HUNGARIAN LABOUR LAW
E - J O U R N A L

A foreign body in employment law? – The impact of EU accession on Hungarian anti-discrimination law in employment – Part II

Szilvia Halmos*

The purpose of this series of articles is to give an overview of the impact of the EU law on equal treatment on relevant Hungarian labour law. In the previous part (Part I),[1] a short description was given on the status of national provisions as existed before the implementation of the relevant EU directives, highlighting the most important regulation needs and challenges identified by the then relevant academic literature. In the present part (Part II), the main features of EU and Hungarian law concerning equal treatment in employment is described; further it is evaluated, how far Hungarian labour law has reached in the implementation process in the past 15 years in terms of determining the protected characteristics and the definition of discriminatory conducts. Part III is going to provide further analyse on the achievements of the implementation process (rules on burden of proof, the structure of exemptions and justifications, sanctions and remedies), and, as a conclusion, the main challenges of the oncoming 15 years are addressed in this field. The development of the case law of Hungarian courts is followed up, which was recently summarised and evaluated by the Case Law Analysing Group of the Kúria[2] appointed to scrutinise the judicial practice of equal treatment regulation in the field of labour law.

* Szilvia Halmos (Ph.D) is judge at the Budapest-Capital Administrative and Labour Court; consultant judge on European Union law and visiting lecturer at the Labour Law Department of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University.
The author is thankful to Annamária Fürjes (Ph.D; judge at the Budapest-Capital Administrative and Labour Court; consultant judge on European Union law) for her valuable contributions supporting the research, as well as to Krisztina Szolnokiné Csernay (judge at the Administrative and Labour Law Department of the Kúria, consultant judge on European Union law) and Éva Gellérné Lukács (senior legal expert in European law and assistant professor at the Faculty of Law of ELTE University) for the peer review of the text and their useful commentaries.

1 Sz. Halmos: A foreign body in employment law? – The impact of EU accession on Hungarian anti-discrimination law in employment – Part I. *Hungarian Labour Law Journal,* 2/2019. 31–47.

2 Before 31 December 2011, the supreme judicial forum of Hungary was denominated as „Supreme Court", subsequently: „Kúria".

1. The main characteristics of EU and current Hungarian employment equality law

1.1. Development of EU equality law in employment

The Treaties establishing the European Communities included only one provision concerning the discrimination of workers: Article 119 of the Treaty of Rome prohibited exclusively the gender-based discrimination of employees, and exclusively in terms of pay. Out of this brief rule, the European Community and later the European Union has developed a robust body of law on equal treatment in employment in the past six decades, encompassing more provisions in primary[3] and secordary law,[4] supported by a vast number of decisions of the Court of Justice of the European Union (hereinafter: CJEU)[5] and various means of soft law and policy instruments (e.g. action programmes). The CJEU has played a particularly vital role in the extension and development of equality law: formulas, definitions, tests and principles processed by judgements constituted the conceptual basis of later directives;[6] and represented a consistent trend in the extensive interpretation of the terms of the Community/Union law (e.g. in terms of protected characteristics,[7] or the definition of „wage"[8]). The increasing number of linkages between EU law and international law[9] on equality has given new perspectives to the further development of the *acquis.* In consequence, the European law on equality in employment can be considered to be a continuously evolving and spreading set of standards for Member States (including Hungary) providing more and more challenges for the national law and practice. Prior to

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3 The key provisions of primary law include the European Union Charter of Fundamental Rights (hereinafter: EUCFR), Art. 20 (equality before the law) and 21 (non-discrimination); the Treaty on the European Union (hereinafter: TEU), Art. 2, 3(3), 9 as well as the Treaty of the Functioning of the European Union (hereinafter: TFEU), Art. 10, 18, 45. See in more detail below in this Section.

4 Relevant secondary law includes a number of – from time to time in part recast – directives. The list of the key documents of secondary law see: European Union Agency of Fundamental Rights: *Handbook on European Non-Discrimination Law.* [Publications Office of the European Union] Luxembourg, 2018. (https://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination), 283–284.

5 In this study we refer to the predecessor of the CJEU („European Court of Justice") as „CJEU" as well.

6 For example the rules on burden of proof were and the definition and justification of indirect discrimination were first invented by the CJEU, and were later transposed to the text of directives. (The rules on the burden of proof will be outlined in more detail in the next Part.) D. Schiek – L. B. Waddington – M. Bell: *Cases, materials and text on national, supranational and international non-discrimination law.* Oxford and Portland, Oregon, Hart Publishing, 2007. 353–354.; S. Fredman: *Discrimination law.* OUP Oxford, 2011. (2nd ed; reprint 2012) 190., 224.

7 See in detail: E. Kajtár: Old limbs, new twigs: From classic to novel forms of protected characteristics in European anti-discrimination law. *Pécsi Munkajogi Közlemények,* vol. 8., 1–2/2015. 37–51., 40.; C-13/94. P v S and Cornwall County Council, ECLI:EU:C:1996:170.; C-303/06. S. *Coleman* v Attridge Law and Steve Law, ECLI:EU:C:2008:415. (hereinafter: *Coleman*-judgement).

8 E.g. C-33/89. Maria Kowalska tegen Freie und Hansestadt Hamburg, ECLI:EU:C:1990:265; C-262/88. Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, ECLI:EU:C:1990:209 (hereinafter: „*Barber*"-case); C-12/81. Eileen Garland v British Rail Engineering Limited, ECLI:EU:C:1982:44 etc.

9 The article 6, paragraph 2 of the TFEU expresses the EU's destination to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and acknowledges the common heritage of the Member States in the field of protection of human rights as general principles of the EU law.
It should be mentioned that the EU acceded (Decision 2010/48.) the Convention on the Rights of Persons with Disabilities (CRPD) as one of the key binding human rights document of the UN. As the CJEU affirmed, by this the CRPD became an integral part of the European Union legal order, consequently the relevant EU law should be interpreted in a manner consistent with that convention. (Joint cases C335/11. HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and C337/11. HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S; ECLI:EU:C:2013:222.)

the assessment of specific instruments of Hungarian equality law in employment in the mirror of these standards, it is useful to describe some key characteristics of the relevant union law at present, giving perspectives for the activity of Member States endeavouring to ensure compliance.

1.2. A mixed pattern of equality concepts

As referred in Section 2.1 of Part I,[10] the academic literature employs various typologies of approaches of equality. According to the aforementioned cathegories we can distinguish the approaches of „equality of treatment", „equality of results", „equality of opportunities" and „equality as an element of dignity". Initially, the anti-discrimination law of the European Communities took a rather formal approach of equality („equality of treatment"), prohibiting the wage discrimination against women. This approach is based on the Aristotelian theory of justice saying that „likes should be treated alike",[11] prohibiting the less favourable treatment of two similarly situated individuals on grounds of a protected characteristic (prohibition of direct discrimination).[12] The requirement of equal pay for equal work (or work of equal value) for women, the horizontal direct effect of which was later acknowledged by the CJEU[13], constituted the earliest and a key intervention of the EC/EU for women's equality.[14]

Nevertheless, in a short time the CJEU had to face the fact that disadvantages suffered by women or other marginalised groups cannot be effectively eliminated through a formal approach of equality. The other half of Aristotle's justice principle says that „differents should be treated differently".[15] Cases where an identical treatment of workers caused considerably more disadvantageous effect on female than on male workers, inspired the CJEU to create the concept of indirect (or hidden) discrimination, giving rise to a more material approach of equality („equality in results"). In a series of cases, the CJEU worked out those principles, which give adequate indication to achieve a satisfactory balance between the assessment of the individual's merits and the necessity of taking measures in favour or women to achieve equality in practice (positive actions). This stance fits notably within the framework

10 Halmos (2019) op. cit. 34–35.

11 Aristotele (translated by Szabó M.): *Nikomakhoszi Etika*. Budapest, Európa Kiadó, 1997. V. 6.

12 See: Fredman (2011) op. cit. 153.

13 C-43/75. Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, ECLI:EU:C:1976:56 ("Defrenne No. I").

14 Fredman (2011) op. cit. 156–157.; S. Fredman: Redistribution and Recognition: Reconciling Inequalities. *South African Journal of Human Rights,* vol. 23, 2007. 214–234.

15 Aristotele (1997) op. cit. V. 6.

of the approach of „equality of opportunities".[16] The most important tenets elaborated by the CJEU were incorporated in the generation of directives of the 2000's.[17]

In the recent case law of the CJEU, the approach of „equality as an element of dignity" is given more and more emphasis. We find the first emergence of this approach in a judgement of the CJEU as well.[18] Specific discriminatory conducts, such as sexual harassment and harassment, where no comparator is required to establish the discrimination, also reflect this approach.[19]

It can therefore be concluded that EU law requires the Member States to depart from a mere formal approach of equality, however, upholding the limits of substantive equality. Legal instruments like indirect discrimination and positive actions serve this latter purpose. The approach of EU law stands the closest to the approach of „equal opportunities", endeavouring to draw an equal start line for all, but leaving the freedom for persons to create their own life plans. In parallel, the human right character of equality and its linkages with human dignity is more and more emphasized.

1.3. Fields and means of EU regulation

European anti-discrimination law has been established in an organic way, through a step by step inclusion of new subject matters, new protected characteristics, new definitions, new instruments. As a result, there is still no all-encompassing anti-discrimination secondary law in the EU in terms of protected characteristics or regulated spheres of life.[20]

EU anti-discrimination law consists of resources of primary and secondary law. In currently effective primary law, the most important rules are the followings: according to Article 2 of the Treaty on the European Union (hereinafter: TEU), the non-discrimination principle is one of the fundamental values of the Union.[21] Article 10 of the Treaty on the Functioning of the European Union (hereinafter:

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16 C-319/03. Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice, ECLI:EU:C:2004:574; C-409/95. Hellmut Marschall v Land Nordrhein-Westfalen, ECLI:EU:C:1997:533; C-450/93. Eckhard Kalanke v Freie Hansestadt Bremen, ECLI:EU:C:1995:322; C-407/98. Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist, ECLI:EU:C:2000:367; C-158/97. Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen, ECLI:EU:C:2000:163; see: Fredman (2011) op. cit. 241.

