBT partners of EU citizens.⁸⁰ The ROI also specified that the institution does not collect data on the sexual orientation of its beneficiaries according to Article 7. (1) of the Law on the Protection of Private Data. In its response to a request filed under the Freedom of Information Act, the ROI mentioned that in enforcing the provisions of the Directive 2004/38/EC, marriages and partnerships concluded between same sex couples are recognized on grounds of the legal provisions in the country of origin, ‘only for the purpose of exercising the right to free movement on Romanian territory.’ Registered partnership can be proved with the partnership registration act, while unregistered partnership can be proved based on a statement issued by the partners which might be supported by any other documents. ROI mentioned that no statistical data is available as no such cases were registered so far.⁸¹

B.1. EU citizens who are LGBT partners of EU citizens

LGBT partners of EU citizens who are also EU citizens have the right to move and reside freely on Romanian territory on the basis of Article 3 of the

⁷⁸ Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006) defines as a partner ‘a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.’

⁷⁹ Romania/Lege 105/1992, cu privire la reglementarea raporturilor de drept internațional privat [Law 105/1992 on private international law regulations] (22.09.1992).

⁸⁰ Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with national FRALEX expert.

⁸¹ Response 2396807 of the Romanian Office for Immigration, 24.02.2010, on file with national FRALEX expert.

Governmental Ordinance 102/2005 further amended by Ordinance 30/2006 or, as partners, according to Article 2.(1)7 of Law 500/2006 which introduces the concept of partnership into Romanian legislation.⁸²

B.2. Third country national LGBT partners of EU citizens

Currently, third country nationals who are partners of EU citizens can freely move and reside in Romania together with their partners only if the partnership is registered according to the law of their Member State of origin or, in cases where the partnership is not registered, if the relationship can be proved.⁸³ See supra for provisions of Article 11 of Law 105/1992. No case law was reported on this issue.

It is unclear how the authorities and the courts will interpret the conflicting norms from Art. 277 of the new Civil Code following its entering into force given the express prohibition of recognition of same-sex marriages or partnerships entered into abroad by same-sex couples as well as the exemption mentioned for cases regarding the freedom of movement in Romania of EU/EEA citizens.⁸⁴

Article 277 of the new Civil Code with the express prohibition of the recognition of partnerships entered into abroad both in case of same-sex and in case of heterosexual couples conflicts with Article 3(2) of the Directive 2004/38/EC which states that a State must ‘facilitate entry and residence’ of the partner, provided either the partners share the same household, or there is between them ‘a durable relationship, duly attested.’

⁸² Art.3 of Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006).

⁸³ Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006).

⁸⁴ Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

B.3. Third country national LGBT partners of Romanian citizens

Unlike third country national partners of EU citizens, the partners of Romanian citizens who are not citizens of an EU Member State can request visas only if the couple has at least one child in common.⁸⁵ In this way, Romanian citizens are treated less favourably than EU citizens residing in Romania as regards the possibility of being joined by non-married partners.

The law does not distinguish between registered and unregistered partnership but the partners must have at least one child together, which implies that childless, same-sex as well as childless, heterosexual partners are excluded.

Law 56/2007 on the Status of Aliens provides that the visa request for family reunification must be accompanied by evidence of the marriage, kinship or partnership, without detailing what types of evidence can be submitted in the case of a partnership.⁸⁶

Article 46(15)c of Law 56/2007 grants the same right to family reunification to ‘children of a Romanian citizen, of the husband or of the wife or of the partner, including adopted children under 21 who are in the care of the Romanian citizen, of the husband or of the wife or of the partner’.

⁸⁵ Art.46.15.b of Romania/ Ordonanța de urgență a Guvernului nr. 194/2002 privind regimul străinilor în România, Emergency Ordinance 194 on the status of aliens amended by Romania/Law 56/2007 for amending and approving E.O.194/2002 (13.03.2007).

⁸⁶ Art.46.16 of Romania/ Ordonanța de urgență a Guvernului nr. 194/2002 privind regimul străinilor în România, Emergency Ordinance 194 on the status of aliens amended by Romania/Law 56/2007 for amending and approving E.O.194/2002 (13.03.2007).

C. Asylum and subsidiary protection

The Romanian legal system recognises sexual orientation, as defining membership of a particular social group, as a ground for persecution for the purpose of seeking refugee status as attested by recent case law.⁸⁷

C.1. Sexual orientation as common characteristic for membership of a particular social group

Romanian legislation transposed the provisions of Article 10(1) of Directive 83/2004 (Qualification Directive), including the definition of persecution of a social group, when sexual orientation is the common characteristic of the group, in Article 10 d) (iii) of Governmental Decision 1251/2006 approving the methodological norms for Law 122/2006 on Asylum.⁸⁸

The text of Governmental Decision 1251 from 2006 provides that, ‘when establishing the reasons for the persecution, it should be taken into consideration if (...) d) the applicant belongs to a social group meaning (...) (iii) depending on the circumstances in the country of origin, a certain social group can include a group based on the common denominator of sexual orientation. Sexual orientation cannot trigger the existence of a social group under the definition of the current provision when the activities specific to sexual orientation are criminal and penalised by Romanian legislation. Gender elements can be included in the understanding of sexual orientation, under the requirement that they are the only reason for enforcing this article.’⁸⁹

The ROI mentioned that there were no cases registered by their offices of sexual orientation being invoked as a justification for persecution in its 2008

⁸⁷ Romania/Tribunalul Suceava, Secția Penală de Contencios Administrativ și Fiscal, Decizia 347 (01.07.2009).

⁸⁸ Romania/ Lege 122/2006 privind azilul în România, Law 122/2006 on Asylum in Romania (18.05.2006).

⁸⁹ Art. 10 d) (iii) of Romania/Hotărâre de Guvern 1251/2006 pentru aprobarea normelor metodologice de aplicare a Legii nr.122/2006 privind azilul în România, Governmental Decision 1251/2006 approving the methodological norms for Law 122/2006 on Asylum.

response.⁹⁰ No information was issued in this regard by the ROI in 2010, however, the institution specified that it is not using phalometry.⁹¹

In 2008, at least two asylum seekers invoked persecution ‘for reasons of homosexuality’ as reported by lawyers and NGOs active in the field. Both cases were initially rejected by ROI. One of them had been reversed by the courts and the other case was closed due to the disappearance of the applicant. In its rejection, ROI acknowledged that the asylum seeker invoked fear of persecution due to his homosexuality and due to the fact that homosexuality was criminalized and the Cameroons’ authorities were aware of his status as he stated that he was prior arrested for two weeks but found that ‘the number of such indictments (for homosexuality) is reduced and, as for any other crime, the accusations must be proved.’⁹² The ROI decision proceeds to find that ‘the fact that the applicant was released (after two weeks), without any documentation shows that there was not enough evidence to lead to an indictment for being guilty and that because of this, practically there is no risk for him to be condemned for this reason.’ When assessing the country of origin information the ROI decision concluded that ‘from the information we have, it is clear that there are enough legal guarantees in Cameroon for a fair trial, observing access to justice related rights and the presumption of innocence.’ The ROI did not assess how the risk of persecution applies in the personal case of the applicant - a person already arrested for homosexuality and only noted that ‘in such cases persons are convicted only if caught in action’ and mentioned that ‘the applicant is not a public person and relocation to ‘another city where he is not known and not sanctioned by the public is a real possibility.’ The decision also stated that ‘the applicant is aware of the legal regime of homosexuality (criminal sanction) and of the possibility of being liable and he basically takes his risk (when engaging in homosexual conduct).’

The ROI decision was attacked by the applicant represented by an appointed lawyer but the court of first instance maintained the ROI decision.⁹³ For the appeal, the applicant was supported by two NGOs (*Consiliul Național pentru Refugiați* and *ACCEPT*) and the tribunal decided in favour of the applicant, quashed the ROI decision and granted asylum.⁹⁴ In reaching this decision, the court looked at the country of origin information (provisions of Cameroons’ Criminal Code sanctioning homosexual conduct) and at the personal situation of

⁹⁰ Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with national FRALEX expert.

⁹¹ Response 2396807 of the Romanian Office for Immigration, 24.02.2010, on file with national FRALEX expert.

⁹² Romania/Oficiul Român pentru Imigrări, Centrul regional pentru cazare și proceduri pentru solicitantii de azil Rădăuți, Dosar ORI 15487+2008, Hotărârea 2303 267/H/BS from 28.11.2008 on file with national FRALEX expert.

⁹³ România/Judecătoria Rădăuți, Suceava, Dosar 6848/285/2008 sentința civilă 332 from 26.01.2009 on file with national FRALEX expert.

⁹⁴ România/Tribunalul Suceava, Dosar 6848/285/2008, Decizia 347 from 01.07.2009 on file with national FRALEX expert.

the applicant (being arrested for two weeks after being spotted by the neighbours while hugging a foreigner in his car) and concluded that ‘in case of return in his country of origin, the applicant runs the risk of being condemned for his sexual orientation, hence the conditions for protection as refugee under the Romanian law are met.’

C.2. Definition of family members in the context of asylum and subsidiary protection

Article 2(h) of the Qualification Directive was transposed into Romanian legislation in Article 2.j of Law 122/2006 on Asylum⁹⁵ which defines family members as: ‘the following members of the family of the beneficiary of refugee status or of subsidiary protection status, as long as, at the date when the application was lodged by the main applicant, the family existed in the country of origin: (i) the husband or the wife of the beneficiary of refugee status or of subsidiary protection status, (ii) minor children of the beneficiary of refugee status or of subsidiary protection status, who are under the responsibility of the beneficiary, under the requirement that they are not married, no matter if they were born within wedlock, outside wedlock or if they were adopted according to national legislation.’⁹⁶

The ROI concluded that Romanian legislation does not include under the definition of family persons living in a stable relationship without being married (same-sex partners of the beneficiaries of refugee status or of subsidiary protection status) because Romanian legislation does not provide for a legal framework for civil unions/unregistered partnerships (*concubinaj*). This approach will be reinforced once the new Civil Code provisions enter into force, particularly Art. 277 (prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages registered in other countries) and Art. 258 (definition of family as marriage between a man and a woman).⁹⁷

⁹⁵ Romania/ Lege 122/2006 privind azilul în România, Law 122/2006 on Asylum in Romania (18.05.2006).

⁹⁶ Art. 2.j, Romania/ Lege 122/2006 privind azilul în România, Law 122/2006 on Asylum in Romania (18.05.2006).

⁹⁷ Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

D. Family reunification

Article 4(3) of Council Directive 2003/86/EC on the right to family reunification was transposed into Romanian legislation in the Emergency Ordinance 194 of 2002 on the status of aliens in Romania.⁹⁸ Article 46(1) of the Emergency Ordinance states that ‘foreigners legally residing in Romania, excepting those with educational visas, can request family reunification for their spouses and children.’ Article 46(5) states that ‘foreigners who were granted refugee status or subsidiary protection can request family reunification for the husband/wife only if the date of the marriage predates the date when any of these forms of protection were established’.