17 See in more detail: Section 1.3., 2.2.2.

18 In the *Coleman*-case (see reference above) AG Maduro proposed that "to protect the dignity and the autonomy of persons belonging to those suspect classifications… treating someone less well ont he basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being humans" [cited and commented by Fredman (2011) op. cit. 227.].

19 Fredman (2011) op. cit. 20–21.

20 Further development of the scope of protection against discrimination is a continuous priority of EU legislation, however, accompanied by setbacks. In 2008, the European Commission presented a proposal for a Council directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief, which aims at extending protection against discrimination through a horizontal approach. However, as unanimity is required in the Council, the draft has remained blocked at that stage since then. In 2014, the European Commission declared its intention to complete the legislation process concerning the proposal. On 16 April 2019, the Commission approved a Communication (COM(2019)186 final) highlighting the gaps in protection and proposing ways of facilitating decision-making in the area of non-discrimination through the use of enhanced qualified majority voting and the ordinary legislative procedure. (Source: http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive)

21 Commitment of the EU to combat discrimination are also stipulated in Article 3 Paragraph 3 and the Article 9 of the TEU.

TFEU) requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities. Prohibition of non-discrimination on the basis of nationality is laid out in Articles 18 and 45 of the TFEU. The Charter of Fundamental Rights of the European Union (hereinafter: EUCFR),[22] as adopted in 2000, was merely a non-binding 'declaration' of human rights, inspired by those rights contained in the constitutions of the Member States.[23] However, when the Treaty of Lisbon entered into force in 2009, it altered the status of the EUCFR to make it a legally binding document with the same legal value as the EU Treaties. As a result, EU institutions are bound to comply with the EUCFR, as are EU Member States but only when implementing EU law.[24] Under the title 'Equality' (Articles 20 to 26), the EUCFR emphasises the importance of the principle of equal treatment in the EU legal order. Article 21 of the EUCFR lays down prohibition of discrimination on various grounds.[25]

The central concepts of EU secondary legislation on equal treatment are the specific protected characteristics. In the field of employment, there are currently nine protected characteristics covered by anti-discrimination directives constituting the hard core of EU's anti-discrimination legislation: gender,[26] race and ethnical origin,[27] religion and belief, disability, age, sexual orientation,[28] part-time work,[29] fixed-term work[30] and temporary-agency work.[31] The prohibition of discrimination on the grounds of nationality is laid down in the abovementioned articles of the TFEU.[32] The catalogue of

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22 Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405.

23 See: C-283/83. Firma A. Racke v Hauptzollamt Mainz ECLI:EU:C:1984:344; C-15/95. EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux, ECLI:EU:C:1997:196; C-292/97 Kjell Karlsson and others, ECLI:EU:C:2000:20.

24 Article 51 of the EUCFR.

25 Article 21 of the EUCFR:
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

About the nature of this article, see below in more detail. About the development of primary law on equality: EU Fundamental Rights Agency (2018) op. cit. 20–23.

26 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), *OJ L 204, 26.7.2006, 23–36 („Gender Directive")*, article 1. The „Gender directive" repealed and recast a set of previous directives related to gender-based discrimination in the field of employment.

27 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; *OJ L 180, 19.7.2000, 22–26 („Race Directive")*, article 1.

28 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L 303, 2.12.2000, 16–22 („Framework Directive")*, article 1.

29 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex : Framework agreement on part-time work, OJ L 14, 20.1.1998, 9–14 ("Part Time Work Directive"), Annex, section 1.

30 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, 43–48 ("Fixed-term Work Directive"), Annex, section 1.

31 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, 9–14 ("Temporary Agency Work Directive"), article 1, 2 and 5.

32 Related secondary implementing laws (particularly: Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141, 27.5.2011, p. 1–12) charge Member States to provide equal treatment for nationals of other Member States and their family members. See in more

protected characteristics is exhaustive.[33] The detailed regulation in relation of the specific protected characteristics are similar, but not identical in terms of definition of discriminatory conducts, exemptions and justifications, margin of positive actions etc.

As for the regulated subject matters in the field of employment,[34] the main topics of the three overarching anti-discrimination directives (Gender Directive, Race Directive, Framework Directive, hereinafter together: "Directives") are the following: (1) definition of the scope, (2) definition of the most typical discriminatory conducts, (3) margin of positive actions, (4) declaration of the minimum standard characteristic of the directive, (5) requirement of the sanctions and remedies, (6) rules on burden of proof (7) measures targeting effective implementation (dissemination of information, dialogue with social partners and NGOs, prohibition of victimisation). The other three directives set out only each one or two, generally formulated sections on the prohibition of discrimination of the covered employees.[35]

As is known, directives require the Members States only to achieve specific results, leaving them free choice to determine the measures of the implementation.[36] In consequence, as a general rule, directives do not have a direct effect, i.e. they cannot be directly referred by private entities in national lawsuits. So far as a rule of a directive complies with a specific conditions (it is unconditional, adequately precise, it grants rights and the deadline for transposition has expired), private entities may refer to the not yet or not properly transposed rules of a directive against the omitting Member State[37] („vertical direct effect)".[38] In contrast, as it has been more times reinforced by the CJEU, directives never have horizontal direct effect (i.e. private entities may not refer to the not yet or not properly transposed directive rules against another private entity).[39]

Nevertheless, a new opportunity of direct reference to the EU law was opened by the CJEU in the *Mangold*-judgement, as it established that the non-discrimination must be regarded as a general principle of Community law, on the grounds of the various international instruments and in the constitutional traditions common to the Member States. Therefore the Framework Directive lays down only the general framework for combating discrimination on specific grounds. Consequently, the national court has to guarantee the full effectiveness of the general principle of non-discrimination,

detail: É. Gellérné Lukács: From Equal Treatment to Positive Actions Through Non-discriminative Obstacles – Regarding the Free Movement of Persons. *ELTE Law Journal,* 2/2018. 101–125.

33 The EUCFR extended the list of protected characteristics as will be described below.

34 Race Directive covers other spheres of life as well.

35 Temporary Agency Work Directive, article 5; Fixed-term Work Directive, Annex, article 4; Part Time Work Directive, Annex, article 4.

36 TFEU, article 288.

37 The concept of „Member State" implies also a state entity as an employer, so improperly transposed directives may be referred also in a public service employment relationship [C-152/84. M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching), ECLI:EU:C:1986:84 ("*Marshall*-case")].

38 C-41/74. Yvonne van Duyn v Home Office, ECLI:EU:C:1974:133; C-148/78. Criminal proceedings against Tullio Ratti, ECLI:EU:C:1979:110; C-8/81. Ursula Becker v Finanzamt Münster-Innenstadt, ECLI:EU:C:1982:7).

39 *Marshall*-case*;* C-188/89. A. Foster and others v British Gas plc, ECLI:EU:C:1990:313; C-91/92. Paola Faccini Dori v Recreb Srl, ECLI:EU:C:1994:292.

by setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired, in horizontal lawsuits as well.[40] Later, the CJEU more times reiterated this position, supplementing it with a reference to the Article 21 paragraph 1 of the EUCFR along with the common international law and constitutional traditions of the Member States.[41] In its landmark decision (*Kücükdeveci*-case) the CJEU held that the Article 21 paragraph 1 of the EUCFR, as an EU primary law,[42] has a horizontal direct effect, i.e. it is sufficient in itself to confer on individuals an individual right which they may invoke as such.[43]

It is not yet clear, how the direct effect of the article 21 section 1 of the EUCFR will affect the development and the interpretation of national anti-discrimination laws (including Hungarian statutory and case law), as long as the primary reference of compliance with EU anti-discrimination law should not be the directives but the aforementioned rule of the charter, providing a more extended list of protected characteristics and a far more generally formulated clause on non-discrimination. The detailed analysis of this question would go far beyond the scope of this study.[44]

It should be also remarked that the CJEU refers to European Convention on Human Rights (hereinafter: ECHR)[45] and the European Social Charter (ESC) as providing guidance for the interpretation of EU law. Both documents are also referred to in the EU Treaty framework[46] and in the EUCFR.[47] The Treaty of Lisbon contains a provision mandating the EU to join the ECHR as a party in its own right and Protocol 14 to the ECHR (on equal treatment) amends it to allow this to happen.

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40 In the *Mangold*-case (C-144/04. Werner Mangold kontra Rüdiger Helm, ECLI:EU:C:2005:709), these establishments referred only to the age discrimination, however later other protected grounds were also included [*C-144*/08. Jürgen Römer v Freie und Hansestadt Hamburg, ECLI:EU:C:2011:286 ("*Römer*-case")].

41 C-555/07. Seda Kücükdeveci v Swedex GmbH & Co. KG, ECLI:EU:C:2009:429 ("*Kücükdeveci*-case"); C-441/14. Dansk Industri (DI), agissant pour Ajos A/S v Sucession Karsten Eigil Rasmussen, ECLI:EU:C:2016:278 ("*Dansk Industri*-case"); C-414/16. Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V, ECLI:EU:C:2018:257; *Römer*-case; C-176/12. Association de médiation sociale v Union locale des syndicats CGT and Others, ECLI:EU:C:2014:2.

42 It should be noted that other, discrimination-related primary law rules have also been declared as having direct effect, for being unconditionally and genuinely precisely formulated, such as the provisions on prohibition on wage discrimination on the grounds of gender (TFEU, article 157; Defrenne No I;. C-149/77. Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, ECLI: EU:C:1978:130 [„Defrenne No. II"]); and on prohibition of discrimination on the grounds of nationality (TFEU, article 18, 45, 56; C-36/74. B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo, ECLI:EU:C:1974:140).

43 See above in this Section*;* M. Bell: The right to equality and non-discrimination. In: T. K. Hervey – J. Kenner (eds.): *Economic and Social Rights under the EU Chatter of Fundamental Rights: A Legal Perspective*. Hart Publishing, 2003. 91–110., 101.

44 On the nature and the future role of the EUCFR see more in detail: W. Weiss: *The EU Human Rights Regime post Lisbon: Turning the CJEU into a Human Rights Court?* In: S. Morano-Foadi – L. Vickers (eds.): *Fundamental rights in the EU: a matter for two courts*. Bloomsbury Publishing, 2015. 69–90.; S. De Vries: *The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony*. In: S. De Vries et al (eds.): *The Protection of Fundamental Rights in the EU After Lisbon.* Hart Publishing, 2013. 53–94.; Bell (2003) op. cit.; M. De Mol: The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination:(Unbridled) Expansionism of EU Law? *Maastricht Journal of European and Comparative Law,* vol. 18., 1–2/2011., 109–135.

45 C-395/08 and C-396/08, Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci, ECLI:EU:C:2010:329.

46 Article 3 paragraph 1 of the TEU, Article 151 of the TFEU.

47 Article 52 paragraph 3 of the EUCFR.

It is not yet clear when this would take place and what the future relationship between the CJEU and the ECtHR would be.[48]

1.4. The structure of current Hungarian employment equality law

The Hungarian Fundamental Law, which repealed and replaced the Constitution from 1 January 2012 on, preserved the general equality clause (nonetheless, amended in a few aspects), containing a somewhat broader list of protected grounds (including e.g. disability). Like the previous Constitution, the Fundamental Law still refers to the general prohibition of discrimination, formally not referring to the prohibition of indirect discrimination.[49] However, the Constitutional Court's practice acknowledging the inclusion of indirect discrimination in the general provision is still applicable. Applicability of the substantive concept of equality is indicated as well by the inclusion of paragraphs 4 and 5 of the article XV of the Fundamental Law, which oblige the State to introduce positive actions in order to the promotion of equal chances of specific disadvantaged groups. We can conclude that the Fundamental Law represents more or less the same stance concerning the equality concepts as the former Constitution.[50] It should be noted that the special reference to the equal payment for equal work has not been transposed to the Fundamental Law.

The basic systematic features of Hungarian anti-discrimination field have also not been significantly modified since the status we depicted in Sections 2.2-2.3 of Part I of this series of articles.[51] This means that the main instrument of implementation of the duties of the State in relation of article XV of the Fundamental Law is the the Act CXXV of 2003 on equal treatment and on the enhancement of equal chances (hereinafter: ETA Act), regulating the main subject matters of principle of equality as described at Section 2.3 of Part I in a uniform manner.[52] These regulations are referred and supplemented by sectoral acts, including the Act I of 2012 on the Labour Code (hereinafter: LC 2012). According to the ETA Act, these sectoral acts shall be interpreted in consistence with this act.[53] Section 12 of the LC 2012 provides a general reference to the ETA Act, adding only a few special rules to the body of antidiscrimination rules in employment, as follows.

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48 EU Fundamental Rights Agency (2018) op. cit. 17. By reasons of space, the expectable consequences of the future joining of the EU to the ECHR cannot be outlined in detail in this study with regard of the high complexity of this question.

49 Article XV of the Fundamental Law: „(2) Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, color, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever."

50 See in detail: Section 2.1

51 Halmos (2019) op. cit. 36–47.

52 Ibid. 45–47

53 ETA Act, sec. 2.

"(1) In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be strictly observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other employees.

(2) For the purposes of paragraph (1), 'wage' shall mean any remuneration provided directly or indirectly in cash or in kind, based on the employment relationship.

(3) The equal value of work for the purposes of the principle of equal treatment shall be determined – in particular – based on the nature of the work performed, its quality and quantity, working conditions, the required vocational training, physical or intellectual efforts expended, experience, responsibilities and labour market conditions."

Further, the LC 2012 enshrines a set of other provisions having relevance in respect of anti-discrimination law as well, even though the statutory law does not refer explicitly to the structural linkage between these rules and Section 12.[54]

Equal treatment duty is consistently recognised as a "real" fundamental principle of labour law across the academy and in the judiciary.[55] As we described above (Section 2.2.1 of Part I),[56] around the beginning of the development of Hungarian anti-discrimination law, there were significant uncertainties in terms of the structural position of equal treatment principle, resulting that the courts were somewhat reluctant to accept the prohibition of discrimination as a limitation of the margin of discretion of the employer. The Resolution of the Labour and Administrative Department of the Kúria No. 4/2017. (XI.28.) KMK on specific issues of the labour law disputes related to equal treatment (hereinafter: KMK Resolution), based on the Executive Report (hereinafter: Executive Report)[57] of the previously referred Case Law Analysing Group of the Kúria, refers (section 4) that the discriminatory nature of a provision of an employer is to examine precisely where the provision is formally lawful, i.e. does not breach the statutory employment law (e.g. in case of a dismissal, it meets the formal criteria of fairness, such as clarity, reality and reasonability). This means that, like the prohibition of abuse of rights, the prohibition of discrimination also constitutes a limitation of exercising the prerogatives of the employer laid down in statutory law. Several judgements demonstrate that courts are consistent in finding that a provision of an employer's act that is formally lawful, but violates

54 For example Section 51(4) of the LC 2012 provides on the reasonable accommodation duty of the employers, which clearly corresponds with Article 5 of the Framework Directive; Section 60(1) of the LC prescribes a kind of accommodation duty in respect of pregnant employees and women parenting a child under 1 year of age, also representing a rule protecting women against unfair treatment on the grounds of pregnancy.

55 Gyulaváry, T. (ed.): *Munkajog.* Budapest, ELTE Eötvös Kiadó, [3]2014, 72.; Halmos, Sz.: *Az "egyéb helyzet" alapján történő diszkrimináció a foglalkoztatásban: A magyar gyakorlat elemzése az elmélet, a nemzetközi jog és az alkotmánybírósági gyakorlat tükrében.* In: Ábrahám, M. (ed.): *Mailáth György Tudományos Pályázat 2017: Díjazott dolgozatok.* Budapest, Országos Bírósági Hivatal, 2017. 603–672., 616–618.; Halmos, Sz. – Petrovics, Z.: *Munkajog.* Budapest, NKE KTK, 2014. 40.; Executive Report, 72–74.

56 Halmos (2019) op. cit. 33–36.

57 Kúria: *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat – Összefoglaló vélemény, 2016.* (https://kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_-_egyenlo_banasmod.pdf)

the equal treatment duty, counts as unlawful (e.g. in the field of singling out persons in the course of executing redundancies, in dismissing the employee during the trial period, in distributing bonus for the workers etc.).[58]

The ETA Act, addressing an above mentioned failure of the previous regulation, introduced and regulated the conditions of positive actions,[59] realising a move from the formal to the substantial approach of equality. Accordingly, in the structure of the ETA Act, positive actions are situated as lawful exceptions to the formal equal treatment duty. Considering the fact that positive actions always involve differences in treatment on the basis of an otherwise protected grounds, application of these measures should be executed with high degree diligence in order not to render these actions *per se* discriminatory. Hence, the case law of the CJEU and the Directives elaborated the criteria of lawful introduction of positive actions.[60] The conditions of positive actions as formulated in the ETA Act are in line with these standards. A recent country report summarises the positive actions enshrined in statutory law currently in place in Hungary.[61]

2. Specific key achievements of the past 15 years in the field of Hungarian equality law

2.1. Protected characteristics: non-exhaustive list and „other status"

As referred in Section 1.3, EU anti-discrimination law is primarily structured by specific protected characteristics. An impulsive extension of protected characteristics can be witnessed since the foundation of the European Communities. The circle of protected characteristics covered by the primary law has an overlap with the catalogue covered by secondary law. But EU law has never taken the position that the list of protected characteristics would be open. In contrast, in a number of national laws (e.g. the federal law the US[62] and Canada[63]) and sources of international law (primarily:

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58 Summary of relevant decisions: Kulisity, M.: A bizonyítási eljárás szabályai az egyenlő bánásmód sérelmére hivatkozás esetén. In: Kúria: *Az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi bírósági gyakorlat.* [hereinafter: Annex of the Executive Report] 2017. 139–141., 144–146.

59 ETA Act, sec. 11; specifically for employment discrimination: sec. 23.

60 Summarised by Schiek et al (2007) op. cit. 801–821. The most notable cases of the CJEU see at Section 1.3.

61 A. K. Kádár: *Country report – Non discrimination, Hungarry 2017. European Commission, Directorate-General for Justice and Consumers.* [Publications Office of the European Union] Luxembourg, 2018. [hereinafter: Kádár (2018a)] 101–102.

62 See: the judgement of US Supreme Court, in the case *United States v Carolene Products Co* 304 US 144, 58 S Ct 778 (1938). (Commented by S. Fredman: *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India*. Luxemburg, European Commission, DG for Justice, 2012. [http://ec.europa.eu/justice/discrimination/files/comparative_study_ad_equality_laws_of_us_canada_sa_india_en.pdf] 32). See further: Krizsán, A.: Amerikai megközelítés a faji alapú diszkrimináció értelmezésében. *Fundamentum,* 3/2000. 13–32.; Győrfi, T. – M. Tóth, B.: 70/A. § [A diszkrimináció tilalma]. In: Jakab, A. (ed.): *Az Alkotmány kommentárja.* Budapest, Századvég, 2009. index [70].