The authority in charge with issuing visas, ROI reported as of January 2008, not receiving any application for family reunification based on same-sex marriages.⁹⁹ No new information was issued by the ROI in 2010.¹⁰⁰

⁹⁸ Romania/ Ordonanța de urgență a Guvernului nr. 194/2002 privind regimul străinilor în România, Emergency Ordinance 194 on the status of aliens amended by Romania/Law 56/2007 for amending and approving E.O.194/2002 (13.03.2007).

⁹⁹ Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with national FRALEX expert.

¹⁰⁰ Request filed on 08.02.2010.

E. Freedom of assembly

E.1. Implementation in the legal system

Article 39 of the Romanian Constitution guarantees freedom of any peaceful assembly.¹⁰¹ This right is thoroughly described in the legislation¹⁰² and establishes the general principle that any peaceful assembly can take place freely, without limitation.¹⁰³ Exceptions are set for reasons of public safety.¹⁰⁴

All assemblies taking place on a public road, in public market squares or in other places outdoors, need to be notified to the mayor's office. The request, '*declarație prealabilă*' [preliminary declaration], must be filed at least three days in advance. A commission comprised of representatives of the local administration and police officials is convened by the mayor and gives its opinion on the request. The mayor takes the final decision.

E.2. Cases of refusals or bans

The first initiative to organise an LGBT-related march in Romania dates from 2005.¹⁰⁵ The process of authorising the gay march was prolonged, exceeding the 48-hour time interval established by the law¹⁰⁶ due to hot public debates.¹⁰⁷ The

¹⁰¹ Article 39 of the Romanian Constitution: 'Freedom of assembly: any meeting, demonstration or procession or any other gathering shall be free and may be organised and take place only peacefully, without arms of any kind'.

¹⁰² Romania/Lege 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law 60//1991 regarding the organisation and execution of peaceful meetings], (23.09.1991) republished in Romania/Monitorul Oficial no.888 of 29.09.2004.

¹⁰³ Article 1 and 2 of Romania/Law 60//1991 regarding the organisation and execution of peaceful meetings (23.09.1991).

¹⁰⁴ For example, it is forbidden to organise two or more separate public events in the same place or on the same itinerary; demonstrations might be forbidden because they are against democratic values, the law prohibiting demonstrations promoting fascist, communist, racist or chauvinistic ideas, demonstrations that incite to discrimination, to public violence, to obscene manifestations or which are against moral values) Art. 9, Romania/Law 60//1991 regarding the organisation and execution of peaceful meetings (23.09.1991).

¹⁰⁵ The initiative belongs to ACCEPT Association: <http://www.accept-romania.ro>. The event took the form of a march for equal rights and not of a gay pride, as did the marches in 2006 and 2007.

¹⁰⁶ L.V.S (2005) 'Homosexualii romani, decizi să iasă în stradă' [Romanian homosexuals determined to take to the streets] in: *Gândul*, (23.05.2005).

¹⁰⁷ During this time, a fervent public debate took place in the media. The opponents of the march differed: Orthodox priests, public persons etc. The mayor's office reported having received almost 600 protest letters against the march collected by an Orthodox priest. See V. Zamfir

first response from Bucharest's Mayor, Adriean Videanu, was negative. The official justification was that the local authorities were not able to ensure the safety of the march participants.¹⁰⁸ This justification did not fall under any of the legal exceptions prescribed by the law.¹⁰⁹

Some public officials' reactions criticising this decision came promptly.¹¹⁰ Apart from these reactions, no political party or public person came publicly to support the march. In the end, because of the political pressure and international lobbying, mayor Videanu issued the authorisation and allowed the gay march to take place.¹¹¹

Mayor Videanu authorised three other gay marches in 2006 and 2007, and 2008; in 2009, dr. Sorin Oprescu replaced Videanu as Mayor of Bucharest and another gay march was authorised. However, in 2006 the mayoralty had objections to the itinerary, which had to be changed.¹¹² The argument of the commission convened by the mayor was that the proposed itinerary passed by the Ministry of Internal Affairs, allegedly, a strategic site.¹¹³ However, the headquarters of an administrative institution is not a site included in the limited list of exceptions.¹¹⁴ Furthermore, according to Article 15(a) of the same law, the mayor's office must establish a list of all these sites, yet no list was invoked in the refusal from the local authorities. Similarly, in 2009, the itinerary had to

(2005) 'Fotbalul incurcă marșul homosexualilor' [Football creates problems for the homosexuals' March] in: *Evenimentul Zilei*, (25.05.2005).

¹⁰⁸ G. Baci (2005) 'Primăria capitalei nu a găsit jandarmi pentru homosexuali' ['Bucharest Mayor's Office did not find gendarmes for homosexuals'] in: *Adevarul*, (24.05.2005); see also V. Zamfir (2005) 'Primăria interzice defilarea homosexualilor prin centru' ['The Mayor's Office interdicts homosexuals marching downtown'] in: *Evenimentul Zilei*, (23.05.2005).

¹⁰⁹ See the information in Section E.1 – Implementation in the legal system.

¹¹⁰ The Ministry of Justice, Monica Macovei, and the President of Romania, Traian Băsescu, harshly condemned Videanu's decision stating that the decriminalisation of homosexual relations took place years ago. O. Stancu (2005) 'Băsescu și GayFest: 'Fiecare o face cum îi place' ['Basescu and GayFest: Everyone is free to do it how he/she likes'] in: *Jurnalul National*, (26.05.2005). See also Chapter I.

¹¹¹ V. Zamfir (2005) 'Homosexualii vor defila prin centrul capitalei' ['Homosexuals will march in the centre of Bucharest'] in: *Evenimentul zilei*, (27.05.2005).

¹¹² This information was provided by Mr. Florin Buhuceanu, ACCEPT Director during the gay march in 2006, interviewed on 20.01.2008.

¹¹³ Article 8 paragraph 2 of the Romania/Lege 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law 60/1991 regarding the organisation and execution of peaceful meetings], (23.09.1991) republished in Romania/Monitorul Oficial no.888 of 29.09.2004 states that the local authorities' commission that is giving the advice during the authorisation procedure may make justified modifications in the organizers' authorisation with their permission. See the discussion on this Article in Section E3 – Legislative limitations and need for amendments.

¹¹⁴ Article 5 of Romania/Lege 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law 60/1991 regarding the organisation and execution of peaceful meetings], (23.09.1991) republished in Romania/Monitorul Oficial no.888 of 29.09.2004, contains a list of sites that qualify for the prohibition of public assemblies in their vicinity, e.g. railway stations, airports, hospitals, military objectives etc.

be shortened in order to avoid passing through Unirii Square, which was considered by the authorities as a difficult place to ensure protection of the participants to the march.¹¹⁵

Every year along with the gay march a so-called Normality March was allowed to take place. This is an initiative of the Conservative Party,¹¹⁶ in cooperation with the Romanian Orthodox Church and extreme right-wing groups, including the organisation *Noua Dreaptă* [New Right].¹¹⁷ In 2005, they were issued authorisation in due time, without any delays or discussions. The participants displayed fascist symbols and the portrait of Corneliu Zelea Codreanu, and they used slogans inciting discrimination and violence against LGBT people. This is particularly worrying since in Romania there is a special law prohibiting such organisations and their activity, which was not enforced by the authorities in any of these cases.¹¹⁸

Apart from these authorised marches, New Right also organised illegal homophobic manifestations in parallel with the gay march (organised ad hoc, at the same time and in the same place as the gay march).¹¹⁹ In 2005, Tudor Ionescu, the organisation's leader was fined by the police.¹²⁰

On 19 May 2008, Provita Association for Born and Unborn Children [*Asociația Provita pentru Copii Născuți și Nenăscuți*] filed an administrative case before Bucharest Tribunal against Bucharest Mayor's Office and ACCEPT Association. Provita asked the court to issue an injunction against the gay march and the annulment of the authorization given by the Mayor's Office to ACCEPT for reasons of being against ethical and moral norms and infringing

¹¹⁵ This information was provided by Ms. Florentina Bocioc, ACCEPT Director during the gay march in 2009 interviewed on January 20th, 2010.

¹¹⁶ L. Ciobanu (2005) 'Voiculescu își scoate PC-ul în stradă' ['Voiculescu is taking his CP members out on to the street'] in: *Cotidianul*, (26.05.2005).

¹¹⁷ *Noua Dreaptă* [New Right] is a non-governmental organisation registered in Romania. It acknowledges its descent from the interwar fascist movement of Legionari, whose head was Corneliu Zelea Codreanu – executed by the Romanian authorities during the operation to eliminate reactionary, undemocratic movements. See more information on the organisation's website <http://www.nouadreapta.ro>. This organisation was sanctioned in 2006 by the NCCD for racist articles published on their website comparing the so-called 'Roma problem' to the 'Jewish problem' Romania had during the interwar period and inciting discrimination and violence against the Roma community. Yet the Prosecutor's Office did not find grounds for prosecuting the organisation or the authors according to criminal legislation in this field.

¹¹⁸ Romania/ Ordonanta de Urgență a Guvernului 31/2002 prohibiting organisations and fascist, racist and xenophobic symbols and the promotion of the veneration of persons guilty of crimes against peace and humanity. See information in Section E4 – Duties of protection by the state.

¹¹⁹ Article 5 (2) of the Romania/Lege 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law 60/1991 regarding the organisation and execution of peaceful meetings], (23.09.1991) republished in Romania/Monitorul Oficial no.888 of 29.09.2004.

¹²⁰ The amount of the fine was 30,000,000 ROL (around 1,000 Euro). See Andrei Luca Popescu (2005) 'Gay Parade – de la timiditate la cafteala' [Gay parade – from timidity to fight] in *Averea*, (30.05 2005).

the right to private and family life. The court dismissed the case on substantive grounds related to pluralism and ensuring the exercise of the right to freedom of association and assembly (Art.11 of the ECHR, applying *Baczowski v Poland*).¹²¹

E.3. Legislative limitations and the need for amendments

No gay march was actually forbidden from taking place, only the 2005 gay march was initially refused authorisation and subsequently authorised by the Mayor of Bucharest. None of the justifications the mayor presented for this decision were covered by the express legal exceptions to freedom of assembly listed by Romanian legislation.

Taking into consideration all the debate around the gay parades in Romania since 2005, there are two main provisions in Law 60/1991 which need amendment.

The first provision refers to Article 9(a), final thesis, and Art.9(c) of the law.¹²² The provision lacks clarity and specificity for a limitation to a fundamental right. This may lead to misinterpretations of the law infringing the exercise of freedom of assembly in the case of gay marches, in a society where homosexuality is considered to be against public morals and homosexual relations displayed in public are considered obscene.

The Romanian Senate rejected a proposal¹²³ to amend Law 60/1991 aiming to forbid assemblies promoting ‘the ideas and manifestations of homosexuals and lesbians’. On 15 October 2008, the draft was rejected by the Chamber of Representatives, too.