63 See the judgement of the Supreme Court of Canade in the case *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203. Commented by: Fredman (2012) op. cit. 33.

the ECHR)[64] apply open lists of protected characteristics, ending in the category of „other status" or have no catalogue at all.

The question reasonably arises, why anti-discrimination laws need (and often use) a list of protected characteristics, regarding that every arbitrary distinction between people may violate human dignity.

As already referred in Section 1 of Part I,[65] the primary purpose of anti-discrimination law in employment is to provide legal tools to dismantle and disable harmful stereotypes deeply embedded in the society. These stereotypes create unjust hierarchic structures, dividing the society into dominant and minority groups according to certain characteristics (gender, race, age, physical and mental ability, religion etc.). General tendencies may be observed, in that members of dominant groups employ hidden „scoring systems" deeming members of minorities as more risky, of inferior of status etc. and underscoring them in societal interactions. This results in outcasting of persons bearing these characteristics from main resources and mainstream spaces of life.[66] Such scoring stereotypes may, and often actually drive the decision-making of employees, motivating them to treat persons with underscored characteristics in a more disadvantageous way than others.

Anti-discrimination laws identify the aforementioned marginalized groups of society by defining protected characteristics. Relying on the general societal experience that persons with protected characteristics are commonly subject to detrimental treatment on the grounds of this characteristic, it is reasonable to set up the presumption that the precise reason for the suffered detriment was indeed this characteristic. Nevertheless, this presumption is rebuttable: the perpetrator (in employment: the employer) may establish that (1) there was no causality between the protected characteristic and the caused disadvantage or (2) even if there was causality, it was justified by a weighty ground. This scheme legitimates that anti-discrimination laws use a higher standard of excuse against the perpetrators, on the one hand in procedural aspect (shared or reversed burden of proof), on the other hand in substantive aspect (narrowly formulated justification grounds and exemptions).[67]

Consequently, protected characteristics constitute the axis of anti-discrimination law. If the set of mechanisms of prohibition of discrimination were not applied to marginalized groups of society, the establishment of the aforementioned presumption based on commonly experienced social phenomena would loose its justification resulting in an unjust and inequitable application of reversed burden of proof as well as high standard justification grounds and exemptions. That is the reason why anti-discrimination rules use either an exhaustive list of protected grounds or, in case of an open formulation of protected grounds, it is upon the case law to draw the limits of the notion of the term „other status" so that only genuinely marginalised groups be covered.

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64 Article 14 and the Protocol 12 of the ECHR.

65 Halmos (2019) op. cit. 31–32.

66 Vö. pl. T. Z. Zarsky: Understanding Discrimination in the Scored Society. *Washington Law Review,* Vol. 89., 2014/4. 1375–1412., 1375., 1384–1385.; D. K. Citron – F. Pasquale: The Scored Society: Due Process for Automated Predictions. *Washington Law Review,* Vol. 89., 2014/1. 1375–1412.; Kiss, Gy.: *Alapjogok kollíziója a munkajogban*. Pécs, Justis Tanácsadó Bt., 2010. 317.

67 Halmos (2017) op. cit. 612–614.

Regarding the list of protected characteristic in the Hungarian ETA Act,[68] it is apparent that the national catalogue is much longer than it is required by EU law. In addition, the Hungarian list is also open, referring to any potential „other status". The text of the act does not provide any definition or interpretative criterion to the construction of this concept.

This model of codification had been obviously derived from the Constitution, which also employed an open list, referring to „other status" as a potential ground of discrimination.

At first sight, the Hungarian statutory law appears to be much more generous in terms of ascertaining of the scope of protected characteristics in order to grant wide-reaching protection against discrimination. However, in practice, the openness of the catalogue resulted in severe complications. Especially in the early period of the functioning of the Equal Treatment Authority (hereinafter: ETA),[69] the authority interpreted „other status" in an extremely extensive manner, accepting hardly any status or characteristics of a person claiming to have been discriminated against. For example references to the employee' personal conflict with a workplace leader,[70] the qualification or the competences of the claimant,[71] the position of the claimant within the employer's organisational hierarchy or the location of the workplace,[72] personal skills (such as good organizational skills, autonomy, conflict avoiding nature)[73] etc. were approved as „other status". The court practice represented a more modest and restrictive position. The courts generally declined the reference to the personal conflict of the employee and the employer's leader,[74] professional curriculum,[75] personal characteristics (such as sense of fairness),[76] as well as any personal relationship of the plaintiff[77] as „other status".

In order to provide guidelines to moderate the uncertainties of the interpretation of „other status", the Advisory Body of the ETA (hereinafter: ETA AB)[78] released a position paper on the notion of this term.[79] In this paper, the ETA AB outlined that the concept of „other status" should be interpreted in the light of international sources of anti-discrimination law and Article 70/A of the Constitution.[80] In compliance with the purpose of protection against discrimination according to the aforementioned

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68 ETA Act, Section 8.

69 The ETA is an administrative authority set up at the same time with the entry into force of the ETA Act, in order to function as an equality body (as envisaged by the Race Directive) designed to control the enforcement of rights and duties arising from the ETA Act via exercising of a wide range of public powers.

70 Decisions of the ETA No. EBH/29/2005.; EBH/231/2008; EBH/1/2008.; EBH/540/2008.; EBH/1318/2008.; EBH/839/2008.

71 Decision of the ETA No. EBH/395/2007.

72 Decisions of the ETA No. EBH/1347/2008, EBH/1784/2009.; EBH/809/2009.

73 Decisions of the ETA No. EBH/310/2007. EBH/617/2008. EBH/736/2007.

74 Judgements of the Supreme Court/Kúria No. Mfv.II.10.163/2007/2.; Mfv.II.10.584/2014/5.; Mfv.II.10.671/2013/5.; Mfv. II.10.582/2011/4.; by contrast: Mfv.I.10.667/2010/38.

75 Judgement of the Supreme Court/Kúria No. Mfv.I.10.410/2014/8.

76 Judgement of the Supreme Court/Kúria No. Mfv.II.10.261/2014/3.

77 Judgements of the Supreme Court/Kúria No. Mfv.I.10.603/2014/6.; EBH2014. M.19.

78 Not functioning any more.

79 Position paper of the ETA AB No. 288/2/2010. (IV.9.) TT. on the interpretation of „other status" (available in Hungarian: http://www.egyenlobanasmod.hu/data/TTaf_201004.pdf)

80 The relevant provisions of the Constitution: see at Section 2.1. of Part I [Halmos (2019) op. cit. 33–36].

norms, the advisory body stressed that rules on shared burden of proof are justifiable exclusively in case if protected persons adhere to specific marginalised groups. „Other status" is an evolving concept, the core of which is that the status must be objectively adequate to constitute a group, and to give rise to negative bias. „Other status" must be by all means a genuine personal character. Therefore, the concept of „other status" should be interpreted in a restrictive manner. The position paper gave some aspects of this narrow interpretation in reference of the practice of the Constitutional Court, the European Court of Human Rights (hereinafter: ECtHR) and the UN Human Rights Commission, and assessed a few decisions of the ETA. However, the paper did not provide a comprehensive test for the adjudication whether a specific characteristic should be considered as „other status" or not.

Subsequent to the publication of the paper, the ETA's approach became considerably more restrictive, rejecting for instance to accept personal conflict situations[81] or personal relationships of the claimant[82] as „other status". As mentioned, the Supreme Court/Kúria gave from the beginning on a more restrictive interpretation to the term, nevertheless court decisions increasingly referred to the position paper to justify the narrow construction.[83] However, the judicial practice still reflected some uncertainty and inconsistency in terms of the contours and interpretative criterion of the concept of "other status".[84]

The Executive Report examined the labour judicial practice in relation of the interpretation of „other status", and finally developed of a comprehensive formula to consolidate the criteria of "other status". The Executive Report, particularly in its annex,[85] analysed a large body of relevant decisions of the ECtHR[86] and the Hungarian Constitutional Court, as the two most important resources for this issue. The report concludes that even though the ECtHR uses highly variable criteria for the interpretation of the term „other status" included in Article 14, the only consequently applied criterion is that only a genuine personal characteristic can constitute „other status". The categories accepted by Constitutional Court as „other status" went also far beyond the characteristics identifying marginalised

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81 Decision of the ETA No. EBH/759/2009. (It should be noted that although the publication of the paper took place in 2010, the proposal was already published in 2009, opened to public discussion.)

82 Decision of the ETA No. EBH/267/2010.

83 Reference to the position paper e.g.: in the judgement of the Kúria No. Mfv.II.10.261/2014/3.

84 The ETA and the court practice in relation of the concept of „other status" is analysed in the following recent studies: Zaccaria, M. L.: *Az egyenlő bánásmód elvének érvényesülése a munkajog területén a magyar joggyakorlatban.* Budapest, HVG Orac, 2015. 150–171.; Zaccaria, M. L.: Az egyéb helyzet, mint védett tulajdonság koncepcionális sajátosságai a magyar joggyakorlatban. *Magyar Munkajog E-Folyóirat,* 1/2016. 29–44.; http://hllj.hu/letolt/2016_1/M_03_Zaccaria_hllj_2016_1.pdf); Halmos (2017) op. cit.

85 The annex is based on Halmos (2017) op. cit.

86 For example: *M.S.S. v. Belgium and Greece* (30696/09), 2011.01.21., *Engel et al. v. The Netherlands* (5100/71, 5101/71, 5102/71, 5370/72), 1976.06.08., *Petrov v. Bulgaria* (15197/02), 2008.05.22.; *Schwitzgebel v. Switzerland* (25762/07), 2010.06.10.; *D.G. v. Ireland* (39474/98), 2002.05.16.; *Bouamar v. Belgium* (9106/80), 1988.02.29.; *Danilenkov et al. v. Russia* (67336/01), 2009.07.30.; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no.2.)* (26740/02) 2007.05.31.; *Sommerfeld v. Germany* (31871/96) 2003.07.08., *Sahin v. Germany* (30943/96), 2003.07.08.; *Paulik v. Slovakia* (10699/05), 2006.10.10.; *Stubbings et al. v. United Kingdom* (22083/93 22095/93)*, 1996.10.22.; Mizzi v. Malta* (26111/02), 2006.01.12.; *Chassagnou et al. v. France* (25088/94 28331/95 28443/95), 1999.04.29.; *Kjeldsen et al. v. Denmark* (5095/71; 5920/72; 5926/72), 1976.07.12., § 56; *Carson et al. v. United Kingdom* (42184/05), 2010.03.16 §§ 66-70; *Magee v. United Kingdom* (28135/95), 2000.09.06.; *Johnston et al. v. Ireland* (9697/82) 1986.12.18.; *Darby v. Sweden* (11581/85) 1990.10.23.; *Lindsay et al. v. United Kingdom* (8364/78.), 1979.03.08. (Commission decision); *Gudmundsson v. Iceland* (23285/94), 1996.01.17. (Commission decision).

groups of society: not only sexual orientation[87] and age,[88] but also occupation,[89] homelessness and vulnerable financial situation,[90] the severity of violation of personal rights,[91] the registered domicile[92] and the natural or legal nature of a person[93] were accepted as such. The academic literature harshly criticised this approach referring that the Constitutional Court's too broad interpretation leads to an unreasonable extension of the protection against discrimination.[94] The Executive Report reminds that in some recent decisions the Constitutional Court has turned toward a narrow, more precise interpretation of „other status".[95] Two core conceptual criteria appear to become firmly established by these decisions: those characteristics may be considered as „other status", which constitute „an unchangeable personal character" and reveal his/her „vulnerable social situation".[96]

As a consequence, the Executive Report finally sets up a comprehensive test for the purpose of defining „other status" as follows. Those characteristics should be considered as „other status" in terms of the section 8 of the ETA Act, which

(1) constitute a genuine characteristic of the person, and

(2) associates the individual to a vulnerable group of society.[97]

This test were included also in the KMK Resolution, giving, even though not binding, but strongly recommended guidelines for the labour judiciary.[98]

It is expected that this recent KMK Resolution will be capable to establish a consistent framework for the court practice in interpretation of „other status", achieving compliance with the purpose and the function of anti-discrimination law as formulated worldwide, and particularly in the EU.

We can present another important achievement related to the protected characteristics, namely the consolidation of the practice in terms of wage discrimination. In this question, the early practice of the courts was variable in the question whether to require the claimant to demonstrate a protected characteristic for the establishment of wage discrimination or not. Before 2012, the paragraph 2 of the Article 70/B of the Constitution, as cited in Section 2.1. of Part I,[99] enshrined the principle of equal pay, providing that everyone has the right to equal compensation for equal work, without

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87 Decisions of the Constitutional Court No. 20/1999. (VI.25.) AB., 14/1995. (III.13.) AB, 45/2000. (XII.8.) AB, 20/1999. (VI.25.) AB, 37/2002. (IX.4.) AB.

88 Decisions of the Constitutional Court No. 857/B/1994. AB hat., 18/2001. (VI.1.) AB.

89 Decision of the Constitutional Court No. 74/1995. (XII.15.) AB.

90 Decision of the Constitutional Court No. 176/2011. (XII.29.) AB.

91 Decision of the Constitutional Court No. 34/1992. (VI.1.) AB.

92 Decisions of the Constitutional Court No. 2002/B/1991. AB.; 3142/2015. (VII.24.) AB.

93 Decision of the Constitutional Court No. 68/1997. (XII.29.) AB.

94 Kovács, K.: *Az egyenlőség felé. A hátrányos megkülönböztetés tilalma és a támogató intézkedések.* Budapest, L' Harmattan, 2012. 86

95 Especially important are the decisions No. 42/2012. (XII. 20.) AB and 3206/2014. (VII. 21.) AB.

96 Executive Report, 88–97.

97 Executive Report, 46–47.

98 KMK Resolution, Section 3.

99 Halmos (2019) op. cit. 33–36.

any discrimination whatsoever. Initially, it was not quite clear, how this norm relates to the general rule on prohibition of discrimination based on protected characteristics: whether the Constitution prohibits wage discrimination only on the grounds of any protected characteristic or in general. The Constitutional Court outlined in two early decisions that the prohibition of wage discrimination is a special, labour law related aspect of the general ban on discrimination.[100] Labour courts had to face a similar problem in the course of interpretation of the previously cited Section 142/A of the Act XXII of 1992 on the Labour Code (hereinafter: LC 1992),[101] because the code did not create a clarity in the question whether this latter section should be interpreted as part of the general ban on discrimination as stipulated in Section 5, or, separately, enshrines distinct duty of the employer. Although the interpretation of the Constitution by the Constitutional Court would not have been necessarily considered as guidance for the labour judiciary, the Kúria decided the question with reference to the above cited two decisions of the Constitutional Court.[102] In the Executive Report, the Kúria reiterated this practice to be followed in the future as well, also for cases under the scope of the LC 2012.[103] The Executive Report also reminded that this interpretation can create consistency with the secondary law of the EU, which are, without any exception, based on specific protected characteristics. Following the structure of EU antidiscrimination law, wage equality should be interpreted as a sub-category of equal treatment, consequently, no violation of equal treatment may be established without a reference to a protected characteristic.[104] This position of the Executive Report was also transposed to the KMK Resolution.[105]

We can welcome this way of development of law also, since, as we outlined above, protection against discrimination may not be depart from the vulnerable groups of the society, otherwise, the rules on burden of proof as well as justification and exemptions would turn unreasonable and inequitable.

2.2. Definitions of conducts violating the equal treatment duty

Definitions of discriminatory conducts applicable in employment law are included in the ETA Act. There are five different conducts considered to be considered as violating the equal treatment duty:

100 Decisions of the Constitutional Court No. 137/B/1991. AB, 849/B/1992. AB.

101 See Section 2.2.2 of Part I [Halmos (2019) op. cit. 41–42.]

102 Decisions of the Kúria No. Mfv.I.10.563/2013/4., reinforced by the decision on principle No. EBH 2014.M.19.

103 The LC 2012 took effect on 1 July 2012, repealing the LC 1992. It should be noted that the text of the LC 2012 also left some doubts about the question, whether wage discrimination should be considered as a subcategory of the general duty of equal treatment or not. The source of uncertainty was that the criteria to be weighed in the course of assessment of equal value of certain works, are listed in the Paragraph 3 of the Section 12, structurally departed from the general provision of equal treatment duty (in Paragraph 1 of Section 12). The Executive Report and the KMK Resolution seem to put an end to these doubts.

104 Executive Report, 51.

105 KMK Resolution, Section 2. It should be noted that the ETA AB also took this position in its position paper of the ETA AB N.o. 384/2/2008. TT. on the interpretation of equal wage for work of equal value.

direct discrimination; indirect discrimination; harassment; victimization and unlawful segregation.[106] Below it is analysed, to what extent are Hungarian definitions of discriminatory conduct are in accordance with the requirements of relevant EU definitions.

2.2.1. Direct discrimination

The concept of direct discrimination as the most fundamental discriminatory conduct, represents the legal emanation of the approach formal equality, declaring that likes should be treated alike.[107]

Direct discrimination is defined in the the three most important EU anti-discrimination directives (Race Directive,[108] Framework Directive[109] and Gender Directive[110]). Resuming these definitions, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of any of the prohibited grounds such as sex, racial or ethnic origin, religion, disability, age or sexual orientation. It is obvious that direct discrimination is not equal to the distinction, because discrimination is always connected with comparability and generally occurs when comparable situations are treated differently. In the Directives the direct form of discrimination relates to the disadvantageous treatment based on the possession of defined characteristics, and based on this characteristic there is distinction from other people. It is therefore necessary to determine a comparator, and a compared situation, which may be either past, present, or even hypothetical.[111]

The definition of direct discrimination, as set forth under Section 8 of the ETA Act, is defined as follows:

> "Direct discrimination shall be constituted by any action, including any conduct, omission, requirement, order or practice, as a result of which a person or group based on his/her/its [here listed protected] characteristics is treated less favourably than another person or group is, has been or would be treated in a comparable situation". As it appears in Section 8, direct discrimination includes three main constituent elements: a less favourable treatment, the existence of an actual (or hypothetical) person, who is in a comparable situation with the victim of the discrimination (comparator), as well as comparable circumstances between the victim

106 ETA Act, sec. 7–10.

107 The author is especially grateful to Annamária Fürjes for meaningful contribution to this Section. About formal approach of equality see in detail: Fredman (2011) op. cit. 166–175.