Article 8(2) of the law also needs further amendment. This paragraph gives competence to a commission convened by the mayor’s office to make any changes in the request for authorisation, with the consent of the applicants. The commission, formed from the local administration, gendarmerie and police

¹²¹ Romania/ Tribunalul Bucuresti/ Asociația Pro Vita pentru Copii Născuți și Nenăscuți – Filiala București v. Primăria Municipiului București și Asociația ACCEPT, Judgment 2807 in File no.18838/3/CA/2008 (24.10.2008).

¹²² The provision in the list of prohibited events for cases where the assembly aims to promote incitement of obscene manifestations which go against good public morals and cases where the assembly aims to infringe public morals.

¹²³ Romania/ Lege pentru modificarea Legii 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law for the modification of Law 60/1991 regarding the organisation and execution of peaceful meetings], L724/2007, available at: <http://80.97.216.132/senat.proiect.asp?cod=12516&pos=23> (13.02.2008).

officials, has an essential role in the process of authorisation: based on its advice, the mayor issues or refuses to issue an authorisation. As illustrated above, this legal provision may be used in practice to put pressure on the organisers to change an itinerary or other elements of the demonstration. This leads to ‘bargaining’ with the manifestation of freedom of assembly: the local authorities prefer the new form because the conditions are more convenient and not because the initial elements fell under the legal exceptions; the organisers prefer to obtain authorisation more quickly without complications.

E.4. Duties of protection by the state

During all the gay marches in Romania, violent homophobic demonstrations have taken place and the trend is that these opponents become more violent and better organised every year.

According to Romanian legislation, the mayor’s office, the police and the gendarmes have obligations to protect the participants in demonstrations: to ensure order and physical integrity and to adopt all the necessary administrative measures to that effect.¹²⁴ For each of the marches, police mobilisation was to a large extent efficient.¹²⁵

In 2006, the protection of the participants on their way out of the area where the march took place became a problem. Six people were probably followed and were beaten inside the metro, although they were not wearing any distinctive symbols.¹²⁶ The press reported that the police officials acknowledged that there were more people beaten in the metro, but they did not lodge complaints.¹²⁷

The six victims of the aggression in 2006 filed criminal complaints supported by medical certificates and photographs of the perpetrators. An investigation was opened. After almost four years the police had not yet informed the victims of any resolution.¹²⁸

¹²⁴ Articles 15-24 of the Romania/Lege 60/1991 privind organizarea și desfășurarea adunărilor pașnice [Law 60/1991 regarding the organisation and execution of peaceful meetings], (23.09.1991) republished in Romania/Monitorul Oficial no.888 of 29.09.2004.

¹²⁵ The information was provided by Mr. Florin Buhuceanu, former Director of ACCEPT, interviewed on 20.01.2008.

¹²⁶ M. Dohi (2006) ‘Sase presupusi homosexuali au fost loviti bestial’ [‘Six alleged homosexuals seriously beaten’] in Libertatea, (07.06. 2006), available at: <http://www.libertatea.ro/index.php?section=articole&screen=stire&sid=154873>.

¹²⁷ A. Niculae (2006) ‘15 ultrași steliști din „Peluza Sud” – agresorii homosexualilor mitingiști’ [‘15 Steaua hooligans from ‘Peluza Sud’ – the aggressors of the homosexuals who participated in the gay march’] in Gandul, (06.06. 2006), available at: http://www.gandul.info/2006-06-06/actual/15_ultrasi.

¹²⁸ United States Bureau of Democracy, Human Rights and Labour, Romania. Country Reports on Human Rights Practices. 2006, (06.03.2007). Furthermore, Romania/ Inspectoratul

In 2005, the police arrested tens of people from the anti-gay group who behaved violently against the participants.¹²⁹ However, no criminal investigation was carried out and no criminal charges have been brought.¹³⁰

In 2006, the gay march was preceded by a joint press conference held by the extreme right-wing organisation New Right and George Becali, the leader of the extreme right party *Noua Generație* [New Generation] and owner of Steaua Soccer Club, in partnership with the Romanian Orthodox Church, in the Metropolitan seat.¹³¹ The Conservative Party and the Christian Democratic Peasants' Party also fervently condemned the gay march.¹³² Consequently, the homophobic demonstrations during the 2006 march were the most violent of all the marches. Neo-fascist groups and hooligans, so-called *Ultrașii Steaua* (Steaua soccer fans), initiated the violence. Fifty people were arrested. The police identified 15 of them as belonging to the last group.¹³³

In 2007, the gay march was again confronted with violence.¹³⁴ The police ensured the protection of the participants. Two policemen were harmed by stones thrown in the direction of the march participants. The media reported that five criminal investigations were initiated after the march against anti-gay

General al Poliției Române was unable to provide us information on the status of investigations in this case and referred to the local police – Romania/ Direcția Generală de Poliție a Municipiului București, Serviciul de Poliție Metrou and the Prosecutor's Office. See Response No.52590/S1/29.01.2010 of the Romania/ Inspectoratul General al Poliției Române, Ministerul Internelor și Reformei Administrative, on file with national FRALEX expert.

¹²⁹ V. Zamfir (2005) 'Atacați cu icoane' ['Attacked with icons'] in *Evenimentul zilei*, (29.05.2005); see also G. Capuerde (2005) 'Homosexuali romani bătuți de legionari' ['Romanian homosexuals beaten by the Legionari'] in *Libertatea*, (29.05.2005); see also R. Radu (2005) 'Articolul 200 a marșăluit prin centrul Bucureștiului' ['Article 200 marched along the centre of Bucharest'] in *Cotidianul*, (29.05.2005).

¹³⁰ V. Zamfir (2005) 'Atacați cu icoane' ['Attacked with icons'] in *Evenimentul zilei*, (29.05.2005).

¹³¹ C. Ghinea (2006) 'Preoți, neofasciști și jandarmi la discotecă' ['Priests, neofascists and gendarmes at the disco'] available at http://www.hotnews.ro/articol_49991-Jandarmi-preoti-si-neofascisti-la-discoteca-de-Cristian-Ghinea.htm; see also Razvan Ionescu (2006) 'Legături primejdioase' ['Dangerous liaisons'] in *Ziua*, (10.06. 2006), available at: <http://www.ziua.ro/display.php?id=201321&data=2006-06-10&keyword=Legaturi+primejdioase>.

¹³² Realitatea TV (2006), 'Protest politic – PPCD condamnă manifestația gay' ['Political protest – PPCD condemns the gay manifestation'] 03.06.2006, 09:26.

¹³³ M. Dinescu (2006) 'Cine ne-a pus magiun pe clanță?' ['Who soiled our door?'] in *Gândul*, (09.06.2006), available at: http://www.gandul.info/2006-06-09/actual/cine_a_pus.

¹³⁴ 'Children of God,' in *Nine O'clock*, issue 3953 p. 4 (13.06.2007), available at: http://www.nineoclock.ro/archive_index.php?page=detalii&categorie=frontpage&id=20070613-500941.

protesters carrying or using weapons against the participants in the pro-gay march.¹³⁵

According to criminal law,¹³⁶ the state has the obligation to protect its citizens against these kinds of organisations and against their actions. Nevertheless, the public prosecutors did not take any measure to open a criminal investigation against any of these groups. Furthermore, although the so-called Normality March promotes slogans inciting discrimination and violence against homosexuals, the authorities have not applied the legislation criminalising such acts, instead the organisers received authorisation easily and no fine was given to the participants or organisers of the ad hoc counter-protest in 2006 or 2007.¹³⁷

¹³⁵ PROTV News (2007) 'Dosare penale și politisti raniti' ['Criminal investigations and harmed policemen'] 09.06.2007, 19:00, available at: <http://www.protv.ro/stiri/social/dosare-penale-si-politisti-raniti-la-marsul-diversitatii.html>.

¹³⁶ Romania/ Ordonanța de Urgență a Guvernului 31/2002 prohibiting organisations and fascist, racist, xenophobic symbols and the promotion of the veneration of persons guilty of crimes against peace and humanity. See information in Section E4 – Duties of protection by the state.

¹³⁷ See information in Section E2 – Criminal Law.

F. Criminal law

F.1. Legal provisions on hate speech related to homophobia

The sanctions issued according to the Anti-discrimination Law on incitement to discrimination have an administrative nature. For criminal penalties, the persons subjected to homophobic speech may invoke the provisions on insult and slander in the Criminal Code, but only to protect their dignity, not to punish 'hate speech.'

The law of July 2006 amending the Criminal Code created the new crime of 'hate speech', as incitement to discrimination based on all grounds of discrimination sanctioned by the Anti-discrimination Law, including sexual orientation.¹⁴² This broadened the scope of application of an earlier provision which only criminalised 'national and xenophobic propaganda' and incitement to racist and nationalistic hatred and did not mention sexual orientation.

Taking into consideration the Criminal Code amendments together with the administrative and civil remedies available under the Anti-discrimination Law referred to above, it may be said that protection against homophobic speech was reasonably covered by Romanian legislation.

Other criminal offences in the field of hate speech are sanctioned by the Romania/*Ordonanța de urgență 31/2002 privind interzicerea organizațiilor și simbolurilor cu caracter fascist, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni contra păcii și omenirii* [Law prohibiting fascist, racist and xenophobic organisations and symbols and the encouragement to venerate persons guilty of crimes against peace and humanity].¹⁴⁴ The text was never used to sanction homophobic groups which

¹⁴² Article 317 of the Criminal Code.

¹⁴⁴ Romania/ Ordonanța 31 privind interzicerea organizațiilor și simbolurilor cu caracter fascist, rasist sau xenofob și a promovării cultului persoanelor vinovate de săvârșirea unor infracțiuni contra păcii și omenirii, Ordinance 31/2002 on the Prohibition of Fascist, Racist and Xenophobic Organisations and Symbols and the Encouragement to Venerate Persons Guilty of Crimes against Peace and Humanity.

acknowledge their lineage to the Fascist movement.¹⁴⁵ Furthermore, the repeal of Articles 8 to 11, which defined misdemeanours and provided for the possibility of dissolving legal entities engaged in fascist, racist or xenophobic conduct, leaves the law without legal remedies when confronted with more than mere individual incidents to illegal conduct.

F.2. Legal provisions on hate crimes

F.2.1. Legal provisions prior to 2006

Prior to 2006, the Criminal Code contained four criminal offences fitting the framework of discrimination-motivated crime.¹⁴⁶ None of them was applicable to homophobia motivated hate crimes. Other provisions such as the aggravating circumstance ('shameful reasons for committing a crime',¹⁴⁷) or insult and slander,¹⁴⁸ which in theory could have been interpreted to apply to homophobic acts, have never been applied by the judiciary in such cases.

Prior to 2006, Article 247 of the Criminal Code, on abuse in the exercise of authority against the rights of the person, did not mention 'sexual orientation'. In December 2000, the police held illegally and interrogated a young man, A.G., on the basis of his sexual orientation. He was asked for the names of all the gay people he knew. A.G. lodged several criminal complaints with the public prosecutors' offices, based on Article 247 and Article 250 paragraph (1) of the Criminal Code (Abusive Behaviour). The authorities rejected the complaints and never opened an investigation. The organisation, ACCEPT, reported that the case was sent to the European Court of Human Rights on 7.02.2003 but the case was communicated to the Romanian government only in April 2010.¹⁴⁹

¹⁴⁵ See information in Section E – Freedom of assembly.