108 Article 2, paragraph (2) a).

109 Article 2, paragraph (2) a).

110 Article 2, paragraph (1) a).

111 J. Maliszewska-Nienartowicz: Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? *International Journal of Social Sciences,* vol. 3., 1/2014. 41–55., 42.

and the comparator.[112] The less favourable treatment may be past, present or hypothetical. Consideration of less favourable treatment requires a comparison to be made between the situation of the person with a protected characteristic and that of any comparator by which the treatment given to that person is less favourable than that given to the comparator. A less favourable treatment could be constituted by any treatment in an ordinary sense, not only violations of statutory protected rights of the victim count as such a disadvantage.[113] The Kúria adjudicated a number of cases where direct discrimination was not verified, by reason of lack of one of the constituent elements. In a number of cases it was established that the parties' mutual agreement on the termination of employment does not amount to a less favourable treatment. In some other cases the Kúria did not establish the occurrence of a direct discrimination with reference to the lack of comparable situation of the victim and the alleged comparators.[114]

The key stage of scrutiny of direct discrimination, as enshrined in the directives, is the comparison of situation and the treatment of the person with protected characteristic with others not having such characteristics (comparators).[115] However, in a certain group of cases, it is difficult or not at all possible to define the comparator(s), resulting the impossibility of the establishment of direct discrimination as well. With reflection to this problem, the CJEU elaborated the concept hypothetical comparator. In the *Dekker*-judgement the CJEU held that in cases where the pregnancy of an employee is the grounds of discrimination, there is no need for a comparator. Since only women can be pregnant, discrimination on the grounds of pregnancy is necessarily a direct discrimination on the grounds of sex. In those circumstances the absence of male candidates cannot affect the establishment of discrimination.[116] The doctrine of hypothetical comparator was applied in other cases than concerning discrimination on the grounds of pregnancy as well.[117] The case law was transposed to the text of the Directives, and has been implemented to the Hungarian definition as well.

As previously indicated, before the accession to the EU, Hungarian regulation on wage equality had not been satisfactory.[118] Even though the LC 1992 was amended by inclusion some key concepts

112 See: EU Fundamental Rights Agency (2018) op. cit. 45–49.

113 See the Position Paper of the ETA AB No. 384/4/2008. (III. 28.) TT. on the shared burden of proof.

114 Judgements of the Kúria No. KGD2015. 148., EBH2016. M.16.

115 Understanding of direct discrimination as a relative concept results that equally bad treatment of persons with and without protected characteristics is excluded from the scope of direct discrimination. If directives applied the term "detrimental" or "unfavourable" rather than using the term "less favourable" treatment (on the grounds of a protected characteristic), the relative nature of direct discrimination could be eliminated, making it unnecessary to seek a comparator in the course of the scrutiny. See: Fredman (2011) op. cit. 169.

116 C-177/88. Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, ECLI:EU:C:1990:383 ("*Dekker*-judgement").

117 C-179/88. Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening, ECLI:EU:C:1990:384.

118 See at Section 2.2.2 of Part I [Halmos (2019) op. cit. 41–42.]

elaborated by the case law of the CJEU,[119] some aspects of the regulation still remained unclear. In the case law concerning wage equality, the judicial practice was for a long time fairly uncertain about the scope of duty to pay equal wage for equal work. Here should be referred to the development of Hungarian case law as outlined at Section 2.1., which ultimately took the position that equal pay duty can be only referred in relation of any protected characteristics, and cannot be interpreted as a general obligation to pay equal remuneration to all workers. We can deem this interpretation guideline as a decisive step away from the earlier prevailing, socialist understanding of Hungarian labour law, which rather preferred a very broad notion of wage fairness claiming that all workers should be granted equal pay for equal work. Within free market conditions, this latter understanding could be hardly preserved. However, it should be reminded that direct wage discrimination, primarily gender wage gap, which, as we have referred, was the first and basic focus of development of EU anti-discrimination law, is still a huge problem across the EU as well as on national level.[120] Nonetheless, the case law developed by the CJEU, granting a broad notion for the concepts of "payment"[121] and "work of equal value"[122] precisely aimed at the tackling of widespread undervaluation of women's work and job segregation.[123] Even though as it was described in a recent national report, it is fairly frequent in both the private and public sector that the employer arbitrarily provides better wage conditions for some individuals or some groups of workers. For example, in one case some groups of nurses working in different departments of the same hospital were entitled to receive hazard bonuses, while other groups of nurses were not, despite working under identical or very similar conditions.[124] During the litigation, the employer stopped paying the hazard bonus to all its nurses, and therefore the claimants' reference point ceased to exist and their claim was dismissed. Nonetheless, the Kúria concluded that as long as the bonus is paid to a group of employees, all groups who are in a comparable situation may request

119 See in detail ibid.

120 For the economy as a whole, in 2017, women's gross hourly earnings were on average 16.0 % below those of men in the European Union (EU28) and 16.1% in the euro area. Across Member States, the gender pay gap varied by 22 percentage points, ranging from 3.5 % in Romania to 25.6 % in Estonia. (Source: Eurostat; https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=sdg_05_20&plugin=1; https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_levels_vary_significantly_across_EU); The European Commission endeavours to tackle gender wage gap by means of soft law as well: it adopted the 'EU Action Plan 2017–2019: Tackling the gender pay gap' in November 2017. The Action Plan takes a holistic approach and addresses the various root causes of the gender pay gap (See: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/eu-action-against-pay-discrimination_en).

121 *Barber*-case; C-78/98. Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc., ECLI:EU:C:2000:247; C-170/84. Bilka - Kaufhaus GmbH v Karin Weber von Hartz, ECLI:EU:C:1986:204; C-200/91. Coloroll Pension Trustees Limited v James Richard Russell and Others, ECLI:EU:C:1994:348; See: E. Ellis – P. Watson: *EU Anti-Discrimination Law.* [Oxford EU Law Library] Oxford, Oxford University Press, ²2013. 180–221.

122 See in particular: C-96/80. J.P. Jenkins v Kingsgate (Clothing Productions) Ltd., ECLI:EU:C:1981:80 ("*Jenkins*-judgement"); C-157/86. Mary Murphy and others v An Bord Telecom Eireann, ECLI:EU:C:1988:62; C-69/80. Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited, ECLI:EU:C:1981:63; C.127/92. Dr. Pamela Mary Enderby kontra Frenchay Health Authority és Secretary of State for Health, ECLI:EU:C:1993:859 ("*Enderby*-judgement"); C-381/99. Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG, ECLI:EU:C:2001:358 ("*Brunnhofer*-judgement"); Ellis –Watson (2013) op. cit. 231–234.

123 See: Fredman (2011) op. cit. 153–157.; S. Fredman: Redistribution and Recognition: Reconciling Inequalities. *South African Journal of Human Rights,* vol. 23., 2007. 214–234.

124 Judgement of the Kúria No. Kfv. III. 39 148/2011. Published: EBH 2011/2424.

the same remuneration. In a more recent case,[125] the Kúria decided that a public servant cannot claim a higher wage by referring to equal pay regulations if that wage was established by the violation of the applicable wage law.[126]

We can also appreciate the direction of development of case law in the aspect that the national courts have accepted the broader notion of wage in terms of application of equal pay duty. By contrast to the previously described, early practice of the Supreme Court,[127] the Kúria, respecting the relevant case law of the CJEU and the requirements of the directives, has recently appreciated extra pay elements, such as subsequently granted bonus, length of service award, meals allowances as wage components that should be granted for workers in compliance with non-discrimination rules.[128]

2.2.2. Indirect discrimination

The concept of indirect discrimination is in correspondence with the approach of "equality of results".[129] The idea that in certain cases equality can be achieved beyond the formal identical treatment of persons, emerged first in the case law of the U.S. Supreme Court. In its landmark judgement *Griggs v. Duke Power Co. (1971.)*, the U.S. Supreme Court developed the "disparate impact" doctrine. This doctrine shall be applied where equal (consistent) treatment of persons or groups have disparate results to the concerned persons: although the treatment (measure, action, practice, omission) itself is applied for both persons or groups with and without protected characteristics, it has a significantly more adverse effect on the former ones. If the actor is not able to justify the disparate impact with reference to any „good reason" (i. e. through objective grounds), this treatment should be considered as indirect discrimination.[130] According to this test, indirect discrimination has also three constituent elements: (1) apparently neutral treatment of individuals of group (i.e. the actor treats persons with and without any specific protected characteristic in a consistent manner); (2) more adverse effect of the treatment on persons with a specific protected characteristic; (3) lack of objective and reasonable justification.

The disparate impact of the identical treatment precisely results from the historically embedded disadvantages of persons in a more vulnerable market and social situation, who would need special attention in the course of employment in order to achieve genuine equality. Thus, the concept of indirect

125 Judgement of the Kúria No. EBH 2014 M 19.

126 B. Nacsa: *Country report – Gender equality. How are EU rules transposed into national law? Hungary – Reporting period 1 January 2017 – 31 December 2017.* [Publications Office of the European Union] Luxembourg, European Commission, DG for Justice and Consumers, 2018. (https://www.equalitylaw.eu/country/hungary), 21.