¹⁴⁶ Article 247 – Abuse in the exercise of authority against the rights of the person, Article 317 – Nationalistic and chauvinistic propaganda, Article 318.(1) – Impeding the free exercise of religion, Article 319 – Profanation.

¹⁴⁷ Article 75 (d) of the Criminal Code.

¹⁴⁸ Article 205 and Article 206 of the Criminal Code.

¹⁴⁹ Adrian Costin Georgescu c. Roumanie, Requete 4867/03 filed on 7.02.2003; see also <http://accept.org.ro/stiri.html#17ian>.

F.2.2. The 2006 amendments

In April 2006, two NGOs¹⁵⁰ in partnership with the NCCD, lobbied the Ministry of Justice to introduce in the amendments of the Criminal Code provisions sanctioning hate crimes, including homophobia motivated crimes:¹⁵¹

- The legal aggravating circumstance for any criminal offence conducted with discriminatory motivation on any ground of the Anti-discrimination Law.¹⁵²
- Expanding the list of grounds protected in the case of two criminal offences already existing in the Criminal Code: abuse in the exercise of power by a civil servant (Article 247) and incitement to hatred (Article 317).¹⁵³

In July 2006, the Criminal Code was amended to specifically punish homophobic motivated crimes, as described above.

There is no assessment of the enforcement of this text. In its Shadow Report, the European Network Against Racism (ENAR) notes that, in spite of governmental efforts to introduce anti-discrimination legislation and practices among law enforcement officials and within concerned institutions, training and real implementation is slow.¹⁵⁴ The Ombudsperson does not give particular attention in its annual reports to human rights violations motivated by homophobia.¹⁵⁵ In addition, police authorities and the Superior Council of Magistracy declare they do not have statistics or data disaggregated on sexual orientation,¹⁵⁶ while the Gendarmerie could offer an analysis of administrative fines issued.¹⁵⁷

After the decriminalisation of homosexual consensual relationships between adults (Article 200 of the Criminal Code),¹⁵⁸ the police used the provisions of

¹⁵⁰ Romania/ ACCEPT Association and Romania/ Centre for Legal Resources.

¹⁵¹ Romania/ Legea Lege 278 / 2006, (4.07.2006).

¹⁵² Article 75. (1), point c¹ of Romania/ Criminal Code amended in 2006.

¹⁵³ Article 247 and Article 317 of Romania/ Criminal Code amended in 2006.

¹⁵⁴ ENAR, 2007 Shadow report: Romania, available at: http://www.enar.eu.org/en/national/romania/Romania_2006.pdf (05.02.2008). The National Institute of Magistracy reports organizing numerous trainings for graduates studying to become judges and prosecutors and also continuous education for judges and prosecutors. See Response No. 4/305/1154/20109/ 4.02.2010 of Romania/ Consiliul Superior al Magistraturii, on file with national FRALEX expert.

¹⁵⁵ See Response No.132/11.01.2010 of Romania/ Avocatul Poporului, on file with national FRALEX expert.

¹⁵⁶ See Response No.9113/19.01.2010 of Romania/ Direcția Generală de Poliție a Municipiului București, Serviciul de informare și relații publice, on file with national FRALEX expert. See Response No.4/305/1154/20109/ 4.02.2010 of Romania/ Consiliul Superior al Magistraturii, on file with national FRALEX expert.

¹⁵⁷ See Response No.357930/02.02.2010 of Romania/ Jandarmeria Română, Direcția de Jandarmi a Municipiului București, on file with national FRALEX expert.

¹⁵⁸ Romania Lege 61/2002 privind aprobarea Ordonanței de urgență a Guvernului nr. 89/2001 pentru modificarea și completarea unor dispoziții din Codul penal referitoare la infracțiuni

the law on public order to harass homosexuals.¹⁵⁹ The police patrolled the public parks and bars known as meeting places of homosexuals.¹⁶⁰ Reportedly, police officers framed cases against homosexuals and either punished them with administrative fines or blackmailed them and solicited money or alcohol.¹⁶¹ ACCEPT reported a series of such cases in 2002-2003.¹⁶² The victims were represented before the administrative courts and the sanctions were declared void because they were unfounded. As prior to 2006 Article 247 of the Criminal Code did not protect sexual minorities, it could not be used against the police officers harassing gay men. Furthermore, starting a procedure before the NCCD might have been easily dismissed based on the fact that these facts were of a criminal nature.¹⁶³ Similar cases have been reported in 2009-2010 and another administrative fine was declared void in 2009.¹⁶⁴

F.2.3. The Criminal Code adopted in 2009

In 2008-2009, during the drafting of the proposal for the New Criminal Code, the criminal provisions regarding the aggravating circumstances in case of discriminatory motivation of criminal deeds were left out by the Government in its initial proposal. The Anti-discrimination Coalition of NGOs petitioned the parliamentary commission debating the proposal of the new Code. The new Criminal Code adopted on July 17th 2009 maintained the aggravating

privind viața sexuală (16.01.2002). Law no.61/2002 approving Government Emergency Ordinance no. 89/2001 was published in the Official Gazette of Romania, part I, no. 65/30.01.2002, and came into force.

¹⁵⁹ Article 2(1) and Article 2(6) of Romania/ Lege 61/1991 pentru sancționarea faptelor de încălcarea unor norme de conviețuire socială, a ordinii și liniștii publice (18.08.2000) on invoking the offer made in public of sexual services in exchange for money, the prohibition of acts that are obscene, insulting or vulgar, that disturb the public order or disturb persons or affect their dignity.

¹⁶⁰ United States Bureau of Democracy, Human Rights and Labour, Romania. Country Reports on Human Rights Practices. 2005, March 2006, February 2009.

¹⁶¹ The information was provided by Danielle Zavoianu, Coordinator outreach workers, ACCEPT, regarding a case that took place in 2007 in Operei Park, Bucharest, interviewed 02.02.2008.

¹⁶² Case of D.A. & B.S from Operei Park (2002), Case of M.S. from Gara de Nord Park (2003). Their summaries are on file with the Centrul de Resurse Juridice [Center for Legal Resources].

¹⁶³ The National Council for Combating Discrimination deals only with cases of discrimination that are of an administrative nature. When receiving cases of a criminal nature, they decline their competence in favour of the public prosecutor's office.

¹⁶⁴ Interview with Florin Buhuceanu, President of ACCEPT, 20.01.2010. See also Romania/ Judecătoria Sectorul 5 București, Secția a II-a civilă /O.C. v. Jandarmeria Română UM 0575, Civil Judgment 3651 in File no.13019/302/ 2008 (24.04.2009).

circumstances in case of deeds perpetrated with discriminatory intent, including criminal motivation based on sexual orientation, in Article 77.¹⁶⁵

The new Criminal Code also sanctions the abuse in the exercise of authority in Art. 297 as the deed of the civil servant who during the exercise of work-related tasks, is limiting the exercise of a right of a person or creates a situation of inferiority on grounds of ... gender, sexual orientation ... which is punishable with prison from two to seven years and the prohibition to take a public position. Art. 223 on sexual harassment sanctions 'requesting repeatedly favours of sexual nature within a work-related relation or a similar one, if the victim was intimidated in this way or was placed in a humiliating position' with prison from three months to one year or with a fine. The new Criminal Code also sanctions torture by a civil servant on a reason based on any of the grounds of discrimination protected in the Anti-discrimination Law according to Art. 282 with prison from two to seven years.

The new Criminal Code, to enter into force at a later, unknown date, also rephrased the definition of incitement to hatred or discrimination in Article 369 by deleting the list of protected grounds and introducing the following language: 'incitement of the public, by any means to hatred or discrimination against a category of persons is punished with prison from six months to three years or with fine.'¹⁶⁶ The current Art. 317 of the Criminal Code sanctioning hate speech as incitement to discrimination mentions specifically that it protects all grounds of discrimination sanctioned by the Anti-discrimination Law and includes the list of protected grounds for clarification.

¹⁶⁵ New wording of Art. 77 (h) includes as aggravating circumstances 'perpetrating a criminal deed for reasons related to the race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, un-contagious chronic illness or HIV/AIDS infection, or other similar circumstances which are considered by the perpetrator as the causes of the inferiority of a person compared to another.'

¹⁶⁶ Romania/ Lege 286/2009 privind Codul Penal [Law 286/2009 on the Criminal Code] (17.07.2009)

¹⁷² Interview with Ms. Alina Oancea, Executive Director of ACCEPT, on April 10th, 2010. See also incidents mentioned in the 2009 US State Department Human Rights Report, text of the report is available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136053.htm> (14.04.2010).

G. Transgender issues

G.1. Transgender status as a ground for discrimination

The Anti-discrimination Law does not explicitly mention gender identity and expression, including transsexualism. Discrimination on such grounds would be covered by the catch-all phrase ‘any other criterion.’ Neither the legal provisions, the jurisprudence or the academic writing perceive discrimination on grounds of gender reassignment as a form of ‘sex’ discrimination as established in ECJ jurisprudence. See Section A.1., paragraph [19].

Harassment of persons due to their transgender status became increasingly a problem as reported by ACCEPT Romania, the only NGO providing support to LGBT.¹⁷²

G.2. Legislation affecting transgender people

There is no special legislation regulating the situation of transgender people, not even secondary legislation at the level of authorities with competency in such cases – Ministry of Health, Ministry of Internal Affairs, Ministry of Justice, *Inspectoratul Național pentru Evidența Persoanelor* [the National Inspectorate for the Registration of Persons], *Direcția Generală de Pașapoarte* [Passport Department], *Institutul Național de Medicină Legală* [the National Institute of Legal Medicine (NILM)].

G.2.1. Norms on identification data

The law on civil registration data¹⁷³ and the law on the procedures for identification documents¹⁷⁴ offer only indirect guidance on the procedure for sex change and for changes to names and identification data. The legal provisions state that, in order to effect changes in the identification data or in order to undergo sex-change surgery, the plaintiff needs a final judgement

¹⁷³ Romania/ Lege 119/1996 cu privire la actele de stare civila [Law regarding civil status documents] (11.11.1996) with the last modifications from 08.09.2006.

¹⁷⁴ Romania/ Ordonanța Guvernului 41/2003 privind dobândirea și schimbarea pe cale administrativă a numelor persoanelor fizice.(02.02.2003) with the last modifications from 06.07. 2004.

which is an intrusion on the right to private life of the person, as explained below.¹⁷⁵

In addition, the conditions under which the right to access to a court might be exercised are not clarified in sufficient detail, adding to the uncertainties of the procedures.¹⁷⁶

According to Article 44 (i) of the Law 119/1996 on civil status documentation, the information on the new sex can be entered in the civil status documents upon request, once the individual has a final decision from a court. This is an administrative procedure carried out by the civil status bureau within the mayor's office. The regulations implementing the law do not contain any express reference to this situation and do not clarify the procedures.¹⁷⁷

According to Article 2.(2).1 of the Ordinance 41/2003 on administrative venues for changing names, any transgender person can apply for an administrative procedure to change the individual's forename and the identification documents only after the approval of sex change has been given in a final decision by a court. Additionally, the person must provide a forensic medical act stating his/her sex. The law does not specify whether such an act may be issued by the general practitioner, the doctor who performed the surgery or whether it must be issued by the NILM. In practice, the authorities require a certificate issued by the NILM which implies delays and travelling to Bucharest for those outside the capital. Furthermore, the NILM does not have special expertise in handling such cases nor protocols or procedures for carrying out such examinations.¹⁷⁹ The request of forensic medical expertise and the whole civil case in court are very intrusive into the individual's private life, instead of being a decision by the individual with the support of medical specialised personnel.

¹⁷⁵ Art. 44(i) and Art. 57-58 of the Law 119/1996.

¹⁷⁶ The laws do not specify which court is competent to judge the case for changes in identification data, on what legal basis, whether it is a contradictory procedure or a non-contradictory procedure, in the event of it being a contradictory procedure what institution the case should be filed against, if the case is a sensitive case and can be heard in camera, what the judicial tax that needs to be paid is, what the means of evidence necessary in order to get a positive judgement are, where the first instance's judgement is appealed etc. See the case of D in Annex 1.

¹⁷⁷ Romania/ Metodologie 1/1997 pentru aplicarea unitară a dispozițiilor Legii nr. 119/1996 cu privire la actele de stare civilă, (13.10.1997).

¹⁷⁹ The National Institute of Legal Medicine regularly handles cases to assess the legal capacity of the person or the degree of physical injuries. See information available at: <http://www.legmed.ro> (02.10.2008). See the Case of D. in Annex 1, when the expertise report recommended a one-year waiting period before allowing the sex-change operation to take place.

The National Inspectorate for the Registration of Persons declared that in the last seven years they had received six requests for change of forename due to sex changes. No other information was available.¹⁸⁰ The NILM states that they have not received any request for expert forensic examination in the last three years, which contradicts information provided by NGOs, by the lawyers and by the media about individuals addressing requests during the same period of time.¹⁸¹ Also, this information is contradicted by the fact that the authorities report that during 2008-2009 four persons have changed their forename because of gender reassignment medical intervention.¹⁸²

G.2.2. The sex-change operation and adjacent treatment

There is no clear data on whether sex-change surgery and treatment are performed in Romania and in what conditions. Spitalul Clinic de Urgență Floreasca declared that it is the only clinic in Romania where this type of surgery is performed according to the law.¹⁸³ However, the hospital does not ensure the pre- and post-operation treatment necessary according to the medical protocols and does not have a department of transsexology.¹⁸⁴ The costs of such intervention and treatment are not covered by public health insurance.

The NILM requires that transgender people who want to undergo a sex-change intervention go through multiple psychiatric assessments and treatments as well as hormone treatment.¹⁸⁵ These decisions are ad hoc, as the Institute lacks a standing committee specialised in transgender-related issues and there is no publicly standardised procedure or medical protocol established on scientific grounds to ensure the predictability and objectiveness of the decision.

¹⁸⁰ See Response No.203520/31.01.2008 of the Romania/ Inspectoratul Național pentru Evidența Populației, Ministerul Internelor și Reformei Administrative, on file with national FRALEX expert.

¹⁸¹ See Response No.A8/172/12.01.2010 of Romania/ Institutul Național de Medicină Legală “Mina Minovici” București, on file with national FRALEX expert.

¹⁸² See also Response No.52590/S1/29.01.2010 of Romania/ Inspectoratul General al Poliției Române, on file with national FRALEX expert.

¹⁸³ See Response No.14/04.02.2008 of Romania/ Spitalul Clinic de Urgenta Floreasca given to ACCEPT, on file with national FRALEX expert. A follow-up letter sent in January 2010 remained without a response. See Center for Legal Resources’ Request of 05.01.2010, on file with the national FRALEX expert.

¹⁸⁴ See Response No.1059/24.01.2008 of Romania/ Spitalul Clinic de Urgenta Floreasca given to a Romanian citizen living in the Netherlands asking about the existence of a transsexology department, on file with national FRALEX expert, courtesy of ACCEPT.

¹⁸⁵ Interview with Ms Danielle Zavoianu, Project Assistant, ACCEPT, interviewed 02.02.2008. See also Case D in Annex 1.

H. Miscellaneous

H.1. Decriminalisation of consensual homosexual relations

The provisions of the Criminal Code banning consensual homosexual relations between consenting adults were repealed in 2002.¹⁸⁶ The legal changes came as a result of pressure from abroad, including from the United Nations,¹⁸⁷ the Council of Europe,¹⁸⁸ and the European Union (on the basis of the Copenhagen political criteria for EU enlargement and through the regular annual reports prior to accession).¹⁸⁹

H.2. Limitations in gathering statistical data

The difficulties in drafting effective legislation and public policies responding to the needs of LGBT people start with the lack of relevant statistical data. Public authorities invoke Article 7 (1) of Law 677/2001 on the protection of persons regarding the use of personal data¹⁹⁰ prohibiting ‘the use of personal data regarding the racial or ethnic origin, political, religious, philosophical or similar opinion, membership of unions, as well as private data regarding health

¹⁸⁶ Romania/ Emergency Ordinance No. 89 (21.06. 2001); adopted by Parliament through Romania Lege 61/2002 privind aprobarea Ordonanței de urgență a Guvernului nr. 89/2001 pentru modificarea și completarea unor dispoziții din Codul penal referitoare la infracțiuni privind viața sexuală (16.01.2002).

¹⁸⁷ Human Rights Committee, (CCPR/C/79/Add. 111, July 28, 1999 para 16).

¹⁸⁸ The Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, Draft opinion on the application for membership to the Council of Europe submitted by Romania, appendix II, AS/Jur (44)74, Strasbourg, 1993 in which PACE expressed its expectation that Romania would change its law in such way that Article 200 of the Penal Code would no longer consider homosexual acts in private between consenting adults a criminal offence. Similarly, in its Resolution 1123/97 on the honouring of obligations and commitments by Romania, the Parliamentary Assembly noted that ‘certain provisions of the Penal Code now in force are unacceptable and seriously imperil the exercise of fundamental freedoms, especially Article 200 on homosexual acts’, and expected that within one year Romania would ‘amend without delay the provisions of the Penal Code’.

¹⁸⁹ Resolution of 19.09.1996, the European Parliament denounced the intention of the Romanian Parliament to increase punishments for consensual same-sex relations between adults. European Parliament - Résolution sur l’aggravation des sanctions contre les homosexuels en Roumanie. Similarly, in its Emergency Resolution on equal rights for gays and lesbians in the EC of 17.09.1998 the European Parliament demanded the elimination of discrimination and unequal treatment of homosexuals.

¹⁹⁰ Romania/Lege 677/2001 pentru protecția persoanelor cu privire la prelucrarea datelor cu caracter personal și libera circulație a acestor date, Law 677 on the protection of persons in relation to the use of personal data (21.11.2001).

status or sexual life'. The same provision is identified as a deterrent for effective data-gathering and policy-making in the case of women¹⁹¹ or Roma.¹⁹²

H.3. Marriage and partnership

Currently, the Romania/Codul familiei [Family Code] defines family in Article 1.3 in gender-neutral terms, 'based on marriage between spouses',¹⁹³ as provided for by Article 48 of the Constitution.¹⁹⁴ Partnerships are not recognised by Romanian legislation. Though the standing definition of marriage does not exclude same-sex marriage, it has never been used for this purpose and the practitioners agree that the interpretation of the Family Code definition limits the institution of marriage to heterosexual couples. Nevertheless, in the last two years religious and conservative groups have organised attempts to restrict marriage to opposite-sex couples.

In 2006, a coalition of religious actors collected signatures for a proposal to modify the Constitution and explicitly introduce a same-sex marriage ban. The Court found unconstitutional the citizens' initiative but the decision was based on procedural grounds (the initiative did not respect the number and geographical representation for signatures).

The new Civil Code adopted in 2009,¹⁹⁷ includes in Article 277 a prohibition of same-sex partnership and marriage and a prohibition to recognize partnerships and same-sex marriages registered in other countries.¹⁹⁸ The Code adds that the

¹⁹¹ See, CEDAW/C/ROM/CO/6, Concluding comments of the Committee on the Elimination of Discrimination against Women, Romania, June 2006.

¹⁹² DecadeWatch : Roma activists assess the progress of the Decade of Roma Inclusion 2005-2006, available at: <http://www.romadecade.org/index.php?content=6>, (10.10.2007).

¹⁹³ Art. 1.3 Romania/Codul Familiei, Family Code (4.01.1953).

¹⁹⁴ The Constitution of Romania, available at <http://www.cdep.ro/pls/dic/site.page?id=371> (10.01.2008) states in Art. 48: 1) The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of parents to ensure the upbringing, education and instruction of their children. (2) The terms for marriage dissolution and nullity of marriage shall be established by law. Religious weddings may be celebrated only after the civil marriage. (3) Children born out of wedlock are equal before the law with those born within wedlock.

¹⁹⁷ Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009).

¹⁹⁸ Art. 277 of Romania/ Lege 289/2009 privind Codul Civil [Law 289/2009 on the Civil Code] (17.07.2009). 'same-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognized in Romania.' Similarly, the new Civil Code mentions that same-sex or opposite-sex civil partnerships registered or contracted abroad by Romanian citizens or foreigners are not recognized in Romania.

legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force without addressing the conflict between the express provisions recognising the marital status of the EU citizens as granted by their countries mentioned in the legislation transposing Directive 2004/38/EC and the recent prohibition of recognition of same-sex marriages or partnership entered into abroad by same-sex couples.¹⁹⁹ The new Civil Code will enter into force at a later date still unknown.

The current legal regime of same-sex spouses validly married under the laws of another state is not affected as provided for by regulations on international private law.²⁰⁰ However, the new Civil Code prohibition of recognition by Romanian authorities of same-sex marriages and heterosexual and same-sex partnerships validly contracted abroad will trigger legal conflicts once the new Civil Code will enter into force.

H.4. LGBT people in detention

The Romanian Helsinki Committee (APADOR-CH) found in its periodic reports that: prison staff have started to recognise that there are cases of men having sex with men; there are sexual abuses in prisons conducted by inmates and ignored by the guards; the complaint procedures in case of rape are not efficient; in general, there is a lack of protection in complaint procedures; homosexuals are discriminated against by their fellow inmates and this treatment is tolerated by the management; sexual education and condoms are absent.²⁰¹ ACCEPT declared that abuses still exist and that they receive complaints. ACCEPT started monitoring detention facilities and filed a case.²⁰²

Recent regulations create the legal possibility for protection of vulnerable groups, including sexual minorities, who can be accommodated, on request, in special rooms.²⁰³ There is no thorough assessment on the implementation of this

¹⁹⁹ Romania/Lege 500/2006 privind aprobarea Ordonanței Guvernului nr. 30/2006 pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 102/2005 privind libera circulație pe teritoriul României a cetățenilor statelor membre ale Uniunii Europene și Spațiului Economic European [Law 500/2006 on amending and approving Ordinance 30/2006] (28.12.2006) defines as a partner ‘a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.’