127 See at Section 2.2.2. of Part I [Halmos (2019) op. cit. 41–42.]

128 E.g. the following decisions of the Kúria: Mfv.I.10.646/2012/4., EBH2010. 2175.

129 About different approaches of equality, see: Section 2.1 of Part I [Halmos (2019) op. cit. 34–35.]

130 See: Fredman (2011) op. cit. 177–178.; Schiek et al. (2007) op. cit. 353–354.; Nacsa, B.: *Munkahelyi diszkrimináció elleni jogvédelem problematikája Magyarországon*. In: Koltay, J. (ed.): *A munkaügyi kapcsolatok rendszere és a munkavállalók helyzete*. Budapest, Magyar Tudományos Akadémia Közgazdaságtudományi Kutatóközpont, 2000. 183–221., 206.

discrimination is in deep correspondence with the Aristotelian principle saying that „differents should be treated differently".[131]

The indirect discrimination was transposed from the North-American case law to the practice of the CJEU concerning anti-discrimination cases already at a quite early stage. In addition, in EC law, the concept of indirect discrimination had for long time played a vital role in the application of the fundamental freedoms: it was used to conteract measures by Member States that resulted in unequal access of goods, services or peersons to national markets.[132] Later the CJEU adopted this doctrine to discrimination cases as well, referring to the *effet utile* of the principle of discrimination, and concluding that it should embrace covert as well as overt forms of discrimination.[133] As far as the CJEU proved to be sensitive to address hidden forms of discrimination, an abundance of (primarily gender-related) cases demonstrated that a large variety of apparently neutral employment practices cause severe disadvantages to protected persons (in particular women). These cases granted the opportunity for the CJEU as well to formulate the constituent elements of indirect discrimination, as written above.[134] The definition of indirect discrimination was adopted to the relevant directives directly from CJEU rulings.[135] A remarkable development of EU law was that in the early practice of the CJEU, statistical evidence was deemed decisive in terms of establishment of adverse effect. However, the definition of indirect discrimination in the Directives does not refer to the requirement of any statistical evidence, instead the term "particular disadvantage" is included, in order to avoid the necessity to deliver statistical evidence, especially for sensitive areas such as sexual orientation or race.[136] Under the Directives, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put a person with a specific protected characteristic at a particular disadvantageous situation compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.[137]

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131 See in detail: Section 1.2.

132 See: P. Olivier: *Free Movement of Goods in the European Community.* London, Sweet&Maxwell, [4]2003. 6.36–6.48.; Schiek et al. (2007) op. cit. 352.

133 C-152/73. Giovanni Maria Sotgiu v Deutsche Bundespost, ECLI:EU:C:1974:13; Schiek et al. (2007) op. cit. 353–354.

134 Leading cases include e.g. *Enderby*-case, C-256/01 Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment, ECLI:EU:C:2004:18 ("*Allonby*-judgement"); C-109/88. Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, ECLI:EU:C:1989:383 ("*Danfoss*-judgement"); C-400/93. Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S., ECLI:EU:C:1995:155 ("*Royal Copenhagen*-judgement"); C-4/02. Hilde Schönheit v Stadt Frankfurt am Main, ECLI:EU:C:2003:583; C-167/97. Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez, ECLI:EU:C:1999:60; C-237/85. Gisela Rummler v Dato-Druck GmbH, ECLI:EU:C:1986:277. See: Schiek et al. (2007) op. cit. 356–360., 376–378., 389–392., 407–409., 387.

135 At first to the Burden of Proof Directive, later on to the Directives as well.

136 Schiek et al. (2007) op. cit. 359.

137 Article 2, Paragraph 2(b) in all the three Directives. The Framework Directive provides on another, specific ground for justification for the purposes of disability-related discrimination (with reference to the reasonable accommodation duty of employers, Article 2, Paragraph (ii) of the Framework Directive).

As described at Section 2.2 of Part I,[138] the definition of indirect discrimination was already included in the LC 1992 by the amendment in 2001. The ETA Act also provides on indirect discrimination: according to Section 9, provisions that are not considered direct discrimination apparently comply with the principle of equal treatment but disadvantage a substantially higher proportion of persons or groups having characteristics defined in Section 8 [protected characteristics] compared with other persons or groups in a similar situation are considered indirect discrimination. Apparently, the Hungarian formulation of the definition is almost a verbatim reproduction of the text of the Directives. Nevertheless, in the practice of labour judiciary, the number of references to indirect discrimination is fairly low. The Executive Report mentions that only three of all cases processed by the Case Law Analysing Group concerned indirect discrimination.[139] The occurrence of such cases before the ETA is somewhat more frequent, but also quite low.[140] It obviously does not mean that Hungarian labour market is free from covert forms of discrimination. In our opinion, precisely the formulation of the statutory definition is a major factor in hindering persons to recognise the occurrence of indirect discrimination at their workplaces, and to assert their rights in such cases. Word-by-word transposition of provisions of EU directives might not be the most effective tool of implementation of the purposes of these provisions. In terms of indirect discrimination this methodology of regulation resulted in a very complex and rather opaque formulation, which is very difficult to understand. It might be not adequately clear that the complicated phrase as "a provision apparently complying with the requirement of equal treatment" simply covers provisions applied to persons both with and without a specific protected characteristic on an identical basis. It is also confusing and not even correct that the text applies the phrase "not considered as direct discrimination", suggesting as if indirect discrimination were a subsidiary act compared with direct discrimination. On the contrary: the existence of an apparently neutral provision excludes the occurrence of direct discrimination, which is established by provisions overtly differentiating between persons with and without protected characteristics. We can conclude that the current formulation of the definition of indirect discrimination in domestic law does not mirror that this concept should cover apparently not distinguishing provisions with disparate impact to persons with and without protected characteristics; or more simply speaking: those cases where unlike are treated alike.

At the first sight it is also not clear whether statistical evidence is required to the comparison of affects of the provision in question under Hungarian law, because the phrase "substantially higher proportion" could imply the statistical comparison of the disadvantaged group to the others. Nevertheless, the use of statistical evidence is not required in the practice in indirect discrimination

138 Halmos (2019) op. cit. 36–39.

139 Executive Report, 26.

140 The ETA publishes anonymised cases on its website from the beginning of the functioning of the authority. The site gives only 8 records upon searching cases concerning indirect discrimination in employment. By contrast, direct discrimination cases are numbered hundreds. (See: http://www.egyenlobanasmod.hu/hu/jogesetek)

cases. However, the parties to indirect discrimination cases may opt to present statistical evidence to the ETA or the courts, as it sometimes occurs in cases adjudicated by the ETA.[141]

2.2.3. Harassment

Harassment constitutes a specific type of discrimination under the Directives. It had previously been dealt with as a particular manifestation of direct discrimination. Its separation into a specific concept under the Directives is based on the idea of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking.[142]

Following up the typology of approaches of equality already more times referred in this study,[143] the conduct of harassment as well as sexual harassment is notably associated with the approach of "equality as an element of human dignity". Reference to human dignity has also been valuable in underscoring the role of equality in situations in which there is no obvious comparator, making it impossible to demonstrate that formal equality has been breached (e. g. in cases of sexual harassment). Dignity was expressly introduced into the statutory definition of sexual harassment and harassment in the Gender Directive[144] as well as the definition of harassment in the Framework Directive[145] and the Race Directive[146].[147]

The concept of harassment, in particular sexual harassment, was traditionally developed in the 1990s from EU gender equality legislation.[148] The definition of harassment in all the three Directives embrace the same elements: harassment occurs where unwanted conduct related to a specific protected characteristic of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[149] According to the definition of „sexual harassment" applied only by the Gender Directive, the unwanted conduct of the above discribed nature should take a sexual character, but not should not necessarily create an intimidating, hostile, degrading, humiliating or offensive environment.[150] This latter difference of the two definitions respects the fact that sexual harassment, by its nature, often occurs in absence

141 See in detail: Nacsa (2018) op. cit. 14.

142 EU Fundamental Rights Agency (2018) op. cit. 63.

143 See in detail: Section 2.1 of Part I [Halmos (2019) op. cit. 33–36.]

144 Gender Directive, Article 2, Paragraph (1)(c)(d).

145 Framework Directive, Article 2, Paragraph (3).

146 Race Directive, Article 2, Paragraph (3).

147 See: Fredman (2011) op. cit. 20–21., 25.

148 I. Chopin – C. Germaine: *A comparative analysis of non-discrimination law in Europe 2017.* [Publications Office of the European Union] Luxembourg, European Commission, Directorate-General for Justice and Consumers, 2018. 51.

149 However, the Framework and the Race Directive allows the Member States to define harassment in accordance with the national laws and practice of the Member States (article 2 paragraph (3) of both directives).

150 Gender Directive, article 2 paragraph (1)(d).

of witnesses, only in presence of the perpatrator and the victim.[151] According to the definition of harassment, there is no need for a comparator to prove it. This essentially reflects the fact that harassment in itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).[152]

The concept of discriminatory harassment exists in Hungarian law since the entry into force of the ETA Act.[153] That time, harassment as a sub-category of abuse of rights had already been and is still regulated in the national labour law.[154] This latter concept has never been statutorily defined, the judicial practice was expected to determine its content. Since the introduction of the category of harassment in the ETA Act, the relation of the two concepts can be described as follows: whenever the harassing conduct is related to a protected characteristic governed by the ETA Act, it should be considered as a discriminatory harassment; otherwise it may (but not necessarily) fall into the scope of the abuse of rights.[155]

In the course of the codification, the ETA Act used the same implementation methodology as in terms of indirect discrimination: the statutory definition is formulated through a more or less verbatim transposition of the text of the Directives. Since the ETA Act endeavoured to formulate the discriminatory conducts in a uniform way, the definitions of "harassment" and "sexual harassment" were merged into a single statutory definition, as follows: "harassment is a conduct, of a sexual or other nature, violating human dignity in connection with an individual's protected characteristic, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around that person. The national text obviously correctly implements the constituent elements of the definitions of harassment included in the Directives. However, in terms of "sexual harassment", concerns can be brought regarding the compliance with the Gender Directive's definition. The Hungarian definition contains the term "the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around that person" as a necessary element of the definition. As referred, a considerable proportion of sexual harassment cases take place in private, which does not mitigate the severity of the harassing act, however, does not prejudice the general workplace atmosphere around the victim. Exclusion of these conducts from the scope of the definition of the ETA Act should be avoided. In the course of adjudication of these cases, the courts' duty to

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151 An EU-wide survey of the EU Fundamental Rights Agency on gender-based violence against women shows that 75% of women in qualified professions or top management have been victims of sexual harassment, and one in 10 women has experienced stalking or sexual harassment through new technologies. (EU Fundamental Rights Agency (2018) op. cit. 66.; EU Fundamental Rights Agency: *Violence against women: an EU-wide survey. Main results report*. [Publications Office of the European Union] Luxembourg, 2014. 96., 104.)