²⁰⁰ See Section B.1 on applicability of Law 105/1992.

²⁰¹ APADOR-CH (2005) ‘Sistemul penitenciar în România 1995-2004’ [The Penitentiary System in Romania 1995-2004], pp.49-52, available at: <http://www.apador.org>.

²⁰² Interview with Florentina Bocioac, Executive Director of ACCEPT, 02.02.2008.

²⁰³ Art. 7.(5) of Romania/ Hotărârea Guvernului nr.1897/21.12.2006 pentru aprobarea Regulamentului de aplicare a Legii nr. 275/2006 privind executarea pedepselor și a măsurilor dispuse de organele judiciare în cursul procesului penal [Decision for the approval of the Regulations on application of the Law on the execution of punishments and other measures decided by the judiciary during criminal case], (16.01.2007).

provision and on its effectiveness in combating discrimination and protecting vulnerable groups. The *Administrația Națională a Penitenciarelor* [National Penitentiary Administration (NAP)] established specific procedures for requesting accommodation in rooms for vulnerable persons and provided the centralized data for each detention unit.²⁰⁴ Thus, the number of places available in protected rooms is of only 567 for a capacity of 30.229 in the penitentiary system; only 76 places are occupied at the moment, out of 38 detention facilities under the administration of NAP, nine facilities do not include rooms for detainees belonging to vulnerable groups as they did not receive specific requests and out of the six penitentiary-hospitals, four have socio-medical units for persons with special needs. The approval rate for the requests to be transferred in rooms for vulnerable groups varies for the different locations, with 18 facilities having a 100 per cent approval rate. The rejection of the transfer request can be appealed before the instruction judge, though the centralized data provided by the NAP shows that no rejection decision was ever challenged by the detainees.

H.5. Incidents of surfaced institutional homophobia

Article 462 of the new Civil Code as well as the recent draft law proposed for public discussions by the *Oficiul Român pentru Adopții* [Romanian Office for Adoptions] regarding a new law regulating adoptions explicitly prohibit adoption of children by two persons of the same sex.²⁰⁵ The express prohibition proposed, without any feasibility study or scientific research to justify this legal solution, indicates institutional homophobia.²⁰⁶ This prohibition is questionable given that the current Adoptions' Law specifically prohibits both simultaneous and consecutive multiple adoptions, except in case of married couples, making adoption by same sex couples impossible.²⁰⁷ Ironically, the Romanian Office for Adoptions justifies the need for a new legal framework on the fact that Romania signed on March 4th 2009 the Council of Europe European Convention on the Adoption of Children (Revised).²⁰⁸

²⁰⁴ Response No.15582 –DSDRP – 03.02.2010 of Romania/ Administrația Națională a Penitenciarelor, on file with national FRALEX expert.

²⁰⁵ Romania/Oficiul Român pentru Adopții, Proiect de modificare a legii privind regimul juridic al adopției available at http://www.adoptiromania.ro/documente_dezbatare.aspx (01.01.2010).

²⁰⁶ Response No.SSPEA/LV/169/29.01.2010 of Romania/ Oficiul Român pentru Adopții, on file with national FRALEX expert.

²⁰⁷ Art.7 of Romania/Lege 273 /2004 privind regimul juridic al adopției [Law 273/2004 on the legal regime of adoption](21.06.2004).

²⁰⁸ Art. 7 of the Revised European Convention provides that 'States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered

The ROI reported that during the asylum procedure it does not apply the tests known as 'phallometry' or 'phallometric testing'.²⁰⁹

No legislation or draft legislation sanctioning public information or campaigns related to homosexuality were reported recently. A draft amendment to the Law 60/1991 proposing prohibition of public events associated with homosexuality was rejected in February 2008 by the Parliament.

H.6. Sexual and reproductive rights

In 2005, the Constitutional Court issued a decision on the draft law on reproductive health and medically assisted reproduction.²¹⁰ Among other infringements of the Constitution, the Court also discussed the discriminatory nature of the draft law which excluded individuals who were not in an established relationship from accessing medical reproductive services and reproductive assistance.²¹¹

In September 2009, another draft law on medically assisted reproduction was introduced in the Parliament, containing the same restrictions for single women which were previously declared unconstitutional. Although the bill received negative opinions from all parliamentary commissions and from the Government, it passed the Senate by tacit adoption procedure (Art.75 (2) of the Constitution). The bill is presently being debated in the Chamber of Representatives.²¹²

into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship.'

²⁰⁹ Response 2396807 of the Romanian Office for Immigration, 24.02.2010, on file with national FRALEX expert.

²¹⁰ Romania/ Proiect de lege privind sănătatea reproducerii și reproducerea umană asistată medical, L334/2004, available at: <http://80.97.216.132/senat.proiect.asp?cod=9290&pos=0>.

²¹¹ Romania/ Curtea Constituțională, DECIZIE 418 din 18 iulie 2005 asupra sesizării de neconstituționalitate a Legii privind sănătatea reproducerii și reproducerea umană asistată medical, published in Romania/ Monitorul Oficial nr.664/26 iulie 2005, point 5. See case in Annex 1.

²¹² Romania/ Proiect de lege privind sănătatea reproducerii și reproducerea umană asistată medical, L407/02.09.2009, available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=10681.

I. Good practices

I.1. Pro-active interventions by the authorities

First, the initiation of *ex officio* cases on the ground of sexual orientation by the NCCD contributed to the increased visibility of this institution in the LGBT community and to increased trust among potential victims.²¹³

Secondly, the 2005 public interventions of government officials (including the President of Romania, Traian Băsescu, the Minister of Justice at the time, Monica Macovei, and the NCCD²¹⁴) who asked the mayor of Bucharest to reconsider his decision not to authorise a gay march led to respect for freedom of assembly but also to increased understanding of the issue.

Thirdly, a positive practice consists of the presence of local police and gendarmerie during the marches organised in 2005-2009, the effective collaboration with ACCEPT (the NGO organising the marches) and the protection secured for participants against mobs of neo-Nazi youngsters, hooligans from football clubs and religious extremists who organised a counter-demonstration entitled Normality March.²¹⁵

I.2. Non-discriminatory access to goods and services

According to the Anti-discrimination Law, the protection against discrimination based on sexual orientation is guaranteed in all fields of the social sphere, including in relation to access to goods and services. Based on this legal

²¹³ Romania/CNCD/ Tarom decision, Decision 39, (01.03.2005). See also, Romania/CNCD/ ACCEPT v. the Ministry of Health for the National Institute of Haematology, Decision 337, (21.11.2005) and Romania/CNCD/ ACCEPT v. the Ministry of Health, Decision 260, (29.08.2007).

²¹⁴ The NCCD issued a press release disapproving of the local authorities' decision and expressing support for the event. The NCCD started an *ex officio* investigation against the mayor's office to determine whether the decision was discriminatory on the ground of sexual orientation. (www.cncd.org.ro)

²¹⁵ ACCEPT, Press release, Marsul diversitatii inca un pas spre toleranta (05.06.2006) available at http://accept-romania.ro/index.php?option=com_content&task=view&id=52&Itemid=75 (13.02.2008).

provision, ACCEPT developed three strategic litigation cases both with the NCCD and with the civil courts securing jurisprudential confirmation.²¹⁶

²¹⁶ See in Annex 1: TAROM Case, DZ v. Distrigaz Sud Case and the Case ACCEPT v. the Ministry of Health on blood donation.

Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	ACCEPT on behalf of B.R. v. A. V., M. I. and Regia Autonoma Piete, Agrement si Salubritate Oradea; Regia Autonoma de Piete, Agrement si Salubritate Oradea (employer), Decision 29 of the NCCD.
Decision date	07.09.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	Mr R. B. was harassed and ill-treated by his superiors Mr A. V. and Mr M. I. on the grounds of his presumed homosexuality. Mr M. I. discussed R. B.'s presumed sexual orientation with his colleagues, asked the plaintiff to resign as he was gay and started sanctions against Mr R. B. Mr R. B. filed a complaint with the NCCD with the support of an NGO but, following the investigation visit organised by the NCCD, he was punished and transferred from his work post (Oradea Zoo) to work in the grave yard.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the defendants created a hostile and intimidating environment on the grounds of presumed sexual orientation and retaliated against the plaintiff following the investigation by the NCCD.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Discrimination in employment; creating a hostile and intimidating environment on the grounds of presumed sexual orientation; victimisation following the complaint to the NCCD.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Defendants punished with a fine of 400RON and 1,000 RON (111 Euro and 278 Euro) and an administrative warning was issued to the employer (the local public authority).
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	B. R. Case Sentinta Civila [Civil Judgement] No.620/L.M./2007, File No.6094/111/2006; Tribunalul Bihor Applicant: B. R. represented by ACCEPT; respondents: A. V., administrator of the Oradea Zoo, M. I., human resources manager at the Romania/ Regia Autonoma de Piete, Agrement si Salubritate Oradea, and Romania/ Regia Autonoma de Piete, Agrement si Salubritate Oradea (employer)
Decision date	01.10.2007. The judgement is not final. The appeal is pending before the Oradea Court of Appeal.
Reference details (type and title of court/body; in original language and English)	Romania/ Tribunalul Bihor [Bihor Tribunal], acting as court of first instance in a labour dispute.
Key facts of the case (max. 500 chars)	B. R. was subjected to discrimination and victimisation by his superiors and by his employer because of his supposed sexual orientation. The acts of discrimination included discriminatory remarks in the presence of his colleagues; B. R. was asked to resign; B. R. was given a disciplinary sanction because he lodged a complaint of discrimination with the equality body (NCCD) which conducted an investigation at his workplace; B. R. was removed from his position at the Zoo and sent to the cemetery, also in the administration of the employer.
Main reasoning/argumentation (max. 500 chars)	B. R. was subjected to discrimination, harassment and victimisation by the employer through its representatives (A. V. and M. I.). This was demonstrated by the decision of the NCCD and by the declaration of one witness. The disciplinary sanction and the removal from his position at the Zoo are illegal and void. These behaviours created serious suffering for B. R. which open the way to compensation.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Harassment: a systematic treatment, including discriminatory remarks and administrative measures taken against a person because of his alleged sexual orientation. Victimisation: disciplinary sanctioning of an employee when a complaint of discrimination was introduced and the employer indirectly refers to it. The application to the discrimination cases of the civil responsibility principle: the acts of the employees perpetrated at work or in relation to their work fall under the responsibility of the employer.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The labour decisions sanctioning the plaintiff were declared illegal and void. The payment of 3,000 lei (900 Euro) compensation (for moral damages). Injunction upon the employer to end all discrimination, harassment and victimisation and to present public apologies in front of the Zoo's employees. 50 lei (around 1.50 Euro) civil fine for each day of delaying the injunctions. Since the employer is a public company, the case can be used to lobby the government to include standards of non-discrimination within public companies.
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	Tarom decision, Decision 39
Decision date	01.03.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	The NCCD started an ex officio case subsequently joint with a complaint file by two NGOs (ACCEPT and CRL) following the advertisement of a Valentine's Day promotion for services for couples issued by the national flight carrier TAROM. The terms of the promotion specified that only two partners of the opposite sex can buy one ticket and get the second ticket free for selected destinations, as mentioned in an internal note sent by TAROM to all its agents.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that, by establishing as a condition that only heterosexual couples can benefit from the promotion, TAROM unjustifiably created an exclusive treatment in relation to homosexual couples and refused access to transportation services. The NCCD noted that, even if there was no intention to discriminate against homosexual couples, the effects of the restriction lead to discrimination.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Ex officio NCCD procedures; access to services; relation between intention to discriminate and effect of discriminatory actions.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Administrative fine of 5,000,000 ROL (143 Euro) and recommendation for the company to organise training on equal opportunities and anti-discrimination principles.
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	Asociatia Attitude v. Silviu Manastire, <i>Gazeta de Cluj</i> , Decision No. 207
Decision date	14.07.2003
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	The plaintiff is an NGO with a mission to protect and promote the rights of LGBT people in Romania. The plaintiff complained against an article published in the local newspaper <i>Gazeta de Cluj</i> with the title: 'Homosexuals from Cluj debauch in spaces belonging to the Vatican' which followed another article, 'Public Danger – the Bar Harley Davidson'.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the article established a hostile, degrading and humiliating environment which was hostile to homosexuals and emphasised and repeated debauchery as a way of life for homosexuals, and considered that the author misused his freedom of expression.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Creating a hostile, degrading and humiliating environment in the media; abusing freedom of expression through discriminatory messages.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Administrative fine of 2,000,000 ROL (57 Euro).

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	SA v. Ziarul Atac, Decision 231
Decision date	29.08.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	The tabloid <i>Atac</i> published pictures of the plaintiff naked under the title ‘Satana with bare penis’ and with a comment stating that it is important ‘to reveal such a guy who is actually a little girl’ and emphasising the need to disclose all homosexuals as dangerous.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the article promotes a degrading picture of homosexuals by stating that they should be unmasked and that it infringed the right to dignity and the right to privacy of the plaintiff as its aim was to reveal the sexual orientation of the plaintiff.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The right to dignity and the right to privacy can be invoked as a justifiable limitation for the freedom of expression.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The NCCD issued an administrative warning against the tabloid <i>Atac</i> .

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 6

Case title	ACCEPT and CRL on behalf of PMG v. priest IS, Decision 16
Decision date	18.01.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	ACCEPT and CRL filed a complaint on behalf of the victim who worked as a singer in the church choir of Biserica Adormirea Maicii Domnului, Braila County. After the religious service, the local priest presented a local newspaper with an announcement of a young gay man seeking a partner, claiming that the announcement belonged to PMG. PMG complained to the Bishop but the priest started to spread rumours in the community that PMG 'goes after men' and convened a local council to investigate the private life of PMG.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the deeds of the priest had the effect of excluding PMG from the local community and from his position as a singer in the church choir and that the priest spread rumours with the effect of restricting the right to privacy and the right to dignity. The NCCD noted that the statements of the defendant were issued <i>nome proprio</i> , after the religious service and did not represent the position of the Orthodox Church, noting that the hierarchy of the church tried to intervene and mediate in the dispute. In the dissenting opinion, it was underlined that the priest acted as a representative of the Orthodox Church which considers homosexuality as a sin and that the priest is under a religious oath all the time.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Autonomy of religious denominations as resulting in observance of internal canon law and anti-discrimination procedures. Analysing the social context in order to assess the impact of discrimination.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Administrative fine of 10,000,000 ROL (278 Euro).

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 7

Case title	ACCEPT v. the Ministry of Health for the National Institute of Haematology, Decision 337
Decision date	21.11.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	The NCCD started an ex officio case following an article published by <i>Adevarul</i> quoting the protestations of an NGO, ACCEPT, on the discrimination of sexual minorities in access to health services (denial to donate blood by the National Institute of Haematology). The National Institute of Haematology confirmed that ‘donors with other sexual orientations are considered a risk group and are permanently excluded from blood donation’.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the permanent exclusion of gay men from donating blood, though objectively justified by a legitimate aim, is illegal as the means chosen are not adequate and necessary.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Ex officio NCCD procedures; access to health services; reasonable limitation; limitation of rights should be objectively justified by a legitimate aim and the means to reach that particular aim must be both adequate and necessary.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The NCCD found discrimination on the grounds of Article 2 of GP 137/2000 but decided that, given the public interest pursued by the defendant, it would issue an administrative warning and recommended to the Ministry of Health that it eliminate all discriminatory provisions from the practice of the National Institute for Haematology and other institutions. The NCCD was supposed to monitor for 90 days the change in practice by the defendant. The case re-emerged in 2007 in the form of a draft Order of the Ministry of Health listing homosexuals among the risk groups prohibited from donating blood and including a questionnaire for prospective blood donors inquiring about whether they have had homosexual relations.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 8

Case title	ACCEPT v. the Ministry of Health, Decision 260
Decision date	29.08.2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Consiliul Național pentru Combaterea Discriminării [National Council on Combating Discrimination]
Key facts of the case (max. 500 chars)	The NCCD started an ex officio case, subsequently joint with a complaint file by ACCEPT, based on a draft Order of the Ministry of Health on blood donation which mentioned in the questionnaire specific questions for men (whether they had had sexual relations with other men) and for women (whether their partners had had sexual relations with other men) and establishing criteria for permanent exclusion from blood donations: the Order states that homosexuals are permanently excluded from blood donations as ‘their sexual behaviour poses them in a group of high-risk for dangerous infectious diseases’.
Main reasoning/argumentation (max. 500 chars)	The NCCD found that the permanent exclusion of gay men from donating blood is not objectively justified by a legitimate aim. The donated blood is tested and sexual orientation of the donor is irrelevant. In this particular context, the sexual habits are more relevant.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Ex officio NCCD procedures; access to health services; reasonable limitation; limitation of rights should be objectively justified by a legitimate aim.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The NCCD found discrimination on the grounds of Article 2 of the GP 137/2000 but did not issue an administrative warning. However, it recommended that the Ministry of Health eliminate all discriminatory provisions in the draft of the Order on blood donations.

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC - no case law is available.

Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC.

Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 1

Case title	N.E.S. v. Romanian Office for Immigrations, Dosar 6848/285/2008, Decizia 347
Decision date	01.07.2009
Reference details (type and title of court/body; in original language and English [official translation, if available])	România/Tribunalul Suceava,
Key facts of the case (max. 500 chars)	N.E.S appealed with the support of two NGOs against the rejection of his asylum application which was initially rejected by ROI. In its rejection, ROI acknowledged that the asylum seeker invoked fear of persecution due to his homosexuality and due to the fact that homosexuality was criminalized and the Cameroons' authorities were aware of his status as he stated that he was prior arrested for two weeks but found that 'the number of such indictments (for homosexuality) is reduced and, as for any other crime, the accusations must be proved.' The ROI decision proceeds to find that 'the fact that the applicant was released (after two weeks), without any documentation shows that there was not enough evidence to lead to an indictment for being guilty and that because of this, practically there is no risk for him to be condemned for this reason.' When assessing the country of origin information the ROI decision concluded that 'from the information we have, it is clear that there are enough legal guarantees in Cameroon for a fair trial, observing access to justice related rights and the presumption of innocence.' The ROI did not assess how the risk of persecution applies in the personal case of the applicant - a person already arrested for homosexuality and only noted that 'in such cases persons are convicted only if caught in action' and mentioned that 'the applicant is not a public person and relocation to 'another city where he is not known and not sanctioned by the public is a real possibility.' The decision also stated that 'the applicant is aware of the legal regime of homosexuality (criminal sanction) and of the possibility of being liable and he basically takes his risk (when engaging in homosexual conduct).' The ROI decision was attacked by the applicant represented by an appointed lawyer but the court of first instance maintained the ROI decision.

Main reasoning/argumentation (max. 500 chars)	The appeal court looked at the country of origin information (provisions of Cameroons' Criminal Code sanctioning homosexual conduct) and at the personal situation of the applicant (being arrested for two weeks after being spotted by the neighbours while hugging a foreigner in his car) and concluded that 'in case of return in his country of origin, the applicant runs the risk of being condemned for his sexual orientation, hence the conditions for protection as refugee under the Romanian law are met.'
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Sexual orientation as reason for invoking justified fear of persecution; assessment of country of origin information
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The tribunal decided in favour of the applicant, quashed the ROI decision and granted asylum.

Chapter C, Asylum and subsidiary protection, case law relevant to art 2/h of Council Directive 2004/83/EC - no case law is available as the legislation does not cover same-sex partners as members of the family.

Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

[1].

Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC - no case law is available. Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

Chapter E, Freedom of assembly – relevant case law

Case title	Case of Asociația Pro Vita pentru Copii Născuți și Nenăscuți – Filiala București v. Primăria Municipiului București și Asociația ACCEPT, Sentința Civilă [Civil Judgement] nr.2807/24.10.2008 of the Romania/ Tribunalul București [Bucharest Tribunal]; File No.18838/3/CA/2008
Decision date	24.10.2008
Reference details (type and title of court/body; in original language and English [official translation, if available])	Romania/ Tribunalul Bucuresti [Bucharest Tribunal]
Key facts of the case (max. 500 chars)	On 19 May 2008, Asociația Pro Vita filed an administrative complaint for an injunction against the gay march and for the annulment of the authorization issued by Bucharest Mayor’s Office to ACCEPT Association in the form of a protocol of collaboration between the two entities allowing for the organization of the march. The administrative complaint was introduced a few weeks before the gay march was scheduled. Due to procedural reasons related to lack of written evidence provided before the court, the Bucharest Tribunal reviewed the case on its merits after the gay march took place.
Main reasoning/argumentation (max. 500 chars)	The limitations on freedom of assembly were argued, the plaintiffs invoking allegedly infringing ethical and moral norms, as well as the right to private and family life. According to the plaintiff, the gay march is aiming to promote sexual relations between same-sex persons which breach the human rights of others. The plaintiff invoked <i>Dudgeon</i> case arguing that sexuality can be legitimately limited by the authorities, as defending children’s moral and spiritual integrity was one of the legitimate aims advanced by the plaintiff.

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The case recognizes the right to freedom of assembly in the case of the gay march. The court stated clearly that the protection of the ethical and moral norms, the right to private and family life and the children's moral and spiritual integrity are not legitimate aims that justify a denial of authorisation. The court stated that the authorisation of a gay march alone is not susceptible of violating the right to private life of others. The court found <i>Dudgeon</i> jurisprudence not to apply in the matters of this case. The court relied on <i>Baczowski v Poland</i> .
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	First, the court dismissed the request for an injunction as the claim was not valid anymore at the time of the decision, the gay march already took place. Second, the court justified the dismissal of the claim regarding the annulment of the protocol on substantive grounds related to pluralism and ensuring the exercise of the right to freedom of association and assembly (Art.11 of the ECHR), according to <i>Baczowski v Poland</i> . The judgment became final after the appellate court upheld the decision of the first instance court.