152 EU Fundamental Rights Agency (2018) op. cit. 66.; Position Paper of the ETA AB on the definition of harassment and sexual harassment No. 384/5/2008.(IV.10.) TT. (http://www.egyenlobanasmod.hu/sites/default/files/content/torveny/szexualis_zaklatas.pdf), 2–5.

153 ETA Act, sec. 10.

154 LC 1992, sec. 4; LC 2012, sec. 7.

155 The relation of the two categories corresponds with the relation of general categories of discrimination and abuse of rights as described at Section 2.2.1 of Part I [Halmos (2019) op. cit. 39–41.]. See further: Nacsa (2018) op. cit. 17.

interpret of national law in consistence with relevant EU law[156] should be of crucial importance. However, a recent study suggests that so far, the case law of the ETA has properly transposed the content of the prohibition of sexual harassment laid down by the Directive.[157]

In Hungarian case law, claims related to workplace harassment are very scarce. The Executive Report mentions that only one of all cases processed by the Case Law Analysing Group concerned harassment. The occurrence of such cases before the ETA is somewhat more frequent, but also quite low.[158] In a case related to harassment, the Kúria held that the employment could be terminated during the probation period, but the termination is unlawful, if the reason of termination connected to the employee's behaviour that rejects sexual harassment.[159] In another case, the Kúria ruled that the modification of working conditions, the arbitrary restriction of the professional activities of the employee (teacher) that is associated with the human reproduction treatment of the claimant counted as harassment.[160]

As an example from the practice of the ETA, a case should be mentioned, where the authority imposed a fine on a respondent for habitually making remarks about the attractive appearance of a female co-worker, using a very intimate tone (calling her 'puppy' or 'piglet'), and repeatedly offering himself as her sexual partner publicly.[161]

Here should be noted that the Framework and the Race Directive[162] contain "instruction to discriminate" as a separate discriminatory conduct (without definition). The ETA Act refers to instruction to discriminate as not a separate discriminatory conduct, but as a sub-category of discriminatory provisions related to any nominated discriminatory conducts.[163] However, with respect to the fact that in an employment relationship, the employer's instruction is, with narrow exceptions, binding on the employees, the employer is obviously responsible for any discriminatory conduct committed by an employee by the instruction of the employer. In cases of harassment, it is more frequent that co-workers mock, humiliate, injure, threaten etc. a colleague due to a specific protected characteristic, but not necessarily by the instruction or even with the knowledge of the

156 See: C-397/98. and C-410/98. Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v Commissioners of Inland Revenue and HM Attorney General, ECLI:EU:C:2001:134; C-446/03. Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes), ECLI:EU:C:2005:763; C-246/89 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, ECLI:EU:C:1991:375; C-279/93. Finanzamt Köln-Altstadt v Roland Schumacker, ECLI:EU:C:1995:31; C-397/01-C-403/01., C-398/01., C-399/01., C-400/01., C-401/01. C-402/01. Bernhard Pfeiffer, Wilhelm Roith, Albert Süß, Michael Winter, Klaus Nestvogel, Roswitha Zeller and Matthias Döbele v Deutsches Rotes Kreuz, Kreisverband Waldshut eV.

157 Nacsa (2018) op. cit., 17.

158 The ETA publishes anonymised cases on its website from the beginning of the functioning of the authority. The site gives only 25 records upon searching cases concerning harassment (including sexual harassment) in employment. By contrast, direct discrimination cases are numbered hundreds. (See: http://www.egyenlobanasmod.hu/hu/jogesetek)

159 BH2011. 347.

160 *Coleman*-case; C-303/06. Christos Michail v Commission of the European Communities, ECLI:EU:C:2009:122, C-268/08. Christos Michail v Commission of the European Communities, ECLI:EU:C:2009:122; as cited by the Kúria in the judgement No. Kfv.IV.37.312/2012/10.

161 Nacsa (2018) op. cit. 17.

162 Article 2(4) respectively.

163 ETA Act, sec. 7(1).

management. According to the relevant practice, if the employer is informed about this conduct of the actual perpetrators and omits to take expectable, reasonable measures to eliminate the harassment, the employers' liability for the violation of rights of the victims is established.[164]

2.2.4. Victimisation, unlawful segregation

The adequate and efficient sanctioning of victimisation is a key factor in the revelation of a large proportion of discrimination cases which would otherwise remain undisclosed. Indeed, confronting an employer adopting discriminatory conducts might well bring risks for the whistleblower (either the victim or an unconcerned co-worker of his/hers), who may hazard his/her own job or suffer other detriments related to the employment relationship. Therefore, the Framework and the Race Directive set forth that Member States must ensure that individuals are protected from any adverse treatment or adverse consequences in reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.[165]

Accordingly, the ETA Act provides that victimisation is a conduct that causes infringement, is aimed at infringement, or threatens infringement, against the person making a complaint or initiating procedures because of a breach of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts.[166] Protection against victimisation is also secured by the Hungarian law providing general (i.e. not only discrimination-related) protection of retribution against whistleblowers. Legal protection is granted for two groups of persons: (1) Where the actor of the wrongful (e.g. discriminatory) act is the employer; the addressee of the whistle-blowing is any of a third person (typically: public authorities); (2) where the actor of the wrongful (e.g. discriminatory) act is a third person (typically: a colleague of the worker or a business partner of the employer) and the addressee of the whistle-blowing is the employer. The Act CLXV of 2013 on Complaints and Reports of Public Interest provides on the general purposes of the protection of whistle-blowers; types of whistle-blowings; the fundamental rules of in-house whistle-blowing system; lawful purposes of employees' whistle-blowing; data protection rules related to the operation of an employer's whistle-blowing system.

In spite of the variety of available forms of legal protection, there are very few cases related to victimisation or whistle-blowing in relation of discrimination cases in Hungary both before the courts

164 Position Paper of the ETA AB on the definition of harassment and sexual harassment No. 384/5/2008.(IV.10.) TT. (http://www.egyenlobanasmod.hu/sites/default/files/content/torveny/szexualis_zaklatas.pdf), 5.; It shall be noted that the comparative analysis of Member States' non-discrimination law in 2017, published by the European Commission, incorrectly states the finding that the Hungarian ETA Act does not provide protection againstharassment committed by colleagues at work. [Chopin–Germaine (2018) op. cit. 53.]

165 Race Directive, article 9; Framework Directive, article 11; Gender Directive, article 24.

166 ETA Act, sec. 9(3).

and before the ETA. The Executive Report mentions that only one of all cases processed by the Case Law Analysing Group concerned victimisation.[167] The occurrence of such cases before the ETA is somewhat more frequent, but also quite low.[168] In a case the ETA established that the employer victimised the employer by not excluding them from a trip organised for the staff because they had brought a legal action against their employer in connection with their discriminatory dismissal.[169]

In the catalogue of discriminatory conducts in the ETA Act, there is one more category, which does not correspond to any other category of discriminatory acts stipulated in the Directives. "Unlawful segregation" occurs, when individuals or groups of individuals are separated from other individuals or groups of individuals in a comparable situation on the basis of their protected characteristics unless it is expressedly permitted by law.[170] The primary purpose of inclusion of concept of unlawful segregation in the ETA Act was to combat discrimination against pupils with disadvantageous social background (in particular Romas) in education, which often used to take the form of segregation of concerned children into separated buildings, institutional units etc.[171] Thus, unlawful segregation is less likely to occur in the field of employment. Nevertheless, Schiek, Waddington and Bell point out that even though segregation is not mentioned in the Directives (neither in the ESC nor in the ECHR), there are cases in the field of employment concerning segregation as well.[172] The authors suggest that various cases illustrate the difficulty of locating segregation within the typical legal framework on discrimination (addressing these cases under the concepts of direct or indirect discrimination). Even where national legislation specifically prohibits segregation, its application has been difficult.[173] However, with regard to the difficulty of finding the correspondence of segregation cases with the other discriminatory conducts catalogued in the Directives, in the author's opinion, the existence of unlawful segregation as a distinct conduct in the Hungarian code might be useful to tackle such infringements as well.

In the final part of this series of articles (Part III) the achievements of the implementation process of relevant EU law is further analysed: transposition of rules on burden of proof, the structure of exemptions and justification as well as sanctions and remedies into national law will be assessed.

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167 Executive Report, 16.

168 The ETA publishes anonymised cases on its website from the beginning of the functioning of the authority. The site gives only 8 records upon searching cases concerning victimisation in employment. By contrast, direct discrimination cases are numbered hundreds. (See: http://www.egyenlobanasmod.hu/hu/jogesetek).

169 Case of the ETA No. EBH/45/2009.

170 ETA Act, sec. 9(2).

171 Official reasons of the ETA Act attached to section 10; Havas, G. – Kemény, I. – Liskó, I.: *Cigány gyerekek az általános iskolában.* Budapest, Oktatáskutató Intézet–Új Mandátum Könyvkiadó, 2002.; Kárpáti, J. – Bihary, L. – Kádár, A. K. – Farkas, L.: *Az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény magyarázata.* Budapest, Másság Alapítvány, 2006. 66.

172 E.g. C-196/02. Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE, ECLI:EU:C:2005:141; C-79/99. Julia Schnorbus v Land Hessen, ECLI:EU:C:2000:676.

173 The authors remind here a British case (Employment Appeals Tribunal, 14 Nov 1979: Pel Ltd. v. Modgill and others); Schiek et al. (2007) op. cit. 263–264. About the legal framework and case law concerning segregation: Schiek et al. (2007) op. cit. 257–269.