Chapter F, Hate speech - no case law is available.

Response of the General Prosecutor No. VIII-1 from 25.01.2008, response of the Supreme Council of Magistrates No. 28517/1154/2007 from 15.01.2008 and response of the Ministry of Justice No.146817 from 21.12.2008, on file with FRALEX.

Chapter G, Applicability of legislation on transgender issues.

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 1

Case title	Case of D. Sentinta Civila [Civil Judgement] nr.1656/23.02.2006 of the Romania/Judecatoria Sectorului 2 Bucuresti [Bucharest Second District's First Instance Court]; File No.1338/300/2004 (Old number 1721/2004)
Decision date	23.02.2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	România/Judecătoria Sectorului 2 Bucureşti [Bucharest Second District's First Instance Court]
Key facts of the case (max. 500 chars)	D. wanted to change her sex from female to male. She introduced a civil case in 2001 which was not successful. In 2004 she introduced another civil case against Bucharest Second District's Local Council asking for the authorisation for the sex change and the change of her name accordingly. The court asked for an expert report from the National Institute of Legal Medicine (NILM). The expert report was provided after five months. It stated that, taking into consideration D's situation, the sex-change operation is not the only treatment for her condition. Consequently, it issued a series of recommendations to be observed for a period of one year and after that the NILM allowed a re-evaluation. In 2006, the re-evaluation report allowed the sex-change operation. Consequently, the court decided in this sense.
Main reasoning/argumentation (max. 500 chars)	The request for a sex change and change of name is based on the following legal provisions: Article 26 paragraph (2) and Article 34 of the Constitution, Article 44, letter (i) and Article 57-58 of the Law 119/1996, Article 8 of the European Convention on Human Rights.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The nature of the case is contradictory – the respondent is the local council in the area of the person's domicile. The court based its decision on forensic medical expertise. This expertise could only be provided by the NILM. The commission of experts recommended the person a period of time to think about the decision etc without having clear, scientific standards to be used or a predictable procedure to be observed. During this time the case was pending before the court.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The court authorised the sex change and the change of name. The court asked the Bucharest Second District's Local Council to make the modifications in the civil status documents of D. The civil case took two years.

Chapter H, Miscellaneous, relevant case law 1

Case title	T. M. v Ministry of Justice, National Administration of Penitentiaries, Ministry of Administration and Internal Affairs, General Inspectorate of the Romanian Police, Constanța County Inspectorate of Police
Decision date	Pending – File No. 19148/300/2006
Reference details (type and title of court/body; in original language and English [official translation, if available])	Civil action – request for compensation and general measures; Judecatoria Sectorului 2 Bucuresti [Bucharest Second District’s First Instance Court] Applicant: T. M. Respondents: Ministry of Justice, National Administration of Penitentiaries, Ministry of Administration and Internal Affairs, General Inspectorate of the Romanian Police, Constanta County Inspectorate of Police. Third-party intervention: ACCEPT.
Key facts of the case (max. 500 chars)	T. M. was in detention during 2004-2005 in several penitentiaries. In some of them he claims to have been subjected to ill treatment by inmates who abused him sexually and by the staff who did not protect him against such treatment. Although T. M. alleges complaining to one of the supervisors regarding this treatment, there was no official registration of the complaint and no measures were taken. According to his medical records, T. M. repeatedly mutilated himself during detention.
Main reasoning/argumentation (max. 500 chars)	Reasoning of the Applicant: T. M. suffered physical and moral damage because of the lack of action on the part of the authorities. He also suffered from exposure to discrimination and inhuman and degrading treatment due to the systematic failure of the authorities to ensure their positive obligation to protect his physical integrity, dignity and private life. Reasoning of the Respondents: the Applicant had access to all procedures and rights guaranteed for all detainees without discrimination. There was no complaint registered by the applicant during detention.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Key issues introduced by the Applicant: the lack of effective complaints procedures within the penitentiary system seriously infringes human rights. Sexual minorities are at particular risk in such a system. The segregation, discrimination and abuse against sexual minorities or people allegedly associated with homosexuals are tolerated by prison staff which amounts to infringements of various human rights.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Applicant asked for: 50,000 Euro compensation; an injunction upon the respondent authorities to adopt and implement institutional measures against discrimination of T. M. and future discriminations; civil damages and civil fine for each day of delaying the fulfilment of institutional measures that will be ordered by the court.

Chapter H, Miscellaneous, relevant case law, case 2

Case title	Reproductive Rights Case - Romania/ Decizie nr. 418/18.07.2005 asupra sesizării de neconstituționalitate a Legii privind sănătatea reproducerii și reproducerea umană asistată medical [Decision No.418/18.07.2005 on the notification of non-compliance with the Constitution of the Law on reproductive health and medically assisted reproduction]; Constitutional Review of a Draft Bill at the request of the President of Romania – File No.545A/2005.
Decision date	18.07.2005
Reference details (type and title of court/body; in original language and English [official translation, if available])	Romania/ Curtea Constituțională a României [Constitutional Court of Romania].
Key facts of the case (max. 500 chars)	In 2005 the Parliament adopted a draft law on reproductive health and medically assisted reproduction containing many provisions that were not in compliance with fundamental rights stated in the Romanian Constitution. One of the issues referred to the subjects of the right to access reproductive medical services and assistance recognised by the law. Though in the general part of the draft this right was recognised to any person, the rest of the draft only referred to couples, <u>denying the right in the case of people who are not in a couple.</u>
Main reasoning/argumentation (max. 500 chars)	The draft creates a privilege for individuals who are part of a couple and, at the same time, discrimination against individuals who are not in a couple. This amounts to a violation of the principle of equality before the law and before the public authorities stated in Article 16 of the Constitution. The existence of an agreement between the couple to access medically assisted reproduction services is an essential condition for the existence of the right to access this service which is against Article 16.(1) of the Constitution.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court recognises: the right of access to medically assisted reproduction services and assistance as a right according to the bill; the marital/couple status as a ground of discrimination in access to medically assisted reproduction services; that the requirement to have an agreement between the couple is in itself excluding the exercise of the right for a category of people – those who are not in a couple.

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Two thirds of the provisions of the bill were found to be in violation of the Constitution. The Court returned the draft to the Senate for amendments to make it comply with the Constitution. Because the violations affected the philosophy of the law in itself, the bill was rejected by the Senate.
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Chapter I, Case law relevant to the impact of good practices on discrimination on the ground of sexual orientation, case 1

Case title	D. Z. v. Distrigaz Sud, Decision 4222 in File no.710/4/2006
Decision date	August, 1st, 2007
Reference details (type and title of court/body; in original language and English [official translation, if available])	Judecătoria sectorului 4 București [First instance court No.4, Bucharest]
Key facts of the case	The plaintiff complained of being subjected to discriminatory conduct based on his affiliation to an NGO defending the rights of LGBT people in Romania (ACCEPT București). The plaintiff is employed by the NGO and when he went to pay the monthly bill to the defendant, employees of the defendant subjected him to degrading remarks. The plaintiff sought civil damages and asked the court to order the defendant to take institutional measures to preclude discriminatory behaviour in the future, to include in its internal norms a specific prohibition of discrimination on all grounds and to train its employees on anti-discrimination provisions.
Main reasoning/argumentation	The court defined 'interest' in conjunction with 'the practical gain obtained'. The interest must exist, be personal, real and actual and legal. The plaintiff proved the existence of the facts entailing an act of discrimination but the defendant did not prove that the facts proved are not discriminatory.
Key issues (concepts, interpretations) clarified by the case	The court clarified the concept of the liability of the employer for the actions of its employees under the anti-discrimination legislation in conjunction with the provisions of the Civil Code for torts. The court also discussed the issue of system remedies such as the institutional measures on combating discrimination and diversity management policies or the training requested by the plaintiff as a possible remedy. In deciding, the court also offered an explanation of the concept of reversal of the burden of proof, linking it to accessibility of evidence.
Results (sanctions) and	The defendant was ordered to pay 1,000 Euro in civil damages but the Court considered that there was no interest for

key consequences or implications of the case	the plaintiff to request institutional measures on combating discrimination in the workplace. The decision was appealed both by the defendant and by the plaintiff.
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Annex 2 – Statistics

Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	N/A	N/A	1	5	6	9	6	7: 3 personal dignity, 3 access to public services, 1 employment	6: 5 personal dignity, 1 employment	6: 5 personal dignity, 1 employment
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	N/A	N/A	0	1 : use of discriminatory language	0	3: 1. use of discriminatory language, 2. access to services, 3. discriminatory language	1 (employment)	1 (harassment by the gendarmerie)	1	1

						in the media				
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	N/A	N/A	0	1 : fine of 2,000,000 ROL (55 Euro)	0	1. Fine of 5,000,000 ROL (143 Euro), 2. fine of 10,000,000 ROL (286 Euro) and 3. administrative warning	Fines of 400 (111 Euro) and 1,000 RON (278 Euro) against two perpetrators and warning against the public authority in charge	Warning	1 fine of 4.000 RON (900 EURO)	1 fine of 500 RON (125 Euro)
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)	N/A	N/A	0	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)	-	-	-	-	-	-	-	-	-	-
Number of LGBT partners who claimed their right to residence but were denied this right	-	-	-	-	-	-	-	-	-	-

Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.	N/A*	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

* Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC	-	-	-	-	-	-	-	-	-	-
Number of LGBT partners of persons enjoying refugee/subsidiary	-	-	-	-	-	-	-	-	-	-

protection status who were denied the possibility to stay with their partner										
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* Response 2150194 of the Romanian Office for Immigration, 25.01.2008, on file with FRALEX.

Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.	-	-	-	-	-	-	-	-	-	-
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification	-	-	-	-	-	-	-	-	-	-

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc	0	0	0	0	0	1	1	2	1	1
Number of demonstrations against tolerance of LGBT people.	0	0	0	0	0	2	2	2	2	2

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)	N/A	N/A	N/A	N/A	N/A	N/A	0 They do not make a distinction on grounds of discrimination.	0	NReg	NReg
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	N/A	N/A	N/A	N/A	N/A	N/A	Not registered by the authorities (NReg.)	NReg	NReg	NReg
Range of sanctions issued for homophobic hate speech	N/A	N/A	N/A	N/A	N/A	N/A	NReg.	NReg.	NReg	NReg
Number of non-criminal court cases initiated for homophobic statements	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.
Number of non-criminal court cases initiated for homophobic statements which were successfully completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.	NReg.

Chapter F, Homophobic motivation of crimes as aggravating factor

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	N/A	N/A	N/A	N/A	N/A	N/A	Not registered by the authorities (NReg.)	NReg.	NReg.	NReg.

Chapter G, Transgender issues

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of name changes effected due to change of gender	1	1	0	0	1	0	1	2	2	2
Number of persons who changed their gender/sex in your country under the applicable legislation	Non response from the authorities (NR)	NR	NR	NR	NR	NR	NR	NR	NR	NR